

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
NATIONAL SECURITY COUNSELORS,)	
)	
Plaintiff,)	
)	
v.)	No. 1:11-cv-00443 (BAH)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant,)	
_____)	

DEFENDANT’S SUPPLEMENTAL MEMORANDUM AND DECLARATION

On December 16, 2011, this Court held a status conference to consider Plaintiff National Security Counselor’s (“NSC”) challenge to Defendant Central Intelligence Agency’s (“CIA”) determination that the records responsive to NSC’s Freedom of Information Act (“FOIA”) request are not readily reproducible in electronic format. During the status conference, the Court noted that the CIA had submitted a detailed declaration supporting its decision and acknowledged that the FOIA instructs courts to “accord substantial weight to an affidavit of an agency concerning the agency’s determination as to ... reproducibility under paragraph (3)(B).” 5 U.S.C. § 552(a)(4)(B). The Court took an interest in issues raised in the CIA’s declaration and ordered the Agency to provide a more detailed explanation of three of those issues. The Court framed the issues as questions: “(1) why unclassified records responsive to a FOIA request must be processed on the agency’s classified information system, including whether redaction software is available and can be installed on the unclassified information system in order to facilitate the processing of such records; (2) how the current policy of processing all records,

whether classified or unclassified, on the classified information system fulfills the agency's obligations under 5 U.S.C. § 552(a)(3)(B); and (3) the process by which the agency makes records in electronic format available in the agency's public reading room." The CIA hereby submits the attached supplemental declaration responding in detail to the three questions posed by the Court

FOIA Section 5 U.S.C. § 552(a)(3)(B) requires agencies to do two things. First, they must provide responsive records in the form or format requested if the responsive records are readily reproducible in that form or format. Second, agencies must make reasonable efforts to maintain their records in forms or formats that are reproducible. In determining whether an agency has met this requirement, courts look at whether agency records can be reproduced, not whether they can be readily reproduced in the format requested by a particular requester. *See Landmark Legal Found. v. Env'tl. Prot. Agency*, 272 F.Supp. 2d 59, 63 (D.D.C. 2003) (rejecting argument that agency was required to keep records in an electronic file that would allow them to be readily reproduced in electronic format and explaining that "agency may keep its files in a manner best designed to suit its internal needs").

The CIA's two declarations conclusively establish that the Agency has met both requirements. The Agency made a reasonable determination that the responsive records in this case are not readily reproducible in electronic format. It also makes reasonable efforts to maintain its records in forms and formats that are reproducible. In this cases, the Agency was able to reproduce the responsive records in paper form and has provided them to NSC.

The Court should accord substantial weight to the CIA's two declarations and conclude that the Agency has met its obligations under 5 U.S.C. § 552(a)(3)(B).

Dated: January 13, 2012

Respectfully submitted,

TONY WEST
Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director

/s/ Ryan Parker
RYAN PARKER
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Mass. Avenue, N.W., Washington, DC 20530
Tel: (202) 514-4336
Fax: (202) 616-8202
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY COUNSELORS,)
Plaintiff,)
v.)
_____) Civ A. No. 1:11-cv-00443-BAH
CENTRAL INTELLIGENCE AGENCY,)
Defendant.)
_____)

**SUPPLEMENTAL DECLARATION OF SUSAN VISCUSO,
INFORMATION AND PRIVACY COORDINATOR
CENTRAL INTELLIGENCE AGENCY**

I, Susan Viscuso, hereby declare and state:

1. On 16 December 2011, this Court ordered the CIA to submit an explanation for: (1) why unclassified records responsive to a Freedom of Information Act (FOIA) request must be processed on the Agency's classified information system, including whether redaction software is available and can be installed on the unclassified information system in order to facilitate the processing of such records; (2) how the current policy of processing all records, whether classified or unclassified, on the classified information system fulfills the Agency's obligations under 5 U.S.C. § 552(a)(3)(B); and (3) the process by which the Agency makes records in electronic format available in the Agency's public reading room. I have addressed each of these three issues below.

2. Through the exercise of my official duties, I am familiar with this civil action. Accordingly, I make the

following statements based upon my personal knowledge and all of the information made available to me in the course of performing my official duties.

