

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ROGER HALL, et. al.,)	
)	
Plaintiffs)	
)	
v.)	Civil Action No. 04-00814 (HHK)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

DECLARATION OF DIANE M. JANOSEK

I, DIANE M. JANOSEK, hereby declare and state:

1. I am currently the Deputy Associate Director for Policy and Records for the National Security Agency (“NSA” or “Agency”). I have served with NSA for 11 years, and prior to my current assignment, I held various leadership positions throughout the Agency. As the Deputy Associate Director of Policy and Records, I am responsible for the processing of all requests made pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for NSA records.

2. In addition, I am a TOP SECRET classification authority pursuant to section 1.3 of Executive Order (E.O.) 13526 dated 29 December 2009 (75 Fed. Reg. 707). Consequently, it is my responsibility to assert the FOIA exemptions over NSA information in the course of litigation. Through the exercise of my official duties, I have become familiar with the current litigation arising out of a request for information filed

by the Plaintiffs,¹ as the NSA received consultations from the Department of Defense (DOD) and the Central Intelligence Agency (CIA). These agencies referred to NSA classified documents because they either originated with NSA and/or contained NSA equities.

3. The purpose of this declaration and attached Document Index² is to explain how NSA processed documents that were referred to the NSA by the CIA and DoD. The declaration further advises the Court that NSA withheld certain information, as set forth below, because it is properly exempt from disclosure under the FOIA based on Exemption 1, 5 U.S.C. §552(b)(1), since the information is a currently and properly classified matter in accordance with E.O. 13526, and Exemption 3, 5 U.S.C. §552(b)(3), since the information is protected from release by statutes. In this case, the relevant Exemption 3 statutes are Section 6 of the National Security Agency Act of 1959, 50 U.S.C. §402 note (Pub. L. No. 86-36); 18 U.S.C. §798; and Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 30 U.S.C. §403-1(i)(1). In order to provide the necessary context for the discussion that follows, I will first describe NSA's origin and mission.

¹ Throughout this declaration, the NSA refers to Plaintiff Hall only when discussing the processing of records responsive to the 7 February 2003 FOIA request submitted by attorney James H. Lesar on behalf of his client Plaintiff Hall. Mr. Lesar represents Mr. Hall only, and accordingly, NSA released responsive information to Mr. Lesar exclusively. Additionally, some of the released documents contain information about certain POW/MIAs that only Mr. Hall can receive because he has received the consent from POW/MIAs family members. These documents have been marked "For Hall Only."

² The Document Index contains a complete listing of all the documents that NSA reviewed in response to the referrals that NSA received from the CIA and DoD. For each document listed in the Document Index, NSA identified the referring agency; identified any exempt material in the document and the specific exemptions invoked; and explained the ultimate disposition of the record, which was either a direct release by NSA to the Plaintiffs or return to the referring agency with NSA redactions.

ORIGIN AND MISSION OF NSA

4. The NSA was established by Presidential Directive in 1952 as a separately organized agency within the Department of Defense under the direction, authority, and control of the Secretary of Defense. NSA's foreign intelligence mission includes the responsibility to collect, process, analyze, produce, and disseminate signals intelligence (SIGINT) information, of which communications intelligence (COMINT) is a significant subset, for (a) national foreign intelligence purposes, (b) counterintelligence purposes, and (c) the support of military operations. *See* E.O. 12,333, section 1.7(c), as amended. COMINT is a subcategory of Sensitive Compartmented Information ("SCI"), and it identifies SCI that was derived from exploiting cryptographic systems or other protected sources by applying methods or techniques, or from intercepted foreign communications.

5. In performing its SIGINT mission, NSA exploits foreign electromagnetic signals to obtain intelligence information necessary to the national defense, national security, or the conduct of foreign affairs. NSA has developed a sophisticated worldwide SIGINT collection network that acquires, among other things, foreign and international electronic communications. The technological infrastructure that supports the NSA's foreign intelligence information collection network has taken years to develop at a cost of billions of dollars and untold human effort. It relies on sophisticated collection and processing technology.

