

CONGRESSIONAL REFERENCE

TO THE

UNITED STATES COURT OF FEDERAL CLAIMS

Congressional Reference No. 98-887X

_____)	
RICHARD M. BARLOW,)	
of Santa Fe, New Mexico,)	
)	
)	
)	
v.)	
)	
)	
THE UNITED STATES)	
_____)	

FILED EX PARTE. IN CAMERA
AND UNDER SEAL

DECLARATION OF LIEUTENANT GENERAL MICHAEL V. HAYDEN,
UNITED STATES AIR FORCE,
DIRECTOR OF THE NATIONAL SECURITY AGENCY

I, Lieutenant General Michael V. Hayden, United States Air Force, do hereby
state and declare as follows:

- (U) I am the Director of the National Security Agency (NSA), an intelligence agency within the Department of Defense. I am responsible for directing the NSA, overseeing the operations undertaken to carry out its mission, and, by specific charge of the President, protecting NSA activities and intelligence sources and methods. I have been designated an original TOP SECRET classification authority under Executive Order (E.O.) No. 12958, 60 Fed. Reg. 19825 (1995) and Department of Defense Directive No. 5200.1-R, Information Security Program Regulation, 32 C.F.R. 159a.12 (1994).

DERIVED FROM NSA/CSSM 123-2
DATED: 24 February 1998
DECLASSIFY ON: X1, X3, X5, X6, X7, X8

099

2. (U//FOUO) The purpose of this declaration is to support a formal assertion of the States Secrets privilege and to assert NSA's statutory privilege over NSA Intelligence reports and information derived from intelligence reports contained in minutes of the Nuclear Export Violations Working Group ("NEVWG") meetings. These documents are sought by Mr. Barlow through discovery requests in this action. The matters set forth in this declaration are based upon my review and consideration of information provided to me in my official capacity, my experience and knowledge regarding NSA's mission and the extreme sensitivity of the information contained in or derived from NSA's Intelligence reports, advice of counsel, and conclusions reached in accordance therewith.

CLASSIFICATION MARKINGS

3. (U//FOUO) This declaration is classified TOP SECRET//COMINT//SI pursuant to the standards in Executive Order No. 12958, 3 C.F.R. 333 (1996), as amended, reprinted in, 50 U.S.C. 435 note (1998). Under that Executive Order, information is classified "TOP SECRET" if disclosure of the information would cause exceptionally grave damage to the U.S. national security, "SECRET" if serious damage would result, and "CONFIDENTIAL" if identifiable damage would result. At the beginning of each paragraph of this declaration, the letter or letters in parentheses designate(s) the degree of sensitivity of the information the paragraph contains. When used for this purpose, the letters "U," "C," "S," and "TS" indicate respectively that the information is either UNCLASSIFIED, or is classified CONFIDENTIAL, SECRET, or TOP SECRET. The phrase "FOR OFFICIAL USE ONLY" and its acronym "FOUO" identify information which has not been given a security classification pursuant to the criteria of an Executive Order, but which is withheld from the public for one or more reasons cited in exemptions 2 through 9 of the Freedom

of Information Act, 5 U.S.C. § 552. The markings "//X1" following the classification in the header and footer of each page indicate an exemption from automatic declassification and the duration of that exemption. This declaration contains information for which additional safeguarding and access requirements, exceeding those normally required for information at the same classification level, are necessary. The term "COMINT," a subset of Signals Intelligence, and its corresponding abbreviation "SI" indicate communications intelligence or special intelligence derived from or concerning the intercept of foreign communications by other than the intended recipient; these replace the control term "HANDLE VIA COMINT CHANNELS ONLY," and the COMINT codeword "UMBRA," found in the two Signals Intelligence ("SIGINT") reports at issue and the NEVWG minutes, which contain information derived from numerous SIGINT reports. In addition, this declaration contains information which concerns particularly sensitive signals intelligence information designated by the term GAMMA, a marking found on one of the SIGINT reports. All NSA information over which I herein assert NSA's statutory privilege and which I find must be protected by the States Secret privilege is Sensitive Compartmented Information or "SCI." SCI information is classified intelligence information concerning or derived from intelligence sources, methods, or analytical processes requiring handling exclusively within special access controls. All NSA information sought to be protected is classified SECRET or TOP SECRET Sensitive Compartmented Information.

