

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AMERICAN CIVIL LIBERTIES UNION <u>et al.</u>	)	
	)	Civil Action No.
Plaintiffs	)	1:02CV2077 (ESH)
	)	
v.	)	(Judge Ellen Segal Huvelle)
	)	
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

DECLARATION OF JAMES A. BAKER

I, James A. Baker, do hereby state and declare as follows:

1. I am the Counsel for Intelligence Policy, Office of Intelligence Policy and Review, (OIPR), United States Department of Justice. In this capacity, I supervise all operations within the office including Freedom of Information Act (FOIA), 5 U.S.C. § 552 administration. At my direction, the Deputy Counsel for Intelligence Policy has decision-making authority regarding requests made under the Freedom of Information Act, and the FOIA Coordinator determines whether records responsive to access requests exist and, if so, whether they can be released consistent with the FOIA.

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. As previously stated in the Declaration of Deputy Counsel Robert O. Davis dated November 21, 2002, [hereinafter Davis Declaration], by letter dated August 21, 2002, plaintiffs, the American Civil Liberties Union (ACLU), the Electronic Privacy Information

Center (EPIC) and the American Booksellers Foundation for Free Expression (ABFFE) through Ann Beeson, submitted a request to the Department of Justice's Office of Information and Privacy (OIP) and the Federal Bureau of Investigation (FBI). This request sought, among other things, records concerning the Department's response to certain questions posed in a letter to the Attorney General dated June 13, 2002, from Representatives Sensenbrenner and Conyers, Chairman and Ranking Member of the House Committee on the Judiciary, to the Department of Justice (Department), regarding the Department's implementation of the USA Patriot Act. Plaintiffs also requested certain policy directives or guidance issued by the Department related to the USA Patriot Act, as well as records containing the number of times various provisions of the Patriot Act have been applied.

4. At the request of plaintiffs, the Office of Information and Privacy (OIP) referred plaintiffs' request to the Office of Intelligence Policy and Review (OIPR) by memorandum dated October 16, 2002.

#### **Searching for Responsive Records**

5. The Office of Intelligence Policy and Review provides legal advice to the Attorney General and the United States intelligence agencies regarding questions of law and procedure that relate to United States intelligence activities. OIPR performs review functions of certain intelligence activities, and prepares and presents applications for electronic surveillance and physical search to the United States Foreign Intelligence Surveillance Court.

6. OIPR's files fall into three general categories: Foreign Intelligence Surveillance Act (FISA) records including applications for authority to conduct electronic surveillance or

physical searches; litigation records; and policy and operational records including congressional inquiries and reports. In response to plaintiffs' request, a search was conducted of OIPR's policy and operational records since we could reasonably expect to locate responsive records within these files rather than the litigation and FISA files. In addition, searches were conducted within the office of the Counsel for Intelligence Policy and all staff tasked with USA Patriot Act-related projects. Because OIPR staff had only recently drafted responses to the Sensenbrenner and Conyers letter ("Sensenbrenner Questions") it was reasonable to expect to find responsive records within the files of those so tasked.

7. In order to locate responsive records, hand searches of large paper files had to be performed, as well as searches of electronic mail (e-mail) files containing hundreds of e-mails, and other automated databases.

8. Thirty-four documents (totaling sixty-eight pages) responsive to items 1, 5, 7, 8, 9, and 10 of plaintiffs' request were located. The vast majority of the records located are e-mail messages to and from multiple officials from different components within the Department discussing the Department's responses to the congressional questions. No responsive records were located for items 2, 3, 4, 6, 11, 12, 13 and 14 of plaintiffs' request.

#### **Processing of Plaintiffs' Request**

9. Because other components within the Department were heavily involved in responding to the congressional questions and have an interest in the documents located, OIPR consulted with those components before determining whether to disclose the records at issue.

See 28 C.F.R. § 16.4(c)(1) (2002).

