

CORRECTED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

_____)	
CHARLES ROBERT VII)	
Plaintiff)	Civil Action No.
v.)	CV-04-1961 (NGG)
UNITED STATES DEPARTMENT OF JUSTICE,)	(Judge Nicholas G. Garaufis)
Defendant.)	
_____)	

DECLARATION OF JAMES A. BAKER

I, James A. Baker, do hereby state and declare as follows:

1. I am the Counsel for Intelligence Policy, Office of Intelligence Policy and Review, (OIPR), United States Department of Justice. In this capacity, I supervise all operations within the office including Freedom of Information Act (FOIA), 5 U.S.C. § 552, administration. I am the final decision-making authority in my office regarding access requests made under the FOIA. At my direction, OIPR's FOIA Coordinator determines whether records responsive to access requests exist and, if so, whether they can be released consistent with the FOIA.

2. I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties.

3. The Office of Intelligence Policy and Review provides legal advice to the Attorney General and the United States intelligence agencies regarding questions of law and procedure that relate to United States intelligence activities. OIPR performs review functions of certain intelligence activities, and prepares and presents applications for

electronic surveillance and physical search to the United States Foreign Intelligence Surveillance Court.

4. My authority to make determinations regarding the classification of information on national security grounds is derived from Executive Order 12958, *as amended*, "Classified National Security Information," 68 Fed. Reg. 60 (March 28, 2003). As the Counsel for Intelligence Policy, I hold original classification authority at the TOP SECRET level, by delegation from the Attorney General, and therefore am authorized to make determinations regarding classification of national security information and to conduct classification reviews.

5. By a letter dated February 17, 2004, plaintiff requested access to records pertaining to "all FISA Affidavits that were relied upon by the FISA Court to authorize the wiretaps of the telephones of Charles Robert, Esq., a/k/a Snowflake 5391 to the DOJ and the CIA." (Exhibit A). OIPR received this request on February 19, 2004 and assigned the plaintiff's request tracking number OIPR 04-0016.

6. OIPR's files fall into three general categories: Foreign Intelligence Surveillance Act (FISA) records, including applications for authority to conduct electronic surveillance or physical searches; litigation records; and policy and operational records including congressional inquiries and reports.

7. The FISA specifies that the record of proceedings "including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence."

50 U.S.C. § 1803(c). It further provides that persons rendering assistance under the Act do so "in such a manner as will protect its secrecy."

8. My March 1, 2004, response to the plaintiff informed him that we could neither confirm nor deny the existence of records pertaining to him in the OIPR files relating to applications to the Foreign Intelligence Surveillance Court. (Exhibit B).

This determination is authorized by Executive Order 12958 § 3.6, *as amended*, which states:

In response to a request for information under the Freedom of Information Act, the Privacy Act of 1974...

(a) An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.

Section 1.4(c) of the Executive Order identifies intelligence activities and intelligence sources or methods as categories of information that may be considered for classification. Information falling within these categories may be classified by an original classification authority if "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security ... and the original classification authority is able to identify or describe the damage." § 1.1(a). The Order defines "national security" as the "national defense or foreign relations of the United States." § 6.1(y). "It is presumed that information that continues to meet the classification requirements under this order requires protection." § 3.1(b).

9. The Department can neither admit or deny the existence of records pertaining

to FISA activities such as those called for by the plaintiff's February 17, 2004 request without disclosing classified information. As explained below, either confirming or denying that the Department maintains information in the FISA application files responsive to such requests for access would result in disclosure of the kinds of information set forth in section 1.4(c) of Executive Order 12958, *as amended*, and such disclosure could reasonably be expected to cause damage to the national security. Thus, the only response the Department can make to plaintiff's request for information within the FISA files is neither to confirm nor deny the existence of responsive information, as authorized under section 3.6(a) of Executive Order 12958, *as amended*. No responsible alternative exists to this procedure, except in those few instances where there has already been an official government affirmation or denial of the existence of such materials by an authorized United States executive branch official. To my knowledge, no such disclosure has been made regarding the subject matter of plaintiff's request.