BACKGROUND

4. ~~(TS//SI)~~ In my official capacity I have been advised that the Plaintiff, Mr. Barlow, seeks compensation through this Congressional reference for alleged wrongful personnel action taken by the Department of Defense in 1989. I understand that Mr. Barlow claims that the action was taken as a result of his knowledge that DoD superiors provided misleading information to the

House Foreign Affairs Committee concerning the sale of F-16 aircraft to Pakistan. I also understand that Mr. Barlow is seeking a number of categories of information from DoD, CIA and NSA, among others, relating to Pakistan's development of nuclear weapons in the time frame between 1986 and 1990. Further, I am aware that the Director of Central Intelligence (DCI), in his public declaration in this matter, in which he asserts the States Secrets privilege over CIA and intelligence community information, acknowledges that during the 1986-1990 period the intelligence community used its sources and methods to monitor Pakistan's nuclear program. The DCI also states unequivocally in that declaration that it is absolutely essential to protect the intelligence sources and methods.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. (U//FOUO) Access to the NSA information at issue is reserved to those who possess the necessary security clearances and access approvals. In this case I deny access approval to the NSA information requested. Plaintiff's counsel has never held an NSA clearance or access approval. Further, although Plaintiff may currently possess a TOP SECRET clearance, I conclude that the information sought here for litigation purposes, must not be disclosed. The information must not be disclosed because of the fragility of the sources and methods involved and the risk that disclosure would compromise those sources and methods.¹

1. Executive Order 12958, section 4.2 and Executive Order 12968 section 1.2 require, prior to obtaining access to classified information, a demonstrated "need to know," in addition to possessing appropriate security clearances and access approvals. Further, determinations regarding "need to know" are committed to the discretion of the Agency and are conclusive. Section 1.5 of Exec. Order 12968. However, a discussion of the "need to know" issue is not necessary where the States Secrets privilege or NSA's statutory privilege are invoked.

THE NATIONAL SECURITY AGENCY

6. (U) The National Security Agency/Central Security Service 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 has two primary missions: (1) to conduct the signals intelligence ("SIGINT") activities of the United States Government; and (2) to carry out the responsibilities of the Secretary of Defense concerning the security of communications systems for the United States Government.

7. (U) NSA's SIGINT mission is conducted through sophisticated collection technologies that allow NSA to obtain information from foreign electromagnetic signals. Based on information derived from these activities, NSA provides reports on a rapid-response basis to national policy-makers, military commanders, and other entities throughout the federal government. This information has proven to be highly reliable and essential to the national defense, national security, and the conduct of the foreign affairs of the United States. Information obtained from intercepted foreign communications is called communications intelligence (hereinafter, "COMINT"). NSA's COMINT efforts constitute part of the core functions and activities of the Agency.

8. ~~(TS//SI)~~ 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 those targets, the vulnerability of particular foreign communications, and the extent of any cryptanalytic successes 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 degree of success or weakness in exploiting those targets, the vulnerability of particular foreign communications, and the extent of any cryptanalytic success would encourage countermeasures by the targets of NSA's COMINT efforts. If a foreign power 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 the foreign powers' signals. If a source becomes unavailable, national policy-makers, military commanders, and the intelligence community must operate without the information the signals provided. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9.(U) All aspects of NSA's COMINT efforts are integral to NSA's core functions and activities. These functions and activities are protected from public disclosure by several statutes. These statutes protect the fragile nature of NSA's COMINT efforts including but not limited to the existence and depth of signals intelligence-related analytical successes, weaknesses and exploitation techniques. These statutes recognize the vulnerability of signals intelligence to countermeasures of a foreign power and the significance of the loss of valuable foreign intelligence information to national policy-makers, military commanders, and the intelligence community.

10.(U) In particular, the National Security Agency Act of 1959, described below, protects classified and unclassified functions and activities of NSA. Also, the National Security Act of 1947, codified at 50 U.S.C. § 403-3 (c)(6), provides that the

Director of Central Intelligence (DCI), as head of the intelligence community, shall protect intelligence sources and methods from unauthorized disclosure. NSA, as part of that community, is also responsible to protect intelligence sources and methods. 50 U.S.C 401a(4)(C), Section 1.7(e) of Executive Order 12333.

NSA'S STATUTORY PRIVILEGE

(50 U.S.C. § 402, note)

11.(U) There are two primary methods of protecting NSA functions and activities in litigation such as this. The first is by the ~~the~~ assertion of the States Secret privilege by the Secretary of Defense, as head of the Agency for this purpose. After review of the SIGINT reports and examples of the NEVWG minutes, I conclude that it is necessary for the Secretary of Defense to protect the NSA Sensitive Compartmented Information at issue here by asserting that privilege. The second method of protection is NSA's statutory privilege, the privilege which I assert, as Director of NSA, through this declaration over the same information.

