



NSA records. It is also my responsibility to assert the FOIA/PA exemptions in the course of litigation.

2. As the Deputy Associate Director for Policy and Records, I am also a TOP SECRET classification authority, pursuant to Section 1.3 of Executive Order 13526. Through the exercise of my official duties as Deputy Associate Director for Policy and Records, I have become familiar with the current litigation arising out of requests for records filed by the Plaintiff.

3. My statements herein are based on my personal knowledge of SIGINT production and NSA operations and the information available to me in my capacity as the Deputy Associate Director for Policy and Records.

#### **ORIGIN AND MISSION OF NSA**

4. NSA was established by Presidential Directive in 1952 as a separately organized agency within the Department of Defense. See Executive Order 12333, Section 1.12(b). NSA's cryptologic mission has three functions: to collect, process, and disseminate SIGINT information for national foreign intelligence purposes; to conduct information security activities; and to conduct operations security training for the United States Government.

5. Signals intelligence is one of NSA's primary missions. NSA's SIGINT mission is to obtain information from foreign electromagnetic signals and to provide, frequently on a rapid response basis, reports derived from such information or data to national policy makers, combatant commanders, and the intelligence community of the United States Government. A primary SIGINT mission of NSA is to intercept communications in order to obtain foreign intelligence information necessary to the

national defense, national security, or the conduct of the foreign affairs of the United States. The SIGINT collection mission of NSA provides national policy makers and the intelligence community with highly reliable foreign intelligence information.

6. The Agency, in carrying out its SIGINT mission, utilizes numerous classified intelligence sources and methods, which enable it to keep pace with challenging developments in communications technology. In the course of fulfilling its mission, NSA produces foreign intelligence and reports it to customers within the United States Government.

7. There are two primary reasons for gathering and analyzing intelligence information. The first, and most important, is to gain the information required to direct U.S. resources as necessary to counter external threats. The second reason is to obtain the information necessary to direct the foreign policy of the United States. Information produced by SIGINT is relevant to a wide range of important issues, including military order of battle; threat warnings and readiness; arms proliferation; terrorism; and foreign aspects of international narcotics trafficking. This information is often critical to the formulation of U.S. foreign policy and the support of U.S. military operations around the world. Moreover, intelligence produced by NSA is often unobtainable by other means.

8. NSA has developed a SIGINT collection network that acquires, among other things, foreign and international electronic communications. The technological infrastructure that supports NSA's foreign intelligence information collection network has taken years to develop at a substantial cost and untold human effort. It relies on sophisticated collection and processing technology.

9. NSA's ability to produce foreign intelligence information depends on its access to foreign and international electronic communications. Further, SIGINT technology is both expensive and fragile. Public disclosure of either the capability to collect specific communications or the substance of the information itself can easily alert targets to the vulnerability of their communications. Disclosure of even a single communication holds the potential of revealing the intelligence collection techniques that are applied against targets around the world. Once alerted, SIGINT targets can implement measures to thwart continued SIGINT collection.

10. Information obtained from intercepted foreign communications is called communications intelligence ("COMINT"). NSA's COMINT efforts constitute only part of the functions and activities of the Agency. A fundamental tenet of the COMINT process is that the identity of specific communications (commonly referred to as "targets"), the degree of success in exploiting these targets, and the vulnerability of particular foreign communications are all matters that must be maintained in strictest secrecy because of the fragility of the ability to exploit foreign communications. Disclosure of the identity of the targets, the ability to exploit those targets, or the vulnerability of particular foreign communications would encourage countermeasures by the targets of NSA's COMINT efforts. If a target is successful in defeating an intercept operation, all of the intelligence from that source is lost unless and until NSA can establish new and equivalent exploitation of that target's signals. If a source becomes unavailable, the military, national policymakers, combatant commanders, and the intelligence community must operate without the information the signals provided. Such losses are extremely harmful to the national security of the United States.



