

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

JOSEPH P. CARSON, *Pro Se*,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES DEPARTMENT)
 OF JUSTICE,)
)
 Defendant.)

Civ. No. 3:10-CV-56
PHILLIPS/SHIRLEY

SECOND DECLARATION OF VANESSA R. BRINKMANN

I, Vanessa R. Brinkmann, declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Counsel to the Initial Request (IR) Staff of the Office of Information Policy (OIP), United States Department of Justice. In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests processed by OIP. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from seven senior leadership offices of the Department of Justice, specifically the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy, Legislative Affairs, Intergovernmental and Public Liaison, and Public Affairs. The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, with other components within the Department of Justice, as well as with other Executive Branch agencies.

2. I make the statements herein on the basis of personal knowledge, my review of the case notes contained in the IR Staff file associated with plaintiff's initial request to OIP, which were taken immediately after the events described herein, as well as on information acquired by me in the course of performing my official duties.

3. In my declaration of September 15, 2010, I described this Office's handling of plaintiff's November 14, 2009 FOIA request to OIP for records pertaining to the Department of Justice's compliance with 5 U.S.C. § 2302(c), which requires the Attorney General to prevent "prohibited personnel practices" (PPP's) in the Department. See Declaration of Vanessa R. Brinkmann ¶¶ 3-5. This declaration responds to certain issues raised in plaintiff's August 6, 2011 Reply to Defendant's Response to Plaintiff's Motion for Litigation Costs by detailing the IR Staff's communications with plaintiff, and supplements and incorporates by reference my declaration of September 15, 2010.

4. Plaintiff's request was received by OIP on November 24, 2009. On that date, FOIA Specialist Natasha Jahangiri, a member of OIP's IR Staff, was assigned plaintiff's request. As such, OIP's December 11, 2009 acknowledgment letter, which acknowledged receipt of plaintiff's request and provided him with an opportunity to narrow the scope of his request, or agree to an alternative time frame for processing, should records be located, was signed by Ms. Jahangiri and contained her contact information. (The IR Staff of OIP's December 11, 2009 letter to plaintiff is attached to my September 15, 2010 declaration as Exhibit 2.)

5. On December 15, 2009, plaintiff left a voice mail message for Ms. Jahangiri stating that he wished to discuss the scope of his request. In response to this message, on that same day, the Chief of the IR Staff, Laurie Day, called and spoke to plaintiff. During this conversation,

plaintiff advised Ms. Day that his request sought two things: (1) Department of Justice procedures/policies against prohibited personnel practices; and (2) assessments of whether such policies are being implemented, and their effectiveness. Plaintiff also indicated that he was interested in receiving material dating within the last ten years. Upon completion of this phone call, Ms. Day relayed the content of the conversation to Ms. Jahangiri.

6. In accordance with the ordinary practice of OIP FOIA Specialists, Ms. Jahangiri memorialized the conversation between Ms. Day and plaintiff in the form of case notes. She then added these notes to the administrative file for plaintiff's request.

7. On December 16, 2009, records searches were initiated in the Office of the Attorney General (OAG) and in the electronic database of the Departmental Executive Secretariat, which is the official records repository of OAG. Both this search and the IR Staff's subsequent review of the records located were conducted in light of plaintiff's clarification of his FOIA request during his December 15, 2009 conversation with Ms. Day.

8. On January 11, 2009, Ms. Jahangiri received another voice mail message from plaintiff, stating that he wished to know the status of his FOIA request. On January 12, 2009, Ms. Jahangiri returned plaintiff's call and advised that a records search was then-pending in OAG. Ms. Jahangiri advised that she would contact that Office to check on the status of the pending search, and would endeavor to speed up the processing of his request to the extent possible. Moreover, Ms. Jahangiri informed plaintiff that she had already initiated a search in the electronic database of the Departmental Executive Secretariat and had located records, but had not yet determined whether those records were responsive to plaintiff's request.

9. Upon completion of this conversation, on that same day, Ms. Jahangiri advised me of the nature of her discussion with plaintiff. Moreover, once again, in accordance with the

ordinary practice of OIP FOIA Specialists, Ms. Jahangiri memorialized her conversation with plaintiff in her case notes. She then added these notes to the administrative file for plaintiff's request.

10. On January 12, 2009, plaintiff submitted a letter which further clarified the scope of his request. This letter stated that plaintiff sought "objective determinations" as to whether the Attorney General is complying with his duty to prevent prohibited personnel practices. Accordingly, upon receipt of this letter, the IR Staff proceeded to process plaintiff's request in light of this additional clarification.

11. On January 13, 2010, the search of the electronic database of the Departmental Executive Secretariat was completed. On this date, Ms. Jahangiri also conducted a search of the records indices of former Attorneys General and their staff. The records indices list file folder titles, arranged according to subject, for the files of former OAG staff.

12. On January 19, 2010, the OAG records search was completed.

13. On January 28, 2010, pursuant to my review of the searches conducted thus far, and upon my request, Ms. Jahangiri conducted a supplemental search of both the electronic database of the Departmental Executive Secretariat and of the records indices.

14. On February 23, 2010, OIP was notified that plaintiff had filed suit in connection with his FOIA request.

15. In his August 6, 2011 Reply to Defendant's Response to Plaintiff's Motion for Litigation Costs, plaintiff provides an affidavit in which he describes a conversation with Ms. Jahangiri. His affidavit does not indicate the date of this conversation, but asserts that during this conversation, Ms. Jahangiri informed plaintiff that: (1) she would not ask him to modify the

scope of his FOIA request, and (2) she was unable to establish an alternative time frame on behalf of the Department. This representation is inconsistent with the administrative record maintained by OIP, including the case notes discussed above. Moreover, plaintiff's affidavit fails to note that plaintiff had two separate discussions with OIP staff prior to his filing suit.

I declare under penalty of perjury that the forgoing is true and correct.



Vanessa R. Brinkmann

Executed this 18th day of August 2011.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARBARA FEINMAN)

Plaintiff,)

v.)

CENTRAL INTELLIGENCE AGENCY,)
et al.,)

Defendants.)

Civil Action No. 08-2188 (EGS)

DECLARATION OF MELANIE ANN PUSTAY

I, Melanie Ann Pustay, declare the following to be true and correct:

1) I am the Director of the Office of Information Policy (OIP),¹ United States Department of Justice. In this capacity, I am responsible for overseeing the actions of the Initial Request (IR) Staff. The IR Staff is responsible for searching for and reviewing records within OIP and the senior leadership offices of the Department of Justice, including the Office of the Attorney General, in response to requests made under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No 110-175, 121 Stat. 2524. The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, with other components within the Department of Justice as well as with other Executive Branch agencies.

¹ On March 5, 2009, the Office of Information and Privacy was renamed the Office of Information Policy.

2) I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties.

Plaintiff's FOIA Request

3) By letter dated July 11, 2008, plaintiff submitted a FOIA request to OIP for "all documents and communications from the Office of Attorney General Alberto Gonzales" pertaining to an alleged phone call to Mariane Pearl regarding Khalid Sheikh Mohammed's confession to the murder of her husband, reporter Daniel Pearl. Plaintiff stated that this phone call was reportedly made by former Attorney General Gonzales to Mrs. Pearl, and advised that the relevant time period could be restricted to dates between February 1, 2007, and March 30, 2007. Finally, plaintiff requested a waiver of fees.² (A copy of plaintiff's initial request letter is attached hereto as Exhibit A.)

4) By letter dated August 15, 2008, OIP acknowledged receipt of plaintiff's FOIA request and advised that, because the request required a search in another Office, OIP staff had not yet been able to complete a search for records within the scope of plaintiff's request. (A copy of OIP's August 15, 2008 acknowledgment letter is attached hereto as Exhibit B).

Records Searches

5) In her request letter, plaintiff specifically sought records from the Office of the Attorney General from February and March of 2007. Therefore, OIP conducted searches for records responsive to plaintiff's request in that Office, and limited to that time period. Moreover, given plaintiff's description of the records requested, OIP determined that the files of former Attorney General Gonzales would be most likely to maintain responsive records. Furthermore, and in an effort to locate any records referencing a phone call from the former Attorney General

¹ No fees were assessed for this request and so the fee waiver request is moot.

to Mariane Pearl, OIP also determined that the available files of staff who had been employed by the Office of the Attorney General in February and March 2007 would be searched.

6) On August 6, 2008, OIP conducted a search of the electronic database of the Departmental Executive Secretariat, which is the official records repository for the Office of the Attorney General. The Departmental Executive Secretariat uses a central database to control and track certain incoming and outgoing correspondence for the Department's senior management offices. This Intranet Quorum (IQ) database maintains records from January 1, 2001 through the present. Records received by the senior management offices are entered into IQ by trained Executive Secretariat analysts. The data elements entered into the system include such items as the date of the document, the date of receipt, the sender, the recipient, as well as a detailed description of the subject of the record. In addition, entries are made that, among other things, reflect what action is to be taken on the records, which component has responsibility for that action, and when that action should be completed. Key word searches of the electronic database may then be conducted by utilizing a single search parameter or combinations of search parameters. Search parameters may include the subject, organization, date, name, or other key words. The FOIA Specialist assigned to plaintiff's request conducted a key word search of the Executive Secretariat's IQ database using the terms, "Mariane Pearl," "Daniel Pearl," and "Khalid Sheikh Mohammed." No records pertaining to a phone call to Mariane Pearl from former Attorney General Gonzales were located in the IQ database.

7) Searches were also performed within the Office of the Attorney General. In order to identify which staff members in the Office of the Attorney General were present in February and March of 2007, the former Chief of the IR Staff contacted an Office of the Attorney General Staff Assistant to determine which staff members were present in that Office during the relevant

time period. Three staff members were identified.² Subsequently, by e-mails dated August 18 and 20, 2008, the three identified staff members were contacted by the former Chief of the IR Staff and requested to advise OIP whether they had records responsive to plaintiff's request. Once an individual in the Office of the Attorney General receives a FOIA request, standard practice is for that individual, based on their experience and knowledge of their files, to determine whether they might have records responsive to the request. If an individual determines that it is possible they might have records, that individual will either search his or her paper and electronic files him or herself, or that individual will ask that an IR Staff FOIA Specialist perform the search for them.

8) By e-mails dated August 18 and 20, 2008, all three Office of the Attorney General staff members who were present in February and March 2007 advised OIP that they did not have any records responsive to plaintiff's request.

9) Searches were also conducted of the classified and unclassified records indices of former Attorney General Gonzales. The indices supplement the electronic database of the Departmental Executive Secretariat and list file folder titles, arranged according to subject, for the records of the former Attorneys General and their staff. In conducting an indices search, the file folders which, based on their titles, are identified as possibly containing responsive records are retrieved, and their contents are searched. In this instance, the FOIA Specialist assigned to plaintiff's request and the former Chief of the IR Staff conducted a search of the general subject indices of former Attorney General Alberto Gonzales and, based on the nature of the records

² The Staff Assistant also indicated that one of former Attorney General Gonzales' personal assistants could possibly have placed the call for the Attorney General. Because OIP was informed that the personal assistants' records were integrated with the former Attorney General's files, any reference to such a call in their files would have been encompassed by the search of the former Attorney General's indices, described below.

sought by plaintiff, determined that only the files entitled "Official Schedule," "Events," and "Chron" could reasonably be expected to contain responsive records, to the extent such records existed. Specifically, the FOIA Specialist assigned to plaintiff's request and the former Chief of the IR Staff searched the February and March 2007 files entitled "Official Schedule," "Events," and "Chron" because those files encompass: scheduled agenda items for a specific day, a more detailed summary of what the Attorney General did on a specific day, and chronological records of general correspondence matters, respectively. No records that referenced a phone call by the former Attorney General to Mariane Pearl were located in any of these files.

10) In addition to searching the indices of former Attorney General Gonzales, OIP searched the indices of former members of his senior staff -- inasmuch as such officials' records may mention a phone call made by the Attorney General -- including former Chiefs of Staff David Ayres and Kyle Sampson, former Deputy Chief of Staff and Counselor to the Attorney General Courtney Elwood, and Senior Counsel to the Attorney General Monica Goodling. We did not locate any records responsive to plaintiff's request in the indices of these former officials.

11) In sum, OIP determined that the searches of the indices and files, as described above, were exhaustive and no further indices or files were likely to contain responsive records.

OIP's Final Response to Plaintiff

12) By letter dated September 8, 2008, OIP provided its final response to plaintiff's request. In this response, OIP informed plaintiff that records searches had been conducted in the Office of the Attorney General and the Departmental Executive Secretariat, which is the official repository for the Office of the Attorney General. Specifically, OIP informed plaintiff that OIP's searches encompassed the relevant records of Attorney General Gonzales and his staff. Finally OIP advised plaintiff that no records responsive to plaintiff's request had been located. (A copy of OIP's August 15, 2008 letter is attached hereto as Exhibit C.)

Plaintiff's Administrative Appeal

13) By letter dated October 16, 2008, plaintiff administratively appealed the IR Staff's response that no records responsive to plaintiff's request were located. (A copy of plaintiff's October 16, 2008 administrative appeal is attached hereto as Exhibit D.)

14) By letter dated October 20, 2008, OIP acknowledged receipt of plaintiff's administrative appeal and advised that OIP would notify the plaintiff of OIP's decision as soon as possible. (A copy of OIP's October 20, 2008 acknowledgment letter is attached hereto as Exhibit E.) Before a final determination was made on her appeal, plaintiff filed the present suit.

I declare under penalty of perjury that the foregoing is true and correct.


MELANIE ANN PUSTAY

Executed this 24 day of March, 2009.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 10-00851 (RBW)
)	
DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
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SUPPLEMENTAL DECLARATION OF VANESSA R. BRINKMANN

I, Vanessa R. Brinkmann, declare the following to be true and correct:

1) I am the Counsel to the Initial Request (IR) Staff of the Office of Information Policy (OIP), United States Department of Justice. In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests processed by OIP. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from seven senior leadership offices of the Department of Justice, specifically the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy, Legislative Affairs, Intergovernmental and Public Liaison, and Public Affairs. The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, with other components within the Department of Justice, as well as with other Executive Branch agencies.

2) I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties.

