

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

PUBLIC RECORD MEDIA,	)	
	)	
<i>Plaintiff,</i>	)	
	)	
v.	)	
	)	Case No. 12-1225- MJD
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
<i>Defendant.</i>	)	
	)	

**DECLARATION OF JOHN E. BIES**

I, John E. Bies, declare as follows:

1. I am a Deputy Assistant Attorney General in the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”). My responsibilities include the supervision of OLC’s responses to requests it receives under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this declaration in support of the Government’s Motion for Summary Judgment in this proceeding. These statements are based on my personal knowledge, on information provided to me by OLC attorneys and staff working under my direction, and on information provided to me by others within the Executive Branch of the Government. The principal function of OLC is to assist the Attorney General in his role as legal adviser to the President of the United States and to departments and agencies of the Executive Branch. OLC provides advice

and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch.

PLAINTIFF'S FOIA REQUEST

2. On October 18, 2011, OLC received a request dated October 11, 2011 from Matt Ehling, President of Public Record Media, L.L.C., seeking (1) “[a]ny and all legal opinions and/or memoranda produced by your office between January 1, 2007 and October 1, 2011 that deal with the use of lethal force by the United States against United States person Anwar al-Awlaki . . .”; (2) “[a]ny and all legal opinions and/or memoranda produced by your office between January 1, 2001 and October 1, 2011 that deal with the use of lethal force – including but not limited to, the projection of lethal force via ‘unmanned aerial vehicles’ (UAVs) – by the United States against United States persons physically located outside of any region under the jurisdiction of the government of the United States at the time that lethal force is or might be used”; and (3) “[a]ny and all legal opinions and/or memoranda produced by your office between January 1, 2001 and October 1, 2011 that deal with the use of lethal force by the United States via the use of UAVs, against any persons physically located within any region under the jurisdiction of the government of the United States at the time that lethal force is or might be used.” *See* Ex. A, attached (Plaintiff’s Request).

3. By letter dated November 3, 2011, OLC Special Counsel Paul Colborn responded to Plaintiff’s request on behalf of OLC. *See* Ex. B, attached (OLC’s Response). With respect to the first item in Plaintiff’s request, OLC neither confirmed nor denied the existence of responsive documents, pursuant to FOIA Exemptions One,

Three, and Five, 5 U.S.C. § 552(b)(1), (3), (5). The letter further indicated that OLC had identified documents “that are responsive to the remaining items in [Plaintiff’s] request,” *id.*, all of which OLC withheld as exempt pursuant to FOIA Exemptions One, Three, and Five. Consistent with OLC’s standard practice, OLC did not separately respond to each subcategory of Plaintiff’s request, but simply indicated that it had identified additional exempt records collectively responsive to the remaining items in Plaintiff’s request.

4. I understand that on May 1, 2012 the Department of Justice’s Office of Information Policy (“OIP”) acknowledged that on April 24, 2012 OIP had received an administrative appeal from Plaintiff dated December 29, 2011 challenging OLC’s response. In Plaintiff’s appeal, Plaintiff only challenged OLC’s response on the third item of Plaintiff’s request. Consequently, by narrowing its request on appeal in this way, Plaintiff has failed to exhaust administrative remedies with respect to any objections to OLC’s response to the first or second items of its request.

5. On May 22, 2012, before OIP had ruled on Plaintiff’s administrative appeal, Plaintiff filed this lawsuit. Like Plaintiff’s appeal, Plaintiff’s complaint in this lawsuit also narrows what Plaintiff is seeking to documents responsive to the third item of its request. OIP subsequently closed the administrative appeal in light of the filing of Plaintiff’s complaint. *See* Ex. D, attached; *see also* 28 C.F.R. § 16.9(a)(3) (“An appeal ordinarily will not be acted on if the request becomes a matter in FOIA litigation.”).

6. I understand that, in light of Plaintiff’s narrowing of its request, counsel handling this litigation for the Department of Justice orally advised counsel for Plaintiff that none of the exempt records located by OLC in response to Plaintiff’s request is

responsive to the third item of Plaintiff's request — that is, OLC located no records responsive to Plaintiff's request for any legal opinions or memoranda produced by OLC between January 2001 and October 1, 2011 relating to the use of lethal force by the United States via the use of unmanned aerial vehicles against any person physically located in the United States or its territories. Plaintiff requested written confirmation from OLC that none of the exempt records is responsive to the third item in the request.

