

C 10-2880

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS AGAINST UNIDENTIFIED
FLYING OBJECTS SECRECY

Plaintiff

v.

NATIONAL SECURITY AGENCY

Defendant

CIVIL ACTION NO.
80-1562

AFFIDAVIT OF EUGENE F. YEATES

State Of Maryland)
) ss.
County Of Anne Arundel)

Eugene F. Yeates, being duly sworn, deposes and says:

1. I am the Chief, Office of Policy, of the National Security Agency (NSA). As Chief, Office of Policy, I am responsible for processing all initial requests made pursuant to the Freedom of Information Act (FOIA) for NSA records. I have read and am familiar with the allegations contained in the Complaint in this case. The statements herein are based upon my knowledge, upon my personal review of information available to me in my official capacity, and upon conclusions reached in accordance therewith.

2. I submit this affidavit regarding all records that have been located by the NSA pursuant to the plaintiff's FOIA requests, in support of the Agency's Motion for Summary Judgment. To supplement this testimony, I will execute an additional affidavit, classified TOP SECRET, to provide highly classified information which is not available in the public realm and which specifically identifies the NSA records being withheld from the plaintiff for the Court's in camera consideration.

Approved for Release by NSA on
11-3-2004, FOIA Case # 44543

2004

THE RELEVANT DOCUMENTS

3. This Agency received four separate referrals (described below) from the Central Intelligence Agency (CIA) concerning NSA documents located by that Agency when it was engaged in FOIA litigation concerning information pertaining to UFOs. (Ground Saucer Watch v. CIA, D.D.C. #78-859.) The first was on November 9, 1978 when this Agency received copies of fifteen Agency documents located by CIA. The NSA also received two other referrals from CIA on December 4, 1978 which provided three additional NSA documents. Subsequently by letter dated December 14, 1978, attorney for the plaintiff, Peter A. Gersten (who was the attorney of record in the CIA litigation) was informed by CIA of the referral of the documents to this Agency. Mr. Gersten then filed a request with NSA for the eighteen documents in his own name on December 22, 1978. In a letter dated January 9, 1979, Roy R. Banner, Chief, Policy Staff, advised Mr. Gersten that the NSA records that had been referred to this Agency by CIA were exempt from release under 5 U.S.C. § 552(b)(1) because they are classified in their entirety, and exempt from release under 5 U.S.C. § 552(b)(3) because they are exempt from release by 18 U.S.C. § 798, 50 U.S.C. § 403(d)(3) and Section 6 of Public Law 86-36 (50 U.S.C. 402 (note)). (A copy of this letter is attached to the Complaint as Exhibit C. A true and correct copy is also attached to this affidavit as Exhibit 1.)

4. By letter dated January 29, 1979 Mr. Gersten appealed the denial of the documents referred by the CIA. (A copy of this letter is attached to the Complaint as Exhibit D. A true and correct copy of this letter (less enclosures) is also attached to this affidavit as Exhibit 2.) On March 2, 1979 the NSA Freedom of Information Act/ Privacy Act Appeals Authority affirmed the denial of the request for release of the information

on the same grounds, i.e., that the information is classified in its entirety and therefore exempt from release under 5 U.S.C. § 552(b)(1) and that the information is exempt from release under 5 U.S.C. § 552(b)(3) for the reason that other statutes prevent its disclosure, to wit: 18 U.S.C. § 798, 50 U.S.C. § 403(d)(3) and Section 6 of Public Law 86-36. (A copy of this letter is attached to the Complaint as Exhibit E. A true and correct copy is also attached to this affidavit as Exhibit 3.)

5. On February 16, 1979 plaintiff in the instant case, by counsel, filed an FOIA request with NSA for all documents in possession or under the control of NSA relating to UFOs and the UFO phenomena. (A copy of this letter is attached to the Complaint as Exhibit F. A copy is also attached hereto and marked Exhibit 4.) By letter dated January 10, 1980, Mr. Banner released two documents within the scope of the request; deletions of information exempt under the provisions of 5 U.S.C. § 552(b)(1) and (b)(3) were taken prior to that release. Plaintiff was also advised in this letter that other NSA documents existed but were exempt from release under 5 U.S.C. § 552(b)(1) because they are classified in their entirety; exempt from release under 5 U.S.C. § 552(b)(3) because disclosure of them was prohibited by 18 U.S.C. § 798, 50 U.S.C. § 403(d)(3) and Public Law 86-36; exempt from disclosure under 5 U.S.C. § 552(b)(5) because they are intra agency memoranda, or letters which would not be available by law to a party other than an agency in litigation with this Agency; or exempt under 5 U.S.C. § 552(b)(6) because they are to personnel or similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. (A copy of this letter is attached to the Complaint as Exhibit G. A true and correct copy is also attached to this affidavit as Exhibit 5.) The January 10 letter also advised the plaintiff that certain information,

originating with other Federal agencies or components would be referred to the originating agency. A total of seventy-nine documents were referred to various agencies for their direct response to plaintiff.