10. In addition to the responsive records identified in ¶ 8, the Office of Information and Privacy (OIP) referred two classified documents to OIPR for its review and direct response as the documents contain information originated by this office. These documents are responsive to item #1 of plaintiffs' request. OIPR completed its review of this material and notified plaintiffs that these documents were properly classified in the interest of national security and, therefore, exempt from disclosure pursuant to Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1). (See Davis Declaration ¶ 9.)

11. By letter dated January 15, 2003, OIPR provided plaintiffs with a final response to their FOIA request. In this response, OIPR advised plaintiffs that thirty-four documents responsive to items 1, 5, 7, 8, 9 and 10 had been located, and no records responsive to items 2, 3, 4, 6, 11, 12, 13 and 14 had been located. OIPR further advised plaintiffs that two documents (totaling fifteen pages) originated with the Office of the Attorney General and the Federal Bureau of Investigation (FBI) had been referred to the Office of Information and Privacy (OIP) and the FBI for review and direct response. Additionally, plaintiffs were advised that two documents were being released in their entirety; twenty-two documents were being released with excisions; and the remaining eight documents were being withheld in their entirety. Finally, OIPR advised plaintiffs that one additional document had been referred by OIP for review and direct response and that OIPR had determined that the document was not appropriate for release. (See letter from OIPR to plaintiff dated January 15, 2002 attached hereto as Exhibit 1).

### **Explanation of Withheld Material**

12. OIPR withheld eight documents in their entirety and portions of twenty-two documents pursuant to Exemptions 1, 5 and 6 of the FOIA, 5 U.S.C. § 552 (b)(1), (b)(5) and (b)(6). (See Index of Documents Located In OIPR attached hereto as Exhibit 2).

#### **Exemption 1**

13. OIPR withheld two documents in full pursuant to Exemption 1 of the FOIA, which protects from disclosure national security information provided that it has been properly classified in accordance with the substantive and procedural requirements of an executive order. As of October 14, 1995, the executive order in effect is Executive Order 12958. Section 1.5 of Executive Order 12958 lists the categories within which information must be considered for classification. Paragraph (c) of Section 1.5 lists intelligence activities (including special activities), intelligence sources or methods, or cryptology. The withheld material consists of the Classified Answers to the House Permanent Select Committee on Intelligence (HPSCI) and certain pages from the Attorney General's Reports to Congress on FISA relied upon in connection with the Department's classified response to the "Sensenbrenner Questions." Both documents fall within paragraph (c) of Section 1.5. Section 1.2 requires classification of information falling within one of the classification categories when a determination is made by an original classification authority that "unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." See Executive Order 12958. The Counsel for Intelligence Policy holds original classification authority, by delegation from the Attorney General, and is therefore authorized to make

determinations regarding classification of national security information and to conduct classification reviews.

14. As Counsel for Intelligence Policy I was the original classification authority for both documents. In response to plaintiffs' request, I conducted a classification review of these two documents and determined that they both warranted continued classification.

15. The "Sensenbrenner Questions" to which the Department provided classified answers are summarized below: (1) how many times has the Department obtained "roving" orders; (2) how many times has the Department obtained orders for pen registers and trace devices for use on facilities used by American citizens or permanent resident aliens, and what procedures are in place to ensure that such orders are not sought solely on the basis of activities protected by the First Amendment; (3) how many applications and orders have been made for tangible objects in any investigation to protect the United States from international terrorism or clandestine intelligence activities, and what procedures are in place to ensure that such orders are not sought solely on the basis of activities protected by the First Amendment; (4) has section 215 been used to obtain records from a public library, bookstore, or newspaper and if so how many times; (5) how many US citizens or lawful permanent residents have been subject to new FISA surveillance orders and how does that figure compare to the previous fiscal year; and (6) how many FISA applications for "roving" surveillance authority and "roving" search authority have been approved, and how many surveillances and searches have been conducted pursuant to those approvals?