10. If it were not permitted to make this type of response to requests for information about a specific person or organization in the FISA application files, the Department would find itself in an insoluble dilemma. Let it be assumed, for the sake of argument, that OIPR does maintain information within a FISA application that is responsive to such a request. Only three possible courses of action are available:

- a. OIPR could deny that it maintains any responsive information. In this hypothetical case, such a response would be false and, therefore impermissible.
- b. OIPR could admit that it maintains responsive information but decline to produce it on the ground it is classified. This response is not acceptable because it discloses the very heart of what must be protected: the fact

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that information about a specific person or organization was retrieved from records pertaining to approval of specific FISA surveillance, physical searches, or overseas electronic surveillance.

- c. OIPR could decline either to confirm or to deny that it maintains responsive information concerning these activities. This response would protect the security of the electronic surveillance or physical search, but only if applied consistently to every request that seeks information regarding such activities. If OIPR denied that it maintains responsive information only in cases in which it in fact does not, while refusing to confirm or deny that it maintains responsive information only in those instances in which it does maintain such information, every refusal to confirm or deny would be a tacit admission that OIPR in fact has responsive information in that case, thereby linking the subjects of those requests to the U.S. foreign intelligence gathering by one or more of the above techniques.

11. Assuming that OIPR maintains information in its FISA files that is responsive to a FOIA request, acknowledgment of that fact would disclose that information within the scope of the request was pertinent to the approval of one or more specific uses of the above techniques. Such disclosures would be recognized and exploited for the immense intelligence and counterintelligence value they would yield to trained intelligence analysts, such as those employed by hostile intelligence services. By its terms, the FOIA permits requests to be filed by "any person," including officials of foreign governments and other foreign nationals. Moreover, intelligence organizations are expert at acquiring and analyzing information in the public domain. It therefore must be expected that any information given to one FOIA requester will be available, not only to subsequent requesters, but also to hostile foreign powers and their intelligence services. If it were the policy of OIPR to indicate routinely that it maintains responsive information in its FISA files, these responses would provide trained

intelligence analysts with individual pieces of information that could be compiled into a catalog of FISA activities, overseas electronic surveillance and physical searches. Such a policy would reveal instances where such activities have been used to obtain intelligence information, and also confirm instances where there have been no such activities. From such disclosures, hostile intelligence services could discover which intelligence agents operating in this country were known to the U.S. Government and which were not. This information could be used by a hostile intelligence service to deploy counterintelligence assets against the U.S. Government more effectively, increasing the risk that U.S. intelligence collecting would be neutralized or impaired.

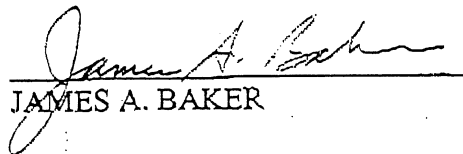
12. Assuming arguendo that OIPR did not maintain FISA information responsive to a request concerning a particular individual or organization, acknowledgment of this fact would indicate that OIPR had not prepared an application under the FISA for that individual or organization. If OIPR were to indicate routinely that it does not maintain responsive records, these responses would also be of immense value to trained intelligence analysts and foreign powers. This information would reveal that the U.S. Government's counterintelligence elements had not focused on intelligence or international terrorism activities in which that individual or organization may be involved. Thus, a hostile intelligence service or international terrorist organization could easily and quietly assess the extent of the U.S. Government's awareness of its activities.

13. For all of the above reasons, the fact of the existence or nonexistence of any FISA information responsive to the plaintiff's request is properly classified in

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accordance with criteria established by sections 1.1 and 1.4 of Executive Order 12958, *as amended*. Such information relates directly to intelligence sources, methods, and activities of the United States. The impairment of U.S. intelligence gathering that would result from disclosing such information would make the United States more vulnerable to hostile foreign intelligence services and international terrorists, and deprive U.S. policy makers of information vital to the national defense and the conduct of foreign relations. OIPR can neither confirm nor deny the existence or nonexistence of FISA information responsive to plaintiff's request without disclosing information that reasonably could be expected to cause serious damage to the national security of the United States and that is, therefore, properly classified at the SECRET level in accordance with Executive Order 12958, *as amended*.