3) In my declaration of November 2, 2010, I described the records searches conducted in response to plaintiff's FOIA request for records concerning the Department's decision to seek a dismissal of defendants in *U.S. v. New Black Panther Party for Self-Defense* [hereinafter "NBPP litigation"]. This declaration supplements and incorporates by reference my November 2, 2010 declaration, and provides additional detail regarding the records searches conducted in the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), Associate Attorney General (OASG), Legal Policy (OLP), Intergovernmental and Public Liaison (OIPL), Legislative Affairs (OLA) and Public Affairs (PAO) [hereinafter, collectively, "Senior Leadership Offices"]. In particular, this declaration supplements ¶¶ 6-27 of my November 2, 2010 declaration, which detail the general search procedure of OIP and the Senior Leadership Offices, as well as the specific records searches conducted in each Office for plaintiff's FOIA request.

4) As noted above, OIP is responsible for processing FOIA requests seeking records from seven Senior Leadership Offices of the Department of Justice, specifically the OAG, ODAG, OASG, OLP, OIPL, OLA, and PAO.¹ As I stated in ¶ 6 of my November 2, 2010 declaration, when processing a FOIA request for the Senior Leadership Offices, OIP initiates records searches by sending a memorandum to each Office which notifies the Office of the receipt of the request and the need to conduct a search.² OIP's search memoranda are sent to

¹ OIP also handles FOIA requests for its own records, including case files associated with the FOIA requests and administrative appeals it processes. Because OIP would not maintain records encompassed by plaintiff's FOIA request, a search was not conducted of OIP records and, accordingly, OIP's internal search procedures will not be discussed in this declaration.

² Although OIP also typically conducts searches of the Departmental Executive Secretariat and of the relevant records indices, and did so in plaintiff's case, these elements of OIP's search, which are described in the November 2, 2010 declaration, will not be addressed anew in this declaration.

points of contact in each Office who serve as the liaisons between OIP and the Senior Leadership Offices. The liaisons in each Office then, upon receipt of OIP's search memorandum, notify each individual staff member of that Office of the receipt of OIP's memorandum requesting that a search be conducted. This is the typical procedure; however, in certain instances, searches will not be distributed to all staff in a given office. In plaintiff's case, two offices (OLA and OIPL) did not distribute the search to all of its staff. OLA contacted OIP to discuss the scope of the request and, upon doing so, determined that its staff would not maintain any responsive records inasmuch as they were not involved in the pertinent NBPP litigation decisionmaking process. OIPL was able to determine at the outset of the search that only one individual could have potentially responsive records because, given the timing of the NBPP litigation, the matter was in only one staff member's portfolio.

5) The individual staff members of each Office, as the custodians of their own records and the best authorities on what records they would personally maintain, will then advise the liaison if they (1) have no records responsive to the request; (2) have potentially responsive material which will be provided directly to OIP for review and processing (in which case the staff member conducts their own search); or (3) have potentially responsive material for which they request an OIP FOIA Specialist to conduct a search. Senior Leadership Office staff members who conduct their own searches will do so depending on how they maintain their own records. If, for example, an individual segregates their records by topic, Office, or other category and already knows where potentially responsive material would be located, they may simply review that material and provide it to OIP without the need for a "keyword" search. This practice ensures that each individual staff member of a given Office reviews OIP's search memorandum and the accompanying FOIA request, and that records searches are conducted by

or for only those individuals who indicate that they would have potentially responsive material.³

6) Upon receipt of plaintiff's FOIA request, OIP determined that it would initiate searches in all of the Senior Leadership Offices for which it processes requests. Although plaintiff did not specify which Offices it wanted to be searched, OIP decided to cast a wide net in order to ensure that any potentially responsive material maintained by the Senior Leadership Offices would be encompassed by the searches conducted in response to plaintiff's request. The searches conducted in the Senior Leadership Offices for records responsive to plaintiff's request were consistent with the procedures described above and in my first declaration.

7) Subsequent to the filing of plaintiff's opposition, and in an effort to put this matter entirely to rest, OIP reached out to OAG, ODAG, OASG, OLP, OIPL, OLA and PAO to confirm the practices each Office used in plaintiff's case. All Offices verified that each individual attorney (and, if applicable, non-attorney staff members) reviewed the OIP search memorandum and accompanying FOIA request when it was circulated, with the exception of OIPL and OLA which, as noted previously, were able to target the search to a specific individual or to determine through discussions with OIP that they would not have any records given their level and timing of involvement in the underlying NBPP litigation.

³ This practice answers the specific question raised in plaintiff's *Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment* (hereinafter "plaintiff's opposition"), as to why only "three [OAG] computers were searched" and to plaintiff's suggestion that OIP only searched the records of "six ODAG employees." (Plaintiff's statements here are also inaccurate. These references to searches of "three computers" and "six ODAG employees" were limited to my discussion of the searches conducted by OIP staff (i.e., searches conducted by OIP at the request of individual staff members in OAG and ODAG as opposed to those conducted directly by the staff members for their own records. In fact, and as stated in my declaration of November 2, 2010, records were also provided directly to OIP from both OAG and ODAG, i.e., from individuals who retrieved their own records). Also, as stated above, every staff attorney in OAG and ODAG reviewed the search for plaintiff's request, whether they ultimately had records or not.

8) Plaintiff's opposition questions why OIP's records searches did not use the names of NBPP litigation defendants as search terms. The terms used by OIP when conducting the records searches were: "New Black Panther Party," "NBPP," "New Black Panther," and "NBP." Additionally, for the Offices that had individual staff members conduct their own keyword searches, these Offices indicated that the search terms used included "Panther," "Black Panther," "New Black Panthers," and "NBP," all of which are consistent with the terms used by FOIA Specialists in the searches conducted by OIP. Simply put, each records search is tailored to the FOIA request and Office at hand. Search terms are derived by a review of the request itself, by OIP's familiarity of the recordkeeping procedures of the Senior Leadership Offices, through direct discussion with records custodians, and/or by the individuals in the Senior Leadership Offices who maintain the records and thus know which terms would be most likely to retrieve them. As explained in ¶¶ 17-18 of my November 2, 2010 declaration, prior to receiving plaintiff's FOIA request, OIP had already obtained material in connection with an earlier search of OASG for records regarding the NBPP litigation. From a review of these records, the FOIA Specialist assigned to plaintiff's FOIA request was able to identify the common terms that appeared in these records, as well as become familiar with the types of records that existed within the scope of plaintiff's FOIA request. In so doing, OIP was able to determine which terms were used by records custodians when discussing the NBPP litigation. Because of this earlier review of records, and OIP's familiarity with the records on this topic, the search terms used in OIP's record searches were tailored to allow the broadest search possible, while targeting the information responsive to plaintiff's request.

9) Because plaintiff's request sought records related to a specific litigation, some staff in the Senior Leadership Offices did not need to conduct "keyword" searches because they had

created files dedicated to the NBPP matter, or otherwise knew where their records regarding the litigation would be maintained. Some staff members in OAG, ODAG, and OASG therefore conducted targeted searches by reviewing relevant e-mail folders, compilations of handwritten notes, and correspondence to/from individuals they knew to be involved in the NBPP litigation.

10) As OIP's records searches in the Senior Leadership Offices continued, OIP staff -- including myself -- reviewed the search results on a rolling basis and continually communicated with the Senior Leadership Offices regarding the progress and results of the searches for records responsive to plaintiff's FOIA request. The monitoring of ongoing searches serves as quality control through which OIP is able to determine if unforeseen keywords or staff members are mentioned in responsive material, and thus need to be searched. If at any time it had become apparent that additional search terms needed to be added, or additional individuals searched, OIP would have done so. As a result of its continuous monitoring of the searches in response to plaintiff's request, OIP did not identify any search terms or records custodians that needed to be added to the Senior Leadership Office searches, and thus determined that those searches were complete.

11) As noted in footnote 3 of my November 2, 2010 declaration, while processing plaintiff's FOIA request, OIP also initiated supplementary records searches in OAG, ODAG, OASG, OLP, OIPL, OLA and PAO in connection with a non-FOIA records request from the United States Commission on Civil Rights. While the scope of this search was significantly broader than plaintiff's FOIA request, OIP nevertheless reviewed all of the material yielded through this separate non-FOIA search to determine whether it included any responsive records which were not picked up by the FOIA searches tailored to plaintiff's FOIA request. This

process, which entailed a canvassing and review of voluminous amounts of material on the subject of the Department's NBPP litigation, provided yet another layer of search and review by which OIP was able to ensure that a thorough search had been conducted for records responsive to plaintiff's FOIA request.

Executed this ____ day of January 2011.

Vanessa R. Brinkmann

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC FRONTIER)	
FOUNDATION,)	
)	
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Plaintiff,)	
)	
v.)	Civil Action No. 1:10-cv-00641 (RBW)
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

DECLARATION OF VANESSA R. BRINKMANN

I, Vanessa R. Brinkmann, declare the following to be true and correct:

1) I am the Counsel to the Initial Request (IR) Staff of the Office of Information Policy (OIP), United States Department of Justice. In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests processed by OIP. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from seven Senior Leadership Offices of the Department of Justice, specifically the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy, Legislative Affairs, Intergovernmental and Public Liaison, and Public Affairs. The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with

personnel in the Senior Leadership Offices and, when appropriate, with other components within the Department of Justice, as well as with other Executive Branch agencies.

2) I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties.

Initial Processing of Plaintiff's Request

3) By fax dated January 15, 2010, David Sobel, on behalf of plaintiff Electronic Frontier Foundation (EFF), submitted a FOIA request to the United States Department of Justice FOIA/Privacy Act Mail Referral Unit (MRU) for all records pertaining to the United States-European Union High Level Contact Group (HLCG) on data privacy and law enforcement cooperation.¹

4) On January 27, 2010, the MRU forwarded plaintiff's FOIA request to OIP for processing and direct response to plaintiff. Plaintiff's FOIA request was received in OIP on February 16, 2010. On that date, OIP opened an administrative file for plaintiff's request on behalf of the Office of the Deputy Attorney General (ODAG). (A copy of plaintiff's initial request letter is attached hereto as Exhibit A.)

5) By letter dated March 11, 2010, OIP acknowledged receipt of plaintiff's FOIA request on behalf of ODAG. OIP's letter advised plaintiff that, because the records sought required a search in another Office, OIP staff had not yet been able to complete a search for records within the scope of plaintiff's request and, thus, that OIP would not be able to comply with the FOIA's twenty-working-day time limit, nor with the ten additional days provided by the statute. Finally,

¹ Plaintiff's January 15, 2010 fax states that plaintiff had previously attempted to submit this request, dated November 6, 2009, to the MRU; however, the MRU tracking sheet associated with plaintiff's request indicates that MRU did not log it as received until January 15, 2010. (See, e.g., Exhibit A.)

OIP's letter suggested that plaintiff might wish to narrow the scope of its request, or agree to an alternative time frame for processing, in order to speed up OIP's records search. (A copy of OIP's March 11, 2010 letter is attached hereto as Exhibit B.)

6) Pursuant to an April 7, 2010 telephone conversation, ODAG advised OIP that plaintiff's FOIA request should also be forwarded to the Department's Criminal Division (specifically, its Office of International Affairs), as that component was likely to maintain responsive records, given its involvement in the topic of plaintiff's request.

7) By memorandum dated April 19, 2010, OIP forwarded a copy of plaintiff's FOIA request to the Criminal Division for processing and direct response. (A copy of OIP's April 19, 2010 memorandum to the Criminal Division is attached hereto as Exhibit C.)

Searches of the Offices of Privacy and Civil Liberties
and of the Deputy Attorney General

8) As noted above, OIP is responsible for processing FOIA requests seeking records from seven Senior Leadership Offices of the Department of Justice, including ODAG.² When processing a FOIA request for the Senior Leadership Offices, OIP initiates records searches by sending a memorandum to each Office which notifies the Office of the receipt of the request and the need to conduct a search.³ OIP's search memoranda are sent to points of contact in each Office who serve as the liaisons between OIP and the Senior Leadership Offices. The liaisons in each Office then, upon receipt of OIP's search memorandum, notifies each individual staff

² As explained below, the Office of Privacy and Civil Liberties falls under ODAG leadership. Thus, procedures for searching OPCL's files are the same as those for ODAG itself.

³ OIP also typically conducts searches of the Departmental Executive Secretariat, and did so in plaintiff's case. This search is discussed in detail below.

member of that Office of the receipt of OIP's memorandum requesting that a search be conducted. The individual staff members of each Office, as the custodians of their own records and the best authorities on what records they would personally maintain, will then advise the liaison if they (1) have no records responsive to the request; (2) have potentially responsive material which will be provided directly to OIP for review and processing (in which case the staff member conducts their own search); or (3) have potentially responsive material for which they request an OIP FOIA Specialist to conduct a search. Senior Leadership Office staff members who conduct their own searches will do so depending on how they maintain their own records. If, for example, an individual segregates their records by topic, Office, or other category and already knows where potentially responsive material would be located, they may simply review that material and provide it to OIP without the need for a "keyword" search. This practice ensures that each individual staff member of a given Office reviews OIP's search memorandum and the accompanying FOIA request, and that records searches are conducted by or for only those individuals who indicate that they would have potentially responsive material. In this instance, OIP conducted searches of this nature in both OPCL and in ODAG itself. Based on these searches and on OIP's search of the Departmental Executive Secretariat, as summarized below, I have determined that all files likely to contain responsive records were searched in response to plaintiff's FOIA request.

9) Upon receipt of plaintiff's FOIA request, based on preliminary research conducted by the OIP FOIA Specialist assigned to plaintiff's FOIA request, OIP determined that the Office of Privacy and Civil Liberties (OPCL), which falls under the purview of ODAG, was the most

likely office to maintain the records sought by plaintiff. Accordingly, OIP first initiated a search for records responsive to plaintiff's request in that Office. By memorandum dated March 23, 2010, OIP initiated its records search in OPCL. As noted above, the practice for this Office is to notify each individual staff member in that Office of the receipt of OIP's memorandum requesting that a search be conducted, and each staff member's files, including electronic files, are then searched as necessary for records responsive to the request.

10) Pursuant to an April 7, 2010 conversation with OIP, ODAG advised that a search also needed to be conducted within the files of ODAG staff, in addition to the search of OPCL.