IMPORTANCE OF SIGINT TO THE NATIONAL SECURITY

6. 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 threats. The second reason is to obtain the

information necessary to direct the foreign policy of the United States. Foreign intelligence information provided by the NSA is routinely distributed to a wide variety of senior Government officials, including the President; the President's National Security Advisor; the Director of National Intelligence; the Secretaries of Defense, State, Treasury and Commerce; U.S. ambassadors serving in posts abroad; the Joint Chiefs of Staff; and the Unified and Specified Commanders. In addition, SIGINT information is disseminated to numerous agencies and departments, including, among others, the Central Intelligence Agency; the Federal Bureau of Investigation; the Drug Enforcement Administration; the Departments of the Army, Navy, and Air Force; and various intelligence components of the Department of Defense. Information provided by NSA is relevant to a wide range of important issues, including, but not limited to, 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.

7. 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 easily frustrate SIGINT collection by using different or new encryption techniques,

disseminating disinformation, or by utilizing a different communications link. Such evasion techniques may inhibit access to the target's communications and, therefore, deny the United States access to information crucial to the defense of the United States both at home and abroad.

PROCESSING OF PLAINTIFF HALL'S FOIA REQUEST

8. On 7 February 2003, Attorney James H. Lesar, on behalf of Plaintiff, Roger Hall, submitted a FOIA request to the Central Intelligence Agency (CIA) seeking all records and information on or pertaining to:

(1) Southeast Asia POW/MIAs (civilian or military) and detainees, who have not returned, or whose remains have not been returned to the US, regardless of whether they are currently held in prisoner status, and regardless of whether they were sent out of Southeast Asia;

(2) POW/MIAs sent out of Southeast Asia;

(3) Prepared by/assembled by CIA between 1 Jan 1960 and 31 Dec 2002, relating to the status of any US POWs or MIAs in Laos, including but not limited to any reports, memoranda, letters, notes or other documents prepared by Mr. Horgan or any other officer, agent or employee of the CIA for the JCS, the President, or any federal agency;

(4) records of the Senate Select Committee on POW/MIA Affairs which were withdrawn from the collection at the National Archives and returned to the CIA for processing;

(5) Records relating to 47 individuals who allegedly are Vietnam era POW/MIAs and whose next-of-kin have provided privacy waivers to Roger Hall, and those persons who are on the POW/Missing Personnel office's list of persons whose primary next-of-kin (PNOK) have authorized the release of information concerning them;

(6) all records on or pertaining to any search conducted for documents responsive to Roger Hall's requests dated 5 Jan 1994, 7 Feb 1994 and 23 Apr 1998; and

(7) all records on or pertaining to any search conducted regarding any other requests for records pertaining to Vietnam War POW/MIAs including any search for such records conducted in response to any request by any Congressional Committee or executive branch agency.

CIA's FIRST REFERRAL OF DOCUMENTS TO THE NSA THAT WERE RESPONSIVE TO PLAINTIFF HALL'S FOIA REQUEST TO CIA (CIA CASE NO. F-2010-01645 AND NSA CASE NO. 63960)

9. By Memorandum dated 21 January 2011, the CIA referred three NSA originated documents to the NSA for review and direct response to the Plaintiff Hall.

TAB B. The CIA FOIA Case No. was F-2010-01645. Prior to sending these three documents to the NSA for review, the CIA reviewed these documents for their equities and redacted CIA information based on Exemptions 1 and 3. These three documents were portions of an NSA working aid entitled "NSA SIGINT Correlation Study-POW/MIA," which began in 1992 but was continually modified as more SIGINT was correlated to POW/MIAs.

10. In an effort to provide Plaintiff Hall with the most complete release of information responsive to his request, NSA, instead of reviewing the earlier and outdated portions that were referred to NSA by the CIA, reviewed the most updated NSA SIGINT Correlation Study-POW/MIA using the most updated Vietnam declassification guidance. NSA reviewed the most updated NSA SIGINT Correlation Study-POW/MIA because it not only contained the same information in the three documents referred to it by the CIA, but it also contained additional information about POW/MIAs, which is the information that Plaintiff Hall sought from the U.S. Government. Based on this review, NSA redacted certain NSA information (information about collection sites and the sources of SIGINT collection) because that information remains a currently and properly classified matter, as discussed below, in accordance with E.O. 13526 and is protected from release by statutes, specifically, Section 6 of the National Security Agency Act of 1959, 50 U.S.C. §402 note (Pub. L. No. 86-36); 18 U.S.C. §798; and Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 30 U.S.C. §403-1(i)(1). With this most updated NSA SIGINT Correlation Study-POW/MIA, NSA also redacted information based on Exemptions 1 and 3 of the FOIA as requested by the CIA which were marked in the three documents referred to the NSA, consistent with how NSA had

previously released this working aid over the years to requesters under the FOIA and/or under mandatory declassification review (MDR) requests following consultation with the CIA on its information.