11. NSA's SIGINT operations are both sensitive and fragile. The critical intelligence information that is derived from NSA's SIGINT operations depends upon the collection of electronic communications, which can be easily compromised if targets are made aware of NSA capabilities and priorities. If an individual learns or suspects that his/her signals are or may be targeted by the NSA for collection, he/she may take steps to evade detection, to manipulate the information that NSA receives, or to implement other countermeasures aimed at undermining the NSA's operations. The resulting loss of intelligence from such a source deprives U.S. policy makers of information critical to U.S. interests, such as the prevention of terrorist attacks.

12. Congress has specifically recognized the inherent sensitivity of the SIGINT activities of the NSA; thus, Congress has passed statutes to protect the fragile nature of NSA's SIGINT efforts. These statutes recognize the vulnerability of signals intelligence to countermeasures of a foreign power or terrorist party and the significance of the loss of valuable foreign intelligence information to national policymakers, combatant commanders, and the intelligence community. These statutes are: Section 6 of the National Security Agency Act of 1959 (codified at 50 U.S.C. § 402 note); Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-1(i)(1); and 18 U.S.C. § 798. Under these three statutes, NSA is specifically authorized to protect certain information concerning its activities, and its intelligence sources and methods, from public disclosure.

**PROCESSING OF THE PLAINTIFF'S FOIA REQUESTS**

**REFERRED TO NSA BY CIA**

13. On or after 7 February 2003, the Plaintiff submitted a FOIA request to CIA, a Federal agency. Searches conducted by CIA revealed records responsive to the Plaintiff's request that were not originated by NSA but had NSA equities in them. Pursuant to section 3.6(b) of Executive Order 12958, as amended 25 March 2003, the CIA referred those responsive records to NSA for its review.<sup>1</sup> To this date, NSA has received (and responded to) a total of two (2) sets of referred documents from CIA which contained a total of five (5) enclosures responsive to the Plaintiff's requests.<sup>2</sup> NSA responded to the first set of referred documents (hereinafter "Referral 1"), which consisted of three (3) separate enclosures totaling sixty-two (62) pages, on 1 February 2008. NSA responded to the second set of referred documents (hereinafter "Referral 2"), which consisted of two (2) separate enclosures totaling eighty-one (81) pages, on 7 August 2009.

14. Upon receipt of each referral, NSA's FOIA office carefully reviewed the documents and conducted a line-by-line review of the NSA information contained in each set of referred documents to determine if any of it was non-exempt and releasable under the FOIA. NSA then responded to CIA, the referring Federal agency.

15. Specifically, NSA's responses to the two (2) sets of referred documents were as follows:

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<sup>1</sup>Executive Order 12958, as amended, was recently replaced by a new Executive Order, 13526. This new Executive Order was signed by the President on 29 December 2009, *see* 75 Fed. Reg. 707, and the referral provisions of that order (which remain at section 3.6(b)) went into effect on 27 June 2010.

<sup>2</sup>NSA received Referral 1 from CIA on 12 October 2007. NSA received Referral 2 from CIA on 10 July 2009.

- a. With respect to Referral 1, on 1 February 2008, NSA informed CIA that certain information contained within the first set of referred documents, a total of three (3) enclosures totaling sixty-two (62) pages, was protected from disclosure in part pursuant to FOIA Exemptions 1 and 3 but that all remaining NSA information could be released to the requestor. I have reviewed and determined that of the three (3) total enclosures contained in the Referral 1 some information contained in one enclosure totaling twenty-four (24) pages was withheld in part from disclosure to the Plaintiff pursuant to Exemption 1 of the FOIA. The categories of classified information in the responsive document at issue here are those found in Section 1.4(c), which include intelligence activities (including special activities), intelligence sources and methods, or cryptology.
- b. With respect to Referral 2, on 7 August 2009, NSA informed CIA that certain information contained within the second set of referred documents, two (2) enclosures totaling eighty-one (81) pages, was protected in part from disclosure pursuant to FOIA Exemptions 1 and 3 but that all remaining NSA information could be released to the requestor. I have reviewed and determined that of the two (2) enclosures contained in Referral 2 some information in one enclosure totaling seventy-six (76) pages was withheld in part from disclosure to the Plaintiff pursuant to Exemption 1 of the FOIA. The categories of classified information in the responsive document at issue here are those found in Section 1.4(c), which include intelligence activities (including special activities), intelligence sources and methods, or cryptology.