6. An additional NSA document was referred to the NSA by the CIA on July 27, 1979. (The fourth and final CIA referral.) In a letter dated December 19, 1979, Mr. Banner responded to the referral by again advising Mr. Gersten that this record is exempt from release under 5 U.S.C. § 552(b)(1) because it was classified in its entirety, and exempt from release under 5 U.S.C. § 552(b)(3) because disclosure of it was prohibited by 18 U.S.C. § 798, 50 U.S.C. § 403(d)(3) and Public Law 86-36. (A true and correct copy of this letter is attached as Exhibit 6.)

7. By letter dated January 23, 1980, plaintiff appealed the denial of the information referred by CIA and the subsequent denial of his general FOIA request of February 16, 1979. By reply letter dated March 24, 1980, the NSA Freedom of Information Act/Privacy Act Appeals Authority affirmed the denial of plaintiff's request for release of information on the same grounds as cited above. (A copy of this letter is attached to the Complaint as Exhibit K. A true and correct copy is also attached to this affidavit as Exhibit 7.)

8. Finally, a portion of a document which is responsive to the plaintiff's request was recently declassified and released to counsel for the plaintiff by letter dated September 15, 1980. (A true and correct copy of this letter less the enclosure is attached as Exhibit 8.)

THE STATUS AND MISSION OF NSA

9. NSA was established by Presidential Directive in October 1952 as a separately organized Agency within the Department of Defense under the direction, authority, and control of the Secretary of Defense, who was designated by the President as Executive Agent of the Government for conducting

the communications security activities and signals intelligence activities of the United States. A primary signals intelligence (SIGINT) mission of NSA is to intercept radio communications sent to or from foreign governments in order to obtain foreign intelligence information necessary to the national defense, national security, or the conduct of foreign affairs. The intelligence information derived from the intercept of foreign communications is called communications intelligence (COMINT). Of the NSA records at issue in this case, only four are not COMINT reports and will be addressed separately. All of the remaining records sought in this civil action are the product of signals intelligence activities.

10. These COMINT activities include the targeting of foreign governments' communications both within their borders and to and from communicants abroad involving the use of their own radio transmitter and receiver facilities not available for public use. Such communications links are known as "government net" communications. A foreign government may use other means for sending and receiving international radio communications in addition to or instead of its own government facilities. (International radio communications as used here includes communications passed at least in part by wire.) This involves the foreign government's use of the facilities of an international communications common-carrier which is also available for use by the public. Such common-access carriers supply the means by which more than half the encrypted and plain text radio communications of foreign governments, foreign organizations, and their representatives are carried.

11. It is common knowledge that the total volume of radio signals transmitted on a given day is vast. It is also generally known that radio transmissions can be received by anyone

operating the proper receiving equipment in the right place at the right time. Thus, the fact that NSA can intercept radio communications is generally known. So, too, is it known to foreign officials that such interception of radio communications is a primary mission of the NSA. Foreign officials may be expected to know, also, that NSA cannot possibly intercept even a significant percentage of all such communications, especially taking account of the fact that NSA's activities involve worldwide communications, not solely those having a United States terminal. The number is simply too vast to be handled with any reasonable amount of personnel and equipment. Moreover, the cost and effort of such interception would be disproportionate to the intelligence value of the results.

12. Instead -- as NSA's foreign intelligence targets presumably know well -- NSA must focus its interception activities on those particular communications lines, channels, links or systems which yield the highest proportion of useful foreign intelligence information. What foreign government officials do not know, however, is which of the vast number of radio communications NSA attempts to intercept, which are intercepted, and, of those that are intercepted, which yield to NSA processing methods and techniques. It is the protection of this critical information that is at the heart of the instant case.

13. The continued efficacy of NSA's vital intelligence activities requires that the lines, channels, links and systems actually monitored remain unidentified. If a foreign government obtains sufficient reason to suspect that NSA is able to intercept and process that government's radio communications, that government would be expected to take immediate steps to defeat that capability. This can be accomplished in a number of ways. A foreign government might shift to communications

links the U.S. cannot intercept. It may also choose to use alternate methods of communications. The foreign governments may possess the technical capability to either upgrade or initiate cryptography to secure its communications. Finally, a communication channel believed to be targeted by NSA can be used by a foreign government to pass misleading information.