I. UNCLASSIFIED INFORMATION RESPONSIVE TO A FOIA REQUEST

A. Unclassified Records Responsive to a FOIA Request Must be Processed on CIA's Classified Information System.

3. First, the Court's question assumes a process that does not reflect the CIA's actual process for receiving and responding to a FOIA request in accordance with the FOIA statute and CIA's published FOIA regulations. The CIA does not transfer documents from the unclassified system to the classified system for review and redaction pursuant to a FOIA request. Instead, the unclassified records are already stored on the classified system. Of note, the CIA's classified computer system contains both classified and unclassified information, while the unclassified system is not approved to store classified information and may only be used for unclassified activities.

4. The vast majority of the CIA's business is classified and conducted, at least electronically, on the classified computer system. In fact, only a subset of CIA officers is even granted access to an unclassified computer system. Generally, CIA officers' daily activities are conducted, and documents are stored, on the classified system. Accordingly, all CIA systems of records are located on the Agency's classified system, and,

as required by the FOIA, the CIA searches these systems of records for information responsive to FOIA requests.

5. The CIA processes all FOIA documents - hard copy and electronic, classified and unclassified - on its classified system for a variety of reasons. First, processing all documents on the classified system protects against the inadvertent compromise of classified or otherwise protected information. The CIA must conduct a line-by-line classification review of all information responsive to a FOIA request on the classified system regardless of how such documents are marked and whether, in the abstract, they are likely to contain classified information. Occasionally, information marked as "unclassified" actually contains classified information.

6. Furthermore, the CIA does not generally receive FOIA requests that ask only for unclassified information responsive to the request¹. Instead, FOIA requesters most often ask for any and all information on a specific topic. Here, the Plaintiff requested in F-2010-01186 all tables of contents from the CIA's in-house journal *Studies in Intelligence*. The Plaintiff did not request only those tables of contents that were unclassified, and in fact, many of the titles are classified and were redacted accordingly. These documents were stored, searched, located,

¹ Occasionally, the CIA receives requests for previously released information. Because the information has already been redacted and approved for release, the information is unclassified and does not go through an additional classification review.

and redacted on the CIA's classified system, and as described in my 13 December 2011 declaration, the documents are not readily reproducible in electronic format.

7. Additionally, the CIA cannot know for certain whether any given FOIA request will illicit classified information until all responsive information is compiled and reviewed by a classification authority. For example, at a hearing before this court on 16 December 2011, the Plaintiff referenced a FOIA request for CIA cafeteria comment cards that Plaintiff assumes could never contain any classified information. The CIA cannot risk the unauthorized disclosure of classified information by just assuming that certain documents will only contain unclassified information. One of the cafeteria comment cards could include, for instance, the name of an undercover CIA officer who wanted to provide her comments on the CIA's cafeteria. That officer's name and association with the CIA would be classified and redacted accordingly.

8. Moreover, without first locating a potentially responsive record and then reviewing the text of that record within a secure information system safeguarded to protect classified information, the CIA would be unable to protect the "fact of" the existence or nonexistence of the particular document in CIA records. Where the "fact of" the existence or nonexistence of responsive records is itself classified, an

agency may refuse to confirm or deny records responsive to a FOIA request, pursuant to Executive Order 13526 section 3.6(a), and the "fact of" the existence or nonexistence of records is protected from release under FOIA exemption (b)(1). A requirement for the CIA to hold its potentially responsive records on an unclassified server while evaluating the applicability of a Glomar response in the context of a particular FOIA request would harm an interest protected by FOIA exemption (b)(1), which protects information authorized under Executive Order 13526 to be kept classified.

9. Second, a requirement for CIA to process potentially responsive documents on an unclassified server would harm CIA's ability to protect individually unclassified, seemingly innocuous facts from release under FOIA exemption (b)(1), based on a "mosaic" effect of harm to national security that has been affirmed by courts as a proper basis for withholding agency records from release under the FOIA. In appropriate cases, the CIA may protect individually unclassified or innocuous facts from release under FOIA exemption (b)(1) based on its factual showing (which may be provided to the court in a classified declaration filed *in camera* and *ex parte*), explaining how the individually unclassified or innocuous facts could be significant to a terrorist organization or knowledgeable foreign adversary if released, when combined with other available

information. Processing potentially responsive FOIA records is specific to the language of the particular request and highly contextual, especially in the realm of classification. As a practical matter, confirmation of the classified or unclassified status of particular facts or information associated with a FOIA request comes at the end of the FOIA search and review process, not the beginning, and therefore would not be a reasonably practicable way to differentiate records for processing.