11) By memorandum dated April 15, 2010, OIP initiated a records search in ODAG. Again, the practice for this Office is to notify each individual staff member in that Office of the receipt of OIP's memorandum requesting that a search be conducted, and each staff member's files, including electronic files, are then searched as necessary for records responsive to the request.

12) Pursuant to a May 25, 2010 telephone conversation, OPCL advised OIP that its records search was complete. Pursuant to this search, OPCL had identified potentially responsive electronic and paper files within the files of the Kirsten Moncada, Director of OPCL. OPCL provided those records to OIP for processing in response to plaintiff's request on May 25, 2010.

13) By memorandum dated May 26, 2010, ODAG returned potentially responsive records to OIP. These records consisted of electronic and paper files from Nancy Libin and Mary

Lee Warren.⁴ Moreover, ODAG advised OIP that a former ODAG official's e-mails might contain potentially responsive records and therefore needed to be searched for responsive records. ODAG requested that OIP conduct this search using the Enterprise (EV) Vault. The EV Vault maintains e-mails of former employees after they depart the Senior Leadership Offices of the Department. On June 2, 2010, the FOIA Specialist assigned to plaintiff's request searched the former official's Enterprise (EV) Vault for potentially responsive records. The terms used for this search included: "HLCG," "High Level Contact Group," and "European Union High Level Contact Group." No responsive records were located in the former official's EV Vault.

14) By a second memorandum dated June 1, 2010, ODAG returned to OIP potentially responsive electronic and paper records from the files of Stuart Delery. By a third memorandum dated July 19, 2010, ODAG returned potentially responsive paper records from Gary Grindler's files, and electronic records from Mary Lee Warren's files, to OIP for review and processing in response to plaintiff's request.

Search of the Departmental Executive Secretariat

15) In addition to the above-described searches conducted in OPCL and ODAG, on February 17, 2010, the FOIA Specialist assigned to plaintiff's FOIA request conducted a search of the electronic database of the Departmental Executive Secretariat. The Departmental Executive Secretariat uses a central database to control and track certain incoming and outgoing correspondence for these offices. Records received by the Departmental Executive Secretariat are entered into its electronic database by trained analysts. Data elements entered into the system

⁴ Mary Lee Warren is an employee with the Criminal Division. Accordingly, OIP forwarded her records to the Criminal Division for processing. (See, e.g., para. 17, below.)

include such items as the date of the document, the date of receipt, the sender, the recipient, as well as a detailed description of the subject of the record. To further facilitate location of the records, keywords are also included. Keyword searches of the electronic database may then be conducted by utilizing a single search parameter or combinations of search parameters. Search parameters may include the subject, organization, date, name, type of correspondence, or other keywords. In plaintiff's case, the OIP FOIA Specialist conducted a search of the Departmental Executive Secretariat database using the terms: "HLCG," High Level Contact Group," and "European Union High Level Contact Group." No responsive records were located in the Departmental Executive Secretariat as a result of this search.

Plaintiff's Narrowed Request

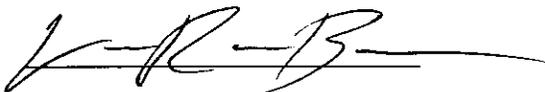
16) Subsequent to the completion of OIP's records searches, pursuant to a December 14, 2010 telephone conversation between plaintiff's counsel and the Department's counsel in this case, plaintiff agreed to narrow the scope of its request to include only those records dated prior to November 6, 2009. Accordingly, OIP only processed records created up to that date.

OIP's Responses to Plaintiff's FOIA Request

17) By letter dated September 17, 2010, OIP provided its first interim response to plaintiff, in which OIP advised plaintiff that records searches had been completed in ODAG and OPCL, and in the electronic database of the Departmental Executive Secretariat, and that 1321 pages of records responsive to plaintiff's request had been located. At that time, four pages of material were released without excision, and two pages were released with excisions made

37) During OIP's review of the information withheld in Groups 1-2, we carefully reviewed each of the documents to determine whether any information could be segregated for release. A significant amount of material was determined to be appropriate for release in part. However, all of the remaining information withheld from plaintiff is protected by the deliberative process privilege. The disclosure of any more information in these documents would reveal draft language and individual assessments of what was deemed significant in the course of the HLCG negotiations, what strategies and options were being considered, when and by who. All reasonably segregable, nonexempt information has been disclosed to plaintiff.

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read 'V-R-B', with a long horizontal line extending to the right.

Vanessa R. Brinkmann

Executed this 16th day of June 2011.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JOSHUA GERSTEIN,)
)
)
 Plaintiff,)
)
 v.) Civil Action No. 06-4643 (MMC)
)
 CENTRAL INTELLIGENCE AGENCY)
 et al.)
)
 Defendants.)
 _____)

Introduction of
the declarant.

DECLARATION OF MELANIE ANN PUSTAY

I, Melanie Ann Pustay, declare the following to be true and correct:

1) I am the Director of the Office of Information and Privacy (OIP), United States Department of Justice. In this capacity, I am the final decision-making authority for matters of the Initial Request (IR) Staff which are subject to litigation. The IR Staff is responsible for searching for and reviewing records within OIP and the senior leadership offices of the Department of Justice, including the Offices of the Attorney General, Deputy Attorney General, and Legislative Affairs, in response to requests made under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000 & Supp. IV 2004). The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, with other components within the Department of Justice as well as with other Executive Branch agencies.

All statements in a declaration must be made on the basis of personal knowledge or information acquired in an official capacity. A declarant can attest to actions taken by others under her supervision.

2) I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties.

3) In my declarations of December 21, 2006, and January 26, 2007, I described the records searches conducted for and the processing of plaintiff's FOIA request up to those dates. This declaration supplements and incorporates by reference my December 21, 2006, and January 26, 2007 declarations, describes the actions taken to complete the processing of plaintiff's request since January 26, 2007, and addresses the basis for withholding documents pursuant to Exemption 5 of the FOIA.¹

OIP's Processing of Plaintiff's Request

Since January 26, 2007

Recount the administrative history of the FOIA request. This may include a summary of the records searches, interpretation of the scope of the request, consultations and referrals, and should always describe and attach any correspondence with the requester/plaintiff. In this case, the declaration supplements a previous declaration in which the initial request and records searches had already been discussed.

4) In my previous declaration I informed the Court that OIP was continuing to process 221 pages of documents and was at that time waiting for consultation responses from other Offices before a final response could be provided to plaintiff. Additionally, I estimated that a final response could be provided to plaintiff by within sixty days (which would have been March

¹ Although OIP's final response to plaintiff included some documents with redactions made pursuant to Exemptions 6 and 7(C) of the FOIA, all redactions on the basis of those exemptions were made on behalf of other entities (the Central Intelligence Agency, Federal Bureau of Investigation, and Office of Professional Responsibility (OPR) of the Department of Justice) and will therefore be justified in declarations by those Offices.

29, 2007).

5) On February 27, 2007, OIP completed all required consultations on the documents remaining to be processed.

6) On February 28, 2007, the Central Intelligence Agency initiated a telephonic consultation with OIP regarding one document, totaling three pages, which OIP had previously referred to that Office for direct response to plaintiff. Pursuant to this consultation, OIP requested that the document be withheld on OIP's behalf pursuant to the deliberative process privilege of FOIA Exemption 5.²

7) By letter dated February 28, 2007, OIP provided its final response to plaintiff's FOIA request. This response included records referred to OIP by OPR, the Office of the Inspector General, and the Criminal Division of the Department of Justice. OIP informed plaintiff that the number of responsive documents remaining had been adjusted to 216 pages.³ OIP disclosed to plaintiff thirty-five documents, totaling ninety-three pages, without excision, and eighteen documents, totaling one hundred thirteen pages, with excisions made pursuant to Exemptions 5, 6, and 7(C) of the FOIA, 5 U.S.C § 552 (b)(5), (6), (7)(C). Exemption 5 pertains to certain inter- and intra-agency communications protected by the deliberative process and presidential communications privileges. Exemptions 6 and 7(C) pertain to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties, and to records compiled for law enforcement proceedings to the extent that disclosure of such

² This declaration will address the withholding of this document on OIP's behalf, pursuant to Exemption 5.

³ After OIP's prior response to plaintiff and upon further review of the remaining two hundred and twenty-one documents, five of those pages were determined to be duplicative of material already being processed.

information could reasonably be expected to cause an unwarranted invasion of personal privacy.⁴

Additionally, OIP provided plaintiff seven pages of electronic mail (e-mail) messages, with excisions made pursuant to Exemptions 5 and 6 of the FOIA.⁵ Finally, one document, totaling three pages, was withheld in full pursuant to the presidential communications privilege of Exemption 5.⁶ (A copy of OIP's February 28, 2007 final response to plaintiff is attached hereto as Exhibit A).

8) On March 28, 2007, the Criminal Division of the Department of Justice referred five documents, totaling sixteen pages, to OIP for processing and direct response to plaintiff on behalf of the Offices of the Attorney General and Deputy Attorney General. This referral was received by OIP on April 3, 2007.

9) On July 9, 2007, OIP provided plaintiff with a final response on the documents referred by the Criminal Division. Four documents, totaling ten pages, were released without excision. Also, one document, totaling six pages, was released with excisions made on behalf of the Criminal Division pursuant to Exemptions 5, 6, and 7(C) of the FOIA, 5 U.S.C § 552 (b)(5), (6), (7)(C).⁷ (A copy of OIP's July 9, 2007 final response to plaintiff on the

⁴ As previously stated, all of the redactions made pursuant to Exemptions 6 and 7(C) were made on behalf of other Offices, which will justify those withholdings separately.

⁵ Only the Exemption 5 excisions, made to a one-page e-mail, were made by OIP. The excisions to the e-mails pursuant to Exemption 6 were made on behalf of the Office of Professional Responsibility, and that Office will therefore justify those withholdings.

⁶ Also, a limited amount of classified material located in the Office of the Deputy Attorney General was withheld in full pursuant to Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1), which pertains to information that is properly classified in the interests of national security pursuant to Executive Order 12958, as amended. The withholding of this material will not be addressed in this declaration because plaintiff is not at this time challenging documents relating to specific cases or investigations.

⁷ The Criminal Division will justify these withholdings, made on its behalf, in a separate declaration.

Provide a summary of what has been withheld. Doing so provides the framework for what is at issue in the litigation and will be addressed by the declaration.

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documents referred by the Criminal Division is attached hereto as Exhibit B).

10) At this time, OIP's processing of plaintiff's FOIA request is completed, and four responses have been made to plaintiff. OIP has disclosed to plaintiff a total of 257 pages in full.⁸ Also, excluding redactions made on behalf of other offices, OIP has withheld 109 pages in part⁹ and 611 pages in full¹⁰ pursuant to the deliberative process and presidential communications privileges of Exemption 5 of the FOIA. Accordingly, this declaration addresses the withholding in full, or in part, of 720 pages of documents pursuant to the deliberative process and presidential communication privileges of Exemption 5.

11) Attached to this declaration is a Vaughn Index containing a detailed description of the withheld documents. Because certain records are similar to one another, we have categorized them into nine distinct groups. The Vaughn Index describes the responsive documents contained in each group, including such information as the date and the general content of the material, provides the number of pages for each group, and identifies the privileges – deliberative process and presidential communications – which protect each group from full or partial disclosure under Exemption 5 of the FOIA.

If you have also prepared a Vaughn Index, introduce it in the declaration, and explain how it is structured/organized for ease of reference.

⁸ This includes 138 pages released in OIP's second interim response, twenty-six pages released in OIP's third interim response, and ninety-three pages released in OIP's final response.

⁹ This includes 108 pages released with excisions made pursuant to the deliberative process privilege, and one page released with excision made pursuant to the presidential communications privilege, in OIP's final response to plaintiff. The final eleven pages withheld in part in the final response will be justified by other offices (the Central Intelligence Agency, Federal Bureau of Investigation, and Office of Professional Responsibility of the Department of Justice).

¹⁰ This includes 600 pages withheld in OIP's second interim response, five pages withheld in OIP's third interim response, and three pages withheld by the CIA on OIP's behalf pursuant to the deliberative process privilege; as well as three pages withheld in OIP's final response pursuant to the presidential communications privilege.

Explanation of Withheld Material

Next, provide a thorough description of the information withheld and, in a non-legalistic manner, provide a justification for the withholdings by explaining your analysis of the information and the attendant harm in its release.

FOIA Exemption 5

12) Exemption 5 of the FOIA protects certain inter- and intra- agency communications protected by the deliberative process privilege. All of the responsive records withheld from plaintiff in whole or in part pursuant to Exemption 5 are inter- and intra- agency communications exchanged, or drafts and handwritten notes created within, the Executive Branch. In one group, the withheld documents consist of a letter, and the portion of a list of attachments describing that letter, sent by the Department to the White House; in another group one withheld document consists of a letter sent by the Department to the Office of Management and Budget; and in one case a letter from the Central Intelligence Agency to the Department was withheld. All other documents are internal to the Department of Justice.

13) Seven hundred sixteen pages of the records withheld in whole or in part are protected by the deliberative process privilege of Exemption 5 of the FOIA. The information withheld on the basis of the deliberative process privilege fall into four overall, but inter-related categories: 1) draft documents, 2) e-mail discussions about the content of drafts, 3) handwritten marginalia and notes, 4) back-and-forth predecisional deliberations, analyses, recommendations and assessments. The remaining four pages of records withheld in whole or in part, comprising Group 9, are protected by the presidential communications privilege as well as the deliberative process privilege and are discussed separately.

Deliberative Process Privilege

14) The deliberative process privilege is intended to protect the decisionmaking processes of government agencies from public scrutiny in order to enhance the quality of agency

decisions.

15) A significant part of the deliberative process within the Department of Justice involves the creation of draft documents which are then reviewed, edited, and modified before they become final. The draft documents in Group 1 consist of unsigned, usually undated, draft letters and memoranda, many with extensive handwritten notes, including multiple versions of a letter from the Attorney General to Congress and draft versions of the final and interim reports to Congress on the Interagency Task Force on Unauthorized Disclosures of Classified Information (hereinafter “classified leaks” task force). By their very nature as drafts, these documents are predecisional, preliminary versions of what will later become a final document. The process by which a draft evolves into a final document is itself a deliberative process. As a result, there is no reasonably segregable, non-exempt information that can be disclosed from the drafts. However, to the extent that final, signed versions of the drafts being protected in Group 1 were located, they were processed and ultimately disclosed to plaintiff. A total of 264 pages of the material withheld in Group 1 consisted of drafts, the final versions of which were provided to plaintiff.