11. NSA also redacted certain information on behalf of the Department of Defense (DoD) POW/MIA Office (DPMO). Specifically, NSA redacted certain information to protect the privacy of POW/MIAs, whose family members did not consent to Plaintiff Hall having access to this information. NSA's redactions for the DPMO were based on Exemption 3 of the FOIA pursuant to P.L. 102-90 and Exemption 6.

12. NSA generally marked the CIA and DPMO redactions in the updated NSA SIGINT Correlation Study-POW/MIA as Other Government Agency (OGA).

13. By letter dated 5 October 2011, NSA provided the updated NSA SIGINT Correlation Study-POW/MIA to Plaintiff Hall through his attorney with redactions of NSA, CIA and DPMO information. TAB A. In the response letter that accompanied the release of the updated NSA SIGINT Correlation Study-POW/MIA, NSA explained how it processed the referral that NSA received from the CIA to include the fact that it processed the most updated Correlation Study instead of reviewing three earlier portions of this working aid. TAB A. Additionally, NSA explained that it had withheld certain NSA information based on Exemptions 1 and 3 of the FOIA, that it withheld certain information on behalf of the CIA based on Exemptions 1 and 3 of the FOIA, and that it withheld certain information on behalf of the DPMO based on Exemptions 3 and 6 of the FOIA. TAB A; Document Index, entries 35-36.

CIA'S SECOND REFERRAL OF DOCUMENTS TO THE NSA THAT WERE RESPONSIVE TO PLAINTIFF HALL'S FOIA REQUEST TO CIA (CIA CASE NO. F-2010-01645 AND NSA CASE NO. 63961)

14. By Memorandum dated 21 January 2011, the CIA referred two CIA originated documents to the NSA for review of NSA equities and return back to the CIA with any requested NSA redactions. The documents were: "Vietnam Checklist for the Director of Central Intelligence" dated 19 December 1965 and a CIA Memorandum entitled "The Situation in Vietnam" dated 26 July 1966.

15. NSA assigned this second CIA referral as FOIA Case No. 63961, which was processed as a consultation since these documents originated with the CIA. NSA reviewed both documents and redacted a small amount of information in each document because the information pertained to certain currently classified NSA targets and NSA collection activities. Some redacted information also pertained to the sensitive sources and methods of NSA's collection activities. NSA redacted this information based on Exemption 1 and 3 of the FOIA as discussed in detail below. The NSA did not protect the remaining NSA information in the two documents.

16. By letter dated 21 June 2011, NSA responded back to the CIA and informed them that certain information as marked in the documents must be protected from release under FOIA Exemption 1 because it is a currently and properly classified matter in accordance with E.O. 13526 and under Exemption 3 because the information falls with the scope of Section 6 of the National Security Agency Act of 1959, 50 U.S.C. §402 note (Pub. L. No. 86-36); 18 U.S.C. §798; and Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 30 U.S.C. §403-1(i)(1). NSA further informed

the CIA that the remaining NSA information in the two documents could be released to the requester. Document Index, entries 37-38.

DOD'S REFERRAL OF RESPONSIVE DOCUMENTS TO THE NSA THAT WERE RESPONSIVE TO LESAR'S FOIA REQUEST TO THE CIA (CIA CASE NO. F-2010-01645; DOD CASE NOS. 10-I-0010, 10-I-0018 AND 11-I-0032; AND NSA CASE NO. 65207)

17. By e-mail memoranda dated 11 August, 15 August, 9 September, 13 September, and 22 December 2011, the Department of Defense referred 19³ documents consisting of 598 pages to the NSA that were responsive to the Plaintiff Hall's FOIA request to the CIA. DoD referred these documents to the NSA because they contained NSA equities. These documents were initially referred by the CIA to the DoD. NSA provided a formal interim response to both CIA and DOD on 8 September 2011 and a final response to DoD on 5 January 2012. NSA also coordinated informally with both agencies concerning its processing of these referred documents.