16. The answers to each of these questions describe the frequency or manner of use

of specific techniques authorized under FISA for use against clandestine intelligence and international terrorist activities. Unlike certain information about the overall numbers on the use of all the techniques of FISA, which under statute and by practice has been publicly disclosed, the disclosure of information about the frequency and nature of the Government's use of specific techniques would harm our national security and is therefore classified. The specific information requested in these six questions, furthermore, is the type of information deemed by Congress and the President to be so sensitive as well as classified that it, under statute and per practice, has been provided only to the Intelligence Committees of Congress. Both the reasons for classification of this information, and the necessity that it be handled as especially sensitive classified information, have, as will be described below, been recently raised and reinforced in discussions between Congress and this Administration.

17. *The reasons for classification of this information.* Each technique authorized under FISA is a tool employed by the Government flexibly and covertly, as a part of a larger deployment of all the tools of FISA, against the changing ways and tradecraft of the national security threats against us. Hostile intelligence services and international terrorist groups operating in the U.S. are sensitive to information that points to certain categories of targets or certain types of methods as either the focus or the relative safe harbors from the eyes and ears of the FBI through the Bureau's use of FISA. Each of the documents classified and withheld under Exemption 1 would, if publicly disclosed, harm our national security by enabling our adversaries to conduct their intelligence or international terrorist activities against us more securely:

- (1) and (6). Disclosing the number of times that the Department has applied for, obtained, or carried out authority under FISA for “roving” surveillance would, particularly against the publicly disclosed number of applications each year overall, provide our adversaries with critical information on whether changing telephones, cellular phones, or other communications facilities would or would not constitute a relative safe harbor from the FBI in the conduct of intelligence or international terrorist activities against us.
- (2) and (5). Disclosing the number of U.S. persons or U.S. person facilities targeted by FISA would, against the statutorily mandated disclosure of overall numbers of FISA applications made and approved, provide our adversaries with an official measure of whether and how much safer their operations would be if they recruit and use U.S. persons as their agents. Disclosing such data over time, furthermore, could, in a particular operational circumstance, be revealing of an operation by a hostile intelligence service or international terrorist group using U.S. persons and provide that service or group with an inkling that its operation was compromised and monitored by the Bureau.
- (3) and (4). Disclosing the number of applications made under FISA for “tangible things” would, against the overall numbers of applications publicly disclosed, enable our adversaries to discern whether or to what extent business records and other such “tangible things” in the hands of third parties were or were not a safe harbor from the FBI.

18. The sensitive nature of the Government’s use of individual techniques under FISA,



and of the categories of targets against which such techniques are employed, is reflected in the Act itself. In balancing the desirability of public disclosure of intelligence activities with the need to protect those activities, Congress specifically required that certain categories of overall information concerning FISA be made public. Under section 107 of FISA (50 U.S.C. § 1807), the Department publicly reports the total numbers of applications annually to the Administrative Office of the United States Courts and to Congress. Consistent with that requirement, the Department has also publicly released the total number of Emergency Approvals granted under the Act before and after September 11, 2001.

19. Congress also recognized, however, that more detailed information could not be made public without harm to the national security and directed that disclosure of such information, including classified and sensitive information, be made to the appropriate oversight committees of the Congress. Under sections 108, 306, 406, and 502 of FISA (50 U.S.C. §§ 1808, 1826, 1846, and 1862), the numbers of applications for each technique and other, more detailed and specific information about the uses of the tools of FISA are submitted to specific congressional committees in classified form.

20. In 1984, in its five-year report to Congress under section 108 of FISA (50 U.S.C. § 1808), the Senate Select Committee on Intelligence rejected a proposal by the ACLU to compel public disclosure of various statistical information concerning the use of FISA, including “the number of U.S. persons who have been FISA surveillance targets.” The Committee did so because “the benefits of such disclosure for public understanding of FISA’s impact would [not] outweigh the damage to FBI foreign counterintelligence capabilities that can

reasonably be expected to result.” S. Rep. No. 98-660, 98<sup>th</sup> Cong., 2d Sess. 25 (1984). As the Committee explained, “[a]ny specific or approximate figure would provide significant information about the extent of the FBI’s knowledge of the existence of hostile foreign intelligence agents in this country. As in other areas of intelligence oversight, the Committee must attempt to strike a proper balance between the need for public accountability and the secrecy required for effective intelligence operations.” *Ibid.*