### **FOIA Exemptions**

#### **Exemption One**

16. Section 552(b)(1) of the FOIA provides that the FOIA does not require the

release of matters that are specifically authorized (under criteria established by an Executive Order) to be kept secret in the interest of the national defense or foreign policy and are in fact properly classified pursuant to such Executive Order. The current Executive Order, which establishes such criteria, is Executive Order 13526.

17. Section 1.4 of Executive Order 13526 provides that information shall not be considered for classification unless it falls within one (or more) of eight specifically enumerated categories of information.

18. The enclosures referenced in paragraphs 15 a. and 15b. of this Declaration were located by CIA in response to the Plaintiff's FOIA request to CIA and were referred to NSA and withheld in part. The withheld information contained in Referrals 1 and 2 meets the criteria for classification as set forth in Subparagraph (c) of Section 1.4 of Executive Order 13526, which authorizes the classification of information concerning "intelligence activities (including covert action), intelligence sources or methods, or cryptology."

19. As described above, I am also a TOP SECRET classification authority, and I have determined that in this case the information found to be exempt from disclosure pursuant to FOIA Exemption 1 is currently and properly classified at the SECRET level pursuant to Section 1.4 of Executive Order 13526, because disclosure of such information reasonably could be expected to cause grave damage to the national security of the United States. Regarding the enclosure contained in Referral 1, information withheld in part by NSA includes specific SIGINT collection efforts against foreign intelligence targets, cover terms, and information about specific foreign intelligence targets. With regard to the enclosure contained in Referral 2, information withheld in part by NSA



includes NSA capabilities against specific foreign intelligence targets. If released, the information contained in Referrals 1 and 2 would permit the identification of targets whose communications have been exploited, reveal intelligence collection assignments, and intelligence sources and methods. The categories of classified information in the responsive enclosures at issue here are those found in Section 1.4(c), which include intelligence activities (including special activities), intelligence sources and methods, or cryptology. Revelation of any of the material withheld pursuant to Exemption 1 of the FOIA would compromise current targeting and/or sources and methods information and potentially cause grave damage to the national security of the United States by revealing or providing insight into sources and methods that the Agency currently uses. Moreover, disclosure of the withheld information would damage the U.S. Government's foreign relationships by exposing the identity of NSA targets, its success in exploiting such targets, the vulnerability of the targets' communications, and the extent of NSA's cryptologic success. Accordingly, NSA properly withheld in part material contained in Referrals 1 and 2 pursuant to Exemption 1 of the FOIA and the material is properly exempt from disclosure.

### **Exemption Three**

20. Section 552(b)(3) of the FOIA provides that the FOIA does not require the release of matters that are specifically exempted from disclosure by statute, provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or established particular criteria for withholding or refers to particular types of matter to be withheld. See 5 U.S.C. § 552(b)(3). Review of the application of Exemption 3 statutes consists solely of determining that the statute relied

upon qualifies as an Exemption 3 statute and that the information withheld falls within the scope of the statute.

21. NSA's FOIA Office and I reviewed all enclosures contained in Referrals 1 and 2, which were identified by CIA as responsive to the Plaintiff's FOIA request to CIA. I have determined that Exemption 3 applies to certain withheld material in one enclosure totaling twenty-four (24) pages contained in Referral 1 and to certain withheld material in the one enclosure totaling seventy-six (76) pages contained in Referral 2. Specifically, both documents contain the names of NSA employees.