18. In NSA's first formal interim response, NSA's FOIA Office addressed 13 documents that the DoD had referred to the NSA for review. In nine documents (CIA Case Nos. C00488720, C05123606, C00005798, C00005799, C00005972, C00336699, C01464904, C03375985, and C05081415), NSA determined that it had no equities and advised DoD that NSA did not seek any redactions of information in these nine documents. Document Index, entries 17-25. Regarding the remaining four documents, NSA's FOIA Office provided DoD with the following information. For CIA Document C02189996, NSA informed DoD that it had already reviewed this information in its

³ It should be noted that Plaintiff Hall has submitted over 50 requests for information under the FOIA or Mandatory Declassification Review (MDR) provisions set forth in E.O. 13526 and its predecessors, for records pertaining to POW/MIAs. Most of the records referred to the NSA by the DoD were previously provided to Plaintiff Hall with redactions of exempt information. As part of its review of these records referred to it from the DoD, NSA reviewed even previously released documents in light of the most updated classification guidance so that Plaintiff Hall would have the most complete and updated release of non-exempt information.

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consultation with the CIA (NSA Case No. 63961), and that it had advised the CIA to
redact certain NSA information based on Exemptions 1 and 3 of the FOIA as set forth in
paragraphs 14-16 above. Document Index, entries 37-38. For CIA Document C0049885,
NSA informed DoD that NSA was already reviewing this information (the NSA SIGINT
Correlation Study-POW/MIA) because it was referred to the NSA by the CIA (NSA Case
No. 63960) except for the DoD cover memorandum and Enclosure 2 (pages 156-164).
NSA informed DoD that NSA was reviewing the most complete and updated version of
the NSA SIGINT Correlation Study-POW/MIA and that NSA would provide this
document with NSA, CIA, and DoD redactions directly to Plaintiff Hall, as set forth in
paragraphs 9-13 above. Document Index, entries 27 and 35-36. NSA further informed
DoD that it would review the DoD cover memorandum and Enclosure 2 and advised
them on whether NSA would seek any redactions of exempt information. For CIA
Document C00495839, the information is duplicative of information previously released
by NSA under the MDR process except for a DoD cover memorandum and an NSA
cover memorandum. NSA informed DoD that it would re-review this previously released
information to see if any new information could be released to Plaintiff Hall and that it
would review both the NSA and DoD cover memoranda. Finally, for Document
C00311210, NSA informed DoD that it would review this document and return it with
any NSA redactions to DoD for their response back to Plaintiff Hall.

19. In NSA's second and final formal response, NSA provided the following
guidance to DoD regarding the documents reviewed by NSA since its first formal
response on 8 September 2011. For CIA Document C0049885 (DoD Referral 10-L-
00010), NSA had no information that required withholding in the DoD cover

memorandum and approved the release of the ten foreign intelligence reports, with redactions, that comprised Enclosure 2. NSA informed DoD that it would send the 10 foreign intelligence reports (9 pages) directly to Plaintiff Hall, and this occurred with accompanying letter dated 6 January 2012. TAB B; Document Index, entries 1-5, 13-16. The information protected in these ten foreign intelligence reports consisted of NSA collection activities against specified targets, collection sites, and sources of intelligence collection.

20. For CIA Document C00495839 (DoD Referral 10-L-00010), all of the information, except a DoD cover memorandum, was released in part in a prior MDR case, which is ultimately a release to the public. NSA re-reviewed the redacted information and determined that in three of the documents, it could release additional information to Plaintiff Hall, which was information about a POW/MIA and some SIGINT addresses (SIGADs). NSA did not have any equities in the DoD cover memoranda. NSA returned the DoD cover memoranda back to DoD on 6 January 2012 and released the remaining information to Plaintiff Hall on 6 January 2012. Document Index, entries 6-12.

21. In CIA Document C00311210, NSA reviewed a National Intelligence Estimate and redacted information about NSA targets and collection activities based on Exemptions 1 and 3 of the FOIA. On 6 January 2012, NSA returned the document to the DoD with exempt NSA information redacted for a direct response to the requester. Document Index, entry 26.