14. If a foreign power is successful in defeating an interception operation, all of the intelligence from that source is lost unless and until NSA can establish a new and equivalent intercept. The risk involved is great. The information produced by NSA includes political, economic, scientific and military data which is of immeasurable value to the President, the Secretary of Defense, the Secretary of State and other policymakers. Obviously, if a COMINT source used by the Agency becomes unavailable, policymakers must operate without the information that source produced. Sometimes it is impossible to establish a new and equivalent intercept and the source is lost permanently. Those losses are not only extremely harmful to the national security but also impose a heavy burden on the limited resources of NSA which must attempt to recover the old source or establish an equivalent source of information.

15. Even after targeting only a small proportion of all available electromagnetic communications for interception, the number of messages intercepted is extremely large. NSA thus is faced with a considerable task in selecting out those messages that will be reviewed for possible intelligence interest. The manner in which NSA does this selection and the degree of reliability and success its methods enjoy are subjects about which virtually no authoritative information has ever been released to the public. Information about these subjects would enable foreign observers to further assess, and thus take

steps to defeat, the capabilities of NSA's intelligence gathering techniques.

RELEASE OF COMINT REPORTS

16. The COMINT reports being withheld from the plaintiff are all based on intercepted foreign communications. The disclosure of these records would identify the communications that had been successfully intercepted and processed for intelligence purposes. No meaningful portion of any of the records could be segregated and released without identifying the communications underlying the communications intelligence report. Also disclosed would be the communications lines, channels, links, and systems targeted and intercepted and NSA's capabilities to successfully process the underlying communications. These communications targets and the processing techniques are current intelligence sources and methods. Disclosing them would permit foreign intelligence officials to draw inferences and make assessments about this nation's COMINT collection and processing activities that would enable them to take counter-measures, as described above, to defeat the capabilities of NSA's intelligence gathering techniques.

17. The COMINT reports being withheld from the plaintiff are classified in their entirety to protect intelligence sources and methods. When originated, certain of the records were properly classified Top Secret pursuant to Executive Order 10501, Section 1(a), providing for the application of that classification to information, the unauthorized disclosure of which could result in exceptionally grave damage to the nation, such as the "compromise of ... intelligence operations ... vital to the national defense." Other documents were properly classified Secret pursuant to Executive Order 10501, Section 1(b), providing for the application of that classification to information, the unauthorized disclosure of which could result in

serious damage to the nation, such as by "compromising... information revealing important intelligence operations." The rest, which were originated after June 1, 1972, were properly classified Top Secret pursuant to Executive Order 11652, Section 1(A), providing for the application of that classification to information, the disclosure of which could result in exceptionally grave damage to the national security, such as "the compromise of complex cryptologic and communications intelligence systems," or were properly classified Secret under Executive Order 11652, Section 1(B), providing for the application of that classification to information, the unauthorized disclosure of which could result in serious damage to the national security, such as the revelation of significant intelligence operations. Each COMINT record was appropriately marked when it was originated. Each COMINT record and each portion thereof remains properly so classified. These COMINT records meet the criteria for classification in Section 1-3 of Executive Order 12065, and they are properly classified within the categories provided in Section 1-1 of the Order. I have reviewed all of the COMINT records being withheld from the plaintiff for possible declassification or downgrading according to the provisions of Sections 3-1 and 3-3 of Executive Order 12065 and I find each portion of each record remains properly classified and therefore excluded from declassification or downgrading. In conducting this review, I weighed the significant need for openness in government against the likelihood of damage to our national security at this time and determined that the records should continue to be classified because of the damage their unauthorized disclosure would reasonably be expected to cause to communications intelligence activities of the United States Government. Because they are properly classified under Executive Order 12065, the

records are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(1).

18. Release of the COMINT records being withheld from the plaintiff or any portion of any of them would disclose information about the nature of NSA's activities including its functions and thereby jeopardize the intelligence collection mission of the Agency. (See paragraphs 11 through 15 above.) This mission of the NSA is singular and unique. Public disclosure of specific information about the records in the context of that singular mission would reveal certain functions and activities of the NSA which are protected from disclosure by Section 6 of Public Law 86-36, 50 U.S.C. § 402 (note). Moreover, the disclosure of these classified records or of specific information about them would reveal information protected by 18 U.S.C. § 798 prohibiting the unauthorized disclosure of classified information concerning the communications intelligence activities of the United States. The disclosure of these records or any portion of them would also compromise classified information pertaining to intelligence sources and methods protected from disclosure by Section 103(d)(3) of the National Security Act of 1947 (50 U.S.C. § 403(d)(3)). Accordingly, it was determined that the COMINT records are exempt from release under 5 U.S.C. § 552(b)(3) of the Freedom of Information Act because each portion of each record is protected from disclosure by Section 6 of the Public Law 86-36, 18 U.S.C. § 798, and by Section 103(d)(3) of the National Security Act of 1947.