Address segregability throughout, and provide as much detail as possible. In this case, although drafts were withheld, final versions of the documents were released. It's a good idea to call attention to this fact.

16) In addition to the draft documents themselves, e-mail messages pertaining to the preparation of the Attorney General’s report to Congress on classified leaks were protected. The seventy-seven pages of e-mail messages located in Group 4 contain commentaries on and discussions of the proposed content and formatting of the report, including extensive editing

suggestions and recommendations.¹¹

17) All of these documents, the drafts themselves, and the discussions reflecting the drafting process, are part of the exchange of ideas and suggestions that accompanies all decision-making and reflect preliminary assessments by attorneys and other staff about issues in which they have been asked to make recommendations and give advice. Agency officials routinely e-mail each other, sharing language, giving and responding to suggestions and proposed language as they draft documents or respond to inquiries. E-mail operates as a way for individual Department of Justice employees to communicate with each other about current matters without having to leave their offices. These "discussions," which get memorialized online, are part of the exchange of ideas and suggestions that accompanies all decision-making and typically reflect staff members' very preliminary assessments about issues on which they may be asked to make recommendations. Indeed, such online discussions most resemble conversations between staff members which are part of the give and take of agency deliberations. Disclosure of such e-mails would severely hamper the efficient day-to-day workings of the Department as individuals would no longer feel free to discuss their ideas and advice on the content of documents in e-mail messages. If e-mail messages such as these are routinely released to the public, Department employees will be much more circumspect in their

Make sure not to be conclusory. In other words, don't assume that the harm in releasing withheld information is obvious to the Court, but lay out exactly what that harm is.

¹¹ Some individual e-mail messages within these seventy-seven pages are purely logistical in nature and are not substantively related to the subject of plaintiff's request. Accordingly, because those e-mails are not responsive to the request, they are not discussed in this declaration.

online discussions with each other. This lack of candor will seriously impair the Department's ability to foster the forthright, internal discussions necessary for efficient and proper decisionmaking. Certainly disclosure of such preliminary assessments and opinions would make officials commenting on drafts much more circumspect in providing their views. Agency decisionmaking is at its best when employees are able to focus on the substance of their views and not on whether their views may at some point be made publicly available. We carefully reviewed the responsive e-mail messages and determined that they contain no reasonably segregable, non-exempt information.

18) Another aspect of the drafting process consists of the creation of handwritten notes and the making of notations on documents. Fifty pages of the documents in Group 2 are purely handwritten notes containing sentence fragments, questions, and other notations reflecting legal analyses. Additionally, sixty-one pages of Group 2 consist of a copy of the March 31, 1982 "Willard Report" on classified leaks and a copy of the Attorney General's October 15, 2002 letter to Congress on the classified leaks task force. The final, unmarked copies of these documents were disclosed to plaintiff. These withheld versions contain unsegregable marginalia and notations. Finally, twenty-seven pages of Group 2 are federal statutes, printed from the internet, which contained extensive notes and marginalia which likewise could not be segregated. OIP located and provided to plaintiff unredacted copies of these federal statutes, thereby only protecting the notes and marginalia.

19) The handwritten notes, markings and marginalia on the documents in Group 2 reveal the thought processes and mental impressions of the agency officials who made the markings. Handwritten notes by their very nature embody the initial thoughts, comments, and evaluations

If you went above and beyond in order to segregate non-exempt information for release, be sure to say so. In this case, the withheld documents were so marked-up with deliberative information, they could not be segregated. Accordingly, clean copies were located and provided to the requester/plaintiff in an effort to disclose as much as possible.

of their writers before they are assembled into a final document. In this sense, handwritten notes represent the writers' distillation of issues and convey information about their original thinking processes. Also, it is common practice for agency lawyers reading documents and statutes to mark them up with underlining, bracketing, or highlighting, and to write comments in the margins. This process allows the attorney to evaluate the document as it is being read and to mark significant portions for later reference. It is crucial that agency officials feel completely free to undergo this process without fear that their views as to what is and is not significant in a document or statute would be publicly revealed. We reviewed these documents for the purpose of segregation. We determined that it is not possible to protect only the markings, as the very act of excising them on the documents would itself reveal where the marginalia was, and correspondingly, would reveal those portions of the documents that were considered significant. However, as stated above, for all the documents with marginalia OIP provided to plaintiff unmarked, "clean copies" of documents.

Address segregation as much as possible.

20) An essential part of the creation of agency policy and final agency decisions is the internal, predecisional back-and-forth among agency officials leading up to the making of final decisions. The final, overall categories of documents withheld on the basis of the deliberative process privilege, located in Groups 3 and 5, and in Groups 6, 7, and 8, reflect this back-and-forth decisionmaking process.

21) The documents protected in full and in part in Group 3 were created pursuant to the classified leaks task force, and the working groups under the umbrella of that task force. The thirty-five pages of taskings, agendas, analyses, group goals, initial reports, issues, and questions for consideration; the twenty pages of working group meeting summaries; and the e-mail

message from the Office of the Deputy Attorney General to three of the task force's working groups, identifying and soliciting comments on areas of interest, all were created pursuant to the classified leaks task force. The purpose of the classified leaks task force was to assess the issue of classified leaks and to advise the Attorney General of recommendations for handling the matter, leading up to the Attorney General's subsequent report to Congress.

22) Like the documents in Group 3, the documents in Group 5 similarly reflect Department officials' input on a larger decisionmaking process, in this instance on the Executive Branch's input on legislation relating to the issue of classified leaks. The memorandum from the Office of Legislative Affairs to the Office of Management and Budget, and the suggested revisions made to the Intelligence Authorization Act for Fiscal Year 2001, provide the Department's views on the legislation with respect to classified leaks. As such, all of the protected information in Groups 3 and 5 are part of the exchange of ideas and suggestions that accompanies all decisionmaking and reflect preliminary assessments by attorneys and other staff about issues on which they have been asked to make recommendations and give advice.

23) Finally, the documents protected in Groups 6, 7, and 8 also reflect the back-and-forth decisionmaking process of the Executive Branch. The memoranda which comprise Group 6 relate to the establishment of the classified leaks task force, and address initial considerations to be addressed in anticipation of its creation, including proposed issues and preliminary questions, and recommendation on selecting a task force chair. The information protected in Group 7 reflects the crafting of solutions in response to the issue of classified leaks, including memoranda discussing a former official's and other offices' views on the topic, a letter from former CIA director George Tenet providing his agency's views and recommendations on the subject, and the

report of the task force to the Attorney General providing its findings, analyses, and recommendations on the leaks issue. The two unsigned, undated documents protected in part in Group 8 provide assessments relevant to the classified leaks issue, including analyses of the recommendations of the Willard Report and of the implementation of whistleblower protections.

24) All of the documents protected in Groups 3 and 5, and in Groups 6, 7, and 8 were prepared by officials within the Department or otherwise in the Executive Branch to assist the Attorney General in addressing the problem of unauthorized leaks of classified information. In doing so, the protected information discusses various options under consideration and contains legal and policy analyses. No final decisions are made in these documents; rather, they are tools for discussion and advice in the larger initiative relating to classified leaks, and leading up to the Attorney General's report to Congress on the issue. The authors of the documents intend to make relevant officials aware of all of the legal and policy implications pertaining to this topic so that a thorough discussion of the issue could take place. It is extremely important that agency decisionmakers be completely aware of every aspect of a given issue so that fully informed decisions can be made. If these documents were disclosed, agency officials tasked with creating and participating in such task forces and working groups would surely be inhibited from including all relevant information and would not be as candid in presenting their views. A staff member who is aware that his or her policy analysis or proposed recommendation may be released to the public may not be as forthcoming as he or she would otherwise be. That staff member may be more concerned with the public perception of the document he or she is drafting than with providing the necessary information to the decision maker. This inhibition would be extremely detrimental to the Department's deliberative process. By affording confidentiality to

agency deliberations such as these, decisionmakers can operate most effectively. We carefully reviewed the withheld documents and released all reasonably segregable, nonexempt information.

25) All of the documents that have been withheld pursuant to the deliberative process privilege are intrinsically a part of the deliberative processes of the Department and the Executive Branch. In the course of drafting documents and advising senior officials, attorneys and staff communicate with each other, seeking information, providing advice, and offering suggestions. The documents at issue consist of just such communications. These documents are part of the exchange of ideas and suggestions that accompanies all decision-making and typically reflect staff members' preliminary assessments about the issue on which they have been asked to make recommendations. Here, the draft documents, internal agency e-mail discussions, notes and marginalia, and similar communications are part of the exchange among government officials who were analyzing the issue of classified leaks and proposing solutions for the problems that issue presents to the Executive Branch. Throughout the process, advice is being requested, analysis is being conducted, and recommendations are being given.

It's a good idea restate your segregation efforts at the end of the discussion.

26) As discussed above in connection with each category of withheld records, we carefully reviewed each of the documents and determined whether there was any reasonably segregable, non-exempt information that could be disclosed. Whenever possible, OIP redacted only those portions of the documents which were exempt from disclosure, and released all non-exempt information to plaintiff.

Presidential Communications Privilege

27) In addition to the documents described above that are protected by the deliberative

process privilege, OIP withheld the two documents in Group 9 pursuant to the presidential communications privilege as well as the deliberative process privilege. One document is a letter from former Deputy Attorney General Jamie Gorelick to the Deputy Assistant to the President for National Security Affairs, National Security Council providing the Department's views and advice on the handling of classified leaks. The second document in Group 9 is a listing of three documents, one of which describes the letter from former Deputy Attorney General Gorelick to the Deputy Assistant to the President for National Security Affairs. The information protected in Group 9 was provided to an adviser to the President who was responsible for handling matters of concern to national security. The underlying purposes of the presidential communications privilege are the same as those of the deliberative process privilege, but they take on a distinct significance at the level of presidential decisionmaking. Advisers must feel free to give the most candid and thorough advice possible in order for the President's decisionmaking process to be effective. The President was the ultimate decisionmaker on Executive Branch policy for responding to classified leaks. He, and his advisors must be free to solicit the advice of the Department on matters they are considering without fear of those communications being disclosed.

28) Because the communication protected in the documents in Group 9 were sent by the Deputy Attorney General to a presidential adviser in response to solicited advice regarding a matter of presidential decision, the letter itself and the description of the letter are protected by the presidential communications privilege.¹² As such the letter is exempt in full and contains no reasonably segregable, non-exempt information. As to the listing of documents, OIP only

¹² This letter is also, in the alternative, protected under the deliberative process privilege for the reasons discussed above.

protected that portion which described the protected letter, and released all non-exempt information to plaintiff.

The declaration should be personally signed and dated by the declarant under the penalty of perjury.

I declare under penalty of perjury that the foregoing is true and correct.

Melanie Ann Pustay
MELANIE ANN PUSTAY

Executed this 30 day of July, 2007.

Civil Action No. 06-4643 (MMC)
U.S. District Court
Northern District of California
San Francisco Division

Vaughn Index

Description of the records of the Offices of the Attorney General, Deputy Attorney General, and Legislative Affairs protected in full and in part by FOIA Exemption 5. The 720 pages of withheld records are divided into nine groups and are described below.

Group Number	Date	Description	Privilege	Pages
1	Varied dates in 2002, but mostly undated	Unsigned drafts, many with handwritten notations, the final versions of which were also processed and provided to plaintiff: consist of draft letters to Congress, draft transmittal memorandum, drafts of the final and interim reports to Congress on classified leaks, and draft memoranda regarding the Interagency Task Force.	Deliberative process in full	264
	Varied dates in 2002, but mostly undated	Unsigned, incomplete, drafts, many with handwritten notations, of which no final versions were located, consisting of draft remarks, portions of memoranda, and analysis of issues involving leaks	Deliberative process in full	71
	None	One unsigned, undated draft statement regarding the Intelligence Authorization Act for Fiscal Year 2001	Deliberative process in full	2

Group Number	Date	Description	Privilege	Pages
2	3/31/82 and 10/15/02	Two documents containing unsegregable marginalia; specifically, marked-up version of the 1982 "Willard Report" and the October 15, 2002 letter to Congress, which were also processed and provided to plaintiff	Deliberative process in full	61
	None	Handwritten notes reflecting legal discussions and analysis	Deliberative process in full	50
	11/21/02	Federal statutes containing unsegregable marginalia, the underlying statutes for which OIP retrieved and provided to plaintiff	Deliberative process in full	27
3	Varied dates in 2002	Documents comprising the "work product" of the working groups on classified leaks, including taskings, analyses, comments, recommendations, agendas with handwritten notations, interim reports offering proposals and analyses, group goals and questions for consideration	Deliberative process in full	35
	12/20/01 to 2/11/02	Summaries of six separate working group chair meetings discussing back and forth between meeting participants	Deliberative process in part	20
	3/11/02	One e-mail message from the PADAG to members of three classified leaks working groups, soliciting comments on particular areas of interest to the leaks task force	Deliberative process in part	1
4	Varied dates in 2002	Responsive portions of related e-mail messages among various DOJ staff, discussing the drafting of and making recommendations on the AG's classified leaks report to Congress	Deliberative process in full	77
5	10/19/00	Memorandum from the AAG of OLA to the Director of OMB regarding DOJ's comments and views on the Intelligence Authorization Act for Fiscal Year 2001	Deliberative process in full	3