21. The classified nature of this information, in particular information concerning the use of FISA techniques against U.S. persons, was recently reinforced in the Administration’s successful objection to a proposal in the Senate that sections 107 and 306 of FISA (50 U.S.C. §§ 1807 and 1826) be amended to require public disclosure of the number of U.S. persons targeted overall by electronic surveillance and physical search under FISA. In a letter dated August 6, 2002, Assistant Attorney General Daniel J. Bryant advised the Chair and Vice-Chair of the Senate Select Committee on Intelligence:

“Section 107 of FISA and 50 U.S.C. § 1826, which this bill would alter, have not been amended since their original enactments in 1978 and 1994, respectively. This suggests to us that Congress and its constituents believe, as we do, that the proper forum for the disclosure of FISA operations remains in the secure rooms of the intelligence committees and not, any more than is currently provided for in section 107, in the public domain, which is available to our adversaries. In our view, the centrality and sensitivity of FISA to our ongoing national effort against terrorism makes this a particularly inappropriate time to provide our adversaries with any more data on the tools we are using so effectively against them.

“This Administration strongly believes that our use of the necessarily secret tool of FISA must, as set forth by the framers of the Act, be made subject to the keen and diligent scrutiny of the intelligence committees. But we believe just as strongly that it is there, rather than in any forum accessible to our

adversaries, that the data on FISA operations described in this proposed legislation should be disclosed.”

(See Bryant letter dated August 6, 2002 and attached hereto as Exhibit 3.) Congress declined to amend FISA to require such disclosures.

22. *The necessity that information concerning FISA techniques be handled as especially sensitive classified information.* Under FISA, the most sensitive information on the use of FISA is reported to Congress only to or through the two Intelligence Committees that have the requisite security, storage, and staff clearances to handle such information. All six answers and underlying reports withheld herein under Exemption 1 are not only classified but in fact fall within the categories of sensitive information that is reported to the two Intelligence Committees.

23. Judgments concerning the sensitive, classified nature of the information in the documents withheld have been made by Congress and the President in the enactment of the FISA and are a part of a larger accommodation between the branches over access to national security information embodied legislatively in the National Security Act of 1947. Those judgments, and the underlying accommodation on these issues, are well summarized in the following excerpt from a letter dated October 22, 2002, from Assistant Attorney General Daniel J. Bryant to the Honorable Richard A. Gephardt:

“As you know, the June 13, 2002, letter from Chairman Sensenbrenner and Ranking Member Conyers to the Department contained 50 questions. The Department provided answers to all 50 questions in letters to the Committee dated July 26, 2002, and August 26, 2002. Six out of the 50 questions posed by the Committee required the disclosure of sensitive FISA operational intelligence information in order to provide the most complete answer. These answers contained information classified at the

SECRET level. Pursuant to the longstanding Executive Branch practice on sharing operational intelligence information with Congress, the Department subsequently supplied these six classified answers to the House Permanent Select Committee on Intelligence (“HPSCI”), which is the committee responsible for receiving and handling sensitive intelligence information. The six classified answers were provided to the HPSCI with the expectation that they would be shared with the Judiciary Committee in the manner deemed appropriate under applicable House procedures. Indeed, the sensitive information was given to HPSCI in order to facilitate--not obstruct-- the Judiciary Committee’s legitimate oversight responsibilities.

