

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMNESTY INTERNATIONAL USA, CENTER)
FOR CONSTITUTIONAL RIGHTS, INC.,)
and WASHINGTON SQUARE LEGAL)
SERVICES, INC.,)

Plaintiffs,)

v.)

CENTRAL INTELLIGENCE AGENCY,)
DEPARTMENT OF DEFENSE, DEPARTMENT)
OF HOMELAND SECURITY, DEPARTMENT)
OF JUSTICE, AND DEPARTMENT OF)
STATE, and THEIR COMPONENTS,)

Defendants.)

ECF Case

07 CV 5435 (LAP)

DECLARATION OF MARGARET P. GRAFELD

I, Margaret P. Grafeld, declare and state as follows:

1. I am the U.S Department of State's (the "Department's") Information and Privacy Coordinator and the Director of the Department's Office of Information Programs and Services ("IPS"). In these capacities, I am the Department official immediately responsible for responding to requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and

other applicable records access provisions. I have been in the employ of the Department of State since 1974, and have served with the Department's Information Access Program for most of my tenure with the Department. I am authorized to classify and declassify national security information pursuant to Executive Order ("E.O.") 12958, as amended, and Department of State regulations set forth in 22 C.F.R. §§ 9.7, 9.14. I make the following statements based upon my personal knowledge, which in turn is based on a personal review of the records in the case files established for the processing of the subject request, or upon information furnished to me in the course of my official duties. I have read the FOIA requests submitted to the Central Intelligence Agency ("CIA") by the plaintiffs in the above-captioned matter, and submit this declaration in support of the CIA's Motion for Summary Judgment.

2. The core responsibilities of IPS include: records access requests made by the public (under the FOIA, the Privacy Act, and the mandatory classification review requirements of E.O.12958, as amended, or the Ethics in Government Act), members of Congress, and other government agencies, and those that have been made pursuant to judicial processes, such as subpoenas, court orders, and discovery requests; records management; privacy protection; national

security classification management and declassification review; corporate records archives management; research; operation and management of the Department's Library; and the application of technology that supports these activities.

3. The purpose of this declaration is to confirm the disposition of one Department of State document and portions of another agency's document referred for consultation to the Department of State by the CIA as part of the CIA's response to the FOIA requests at issue in this lawsuit.

I. DEPARTMENT OF STATE REVIEW

4. The Department of State was asked to review documents referred by the CIA in connection with plaintiffs' FOIA requests. One of the documents referred, document 103, originated with other agencies and contains Department of State information; another document referred, document 82, originated with the Department.

5. I submit this declaration to explain why certain information originating with the Department of State within document 103 must be withheld under FOIA exemption (b)(5) and why document 82 must be withheld in its entirety under FOIA exemption (b)(5). Specifically, the two documents are protected from disclosure because they contain information

protected by the deliberative process privilege and the attorney-client privilege.

II. EXEMPTION CLAIMED

FOIA Exemption (b) (5) - Deliberative Process And Attorney Client Materials

6. Title 5 U.S.C. Section 552(b) (5) states that the FOIA does not apply to:

Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.

7. This exemption protects information to the same extent it would be protected in the civil discovery context, including information protected by the deliberative process privilege and the attorney-client privilege. The deliberative process privilege protects the candid views and advice of U.S. Government officials provided in the course of pre-decisional deliberations regarding policy formulation and administrative direction. Disclosure of material containing such deliberations, or of material on which such deliberations are based, would prejudice the free flow of internal recommendations and other necessary exchanges. It would severely hamper the ability of responsible officials to formulate and carry out executive branch programs.

8. As described more fully below, information in documents 103 and 82 has been withheld pursuant to the deliberative process privilege. The information is pre-decisional and contains selected factual material intertwined with opinion, and its disclosure would inhibit candid internal discussion and the expression of recommendations and judgments regarding current problems and preferred courses of action. There are no reasonably segregable facts that may be disclosed in this deliberative material.

9. Material has also been withheld from these two documents pursuant to the attorney-client privilege. The material was prepared by Department of State attorneys in their capacities as legal advisers on matters of international law, providing confidential legal advice on issues of international law, including issues to be discussed at a National Security Council ("NSC") Deputies Committee meeting.¹

10. The withheld information in documents 103 and 82 is, accordingly, exempt from release under FOIA exemption (b)(5).

¹ At the time documents 82 and 103 were drafted, the NSC Deputies Committee was the senior sub-Cabinet interagency forum for consideration of policy issues affecting national security. See National Security Presidential Directive-1, Organization of the National Security Council System, February 13, 2001, available at <http://www.fas.org/irp/offdocs/nspd/nspd-1.htm>.