22. In CIA Document C00498934, which consisted of three NSA foreign intelligence reports that were previously released in part in an MDR case, NSA re-

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reviewed these three reports in light of new declassification guidance and released
additional information to Plaintiff Hall. Some of the remaining previously withheld
information still warranted protection based on Exemptions 1 and 3 of the FOIA. NSA
provided these three foreign intelligence reports to Plaintiff Hall on 6 January 2012.

TAB B; Document Index, entries 28-30. As part of this referral in CIA Document
C00498934, DoD also sent NSA a collection of DIA documents consisting of 56 pages.
NSA redacted two pieces of information on page 4 based on Exemptions 1 and 3 of the
FOIA, and returned the DIA documents to the DoD on 6 January 2012 for response to the
requester. Document Index, entry 34.

23. In CIA Document C00498728, NSA reviewed a 31-page DIA briefing to the
Senate Select Committee on Intelligence. All of the NSA information in this document
was releasable (non-exempt), and NSA informed DoD of this fact in an informal
consultation on 4 October 2011, and formalized that response on 6 January 2012. See
Document Index, entry 31.

24. In CIA Document C0051220, NSA reviewed a Secretary of Defense
Response to Senator McCain's request for information on a DoD investigation of
POW/MIA reports. All of the NSA information in this document was releasable to the
public except for the names of certain POW/MIAs, which were releasable to Plaintiff
Hall only because he had the consent of family members. These documents are marked
"For Hall Only." NSA informed DoD of this fact in an informal consultation response to
DoD on 6 December 2011, and formalized that response on 6 January 2012. Document
Index, entry 32.

25. In CIA Document C00488217, NSA reviewed a 20 page DIA chronology of reporting. All of the NSA information in this document was releasable, and NSA informed DoD of this fact in an informal response on 6 December 2011, and formalized that response on 6 January 2012. Document Index, entry 33.

26. As outlined above, NSA conducted a review of all the information referred to the NSA by the CIA and DoD, which for the majority of documents was a re-review because this information had been previously released to requesters, to include Plaintiff Hall, under the FOIA and/or MDR provisions. Ultimately, NSA redacted only a small amount of information because it was classified in accordance with E.O. 13526 and protected from release by statute (all three above-cited statutes). Specifically, the redacted information pertained to the sources of NSA's collection activities, collection sites, countries and organizations that were targeted by NSA and the results of such collection efforts. All of this information, as set forth in greater detail below, is exempt from release based on Exemption 1 of the FOIA because the information is currently and properly classified in accordance with E.O. 13526 and Exemption 3 because the information is protected from release by three statutes, Section 6 of the National Security Agency Act of 1959, 50 U.S.C. §402 note (Pub. L. No. 86-36); 18 U.S.C. §798; and Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, 30 U.S.C. §403-1(i)(1).

FOIA EXEMPTION ONE

27. 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

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and are in fact properly classified pursuant to such Executive Order. The current
Executive Order that establishes such criteria is E.O. 13526.

28. Section 1.4 of E.O. 13526 provides that information shall not be considered for classification unless it falls within one (or more) of seven specifically enumerated categories of information. The categories of classified information in the documents at issue here are those found in Section 1.4(b), which includes foreign government information, and Section 1.4(c), which include intelligence activities (including special activities), intelligence sources and methods, or cryptology.

29. In my role as a TOP SECRET classification authority, I have reviewed the information responsive to Plaintiff Hall's FOIA request made directly to the CIA and the information forwarded to NSA for consultation by the CIA and DoD because the information originated with NSA and/or contained NSA equities. For the following reasons, I have determined that all of the information withheld by NSA is currently and properly classified at the SECRET-Sensitive Compartmented Information ("SCI") level in accordance with E.O. 13526. Accordingly, the release of this information could reasonably be expected to cause serious damage to the national security. Additionally, this information is subject to special access and handling restrictions because it involves SCI, which means that the information involves or derives from particularly sensitive intelligence sources and methods. Because of the exceptional sensitivity and vulnerability of such information, these special safeguards and access requirements exceed the access standards that are normally required for information of the same classification level.