The Department’s provision of the classified answers directly to HPSCI for sharing with the Judiciary Committee was consistent with the legal framework and historical practice for Intelligence Community reporting to, and oversight by, Congress on matters relating to intelligence and intelligence-related activities of the United States Government. Consistent with the President’s constitutional authority to protect national security information, Congress and the President established reporting and oversight procedures that balance Congress’ oversight responsibility with the need to restrict access to sensitive information regarding intelligence sources and methods. The delicate compromise - embodied legislatively in Title V of the National Security Act of 1947, 50 U.S.C. § 413-15, and based on the preexisting practice of providing only the intelligence committees with sensitive information regarding intelligence operations - established procedures for keeping Congress “fully and currently informed” of intelligence and intelligence-related activities. Under these procedures, the Intelligence Community provides general, substantive, and often, classified operational information only to the intelligence committees. Even with regard to the intelligence committees, the Director of Central Intelligence and the heads of other intelligence agencies are, under Title V, to provide such information only “to the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other sensitive matters.” *Id.* §§ 413a(a); 413b(b).

A request to bypass the HPSCI and provide this sensitive intelligence information directly to the Judiciary Committee would require a change in the compromise between the President and Congress as a whole that preexisted, and was codified by, Title V of the National Security Act. The Attorney General does not have the authority to accede to this request.”

(See Bryant letter dated October 22, 2002 attached hereto as Exhibit 4.)

### Exemption 5

24. OIPR withheld six documents in full and portions of eighteen documents pursuant to Exemption 5 of the FOIA, which allows agencies to withhold inter- and intra- agency communications protected by the deliberative process privilege.<sup>1</sup> The first category of records withheld on this basis consists of deliberative portions of electronic mail messages. These e-mails were generated by various individuals in the Offices of the Deputy Attorney General, Legislative Affairs, and Intelligence Policy and Review while compiling the Department's response to the "Sensenbrenner Questions." In these e-mails Department officials are discussing which Department components should be assigned to work on particular questions, what approach should be taken in responding to the questions, and what language should be used in the response letter. In some instances, officials within various Offices would discuss electronically how to answer a particular question and would then forward that information to officials in the Deputy Attorney General's Office for review and approval. The withheld communications are both deliberative and predecisional. They reflect the thinking of individuals, rather than adopted policy of the Department.

25. 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

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<sup>1</sup> Paragraph 4 of OIPR's January 15, 2003 final response to plaintiffs references "handwritten notes" included among the redacted material. In fact, only portions of a type-written note (document #18) were redacted.

that accompanies all decision-making and typically reflect staff members' very preliminary assessments about issues on which they may be asked to make recommendations. Before the advent of computers, these discussions probably would have occurred only orally, in face to face encounters, with no record of their existence being kept. The fact that these discussions are now recorded should not obscure the fact that they most resemble simple conversions between staff members which are part of the give and take of agency deliberations. If e-mail messages such as these are routinely released to the public, Department employees will be much more circumspect in their 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 decision-making.

26. The second category of information withheld, also in reliance on the deliberative process privilege, consists of drafts that were generated in connection with OIPR's efforts to establish the appropriate channel for disseminating classified Foreign Intelligence Surveillance Act (FISA) information.<sup>2</sup> In connection with the Department's response to the "Sensenbrenner Questions," OIPR culled data from various sources including classified Attorney General Reports to Congress on FISA. Because classified FISA information is provided to Congress through secure channels and some of the Department's responses included classified FISA information, there were significant deliberations regarding the appropriate manner for disseminating this information. Draft responses were generated accordingly, as decisions were

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<sup>2</sup> The one additional document (totaling three pages) referred by OIP and referenced on page 3 of OIPR's January 15, 2003 response also falls within this category.

being made by senior agency officials. These drafts reflect staff members' preliminary assessments about issues on which they were asked to make recommendations. The drafts are both predecisional and deliberative. If draft documents that are not formally adopted by the agency are routinely released to the public, Department staff will be reluctant to provide candid recommendations necessary for efficient and proper decision-making.

27. OIPR withheld portions of twenty-six documents pursuant to Exemption 6 of the FOIA, which pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties. Plaintiffs do not challenge any invocation of Exemption 6 and, therefore, it is not necessary to detail the information withheld pursuant to Exemption 6 and the basis for the withholding.

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

  
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JAMES A. BAKER

Executed this 24<sup>th</sup> day of January, 2003