22. The information withheld from disclosure pursuant to Exemption 3 in the two (2) sets of referred documents falls squarely within the scope of a statutory privilege unique to NSA. As set forth in section 6 of the National Security Agency Act of 1959, Public Law 86-36 (50 U.S.C. § 402 note), "[n]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries or number of persons employed by such agency." (emphasis added). Congress, in enacting the language in this statute, decided that disclosure of any information relating to NSA activities is potentially harmful. *Hayden v. NSA*, 608 F.2d 1381, 1390 (D.C. Cir. 1979). Federal courts have held that the protection provided by this statutory privilege is, by its very terms, absolute. *See, e.g., Linder v. NSA*, 94 F.3d 693 (D.C. Cir. 1996). *See also Wilner v. NSA*, 592 F.3d 60, 75 (2nd Cir. 2010); *Larson, et al. v. Department of State*, 565 F.3d 857, 868 (D.C. Cir. 2009); *Students Against Genocide, et al. v. Department of State, et al.*, 257 F.3d 828 (D.C. Cir. 2001); *Lahr v. National Transp. Safety Bd., et al.*, 453 F. Supp.2d 1153, 1171-73 (C.D. Cal. 2006);

*People for the American Way v. NSA*, 462 F.Supp.2d 21, 30 (D.D.C. 2006); *Florida*

*Immigrant Advocacy Center v. NSA*, 380 F.Supp.2d 1332, 1340-41 (S.D. Fla. 2005).

Section 6 states unequivocally that, notwithstanding any other law, including the FOIA, NSA cannot be compelled to disclose any information with respect to its activities. *See Hayden*, 608 F.2d at 1389. Further, while in this case the harm would be grave, NSA is not required to demonstrate specific harm to national security when invoking the statutory privilege of Section 6, but only to show that the information relates to its activities. *Id.* at 1390. NSA's functions and activities are therefore protected from disclosure regardless of whether or not the information is classified.

23. Moreover, the twenty-four (24) page enclosure contained in Referral 1 and the seventy-six page (76) page enclosure contained in Referral 2, were referred to NSA by CIA and contain information that falls squarely within the scope of Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-1(i)(1). Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-1(i)(1), provides that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." NSA, as a member agency of the U.S. intelligence community, must also protect intelligence sources and methods. Like the protection afforded to core NSA activities by Section 6 of the NSA Act of 1959, the protection afforded to intelligence sources and methods is absolute. *See Central Intelligence Agency v. Sims*, 471 U.S. 159 (1985). Whether the sources and methods at issue are classified is irrelevant for purposes of the protection afforded by 50 U.S.C. § 403-1(i)(1). *Id.*

24. Based on my review of the information contained in Referrals 1 and 2, which was withheld in part from the Plaintiff pursuant to Exemption 3 of the FOIA, I conclude that the information is protected from disclosure by statute pursuant to section 6 of the National Security Act of 1959 (Pub. L. 86-36) (50 U.S.C. § 402 note), because the information concerns the organizations, functions, and activities of the NSA, as well as the names of NSA personnel. Additionally, certain information contained in Referrals 1 and 2 falls under 50 U.S.C. § 403-1(i)(1), because the information concerns intelligence sources and methods.

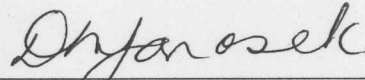
25. Section 798 of Chapter 18 of the U.S. Code prohibits the unauthorized disclosure of classified information: (i) concerning the communications intelligence activities of the United States; or (ii) obtained by the process of communication intelligence derived from the communications of any foreign government. The term "communications intelligence," as defined by 18 U.S.C. § 798(b), means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients.

26. The seventy-six (76) page enclosure contained in Referral 2 also contain information that falls squarely within the scope of 18 U.S.C. § 798, because disclosure would likely reveal classified information derived from NSA's exploitation of foreign communications.

27. For all of the foregoing reasons, some of the information in the twenty-four (24) page enclosure contained in Referral 1 and some of the information in the seventy-six (76) page enclosure contained in Referral 2 was denied in part pursuant to Exemption 3 of the FOIA. The information is properly exempted from disclosure.



Signed this 16<sup>th</sup> day of August 2010.



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Deputy Associate Director  
for Policy and Records