7. On August 3, 2012, Mr. Colborn provided such confirmation by letter, advising Plaintiff that none of the exempt records located by OLC is responsive to the third category of records sought by Plaintiff's request. *See* Ex. F, attached. Rather, as Mr. Colborn's letter explained, any responsive records located by OLC are responsive to the second category of Plaintiff's request, broadly construed. *Id.* Mr. Colborn further explained that, consistent with OLC's normal practice in responding to FOIA requests, OLC did not separately respond to each category of Plaintiff's request, but simply indicated that it had identified additional exempt records responsive to the remaining items in Plaintiff's request.

8. Plaintiff did not seek clarification from OLC as to whether any of the exempt documents OLC located were responsive to the third item of its request prior to filing its appeal with OIP or its complaint in this litigation. In the past, OLC has typically responded to such requests for clarification when the number of exempt records responsive to a particular request could be reasonably ascertained and determining that number was not overly burdensome, except where disclosing the number of records

responsive to a particular item in a request would have revealed information otherwise protected by a FOIA exemption.

9. Although Plaintiff has not indicated its basis for any challenge to the adequacy of OLC's search or to OLC's conclusion that it has no responsive records to this item of its request, I provide below a detailed description of OLC's search to assure the Court that OLC conducted a thorough search for potentially responsive records to Plaintiff's request.

#### OLC'S SEARCH

10. Although the language used in Plaintiff's request is not entirely clear, OLC understands the item of Plaintiff's request at issue in this litigation (the third item) to seek any legal opinions or memoranda produced by OLC between January 2001 and October 1, 2011 relating to the use of lethal force by the United States via the use of unmanned aerial vehicles against any person physically located in the United States or its territories. As described below, OLC conducted an adequate search for records responsive to this category of Plaintiff's request and determined that OLC has no responsive records.

11. There are a number of locations where OLC's substantive records are stored. OLC's unclassified substantive records may be located in the paper files of individual OLC employees or stored electronically in two types of electronic systems: a shared central storage system for the office's final unclassified work product (such as opinions and memoranda) and the computer accounts of individual employees. The central storage system consists of documents in their original file format (e.g., Microsoft Office, WordPerfect, PDF) collected in folders, which are organized by date, on a shared

network drive on the Department of Justice electronic file server. It is OLC's practice to save all final unclassified work product to this central storage system; accordingly, if OLC has provided any unclassified written advice or has memorialized any unclassified oral advice in writing, that advice should be accessible through this system. OLC uses a sophisticated search engine, called Isys Search Software ("Isys"), to perform keyword searches of this collection of final work product files. Isys searches the full text of documents (including PDF files) within this collection of final work product, as opposed to searching only document titles or e-mail subject lines.

12. In addition, OLC may have classified substantive records that could be responsive to a FOIA request. Paper files containing classified documents must be stored either in individual safes or in OLC's Sensitive Compartmented Information Facility ("SCIF"). These paper files include classified records that are not part of any individual custodian's files but rather are maintained as a part of the Office's records regarding final classified legal advice that has been provided by OLC. Electronic classified records might also be stored in a secure computer system, in which records might be located in the classified computer accounts of individual users or in shared folders.

#### *The October 2011 Searches*

13. In October 2011, an OLC attorney initiated a search for records responsive to both the second and third categories of records sought by Plaintiff's request,<sup>1</sup> including any final legal advice provided by OLC with respect to the subjects of the request located

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<sup>1</sup> With respect to the first category of records sought by Plaintiff's request, OLC neither confirmed nor denied the existence of responsive documents, pursuant to FOIA Exemptions One, Three, and Five.

either in the Isys database or in secure locations identified by a senior career OLC attorney as locations that possibly could contain potentially responsive records. (All such locations identified were searched.)

14. In addition to these searches, an OLC attorney also specifically discussed the third item of Plaintiff's request with the two senior OLC attorneys most likely to be aware of any records concerning the subject of this category of Plaintiff's request. Neither of those attorneys recalled any records responsive to this third item.