10. Third, in contrast to other federal agencies that are also subject to the FOIA, the CIA creates potentially responsive agency records in the conduct of its unique clandestine foreign intelligence mission. To protect the national security of the United States, the CIA must conduct its sensitive intelligence mission in secret. All CIA information systems serve CIA intelligence activities. Since CIA records potentially responsive to a FOIA request must first be located by searching within the CIA's secure electronic information systems and secure file storage areas for CIA records, potentially responsive records may contain both classified and unclassified material. These records are tasked for search, review and processing within a secure electronic information system. Before the current and proper classification of responsive portions of CIA records can be identified for purposes of final segregability and release determinations, the records may

require referrals and coordination within or outside the CIA. Potentially responsive CIA records would not be adequately safeguarded through this search and review process if the CIA were required to store the records on an unclassified file server.

11. Fourth, processing all responsive FOIA documents on a single computer system conserves CIA resources. Although, in theory, the CIA could install redaction software on its unclassified system, doing so would require a substantial financial and human resource investment, including but not limited to purchasing, reviewing and testing the software, setting up appropriate information security safeguards, and hiring additional IT support officers. For some federal agencies, that expense might well be worth the benefits received from such a system. But as described above and in my prior declaration on this topic, the CIA's unique information security environment - in which the CIA is entrusted by the American people to protect our most sensitive national security secrets - renders the unclassified system unfit for processing even ostensibly unclassified information.

12. Finally, bifurcating the processing of classified and unclassified FOIA documents, ultimately, would significantly slow the CIA's overall FOIA processing for all FOIA requesters. As mentioned above, all CIA systems of records are located on

the classified system. In response to a FOIA request, these systems would need to be searched to determine if information, whether classified or unclassified, responsive to a FOIA request exists. The documents would still need to be reviewed by a classification authority prior to being transferred, as described in my 13 December 2011 declaration, to the unclassified system, and then redacted on the unclassified system.

B. Redaction Software

13. Redaction software could be installed on the CIA's unclassified system, but its use would decrease CIA's FOIA processing efficiency, could inadvertently lead to the disclosure of classified information, and would cost the CIA a large amount of resources. Implementation would be very expensive and time consuming. Additional levels of information security would need to be constructed because hackers and cyber criminals frequently target the CIA. This new IT infrastructure would undoubtedly drain CIA resources, both in terms of time and money.

14. Redacting from two systems would require FOIA processors to constantly toggle between two systems to ensure completeness and consistency. Information management would be more difficult, time consuming, and would remove the current structure's benefit of creating a central repository of released

records. Finally, using redaction software on both systems would only add additional steps to an already time consuming FOIA process thereby increasing the CIA's FOIA backlog and creating additional opportunities for user error, mistakes or inconsistency.

15. I have determined that placing redaction software on the unclassified system would significantly interfere with CIA's processing of FOIA requests and create increased and unnecessary delay in the amount of time needed to respond to any given FOIA request.

II. CIA'S OBLIGATIONS UNDER 5 U.S.C. § 552(a)(3)(B)

16. 5 U.S.C. Section 552(a)(3)(A) requires that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(B) provides that "(e)ach agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section."

17. The CIA has made reasonable efforts to maintain its records in forms or formats that are reproducible as required by the FOIA, 5 U.S.C. Section 552. CIA records are in fact reproducible as required by the FOIA, but the responsive records

in this case are not readily reproducible in the format requested by the Plaintiff. As noted in my 13 December 2011 declaration, the CIA works within the confines of a unique security environment and has developed a FOIA process that reasonably balances the need to protect national security with the FOIA's requirement to provide information. I will describe the CIA's reasonable efforts to maintain records in reproducible form in more detail below.

18. Once a FOIA request is accepted, logged, assigned a tracking number and tasked to CIA components for search and review, in accordance with the procedures set forth in CIA's published FOIA regulations at 32 CFR 1900.21 *et. seq.*, information in potentially responsive records is reviewed for releasability in the context of the language of the specific FOIA request and the specific information in the records. Tasking and information review in response to FOIA requests is conducted on an access-controlled information system known as the CIA Automated Declassification and Release Environment (CADRE).