Group Number	Date	Description	Privilege	Pages
	7/12/00	One marked-up version of the Intelligence Authorization Act for Fiscal Year 2001, including suggested legislative revisions	Deliberative process in full	3
6	7/23/99	Two versions of a memorandum from the PADAG to the AAG of the Criminal Division asking various questions about the handling of classified leaks and constituting an initial assessment regarding the anticipated creation of a working group on the handling of classified leaks	Deliberative process in full	6
	7/28/99	One memorandum from the Associate DAG to the PADAG proposing issues for consideration and preliminary questions for the classified leaks working group	Deliberative process in full	6
	11/19/01	One memorandum from the Associate DAG, through the ODAG, to the AG providing recommendations for selecting a task force chair in anticipation of the establishment of a classified leaks task force	Deliberative process in part	5
7	3/12/01	One memorandum from the Inspector General to the PADAG regarding investigating classified leaks, and describing the content of a separate deliberative memorandum in which a former AAG discussed options regarding classified leaks	Deliberative process in part	2
	9/3/02, 9/23/02, and 10/15/02	Three memoranda from the Associate DAG, through the DAG, to the AG seeking signature and approval to submit the report on classified leaks to OMB for clearance, and discussing other offices' views on, and modification of, the draft report	Deliberative process in part	11
	4/29/02	Report to the AG on the work of the interagency task force on classified leaks, submitted by the Associate DAG, and discussing	Deliberative process in part	62

Group Number	Date	Description	Privilege	Pages
	undated	the task force's findings, recommendations, and analysis of the problem of leaks Letter from the Director of the CIA to the AG making multiple recommendations on the approach to be taken with respect to the draft report on classified leaks	Deliberative process in full	3
8	Undated	One unsigned, undated summary, created by the legislative working group on classified leaks, on implementation of the 1982 Willard Report on classified leaks, and assessing the success of the recommendations of that report	Deliberative process in part	3
	Undated	One unsigned, undated document discussing whistleblower protections and procedures, and providing recommendations for successful implementation of whistleblower protections	Deliberative process in part	4
9	4/1/97	One final letter from the DAG to the Deputy Assistant to the President for National Security Affairs, National Security Council, regarding the DOJ's review of and providing advice on classified leaks	Presidential communications privilege in full Deliberative process privilege in full	3
	None	One portion of a list of attachments which describes the above letter from the DAG to the Deputy Assistant to the President for National Security Affairs, National Security Council, regarding the DOJ's review of and providing advice on classified leaks	Presidential communications privilege in part Deliberative process privilege in part	1

Legend:

DOJ – Department of Justice
OAG – Office of the Attorney General
ODAG – Office of the Deputy Attorney General
PADAG – Principal Associate Attorney General
AAG – Assistant Attorney General

OMB - Office of Management and Budget
AG – Attorney General
DAG – Deputy Attorney General
OLA – Office of Legislative Affairs

3) In my declaration of November 2, 2010, I described OIP's handling of plaintiff's FOIA request for records concerning the Department's decision to seek a dismissal of defendants in *U.S. v. New Black Panther Party for Self-Defense* [hereinafter "*NBPP* litigation"], including an explanation of the forty-eight pages of material withheld from plaintiff pursuant to Exemption 5 of the FOIA. This declaration supplements and incorporates by reference my November 2, 2010 declaration, and provides additional detail regarding the segregability of the withheld documents. In particular, this declaration addresses the segregability of the records withheld by OIP which this Court has determined are solely protected by the deliberative process privilege of FOIA Exemption 5.

4) In its Memorandum Opinion and Order dated August 4, 2011, the Court ruled that OIP properly asserted FOIA Exemption 5 in withholding all of the forty-eight pages of documents at issue, and which were addressed in ¶¶ 38-60 of my November 2, 2010 declaration. OIP had asserted both the deliberative process privilege and the attorney work product privilege for all forty-eight pages. With respect to documents withheld by OIP which post-date the May 15, 2009 filing of the Department's notice of voluntary dismissal in the *NBPP* litigation [hereinafter the "post-dismissal" documents], the Court determined that only the deliberative process privilege of FOIA Exemption 5 applies and ordered the Department to renew its motion for summary judgment, accompanied by declarations that solely address the segregability of documents 37a-c and the post-dismissal documents.

5) As described in my November 2, 2010 declaration, during OIP's original review of the information withheld from plaintiff, we carefully reviewed each of the documents to determine whether any information could be segregated for release. At that time, inasmuch as the

documents that remained at issue were being protected in their entireties by the attorney work-product privilege, OIP determined that disclosure of the documents, and the facts selected for and contained within them, would reveal individual assessments of what was deemed significant in the course of the litigation, what strategies and options were being considered, when, and by whom. Because the attorney work-product doctrine protects from disclosure the entire contents of documents to which it applies, and OIP had asserted that doctrine in conjunction with the deliberative process privilege to withhold all of the documents at issue, none of the forty-eight pages of withheld documents were identified as appropriate for segregation.

6) In light of the Court's August 4, 2011 Order, OIP has now conducted a supplemental review of the documents that the Court held were protected only by the deliberative-process privilege, specifically: documents 107a, 110, 111, 113, 116, and 117a-d.¹ As a result of this supplemental segregability review, OIP has now determined that certain material in these documents is appropriate for segregation and release to plaintiff inasmuch as such disclosure does not reveal information protected by the deliberative process privilege. Accordingly, portions of documents 107a, 116, and 117a-d have now been segregated and released to plaintiff through counsel. The newly-released material consists of certain purely factual information, including e-mail envelope information (such as the "to," "from," "sent date," and "subject" fields)²; information that is already a matter of public record, including language excerpted from public court filings, and other non-deliberative statements. The material which OIP continues to

¹ The remaining post-dismissal documents and Document 37a-c are discussed in the Second Supplemental Declaration of Nelson D. Hermilla.

² Most e-mail envelope information, such as the authors, recipients, dates and subjects of e-mails, had already been disclosed to plaintiff through the Vaughn Index attached to my November 2, 2010 declaration.

withhold within the post-dismissal documents, as detailed in the following paragraphs, consists of information that this Court has ruled is protected by the deliberative process privilege or is so intertwined with exempt information that it cannot be segregated for release. OIP's segregability review of each of the post-dismissal documents is addressed comprehensively below.

Document 107a

7) As a result of our supplemental segregability review, OIP has determined that factual portions of document 107a are appropriate for segregation and release to plaintiff, inasmuch as such portions do not reveal deliberative process privileged information. Document 107a is described in OIP's Vaughn Index as follows:

[An] e-mail from OASG to OAG, ODAG, and OASG officials forwarding court papers filed in the NBPP litigation, as well as emails briefing recipients on the relief sought therein. E-mail provides additional comment and characterization of relief sought.

The information that has now been released to plaintiff in this document consists of e-mail envelope information and the author's factual statements regarding a public court-filing. The remaining information consists of the author's above-described opinion about the judicial relief sought in the *NBPP* litigation and, as such, is the very information which this Court has determined is properly protected by the deliberative process privilege. Document 107a therefore cannot be segregated any further without disclosing privileged information.

Documents 110 and 111

8) As a result of our supplemental segregability review, OIP has determined that documents 110 and 111 do not contain any non-exempt segregable information, inasmuch as the factual information included within these predecisional briefing papers is inextricably intertwined with the analysis they contain, so that disclosure of any portions of these documents

would reveal the very deliberative process this Court has determined applies to these materials.

Document 110 is described in OIP's Vaughn Index as follows:

[A] briefing paper, including talking points, for the [Attorney General] regarding the Department's handling of the NBPP litigation and the decision to drop charges against three of the defendants. This briefing paper identifies selected aspects of the Department's handling of the NBPP litigation, and serves to brief the [Attorney General] on how he may prepare for potential inquiries during upcoming Hill testimony.

Document 111 is described as:

[A] briefing paper, including talking points, for the [Associate Attorney General] regarding the Department's handling of the NBPP litigation and the decision to drop charges against three of the defendants. This briefing paper identifies potential issues and various aspects of the Department's handling of the NBPP litigation, and serves to brief the [Associate Attorney General] on how he may prepare for inquiries.

The information withheld from plaintiff in these internal briefing papers represents the authors' internal decisions to select particular facts and present their analysis of them to the Department's senior leadership. These documents were assembled through the authors' exercise of judgment in extracting pertinent material from any number of sources, to be used and relied upon by the Attorney General and Associate Attorney General as they are called upon to take discretionary action in representing the Department -- in this instance, as they respond to outside inquiries on the *NBPP* litigation. The decision to include or exclude certain factual information from analytical documents is itself an important part of the deliberative process. Accordingly, I have carefully reviewed documents 110 and 111, but have determined that they are not segregable, and that any further disclosure would reveal details of the Department's deliberative process.

Document 113³

9) As a result of our supplemental segregability review, OIP has determined that the very limited portion of document 113 that is responsive to plaintiff's request does not contain any non-exempt segregable information. Document 113 consists of handwritten meeting notes and any further disclosure of the responsive portion of these notes would reveal the very deliberative process this Court has determined applies to these notes. Document 113 is described in OIP's Vaughn Index as follows:

Handwritten notes taken at a "[Civil Rights Division] Weekly Meeting" in which a variety of pending [Civil Rights Division] matters are discussed. Author's notes reflect a discussion of a development in the NBPP litigation.

*Only a limited portion of these notes relate to the subject of plaintiffs FOIA request.

The information withheld from plaintiff in document 113 consists of a mere six words, which reflect a discussion regarding a course of action that was under consideration at this early May meeting.⁴ The remainder of this one page of meeting notes reflects discussions of non-NBPP Civil Rights Division matters, which are not responsive to plaintiff's FOIA request. It is not possible to segregate these six words in document 113 without revealing the nature of the underlying, privileged discussion.

³ In Defendant's Reply and Opposition to Plaintiff's Cross-Motion for Summary Judgment, filed January 10, 2011, it was erroneously noted that document 113 post-dated the dismissal in the *NBPP* litigation. See Def.'s Reply at 11 n. 8. Document 113 is dated "early May" and was located along with other "weekly meeting" notes, including document 112 (dated April 30, 2009) and document 114 (dated May 14, 2009). Therefore, Document 113 likely was created on May 7, 2009, prior to the *NBPP* dismissal on May 15, 2009. In keeping with the Court's analysis, document 113 thus would be protected by the attorney work-product privilege.

⁴ As noted above, although document 113 was previously listed as a post-dismissal document, it reflects a discussion from a meeting that likely occurred May 7, 2009.

Document 116

10) As a result of our supplemental segregability review, OIP has determined that certain factual portions that are separate and apart from the analyses comprising document 116 are appropriate for segregation and release to plaintiff, inasmuch as such portions do not reveal deliberative process privileged information. Document 116 is described in OIP's Vaughn Index as follows:

Detailed "chronology" of the Department's involvement in the NBPP litigation as presented from the author's perspective. Includes the author's characterization of actions and discussions with and among Department colleagues since the inception of the lawsuit, but focusing primarily on the time period of 4/29/09-5/21/09.

The information that has now been released to plaintiff in this document consists of information that was presented in papers filed by the Department in the *NBPP* litigation, including factual details of the *NBPP* events, litigation dates, and contents of court filings.⁵ The remaining material cannot be segregated any further without revealing the analysis, assessments and evaluations of the document's author.⁶ Moreover, the author's decision to include or exclude certain factual information from this analytical document is an important part of his deliberative process, as he exercises his judgment in extracting pertinent material from a vast number of sources and notes his own "take" on events that are discussed. The very facts that the author chooses to discuss, the nature in which he discusses them, and the manner in which he arranges them reveals his thought process. Furthermore, information revealing dates that certain actions in the deliberative process were (or were not) undertaken is non-segregable because such

⁵ An example of information that was released to plaintiff includes the entry for April 28th, on page 5 of the document, which reads "The United States sent the Defendants notice that it would file a motion for default judgment after at least three days."

⁶ Document 116 contains and discusses full-text excerpts of draft court filings, which the Court has elsewhere determined to be protected by the attorney-work product privilege.

information regarding the timing of internal *NBPP* developments and discussions would disclose the details of the consultative process at each stage of the process. Accordingly, certain factual information not released to plaintiff pursuant to OIP's supplemental review is so inextricably intertwined with the deliberations contained in this predecisional document that any further disclosure would inevitably reveal the deliberations that the Court has determined are protected by Exemption 5 of the FOIA. Document 116 therefore cannot be segregated any further without revealing privileged information.

Documents 117a-d

11) As a result of our supplemental segregability review, OIP has determined that certain factual portions of documents 117a-d are appropriate for segregation and release to plaintiff, inasmuch as such portions do not reveal deliberative process privileged information. Document 117a-d is described in OIP's Vaughn Index as follows:

Forward of an e-mail with the subject "New Black Panther Party: Response to Lamar Smith" by an ODAG attorney, who then presents a detailed analysis to the DAG on certain points of [the Civil Right Division's] decisionmaking process in the *NBPP* litigation. The ODAG attorney provides [the Civil Right Division's] explanations on its handling of the litigation and opines on how most appropriately to present certain aspects of the case in a draft letter to Congress.

The information that has now been released to plaintiff in this document consists of e-mail envelope information, a non-substantive statement unrelated to plaintiff's FOIA request, and factual statements regarding a draft response letter to a Congressional inquiry involving the *NBPP* litigation. The remaining information consists of the author's above-described legal analysis of judicial relief sought in the *NBPP* litigation and, as such, is the very information which this Court has determined is properly protected by the deliberative process privilege. Any additional segregation of these documents would produce only incomplete, fragmented,

unintelligible sentences and phrases that are devoid of any meaning. Documents 117a-d therefore cannot be segregated any further without disclosing privileged information.

12) When initially processing plaintiff's FOIA request, OIP conducted a line-by line review and analysis of the documents at issue to ensure that only exempt material was withheld from plaintiff. Consistent with the Court's August 4, 2011 Memorandum Opinion and Order, OIP concluded a supplemental review of the documents that the Court determined are properly protected by the deliberative-process privilege of Exemption 5 of the FOIA, but not the attorney work product privilege. As a result of that review, OIP was able to segregate and release certain material without revealing protected deliberative process privileged material. That segregable material has been provided to plaintiff. The remaining information in documents 107a, 110, 111, 113, 116, and 117a-d that has not been segregated and released to plaintiff consists of the protected deliberations and information so inextricably intertwined with those deliberations that its disclosure would reveal the deliberations themselves.

I declare under penalty of perjury that the foregoing is true and correct.



Vanessa R. Brinkmann

Executed this 30th day of September 2011.