19. It should be noted that the classification of these COMINT records and the withholding of them pursuant to FOIA exemptions (b)(1) and (b)(3) are not based only on the substantive content of the documents but also on the characteristics of the reports that identify the intelligence sources and methods that would be seriously jeopardized by the disclosure plaintiff

seeks. That is, all of the COMINT reports at issue here (with one exception) are based on messages which were intercepted from government net communications systems. (See paragraph 10, above.) Moreover, almost all of these messages were enciphered when originally transmitted. Thus, release of any portion of the substantive message would not only risk identifying the ability of NSA to intercept a particular line of communications but would also risk revealing the capability of NSA to read a foreign government's enciphered messages. Similar harm would result from the disclosure of any material that might help to identify the communications intercepted by NSA, such as information about date, time, origin or manner of transmission or receipt. Also, the revelation of the substantive content of the reports would allow foreign officials to determine which channels or types of communications are being monitored. The public disclosure of either the content of the reports or of any identifying characteristics would have the same adverse consequences on the communications intelligence activities of the United States. All such information relates to classified communications intelligence functions of NSA that have not been publicly disclosed by the Agency in any other context.

RELEASE OF NON-COMINT RECORDS

20. Three of the four non-COMINT records at issue here were released in large part, with certain deletions. One of these records was withheld in its entirety. These documents are:

a. A document entitled UFO Hypothesis and Survival Questions which was prepared by an Agency employee. The entire report has been released except for the name and organization of the preparer of the document. This is not a COMINT report and contains no reference to SIGINT activities. It is a draft of a monograph that was located in an Agency

file where it had been retained for historical reference purposes. The deletion was made pursuant to 5 U.S.C. § 552(b)(3) which provides that the FOIA does not apply to matters that are specifically exempted from disclosure by statute. The applicable statute in this instance is Section 6 of Public Law 86-36 which specifically exempts from disclosure the names and titles of NSA employees.

b. The second non-COMINT document is a memorandum which discusses the UFO phenomena as the author believes they may relate to the intelligence community. This document was released with deletions of the descriptive references to the COMINT operations of the Agency. The deletions contain information which I have determined to be currently and properly classified and, thus, exempt from disclosure under 5 U.S.C. § 552(b)(1). Portions of the material deleted also concern information with respect to the organization and operational activities and functions of NSA which are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(3) which provides that the FOIA does not apply to matters that are specifically exempted from disclosure by another statute. Section 6 of Public Law 86-36 provides that no law shall be construed to require disclosure of the organization or any function of the NSA or any information with respect to the activities thereof. Moreover disclosure of this information would reveal information protected by 18 U.S.C. § 798 which prohibits the unauthorized disclosure of classified information concerning COMINT activities and by the National Security Act of 1947 (50 U.S.C. § 403(d)(3)) which prohibits the disclosure of information pertaining to intelligence sources and methods. A portion of this document was deleted pursuant to 5 U.S.C. § 552(b)(5) because it represents this employee's expression of opinion on how the topic relates

to the mission of the Agency. This deletion is non-factual and does not represent finalized Agency policy. It includes the kind of analysis, frank comment and recommendations, which an agency must encourage and protect from public disclosure to avoid a chilling effect upon free and candid internal discussions in support of optimum decision making within the Agency. Finally, a portion of this record in addition to being exempt from disclosure under 5 U.S.C. §552(b)(1) and (b)(3) is being withheld for the reason that it is not within the scope of plaintiff's request.

c. The third non-COMINT document is a memorandum for the record by an NSA assignee that was originally withheld in its entirety pursuant to 5 U.S.C. § 552(b)(5) and (b)(6). In my review today I have ascertained, however, that this memorandum is neither in whole nor in part responsive to the plaintiff's request. It does not deal with UFOs or the UFO phenomena. Rather, it is a document voluntarily prepared by the assignee to report an incident that occurred during his attendance at a UFO symposium. It is the assignee's personal account of his activities and does not include reference to any UFO sighting or phenomena.

d. The final non-COMINT record is a report which was addressed in paragraph 8, above. The portion of the record responsive to this FOIA request has been released to plaintiff's attorney, (See Exhibit 8, attached hereto). The remaining portions of the record contain no reference relating to UFOs or UFO phenomena and are, therefore, not responsive to plaintiff's request.

21. Further information about the records or portions thereof being withheld is contained in the in camera affidavit executed by me.

Eugene F. Yeates
EUGENE F. YEATES
Chief, Office of Policy
NSA

Subscribed and sworn to before
me this 30th day of September 1980.

Serald O. Everett
NOTARY PUBLIC

My commission expires on July 1, 1982.