19. The CADRE system contains FOIA requests, search taskings, potentially responsive records, and information from CIA components developed in response to the FOIA taskings. The system is a single operating system with a functionality that enables coordination across information release programs. The

system is the means by which CIA electronically reviews records for declassification and electronically redacts such records. It contains full text electronic records stored in secure file servers and contains versions of records that reflect various stages of Agency review and decision making during the FOIA review and release process.

20. A document that is reviewed electronically and processed for redaction must be protected at the level of its original classification. Records in CADRE can range from UNCLASSIFIED to TOP SECRET. CADRE, and the information and records maintained within the system, are safeguarded by rigorous information security and access controls, designed to prevent unauthorized access to or unauthorized disclosure of classified or sensitive national security information in accordance with federal law and policy including the National Security Act of 1947, the CIA Act of 1949, the Privacy Act, E.O. 13526, and E.O. 12333, as amended.

21. CADRE is accessed only by a select number of authorized personnel. This system enables authorized personnel within the CIA to carry out lawful and authorized releases of information to the public, supports the review, redaction, and release of CIA records potentially responsive to FOIA requests, provides documentation of referral and coordination requests, provides redaction capabilities that adequately safeguard CIA

information during the process of review, assigns exemption codes to processed records, documents final determinations, provides reference to cases under administrative appeal, and facilitates process integrity by documenting CIA decisions while safeguarding CIA information.

22. CIA's information system infrastructure has been built and developed in a manner that fosters its unique mission and safeguards information the release of which would damage the national security. While the Agency is able to provide records in compliance with the FOIA, 5 USC 552(a)(3)(b), it is not always able to do so in the particular format requested by each individual requestor.

23. In an effort to ensure that we are operating in the most efficient manner given our unique circumstances, the CIA undertakes periodic reviews of our FOIA processing structures and systems. In fact, we completed an initial review FOIA processing efficiency in 2011, and we are continuing this efficiency review today. We hope to decrease the CIA's backlog of FOIA requests and to lessen the time needed to respond to FOIA requests.

III. THE CIA'S ELECTRONIC READING ROOM

24. There is no direct link between CADRE, an internal CIA processing system containing classified information, and cia.gov, the CIA's official public website. CIA.gov serves a

wide variety of different functions including, but not limited to, the statutory requirement to make available an electronic public reading room containing records released under the FOIA.

25. The CIA's electronic reading room is provided as a public service by the CIA, more specifically, the CIA's Information Management Services. The reading room is located on CIA's eFOIA website and provides visitors the opportunity to view documents previously released through the FOIA and other disclosure statutes. Although many of the documents found in the reading room contain collections of historically significant topics, there are also categories of "Frequently Requested Records," "Special Collections," and "25 Year Program Archive." Because not all documents reside in collections, a visitor can also perform a search for records of interest.

26. The CIA uses automated extraction software to identify documents that may be suitable for posting to the electronic reading room. The extraction software searches through that prior month's FOIA releases and identifies documents that meet a series of requirements. For example, the extraction software will only identify documents that are unclassified, have been released in part or released in full pursuant to a FOIA request, are associated with a closed FOIA case, and are CIA originated. A FOIA case is considered closed when the responsive information has been provided to the requestor and there is no ongoing

administrative appeal or litigation relating the documents. Only the latest released version of a document will be identified.

27. At the beginning of each month, the documents that have been identified by the extraction software based on the criteria mentioned above are downloaded and reviewed by the CIA's FOIA processing office. The downloaded documents can be quite voluminous and each page is reviewed individually to determine if the information is suitable to be placed in the CIA's electronic reading room. When reviewing the documents, the FOIA processing office considers a variety of factors to determine whether the document will be placed in the electronic reading room. For example, the reviewers consider the case number, the document title, the release decision, the original classification, the page number and any metadata that may be attached to the document. Once the FOIA processing officers identify which documents will be placed in CIA's electronic reading room, the documents are sent to CIA information technology specialists for release via the electronic reading room.

28. Based on the foregoing, even after these documents are no longer the subject of pending litigation, a multi-stage review process must commence to determine whether they are appropriate for posting in the CIA's electronic reading room.

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

Executed this 13th day of January 2012

A handwritten signature in black ink, appearing to read 'Susan', is written over a horizontal line.

Susan Viscuso
Information and Privacy Coordinator
Central Intelligence Agency