Electronic Frontier Foundation v. U.S. Department of Justice
Civil Action No. 10-CV-0641 (RBW)
U.S. District Court for the District of Columbia

OIP Vaughn Index

This index contains a description of the 221¹ pages of records protected, either in part or in full by OIP, pursuant to Freedom of Information Act Exemption 5 (deliberative process privilege).² For clarity of presentation, the documents are assembled into two general groups and nine sub-groups. The documents in Group 1 of this Index includes records withheld from plaintiff in part (Groups 1(a) – 1(e)), and the documents in Group 2 include records withheld from plaintiff in full (2(a) – 2(d)).

Group 1: Documents withheld in part pursuant to Exemption 5.

Group 1(a): E-mail messages in which issues raised in a meeting between the U.S. and EU are discussed among DOJ officials.

Group 1(b): E-mail messages in which DOJ senior officials solicit and receive advice and discuss questions, developments, and potential ramifications, concerning the HLCG deliberations.

Group 1(c): E-mail discussions pertaining to the development of drafts.

Group 1(d): E-mail discussions pertaining to strategies, progress, and next steps regarding HLCG negotiations.

Group 1(e): Briefing material.

Group 2: Documents withheld in full pursuant to Exemption 5.

Group 2(a): Drafts.

Group 2(b): Comments on drafts.

Group 2(c): Briefing material.

Group 2(d): Handwritten meeting notes.

Acronyms:

OAG: Office of the Attorney General

ODAG: Office of the Deputy Attorney General

OPCL: Office of Privacy and Civil Liberties

CRIM: Criminal Division

DHS: Department of Homeland Security

State: Department of State

OIP: Office of Information Policy

EU: European Union

HLCG: High Level Contact Group

Identification of Relevant Department Personnel:

Thomas Burrows: CRIM

Nancy Libin: ODAG

David Ogden: ODAG

Amy Jeffress: OAG

Bruce Swartz: CRIM

Stuart Delery: ODAG

Kenneth Harris: CRIM

Emily Petty: OAG

Melanie Ann Pustay: OIP

Kirsten Moncada: OPCL

Molly Warlow: CRIM

Miriam Vogel: ODAG

¹ Although 221 pages are included in the Vaughn Index, it should be noted that these pages were not withheld in their entirety. As a result of OIP's efforts to segregate as much information as possible for release to plaintiff, many of the individual pages within documents or e-mail chains contain no redactions at all.

² Shaded entries within this Vaughn Index denote information that was withheld on behalf of the Criminal Division, and, accordingly, the justification for those withholdings is being addressed by that component.

Patricia Reedy: CRIM

Lisa Monaco: ODAG

Mary Lee Warren: CRIM

Group 1: Description of documents that were released in part with excisions made pursuant to Exemption 5 of the FOIA.

Group	Document Numbers		Date	Description	Exemption	Pages
1(a)	SD-18 SD-23 SD-24		10/15/09 through 10/16/09	E-mail messages between David Ogden and Stuart Delery discussing issues raised by a meeting between U.S. and EU representatives on HLCG information sharing principles.	<u>Exemption 5</u> Deliberative process privilege	2
1(b)	NLI-14 NLI-23 NLI-25 NLI-48 NLI-68 NLI-69	NLI-70 NLI-71 TB-672 SD-1 SD-15	7/22/09 through 10/23/09	E-mail messages among Nancy Libin, Melanie Pustay, Thomas Burrows, and Bruce Swartz, in which senior officials seek and receive advice, and discuss questions, developments, and potential ramifications, with respect to the HLCG deliberations.	<u>Exemption 5</u> Deliberative process privilege	11

Group	Document Numbers		Date	Description	Exemption	Pages
1(c)	KMI-14 KMI-7 KMI-8 KMI-9 KM-72 KM-73 KM-74 NLI-34 NLI-35 NLI-36 NLI-37 NLI-38 NLI-39 NLI-40 MW-1 NLI-27 NLI-28 NLI-29 NLI-30 KM-104 KM-105 NLI-1 TB-60 TB-61 TB-350 TB-351	TB-352 TB-500 TB-501 TB-682 TB-683 TB-684 TB-605 TB-606 TB-551 TB-552 TB-541 NL-321 KM-113(a) KM-114 NL-426 NL-427 NL-348 NL-451 NL-183 NL-184 NL-185 NL-186 NL-188 NL-188(a) NL-102 TB-558	1/23/09 through 10/28/09	E-mail messages among Thomas Burrows, Mary Lee Warren, Kirsten Moncada, Nancy Libin, and Bruce Swartz sharing and discussing various comments and opinions in the development of drafts, including suggested language, edits, mark-ups, additions, and contextual extractions. Authors of these e-mails address questions that arise in connection with the drafts, explain their reasoning for making certain edits, and their assessments as to the effect of the prepared draft language in the context of the HLCC negotiations.	<u>Exemption 5</u> Deliberative process privilege	27

Group	Document Numbers		Date	Description	Exemption	Pages
1(d)	NLI-42 NLI-43 NLI-44 NLI-45 NLI-46 SD-5 SD-16 NL-68 NLI-52 NLI-53 NLI-54 NLI-55 NLI-56 TB-465 TB-466 TB-715	TB-716 TB-597 NL-171 NL-89 NL-13 NLI-57 NLI-59 NLI-60 NLI-61 NLI-62 NLI-63 NLI-64 NLI-65 NLI-67	9/3/09 through 10/27/09	E-mails among Bruce Swartz, Mary Lee Warren, Nancy Libin, Thomas Burrows, Miriam Vogel, Stuart Delery, Kirsten Moncada, and Patricia Reedy consisting of discussions and opinions about negotiation strategies, the progress of the deliberations, and next steps in the HLCG deliberations, including reactions by DOJ officials to issues raised during HLCG deliberations, and discussions and analysis of pertinent U.S. statutes and case law.	<u>Exemption 5</u> Deliberative process privilege	17

Group	Document Numbers	Date	Description	Exemption	Pages
1(e)	TB-696 TB-697 TB-710 TB-711 TB-712 NL-231(b) TB-456(a) TB-456(b)	8/26/09 through 10/27/09	E-mail messages among Mary Lee Warren, Kenneth Harris, Bruce Swartz, Molly Warlow, Thomas Burrows, Amy Jeffress, Emily Petty, and Stuart Delery regarding the creation of briefing materials for upcoming meetings with EU member state dignitaries, as well as the briefing materials themselves.	<u>Exemption 5</u> Deliberative process privilege	14
	SD-24(a) SD-24(b) SD-24(c)		Two copies of an October 7, 2009 memorandum (one with a handwritten notation) from Nancy Libin to the Deputy Attorney General, through Stuart Delery, concerning a U.S.-E.U. meeting in Brussels, and an attachment thereto consisting of a preliminary "Agreed Text from the HLCG Experts" dated October 2, 2009. Redacted information consists of the author's briefing of senior officials on the meeting, and portions of the attachment consisting of sections that were subsequently changed in the final version of the text.		11

Group 2: Description of documents protected in full pursuant to Exemption 5 of the FOIA.

Group	Document Number	Date	Description	Exemption	Pages
2(a)	KMI-9(a) KMI-10(a) KMKC-6(a) KM-85(a) KM-86(a) KM-87(a) KM-88(a) KM-89(a) NL-143(a) NL-231(g) TB-578(a) TB-528(a)	TB-598(a) TB-353(a) NLI-77(c) TB-390(a) TB-526(a) TB-426(a) TB-438(a) TB-438(b) TB-534(b) NLI-30(a)	Undated Various drafts, including mark-ups, proposed language, and edits by U.S. government personnel, including drafts of: a proposed agreement on data privacy protections; joint EU-U.S. statement on enhancing transatlantic cooperation; insert regarding HLCG conclusions; and agendas for upcoming EU-U.S. meetings.	<u>Exemption 5</u> Deliberative process privilege	60
2(b)	TB-464(a) KM-90 KM-91 KM-92 NLI-73 NLI-74 NLI-75 NLI-76 NLI-77 TB-389(a)	Undated, 4/3/09, 9/28/09	Discussion papers and general comments, including e-mails among Kirsten Moncada, Thomas Burrows, Mary Lee Warren, Nancy Libin, and various DHS and State officials, on drafts and revisions to drafts.	<u>Exemption 5</u> Deliberative process privilege	11
2(c)	OIPGEB-1 TB-17(a) NL-231(a)	3/16/09 through 10/28/09	Briefing materials consisting of a “briefing book” for the Attorney General, and draft talking points/briefing papers for upcoming meetings with EU member state dignitaries.	<u>Exemption 5</u> Deliberative process privilege	50

Group	Document Number		Date	Description	Exemption	Pages
2(d)	KMI-1 KMI-4 KMI-5 NLI-82 NLI-83 NLI-84	NLI-85 NLI-86 NLI-87 NLI-89 NLI-90 NLI-91	Various Dates (some undated)	Handwritten notes of senior DOJ officials from teleconferences, meetings, and other discussions. Notes which include the author's evaluations and contemporaneous thoughts on internal U.S. discussions regarding HLCG deliberations and negotiations, as well as notes to self and questions for follow-up.	<u>Exemption 5</u> Deliberative process privilege	18

amended by the OPEN FOIA Act of 2009; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General and FBI policies and procedures; judicial decisions and Presidential and Congressional directives. My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 13526¹, and the preparation of declarations in support of Exemption 1 claims asserted under the FOIA². I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to Executive Order 13526, §§ 1.3 and 3.1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI's response to plaintiff's FOIA/Privacy Act requests directed to FBIHQ, Chicago, New York City, and Washington Field Offices for records pertaining to himself.

(4) The purpose of this declaration is to provide the Court and plaintiff with an explanation of the procedures used by the FBI to review and process the 205-page sample chosen by plaintiff. The 205 page sample included four permanent serial charge-out forms³, indicating

¹ 75 Fed. Reg. 707 (2010).

² 5 U.S.C. § 552 (b)(1).

³ Serial charge-out forms authorize the removal of a document from an FBI file, and placement of a document in another location, e.g., confidential file room or a supervisor's office. Document is to be replaced by the "serial charge-out." Normally, an agent wanting to see a document will call for an entire

that additional pages were located in the FBI's Special File Room⁴ ("SFR"). Despite the fact that all SFR documents were located and provided to plaintiff previously as part of the entire release, the four SFR documents which have been selected in the sample have been placed behind each corresponding serial charge-out form and are identified as Bates-stamp pages CPO-656-A, 658-A, 659-A, and 660-A. Therefore, these four corresponding pages have been added to plaintiff's sample, despite their previous release to plaintiff. Plaintiff also selected a Change-to Memo⁵, identified as CPO-1722, which indicates that file 100-123974 Serial 539 was changed to 62-111917 Serial 4. Serial 4 of 62-111917 was located and identified as three pages which originated with a division of the U.S. Justice of Department ("DOJ"), which is now a part of the DOJ National Security Division ("DOJ/NSD"). These pages have been referred to DOJ/NSD for direct response to plaintiff and will not be included in this sample. A Deleted Page Information Sheet ("DPIS")⁶ indicating this referral has been placed behind the Change-to Memo. Two DPIS forms were also chosen by plaintiff as a part of this sample. The first is identified as CPO-1734. The documents which correspond with this form are Air Force-originated documents identified as Bates-Stamp pages CPO-1735 to CPO-1738. All of these pages, with the exception of

"section" of a file and the section will later be returned. "Serial charge-out" is thus a fairly unusual procedure.

⁴ Special File Room is a location outside the Central Records complex for particularly sensitive FBI files.

⁵ A Change-to Memo indicates that a document has been removed and placed in a more appropriate file. The "Change-to memo" is placed where the document had been. It is a more routine procedure than the "serial charge-out."

⁶ The FBI replaced pages withheld in their entirety with a "Deleted Page Information Sheet" ("DPIS") which identifies the FOIA exemptions asserted to withhold the document in full as well as the Bates-page numbers for the withheld pages. If the document originated with another Government agency, the DPIS will state that it was referred to that agency for review and direct response.

CPO-1735, were chosen by plaintiff as a part of this sample. CPO-1735 has now been included as it corresponds with the DPIS. Therefore, one additional page --CPO-1735-- was added to this sample, however, this page contains no exemptions and was released in its entirety. All of these pages were previously processed and released by the FBI after consult with the Air Force and will be addressed by the Air Force by separate declaration. The second DPIS is identified as CPO-2114. The documents which correspond with this form are Army-originated documents identified as Bates-stamped pages CPO-2113, 2115, and 2010-2126. These nine pages will not be included in this sample as they were sent to the Army for direct response previously and the Army responded directly to plaintiff's counsel by letter dated March 12, 2008 with respect to these pages.

(5) In summary, a total of five pages have been added to the plaintiff's 205-page selection resulting in a **210-page selection**. The remainder of the material mentioned above will be addressed in separate declarations to be submitted by the Army, Air Force and DOJ NSD, respectively, in accordance with Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973).⁷ This declaration therefore provides a justification only for the FBI-originated information in this 210-page sample which the FBI has withheld from disclosure by the FBI pursuant to Privacy Act Exemption (j)(2), 5 U.S.C. § 552a (j)(2), and FOIA Exemptions 1, 2, 6, 7(C), 7(D) and 7(E), 5 U.S.C. §§ 552(b)(1), (b)(2), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E). Moreover, this declaration supplements, and hereby incorporates, the Declaration of Scott A. Hodes, dated July

⁷ The FBI also located certain documents which originated with CIA and NSA within this sample. The FBI sent referrals – either for consult or direct response – to these agencies on or about February 14, 2008 and February 3, 2009 and will address these in further detail infra, ¶¶ 145-154. This material will also be addressed separately by these agencies.

8, 2002 (“Hodes Declaration”), the Declaration of Nancy L. Steward, dated August 10, 2005 (“Steward Declaration”), the Declaration of David M. Hardy dated March 7, 2006 (“Hardy Declaration-March 7, 2006”), and the Declaration of David M. Hardy dated May 22, 2009 (“Hardy Declaration-May 22, 2009”) all of which have been submitted previously in this case.

CORRESPONDENCE

(6) The Hodes Declaration contains correspondence related to this case from approximately April 1999 to approximately June 2002. See Hodes Declaration, ¶¶ 4-15.