15. None of the responsive records located by the October 2011 searches is responsive to the third item of Plaintiff's request. Rather, all of the responsive records located as a result of the October 2011 searches are responsive to the second category of Plaintiff's request, broadly construed. (Because those records are marked as classified, protected from disclosure by statute, or protected by the attorney-client and/or deliberative process privileges, they were withheld as exempt from disclosure pursuant to FOIA Exemptions One, Three, and/or Five, 5 U.S.C. § 552(b)(1), (3), and (5).) The absence of records responsive to the third item of Plaintiff's request is consistent with the understanding of the attorneys with whom the third request was specifically discussed in October 2011, none of whom recalled any such responsive records.

*The Spring 2012 Searches*

16. In the spring of 2012, OLC conducted additional searches in the course of processing additional (and broader) FOIA requests that OLC had received from other FOIA requesters on topics generally related to the subjects of Plaintiff's request. Given the scope of those other requests, OLC conducted a much broader search for OLC

records in this general subject-matter area. These additional searches did not identify any records responsive to Plaintiff's FOIA request that had not been identified during OLC's October 2011 searches.

17. Specifically, in April 2012, a paralegal employed at OLC used Isys to perform additional keyword searches of OLC's central storage system of all unclassified, final OLC advice. The keyword terms used in those searches are listed in Exhibit E, attached hereto. In performing these searches, the paralegal ran a separate search with each of the listed terms or phrases, without connectors joining the separate terms or phrases. OLC's paralegals use Isys on a regular basis and are experienced in running searches such as the ones conducted here.

18. Also in the course of processing these other FOIA requests, an OLC attorney consulted with the OLC attorneys likely to be familiar with individual assignments on national security matters and identified four current and four former attorneys as individual custodians who might potentially have records responsive to these other FOIA requests.<sup>2</sup> (OLC is a very small component of the Department of Justice, employing approximately twenty to twenty-five attorneys at any one time.)

19. With each of the four current employees identified as potential custodians of records responsive to these other FOIA requests, an OLC attorney discussed locations where potentially responsive documents might be located, and those locations in the paper files of each attorney were searched for potentially responsive documents. Where

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<sup>2</sup> A fifth employee identified as potentially having responsive records, an attorney adviser, was on maternity leave at the time of the search. That attorney indicated that any potentially responsive records in her files would almost certainly be duplicates of materials in the possession of the custodians who were searched.



the current employee indicated specific locations in his or her electronic or e-mail files where potentially responsive materials might be found, those locations were also searched for potentially responsive documents. In addition, an OLC attorney discussed with each of the identified custodians who are current employees if there were secure locations in individual safes or in the SCIF that should be searched for potentially responsive classified records, and any locations so identified were also searched for potentially responsive documents. An OLC paralegal also reviewed any individual paper files left by the four departed custodians for potentially responsive documents.

20. Similarly, in connection with the processing of these other FOIA requests (which sought, *inter alia*, internal and interagency communications), an OLC attorney or paralegal also conducted keyword searches of the e-mails of the four current employees identified as potential custodians. The same keyword searches were also conducted for the departed user e-mail accounts of the four identified employees who were no longer employed at OLC at the time of the searches. The keyword terms used in these searches were the same keywords listed in Exhibit E. Using the identified search terms with no connectors, the paralegals used the Microsoft Outlook program to search the e-mail files of the identified custodians. These searches included both the custodian's unclassified e-mail account well as any classified e-mail accounts the custodian had.

21. The additional searches in spring 2012 also did not identify any documents responsive to the third item of Plaintiff's request.

22. In addition to the searches already described, following the filing of Plaintiff's complaint in this matter, I also specifically discussed this third item of

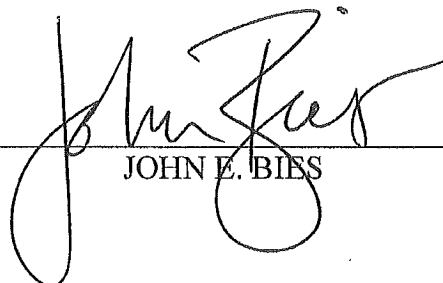
Plaintiff's request with the four current employees identified as potential custodians of responsive records in connection with the spring 2012 searches. None of those attorneys recalled any responsive records relating to the subject of the third item of Plaintiff's request.

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23. In conclusion, OLC conducted an adequate search in response to Plaintiff's FOIA request and located no responsive records to the item of Plaintiff's request that is the subject of this litigation.

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

Executed: September 21, 2012

  
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JOHN E. BIES