30. Plaintiff Hall's FOIA request encompasses information about operational details of NSA's SIGINT activities in Southeast Asia. The methodologies used by NSA to log, track, account for, and analyze collection during the Vietnam era are still used today. Thus, any revelation of this "who," "when," "where," and "how" could provide an adversary with a great deal of insight into NSA's targets, collection sites, and other collection and analysis-related information that is being used today.

31. The release of such specific information would reveal details of NSA's success or lack of success in its collection efforts against targets whose identities are still classified. Revealing information about specific NSA targets will enable adversaries to deduce the strength and range of NSA's capabilities at that time. Further, in many cases there is a direct link between the communications systems used then and those used today by NSA targets. Any disclosure of NSA's ability or lack of ability to collect intelligence against these targets at that time could cause our targets to adopt practices to deny or degrade NSA's current collection capabilities. Public disclosure of either NSA's capability to collect specific communications or the frequency with which such information is collected during that time period can easily alert targets to the vulnerability of their communications. Once alerted, SIGINT targets can frustrate SIGINT collection by using different communication techniques, or by utilizing a different communications link. This may result in denial of access to the target's communications and therefore result in a loss of access to information crucial to the defense of the United States.

32. Further, some of the information in the NSA-originated documents contains intelligence collected by foreign SIGINT partners, and any such disclosure of information

the disclosure of the organization or any function of the National Security Agency, [or] of any information with respect to the activities thereof. . . .” (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); *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). 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). 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 serious, NSA is not required to demonstrate specific harm to national security when invoking this statutory privilege, but only to show that the information relates to its activities. *Id.* at 1390. To invoke this privilege, NSA must demonstrate only that the information it seeks to protect falls within the scope of section 6. NSA’s functions and activities are therefore protected from disclosure regardless of whether or not the information is classified.

35. The second applicable statute is 18 U.S.C. § 798. This statute prohibits the unauthorized disclosure of classified information: (i) concerning the communications intelligence activities of the United States; or (ii) obtained by the process of

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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.

36. The third applicable statute is Section 102A(i)(l) of the Intelligence Reform
and Terrorism Prevention Act of 2004, 50 U.S.C. § 403-1(i)(1), which states 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.

37. As described above, Congress has enacted three statutes to protect the fragile
nature of NSA’s SIGINT efforts, to include but not limited to, the existence and depth of
signals intelligence-related successes, weaknesses and exploitation techniques. These
statutes recognize the vulnerability of signals intelligence to countermeasures and the
significance of the loss of valuable intelligence information to national policymakers and
the Intelligence Community. Given that Congress specifically prohibited the disclosure
of information related to NSA’s functions and activities and its communications
intelligence activities, as well as the sources and methods used by the Intelligence

Community as a whole, I have determined that NSA's SIGINT activities and functions, and its intelligence sources and methods would be revealed if any of the withheld information about NSA's SIGINT activities in Southeast Asia during the time period at issue in this FOIA case were disclosed.

38. The "who," "when," "where," and "how" NSA collected communications during this time period all reveal information related to "any function" or "the activities" of the NSA, and thus, this withheld information falls squarely with Section 6 of the NSA Act. Likewise, this information all pertains to the communications intelligence activities of the NSA and is also protected from release pursuant to 18 U.S.C. § 798. Finally, the sources and methods used by NSA's to obtain SIGINT would be revealed if the withheld information were disclosed to the plaintiffs and thus is protected from release pursuant to 50 U.S.C. § 403-1(i)(1).

39. Accordingly, based upon my review of the responsive NSA material, I conclude that NSA made every effort to provide Plaintiff Hall with the most complete and updated information that was responsive to his request and that the information NSA withheld (and continues to withhold) is protected from disclosure by statute pursuant to the following three authorities: (1) 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, function and activities of the NSA as described above; (2) 18 U.S.C. § 798, because disclosure would reveal classified information derived from NSA's exploitation of foreign communications; and (3) 50 U.S.C. § 403-1(i)(1), because the information concerns intelligence sources and methods.

40. I declare under penalty of perjury that the facts set forth above are true and correct.

Executed, this 8th day of February 2012, pursuant to 28 U.S.C. § 1746.



DIANE M. JANOSEK
Deputy Associate Director for Policy and Records
National Security Agency