(7) On or about May 23, 2002, the FBI notified plaintiff that his fee waiver was denied, that he did not qualify for a waiver of search fees or duplication fees, and that upon receipt of plaintiff’s willingness to pay fees the remainder of the interim release will be mailed and the remaining documents will continue to be processed. (See Exhibit A).

(8) By letter dated June 21, 2002 Office of Information and Privacy⁸ (“OIP”) responded to an appeal regarding a fee waiver and plaintiff’s status as a representative of the news media. OIP advised plaintiff that he qualified as a journalist and is entitled to news media status, and that his fee waiver was properly denied by the FBI. (See Exhibit B).

(9) By letter dated October 7, 2002, the FBI requested payment a second time of \$85.10 from plaintiff for the release mailed on June 21, 2002 of 851 pages. The FBI stated that if it did not receive payment by October 21, 2002, a dispositive motion would be prepared based on plaintiff’s failure to exhaust administrative remedies. (See Exhibit C).

(10) By letter dated October 21, 2002, plaintiff submitted a check in the amount of

⁸ The Office of Information and Privacy changed its name to the Office of Information Policy on or about March 11, 2009.

§85.10. (See **Exhibit D**).

(11) By letter dated May 7, 2003⁹, the FBI made an interim release to plaintiff.

Plaintiff was advised that 295 pages were reviewed and 287 pages were being released.

(See **Exhibit E**).

(12) By letter dated June 5, 2003, the FBI made the second interim release to plaintiff.

Plaintiff was advised that 250 pages were reviewed and 240 pages were being released.

(See **Exhibit F**).

(13) By letter dated July 2, 2003, the FBI made the third interim release to plaintiff.

Plaintiff was advised that 298 page were reviewed and 294 pages were being released.

(See **Exhibit G**).

(14) By letter dated August 6, 2003, the FBI made the fourth interim release to

plaintiff. Plaintiff was advised that 345 pages were reviewed and 344 pages were being released.

(See **Exhibit H**).

(15) By letter dated September 29, 2003, the FBI made the fifth interim release to

plaintiff. Plaintiff was advised that 907 pages were reviewed and 404 pages were being released.

(See **Exhibit I**).

(16) By letter dated October 31, 2003, the FBI made the sixth interim release to

plaintiff. Plaintiff was advised that 242 pages were reviewed and 222 pages were being released.

(See **Exhibit J**).

(17) By letter dated November 26, 2003, the FBI made the seventh interim release to

⁹ See Hodes Declaration, ¶¶ 4-15 regarding release letters dated June 10, 2002 (101 pages reviewed, 100 pages released) and June 21, 2002 (880 pages reviewed, 851 pages released). This brings the total pages released in 2002-2003 to 4,510 pages reviewed and 3,770 pages released.

plaintiff. Plaintiff was advised that 399 pages were reviewed and 353 pages were being released. (See **Exhibit K**).

(18) By letter dated December 23, 2003, the FBI made the eighth and final release to plaintiff. Plaintiff was advised that 793 pages were reviewed and 685 pages were being released. (See **Exhibit L**).

(19) In response to plaintiff's "Cross-Motion for Summary Judgment" and "Opposition to Defendants' Motion for Summary Judgment" the following items were provided to plaintiff by letter dated March 6, 2006: search slips, worksheets, a prior request letter from plaintiff dated January 17, 1976, and one audiotape from the TV program "Impact." (See **Exhibit M**).

(20) OIP acknowledged receipt of plaintiff's appeal by letter dated June 29, 2007. (See **Exhibit N**).

(21) Pursuant to the joint status report dated April 30, 2007, the FBI made a series of interim releases beginning on or about July 2, 2007. By letter dated July 2, 2007,¹⁰ the FBI provided the first interim release to plaintiff and advised him that 761 pages were reviewed and 747 pages were being released. (See **Exhibit O**).

(22) Pursuant to the joint status report of April 30, 2007, the FBI also sent a letter to plaintiff dated July 2, 2007 detailing the FBI's search efforts for any and all COINTELPRO records and the results thereof. (See **Exhibit P**).

(23) By letter dated August 31, 2007, the FBI made a second interim release to

¹⁰ As a result of the re-processing of the entire collection of documents in this case, plaintiff received four interim releases of the re-processed documents from approximately July 2007-February 2008.

plaintiff. Plaintiff was advised that 1,105 pages were reviewed and 786¹¹ were being released. (See **Exhibit Q**).

(24) OIP responded to an appeal by letter dated September 25, 2007 and stated they were closing the appeal as the matter is before the Court. (See **Exhibit R**).

(25) By letter dated November 30, 2007, the FBI made a third interim release to plaintiff. Plaintiff was advised that 1,214 pages were reviewed and 1,201 pages were being released. (See **Exhibit S**).

(26) By letter dated February 14, 2008, the FBI made a fourth and final interim release to plaintiff. Plaintiff was advised that 815 pages were reviewed and 776 pages were being released. (See **Exhibit T**).

(27) The FBI released a total of 34 pages that were inadvertently omitted from the fourth release by letter dated February 22, 2008. These pages were included in the original number of pages reviewed and released as stated in the February 14, 2008 letter. (See **Exhibit U**).

(28) As a result of consultation with the Department of State, the FBI released five documents to plaintiff by letters dated April 30, 2008 and May 15, 2008. (See **Exhibit V**).

(29) On or about June 30, 2008, plaintiff submitted to the FBI a selection of 221 pages to be Vaughned for the prior Hardy Declaration dated May 22, 2009. (See **Exhibit W**).¹²

(30) As a result of consultation with the Internal Revenue Service (IRS), the FBI made

¹¹ Due to an inadvertent administrative error, the totals in this letter are incorrect and should instead reflect 1,038 pages reviewed and 799 pages released.

¹² Seven pages were added to this sample, making it a 228 page sample. See ¶14 of Hardy Decl filed May 22, 2009.

a release of one document to plaintiff by letter dated July 8, 2008. (See Exhibit X).

(31) As a result of consultation with the Central Intelligence Agency (CIA), Department of the Army (Army), and the Defense Intelligence Agency (DIA), the FBI made a release to plaintiff by letter dated April 10, 2009. Plaintiff was advised that 41 pages were reviewed and 41 pages were being released. (See Exhibit Y).

(32) In the process of reviewing the documents in the prior 228 page sample for Hardy Declaration dated May 22, 2009, it was determined by the FBI that some additional information withheld pursuant to Exemption 7(D) and Exemption 1 should be released. The FBI completed its review and released additional information within the prior 228 page sample. As a result, the FBI re-processed an additional 148 pages from the larger collection of documents. This information was released to plaintiff by letter dated May 21, 2009. Plaintiff was advised that 148 pages were reviewed and 147 pages were being released. (See Exhibit Z).

(33) As a result of consultation with National Security Agency (NSA) and the Department of the Air Force (Air Force), the FBI made a release to plaintiff by letter dated July 30, 2009. Plaintiff was advised that 17 pages were reviewed and 17 pages were being released. (See Exhibit AA).

(34) By letter dated February 12, 2010, one CD was mailed to plaintiff at his request which contained the four interim releases ranging from July 2007-February 2008. (See Exhibit BB).

(35) On November 12, 2010, a detailed listing of the location of all referred material, within the entire collection of documents, was e-mailed to plaintiff upon his request. (See Exhibit CC). At the same time, a detailed chart of all FOIA processing changes, made to the

entire collection of documents, was provided by e-mail to plaintiff pursuant to a re-review of the material (See Exhibit DD).

(36) As a result of the re-review of all of the material in this case, the FBI made a release to plaintiff by letter dated April 14, 2010. Plaintiff was advised that 3,828 pages were reviewed and 3,523 pages were being released. See ¶46. (See Exhibit EE).

(37) The FBI identified pages included in the sample which had been inadvertently marked improperly with regard to classification. Because of this, the FBI re-reviewed the entire collection of documents with regard to classification markings, and made a release to plaintiff of 115 corrected pages within the entire collection of documents by letter dated July 20, 2010. (See Exhibit FF).

(38) On or about May 8, 2010 plaintiff provided a 205 page sample selection by e-mail. (See Exhibit GG).

EXPLANATION OF THE FBI'S CENTRAL RECORDS SYSTEM

(39) The CRS enables the FBI to maintain information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities. The records maintained in the CRS consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. The CRS is organized into a numerical sequence of files called FBI "classifications," which are broken down according to subject matter. The subject matter of a file may correspond to an individual, organization, company, publication, activity, or foreign intelligence matter (or program). Certain records in the CRS are maintained at FBIHQ, whereas records that are pertinent to specific field offices of the FBI are maintained in those field offices. While the CRS is primarily designed to serve as an investigative tool, the FBI searches the CRS

for documents that are potentially responsive to FOIA and Privacy Act requests. The mechanism that the FBI uses to search the CRS is the Automated Case Support System ("ACS").

(40) The ACS was implemented for all field offices, Legal Attaches ("Legats"), and FBIHQ in order to consolidate portions of the CRS that were previously automated. ACS can be described as an internal computerized subsystem of the CRS. Because the CRS cannot electronically query the case files for data, such as an individual's name or social security number, the required information is duplicated and moved to the ACS so that it can be searched. More than 105 million records from the CRS were converted from automated systems previously utilized by the FBI. Automation did not change the CRS; instead, automation has facilitated more economic and expeditious access to records maintained in the CRS.

(41) The retrieval of data from the CRS is made possible through the ACS using the General Indices, which are arranged in alphabetical order.¹³ The entries in the General Indices fall into two categories:

(a) A "main" entry -- A "main" entry, or "main" file, carries the name corresponding with a subject of a file contained in the CRS.

(b) A "reference" entry -- "Reference" entries, sometimes called "cross-references," are generally only a mere mention or reference to an individual, organization, or other subject matter, contained in a document located in another "main" file on a different subject matter.

(42) Searches made in the General Indices to locate records concerning a particular subject, such as Carl Oglesby, are made by searching the subject requested in the index.

(43) The ACS consists of three integrated, yet separately functional, automated

¹³ The General Indices are not only automated but also include index cards which allow a manual search for records that pre-date the implementation of ACS on October 16, 1995.

applications that support case management functions for all FBI investigative and administrative cases:

(a) Investigative Case Management (“ICM”) – ICM provides the ability to open, assign, and close investigative and administrative cases as well as set, assign, and track leads. The Office of Origin (“OO”), which sets leads for itself and other field offices, as needed, opens a case. The field offices that receive leads from the OO are referred to as Lead Offices (“LOs”). When a case is opened, it is assigned a Universal Case File Number (“UCFN”), which is used by all FBIHQ, as well as all FBI field offices and Legats that are conducting or assisting in the investigation. Using a fictitious file number “111-HQ-12345” as an example, an explanation of the UCFN is as follows: “111” indicates the classification for the specific type of investigation, “HQ” is the abbreviated form used for the OO of the investigation, which in this case is FBIHQ; and “12345” denotes the individual case file number for the particular investigation.

(b) Electronic Case File (“ECF”) – ECF serves as the central electronic repository for the FBI’s official text-based documents. ECF supports the universal serial concept in that only the creator of a document serializes it into a file. This provides a single-source entry of serials into the computerized ECF system. All original serials are maintained in the OO case file.

(c) Universal Index (“UNI”) – UNI continues the universal concepts of ACS by providing a complete subject/case index to all investigative and administrative cases. Only the OO is required to index; however, the LOs may index additional information as needed. UNI, an index of approximately 109.2 million records, functions to index names to cases, and to search names and cases for use in FBI investigations. Names of individuals or organizations are recorded with identifying applicable information such as date or place of birth, race, sex, locality,

Social Security number, address, and/or date of event.

(44) The decision to index names other than subjects, suspects, and victims is a discretionary decision made by the FBI Special Agent ("SA") - and on occasion, support employees - assigned to work on the investigation, the Supervisory SA ("SSA") in the field office conducting the investigation, and the SSA at FBIHQ. The FBI does not index every name in its files; rather, it indexes only that information considered to be pertinent, relevant, or essential for future retrieval. Without a "key" (index) to this enormous amount of data, information essential to ongoing investigations could not be readily retrieved. The FBI files would thus be merely archival in nature and could not be effectively used to serve the mandated mission of the FBI, which is to investigate violations of federal criminal and national security statutes. Therefore, the General Indices to the CRS files are the means by which the FBI can determine what retrievable information, if any, the FBI may have in its CRS files on a particular subject matter or individual, *i.e.*, Carl Oglesby.

RECORDS RESPONSIVE TO PLAINTIFF'S REQUEST

(45) An explanation of the records responsive to plaintiff's request is detailed in the Hodes Declaration, ¶¶ 30-34.

(46) From the files referenced in ¶¶ 31-35 of the Hodes Declaration dated July 8, 2002, ten releases were made to plaintiff in 2002-2003 consisting of approximately **3,770** pages released of **4,510** pages reviewed.¹⁴ This material was processed in paper, and redactions were

¹⁴ The FBI located certain documents within the entire collection of documents, as well as in this 210 page sample and the prior 228 page sample, which originated with the IRS, U.S. Air Force, U.S. Army, U.S. Navy, Central Intelligence Agency, U.S. Department of Defense, U.S. Department of State, the National Security Agency, and the National Security Division. The FBI sent referrals -- either for consult or direct response -- to these agencies on or about February 14, 2008, February 3, 2009, February

made by hand. In 2007-2008, the material was entered into the electronic system, reprocessed, and four interim releases were sent to the plaintiff consisting of approximately 3,523 pages released of 3,828 pages reviewed.¹⁵ On April 14, 2010, defendant FBI provided a supplemental release to plaintiff consisting of approximately 3,523 pages released of 3,828 pages reviewed. The FBI agreed to a re-review of the material with regard to Exemption 1, however, the FBI also conducted a re-review with regard to all FOIA exemptions to determine if any additional segregable material could be released. The material was Bates-stamped so it could be easily identified and a sample chosen by plaintiff. Plaintiff has selected 205 pages¹⁶ out of the entire collection of material from the 2010 Bates-stamped release. One additional page is included in this sample for a total of 210 pages (See ¶¶ 4-5 above) which will be justified by the FBI herein.

4, 2009, April 17, 2009 and June 9, 2010 and will address these in further detail infra, ¶¶ 145-154.