III. DOCUMENT DESCRIPTIONS

A. DOCUMENT 103

11. The Department has sub-divided document 103, which consists of a memorandum and several attachments, into several separate sub-documents, in accordance with its standard procedures for processing documents. Two of those sub-documents, which the Department has labeled C4 and C7, contain materials that must be withheld under FOIA exemption (b)(5).

i. Sub-Document C4

12. Sub-document C4 is an undated, eight-page document with no drafting information. The heading on the first page of the document states that it is a summary of "Department of State Recommended Changes" It is marked "Sensitive But Unclassified," and "draft." It was circulated by the White House Situation Room by facsimile on May 18, 2005, according to the fax date line on the document.

13. This document was distributed among selected federal agencies within the Executive Branch as part of a group of documents in preparation for consideration at an NSC-chaired Deputies Committee meeting.

14. It raises five legal issues related to detainees for discussion, describes the then-current practices, and proposes a change or changes for each issue. International law issues are discussed. The first page is a summary of each of the

five issues; the remaining seven pages are detailed discussions of each of the issues and proposed changes in practice. The particular facts contained in this letter were identified, extracted or highlighted from other potentially relevant facts by the author, in the exercise of the author's judgment. Accordingly, the disclosure of the facts that were selected for inclusion in this letter would themselves tend to reveal the author's and the Department's deliberative process. This pre-decisional, draft, deliberative document is therefore exempt from release pursuant to the deliberative process privilege under FOIA exemption (b) (5).

15. The document also contains confidential legal analysis and advice prepared by Department of State attorneys on issues of international law. The document is therefore also exempt from release pursuant to the attorney client privilege under FOIA exemption (b) (5). There is no non-exempt information in sub-document C4 that may be segregated and released.

ii. Sub-Document C7

16. Sub-document C7 is a three-page paper dated May 6, 2005. I understand that this paper was prepared by the Department of Defense ("DOD"). The document was circulated among selected federal agencies within the Executive Branch in

the same manner and at the same time as sub-document C4. It does not bear any classification or distribution limit.

17. The two paragraphs marked as Part B of sub-document C7 summarize the Department of State proposals in sub-document C4, then provide the drafting agency's views on the proposals for consideration at the Deputies Committee meeting. These two paragraphs are pre-decisional and part of the deliberative process and are therefore exempt from release under FOIA exemption (b) (5). Within these two exempt paragraphs there is no factual information that may be segregated and released.

B. DOCUMENT 82

18. Document 82 is an eleven-page document, dated February 9, 2007. It is a letter from the Legal Adviser of the Department of State to the acting head of the Office of Legal Counsel at the Department of Justice ("OLC"). It is marked Top Secret, and has additional markings indicating that it is for very limited distribution.

19. This letter provides Department of State comments with respect to a draft, pre-decisional legal opinion prepared by OLC for the CIA relating to the CIA's terrorist detention and interrogation program. The comments are confined to the legal analysis contained in the draft, and the letter does not

purport to provide any policy recommendations. The letter is by nature deliberative and pre-decisional because it provides comments on a draft legal opinion. Moreover, it is also deliberative because the Department is not the final decisionmaker with respect to either the contents of an OLC legal opinion or any policy that the CIA might adopt with respect to the issues addressed in the OLC memorandum, as neither OLC nor the CIA fall under the Department's chain of command. The deliberative process privilege also protects the factual information contained in this letter. The particular facts contained in this letter were identified, extracted or highlighted from other potentially relevant facts by the author, in the exercise of his judgment. Accordingly, the disclosure of the facts that were selected for inclusion in this letter would themselves tend to reveal the author's and the Department's deliberative process.

20. Additionally, the document contains confidential legal analysis and advice prepared by Department of State attorneys on the basis of confidential facts on issues of international law and is therefore also exempt from release pursuant to the attorney-client privilege.

21. Document 82 is properly withheld under FOIA exemption (b) (5). There is no non-exempt information that may be segregated and released.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 13th day of September, 2009.


Margaret P. Grafeld