12. (U) Section 6 of the National Security Agency Act of 1959, Public Law 86-36 (50 U.S.C. § 402, note) provides that "[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 the persons employed by such agency." By this language Congress expressed its finding that disclosure of any information relating to NSA activities is potentially harmful. The courts have also held that the protection provided by this statutory privilege is, by its very terms, absolute. See, Linder v. NSA, 94 F. 3d 693 (D.C. Cir. 1996). Section 6

states unequivocally that notwithstanding any other law, including the discovery laws, NSA cannot be compelled to disclose any information with respect to its activities. See, Hayden v. NSA, 608 F.2d 1390 (D.C. Cir. 1979). Further, while in this case the harm in disclosing the requested reports and the NEVWG minutes would be very serious, NSA is not required to demonstrate specific harm to national security when invoking this statutory privilege. To invoke the privilege NSA must demonstrate only that the information relates to its activities. NSA's functions and activities are therefore protected from disclosure regardless of whether or not the information is classified -- i.e., regardless of whether the information is covered by the State Secrets privilege and, regardless of a requesting party's litigation needs. Because the SIGINT reports at issue and the NEVWG minutes are integrally related to NSA's functions and activities, that information is absolutely protected from disclosure by this statutory privilege.

13.(U) Accordingly, I assert the above statutory privilege over the NSA originated information described herein. I do so because the information would reveal intelligence sources and methods and because the information directly relates to NSA core functions and activities. Regardless of any need demonstrated by Plaintiff in the context of this litigation, NSA can not be required to disclose this information.

INFORMATION AT ISSUE

Signals Intelligence Reports

14. (U//FOUO) Mr. Barlow described, in classified terms, four SIGINT reports he requests NSA to produce. His stated intention is to use the four docu-

ments to help him describe another 20 or more reports he wants NSA to produce. Using Mr. Barlow's descriptions NSA searched for the reports. NSA located two reports approximately matching Mr. Barlow's descriptions. Both reports are currently and properly classified TOP SECRET UMBRA and one of the two carries the additional caveat GAMMA. This additional caveat is an indication of the added level of sensitivity of the information contained in the report.

15. ~~(TS//SI//G)~~ [REDACTED]

16. ~~(TS//SI//G)~~ [REDACTED]

[REDACTED]. This type of information is as invaluable to

United States policy-makers today as it was at the time of the reports [REDACTED]

[REDACTED] Any hint that these communications are being successfully exploited would encourage immediate countermeasures. Accordingly, none of the information in the two SIGINT reports can be released without risking disclosure of the source of the communications and its method of collection.

Minutes of The Nuclear Export Violations Working Group

17. ~~(TS//SI)~~ Likewise, the information reported in the NEVWG minutes and derived from [REDACTED] SIGINT reports would reveal to the knowledgeable person [REDACTED] sources and methods used to obtain valuable information. Each set of minutes is covered with a form identifying the minutes as classified TOP SECRET CODEWORD, with the handling caveat "handle Via COMINT channels." This specifically identifies the material as NSA originated intelligence. [REDACTED]

[REDACTED]

18. ~~(TS//SI)~~ [REDACTED]

[REDACTED]

Some minutes, as currently stored, have agendas attached which specifically identify

the serial numbers of NSA SIGINT reports. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

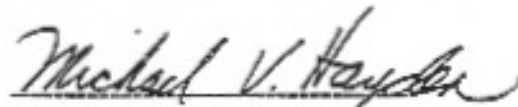
[REDACTED]

Finally, with the exception of one set of minutes marked SECRET, each page of the minutes is marked TOP SECRET UMBRA, again, specifically identifying the source of the information as SIGINT. All information in these minutes derived from SIGINT must thus be protected.

CONCLUSION

19. (U//FOUO) For the reasons stated above the risk of compromise to the sources and methods described is too great, and the harm to the national security which would result is too severe, to permit the disclosure of the information sought. Accordingly, I find it is necessary to protect that information through invocation of the States Secrets privilege over the two specific SIGINT reports and over NSA information in the NEVWG minutes derived from NSA SIGINT reports, and I hereby assert NSA's statutory privilege over the same information.

Pursuant to Title 28 Section 1746, I declare under penalty of perjury that the foregoing is true and correct.



MICHAEL V. HAYDEN
Lieutenant General, USAF
Director, National Security Agency

Executed this 20th day of February, 2000

109

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 6th day of March 2000, I caused to be placed in the United States mail (first class mail, postage prepaid) copies of "APPENDIX TO DEFENDANT'S MOTION FOR A PROTECTIVE ORDER" addressed as follows:

Paul C. Warnke, Esq.
Dianne S. Pickersgill, Esq.
Howrey, Simon, Arnold & White, LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Gina M. Goddard