¹⁵ FBI employees attempted to locate the paper copy of some of the material that was processed and released in 2002-2003, but were unsuccessful in their efforts. Therefore, this material could not be scanned into the system or reprocessed in 2007-2008. This is the reason for the difference in page counts.

¹⁶ Since the prior declaration filed in May 2009, the FBI conducted two separate reviews of the entire collection of documents. In the first review, the FBI conducted a re-review of the material with regard to Exemption b1. The FBI also conducted a re-review with regard to all FOIA exemptions to determine if any additional segregable material could be released. In the second review, the FBI reviewed the entire collection of documents with regard to classification markings. During this review, it was determined that some pages had been inadvertently marked improperly with regard to classification. As a result of corrective action, additional information previously withheld pursuant to Exemptions 1 and 7(D) is being released. All of these pages are now properly marked. Because of this error noted in the sample, the FBI determined that it was necessary to review the classification markings of the entire set of approximately 3,523 responsive pages. As a result of this review, the FBI identified and corrected the classification markings and released additional information pursuant to Exemptions 1 and 7(D), where appropriate, on approximately 115 pages (within the large collection) and made a release to plaintiff by letter dated July 20, 2010.

ELECTRONIC SURVEILLANCE INDICES¹⁷

(47) The Electronic Surveillance (“ELSUR”) indices are used to maintain information on subjects whose electronic and/or voice communications have been intercepted as the result of a consensual electronic surveillance or a court-ordered (and/or sought) electronic surveillance conducted by the FBI. The ELSUR indices date back to January 1, 1960. On or about October 9, 1991, the ELSUR indices were automated. Since that time, FBIHQ and all FBI field offices have electronically generated, maintained, modified and accessed all ELSUR records.

(48) The ELSUR indices are a separate system of records from the CRS. Prior to automation, the ELSUR indices consisted of index cards on individuals who had been the subject of a microphone or telephone surveillance by the FBI from 1960. As stated above, the previous manual index card system was converted to an automated system on or about October 9, 1991. These indices include individuals who were the (a) targets of direct surveillance, (b) participants in monitored conversations, and (c) owners, leasers, or licensors of the premises where the FBI conducted electronic surveillance. In addition to the names of individuals in the above categories, the cards in the ELSUR index contain the date the voice was monitored, a source number to identify the individual on whom the surveillance was installed, and the location of the FBI field office that conducted the monitoring.

(49) ELSUR indices are published as a separate records system in the Federal Register

¹⁷ The FBIHQ ELSUR indices were searched previously in this case, and revealed no records. The ELSUR indices for the New York and Washington Field Offices were also searched, and revealed no records. The Chicago Field Office located ELSUR records. An extensive search of the Chicago Field Office failed to disclose a tape. However, a transcript of the audio was processed and released to plaintiff in the August 6, 2003 and November 30, 2007 releases and is located in File 100-CG-40903, Sub A. This supplements and corrects Hodes Declaration ¶35.

because not all names contained in the ELSUR index can be retrieved through the General Index and CRS. See 52 Fed. Reg. 8482 (1992).

(50) The FBI field offices that have conducted electronic surveillance at any time from 1960 to the present also maintain ELSUR indices. Since January 1, 1960, the field offices have been including in their ELSUR indices - and reporting to FBIHQ for inclusion in its index - the names of all persons whose voices have been monitored through a FBI microphone installation or a telephone surveillance. The names of monitored subjects are retrievable through the FBIHQ or local field office ELSUR indices.

CONFIDENTIAL INDICES¹⁸

(51) In 1999, plaintiff submitted requests to Washington Field Office, Chicago Field Office, and New York Field Office. The field offices conducted searches of the confidential indices at that time, and forwarded all responsive material to FBIHQ. The FBI does not search the confidential indices on third parties without privacy waivers. The confidential indices were only searched with regard to Carl Oglesby.

JUSTIFICATION FOR NON-DISCLOSURE UNDER PRIVACY ACT EXEMPTION (j)(2)

(52) Section (j)(2) of the Privacy Act exempts from mandatory disclosure systems of records "maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals"

(53) Records concerning plaintiff were compiled by the FBI for various law

¹⁸ Confidential indices, located only at the field offices, consist of the Confidential Human Source ("CHS") information.

enforcement investigations. Specifically, the responsive documents relate to an internal security investigation of the "Students for a Democratic Society" organization; Domestic Security which covers investigations by the FBI in the domestic security field (see 58 Fed. Reg. 51861 (1993); Anti-Riot Laws, 18 U.S.C. § 245 (b)(3); and various Foreign Counter Intelligence investigations. Accordingly, these documents are exempt from disclosure pursuant to 5 U.S.C. § 552a (j)(2) of the Privacy Act, in conjunction with 28 C.F.R. § 16.96. Although access to the records at issue was denied under the Privacy Act, the documents located responsive to plaintiff's requests were processed under the access provisions of the FOIA to achieve maximum disclosure.

**JUSTIFICATION FOR REDACTED INFORMATION UNDER THE FOIA AND
EXPLANATION OF CODED FORMAT USED**

(54) All information was processed to achieve maximum disclosure consistent with the access provisions of the FOIA. Every effort was made to provide plaintiff with all material in the public domain and with all reasonably segregable portions of releasable material. No reasonably segregable, nonexempt portions were withheld from plaintiff. To further describe the information withheld could identify the material sought to be protected. Copies of the **210 sample pages** are attached hereto as **Exhibit HH**. Each page of Exhibit HH is numbered with the corresponding Bates number at the bottom of each page. Also included are pages labeled in a different manner as CPO-656-A, CPO-658-A, CPO-659-A, CPO-660-A. The FBI properly denied records responsive to plaintiff's requests in their entirety pursuant to Privacy Act Exemption (j)(2), 5 U.S.C. § 552a (j)(2) in conjunction with C.F.R. § 16.96(2003) and released pages with partial redactions pursuant to FOIA Exemptions 1, 2, 6, 7(C), 7(D) and 7(E), 5 U.S.C. §§ 552 (b)(1), (b)(2), (b)(3), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(E).

(55) Copies of the documents contain coded categories of exemptions which detail the nature of the information withheld pursuant to the provisions of the FOIA. To further describe the information withheld in more detail could identify the very material that the FBI is protecting. No reasonably segregable, nonexempt portions were withheld from plaintiff. The coded categories are provided to aid the Court's review of the FBI's explanations of FOIA exemptions used to withhold the protected material. Accordingly, a review of this information will reveal that all material withheld is exempt from disclosure pursuant to a properly asserted FOIA/Privacy Act Exemption or it is so intertwined with protected material that segregation is not possible without revealing the underlying protected material.

(56) A coded format is used in this case to assist the Court and plaintiff in reviewing the information withheld within the context of the material itself. Each instance of information withheld pursuant to the FOIA on the attached documents is accompanied by a coded designation that corresponds to the categories listed below. For example, if "(b)(7)(C)-1" appears on a document, the "(b)(7)(C)" designation refers to Exemption (b)(7)(C) of the FOIA concerning "Unwarranted Invasion of Privacy." The numerical designation, "1" following the "(b)(7)(C)" narrows the main category to the more specific subcategory, "Names and/or Identifying Information of FBI Special Agents and Support Personnel." Listed below are the categories used to explain the FOIA exemptions asserted to withhold this material:

SUMMARY OF JUSTIFICATION CATEGORIES

CODED CATEGORIES	CODE	CATEGORY OF INFORMATION WITHHELD
(b)(1)		<u>CLASSIFIED INFORMATION</u>
		Information Properly Classified By an FBI Official Pursuant to E.O. 13526
(b)(2)		<u>INTERNAL AGENCY RULES AND PRACTICES</u>
	-1	Investigative Techniques and Procedures
	-2	Confidential Source Symbol Numbers [Cited at times in conjunction with (b)(7)(D)-1]
	-3	Confidential Source File Numbers [Cited at times in conjunction with (b)(7)(D)-4]
	-4	Confidential Identification Symbol Numbers of Electronic Microphone Surveillances
(b)(6) & (b)(7)(C)		<u>CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY AND UNWARRANTED INVASION OF PERSONAL PRIVACY</u>
	-1	Names and/or Identifying Information of FBI Special Agents and Support Personnel
	-2	Names and/or Identifying Information of Third Parties who Provided Information to the FBI [Cited at times in conjunction with (b)(7)(D)-3 and (b)(7)(D)-5]
	-3	Names and/or Identifying Information Concerning Foreign and Local Law Enforcement Personnel
	-4	Names and or/ Identifying Information of Third Parties of Investigative Interest
	-5	Names and/or Identifying Information of Third Parties Merely Mentioned
(b)(7)(D)		<u>CONFIDENTIAL SOURCE MATERIAL</u>
	-1	Confidential Source Symbol Numbers (Express Confidentiality) [Cited at times in conjunction with (b)(2)-2]
	-2	Foreign Law Enforcement Agency Information (Express Confidentiality)

	-3	Names and/or Identifying Information of Third Parties who Provided Information to the FBI under an "Express" Assurance of Confidentiality [Cited at times in conjunction with (b)(6)-2 and (b)(7)(C)-2, (b)(6)-4 and (b)(7)(C)-4 and (b)(6)-5 and (b)(7)(C)-5]
	-4	Confidential Source File Numbers (Express Confidentiality) [Cited at times in conjunction with (b)(2)-3]
	-5	Information Provided by and/or Identifying Data Concerning Source Symbol Numbered Informants under an Express Promise of Confidentiality [Cited at times in conjunction with (b)(6)-2 and (b)(7)(C)-2]
	-6	Foreign Government Agency Information (Express Confidentiality)
	-7	Names and/or Identifying Information of Third Parties who Provided Information to the FBI Under an "Implied" Assurance of Confidentiality [Cited at times in conjunction with (b)(6)-2 and (b)(7)(C)-2, (b)(6)-4 and (b)(7)(C)-4 and (b)(6)-5 and (b)(7)(C)-5]
(b)(7)(E)		<u>INVESTIGATIVE TECHNIQUE OR PROCEDURE</u>
		Investigative Techniques and Procedures

JUSTIFICATION FOR REDACTIONS

(57) Paragraphs 57-143 infra, explain the FBI's rationale for withholding each particular category of information under the specific exemption categories described above.

APPLICATION OF FOIA EXEMPTION (b)(1) AND E.O. 13526

(58) The FBI's analysis of the withholding of classified information contained in these documents is based on the standards articulated in the FOIA statute, 5 U.S.C. § 552 (b)(1). Exemption (b)(1) protects from disclosure those records that are: "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy; and (B) are in fact properly classified pursuant to such Executive Order."

(59) The FBI's analysis of whether Exemption (b)(1) permits the withholding of agency

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARL OGLESBY,)
)
)
 Plaintiff,)
)
 v.)
)
 U.S. DEPARTMENT OF JUSTICE,)
)
 et al.,)
)
 Defendants.)

Civ. A. No. 02-CV-00603 (RWR)

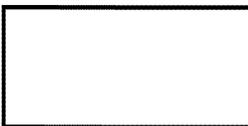
Exhibit HH

SAC, Detroit

6/23/65

Director, FBI

1 -
1 -
1 -



b6 -1
b7C -1

CARL OGELSBY
SECURITY MATTER - SDS



b6 -4
b7C -4

SECURITY MATTER - SDS

"The New York Times," page 26, dated June 15, 1965, carried a news item entitled "Left-Wing Student Group Elects New President." This article indicated Carl Ogelsby was elected President of the "Students for a Democratic Society." He is described as a 23-year-old graduate of the University of Michigan who formerly was head of the technical writing department of the Systems Division of the Bendix Corporation. He left this position to work full time for the Students for a Democratic Society (SDS).

142057-1

This same article indicated that one Jeffrey Shero, a student at the University of Texas, Austin, Texas, was elected Vice President of the SDS.

Bureau files contain no information identifiable with these individuals other than racial activities of Shero, which is already in possession of San Antonio. Detroit and San Antonio are instructed to open security-type investigations concerning these individuals. These investigations should be conducted in accordance with Section 87D of the Manual of Instructions. Contact at the University of Michigan and University of Texas should be confined to established sources. These investigations should be handled promptly and the results submitted to the Bureau in report form suitable for dissemination along with your recommendation as to whether their names should or should not be included in the Security Index.

RECORDED COPY FILED IN

- 2 - San Antonio
- 1 - Chicago

MCT-10
MAILED 3
14 JUN 25 1965
COMPLETED

NOTE:

ENCLOSURE

- Olson _____
- Belmont _____
- Mohr _____
- DeLoach _____
- Casper _____
- Callahan _____
- Conrad _____
- Felt _____
- Gale _____
- Rosen _____
- Sullivan _____
- Tavel _____
- Trotter _____
- Tele. Room _____
- Holmes _____
- Gandy _____

Bufiles contain no subversive information identifiable with subjects. The SDS is a socialist-oriented youth organization which has in recent months been extremely active in protest demonstrations against the United States policy in Vietnam. This organization is currently under investigation to determine the extent of infiltration by communists and other subversive elements.

WTF:baf (11)

MAIL ROOM TELETYPE UNIT

CPO-2

92219/
447921

09/13/65

DETAIL

TO: DIRECTOR, FBI

FROM: SAC, WFO

STUDENTS FOR DEMOCRATIC SOCIETY
IS - C
(WFO file 101-44325) (P)

ERNE PRESTON OGLESBY
IS - C
(WFO file 100-244)

Re Chicago radiogram to the Bureau, Washington Field, and Detroit dated 8/13/65, captioned 'STUDENTS FOR A DEMOCRATIC SOCIETY: IS-C.'

Submitted herewith are 11 copies of an LHM for the Bureau and 2 copies each for Chicago and Detroit. LHM sets forth passport data concerning travel plans of OGLESBY for France and Japan.

The records of the Passport Office, U.S. Department of State, were checked on 8/18/65, by IC [redacted]

b6 -1
b7C -1

Passport photos of OGLESBY will be submitted to the Detroit Office by E/W when processed.

- 4 - Bureau (Enc. 11)
- 2 - Detroit (Enc. 2)
- 2 - Chicago (Enc. 2)
- 2 - WFO

GTT:cgl
(10)

105-142056-4
NOT RECORDED
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DETAIL

ENCLOSURE

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CPO-12

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