I declare under penalty of perjury that the foregoing is true and correct based upon information and belief and that Exhibits A and B are true and correct copies.


JAMES A. BAKER

Executed on this 1st day of October, 2004.

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OVERNIGHT MAIL

February 17, 2004

GayLa D. Sessoms
FOIA Coordinator Room 6150
Office of Intelligence Policy and Review
950 Pennsylvania Avenue, N.W.
Department of Justice
Washington, D.C. 20530-0001

RE: FISA Affidavit in support of a FISA Court Order to wiretap the telephones of Charles Robert, a/k/a Snowflake 5391 to the DOJ and the CIA

Dear FOIA Coordinator GayLa D. Sessoms,

Pursuant to the FOIA, the requester seeks the release of all FISA Affidavits that were relied upon by the FISA Court to authorize the wiretaps of the telephones of Charles Robert, Esq., a/k/a Snowflake 5391 to the DOJ and the CIA. For background information, please find enclosed the FOIA complaints Robert II v CIA and DOJ and Robert VI v DOJ.

The requester seeks a waiver of FOIA costs in the public interest. It is respectfully submitted that with the Congress considering amendments to the USA Patriot Act, these affidavits will provide evidence of the need for the DOJ, CIA, and FBI to establish internal checks and balances to prevent inaccurate facts being included in the FISA Affidavits and also procedures to cure the collateral damages caused when it is subsequently learned that inaccurate information had been included in the FISA Affidavits. Since this FOIA seeks documents created prior to the enactment of the USA Patriot Act with its FOIA exemption, the release of these documents is in the public interest to learn that legislation is needed to establish procedures to cure inaccurate information presented in FISA affidavits.

If FOIA Exemptions 1 or 3 are used, then please explain in detail how the FOIA Exemptions were applied to the withheld documents. Please note the Robert VI v. DOJ AG Ashcroft service letter seeking the application of President Bush's March 25, 2003 Executive Order 12958, Section 1.7 as to misuse of national security classifications. If the "glomeration" defense is used, please explain why that FOIA defense has been applied. See Phillipi v. CIA, 546 F. 2d 1009 (D.C.Cir. 1976).

EXHIBIT A

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If there are no documents, then please provide a Declaration detailing the search for the documents. That Declaration should include an affirmative statement that there was a search of the FISA Court's docket from 1984-2004 inclusive and no FISA Orders were issued that authorized the wiretaps of the telephones of Charles Robert, Esq..

Please note that the requester has filed a complaint with FBI Director Robert Mueller that there is presently in place a DOJ "cover up" regarding the docketing of complaints filed with Inspector General Fine complaining of the refusal of the Eastern District of New York FOIA Officer docketing FOIA requests, including the FOIA request for the DOJ "Robert v. Holz" documents. That complaint also alleged that DOJ attorneys in 2004 are implementing a Barrett v. United States, 798 F. 2d 565 (2d Cir. 1986), intra-circuit nonacquiescence policy whereby DOJ attorneys have a license to withhold material evidence from federal court judges and suborn perjury if there is a good faith belief that this is necessary to protect the national security. Therefore, your decision will be presented to FBI Director Mueller and cited to federal court judges in pending litigation challenging the 2004 clandestine implementation of the nonacquiescence policy of HHS General Counsel del Real, AAG Richard Willard, and AAG John R. Bolton which is contrary to the sworn July 25, 1985 Congressional testimony of DAAG Kuhl, the President's 2004 Nominee for the Ninth Circuit, that the HHS nonacquiescence policy had ended on June 3, 1985.

Given the gravity of the allegations, please be advised that your response will also be provided to Congressional Oversight Committees considering amendments to the USA Patriot Act and to investigative reporters. The FOIA requested FISA affidavits are one of the missing dots in a mosaic of documents that connect the fact that HHS General Counsel del Real was a CIA asset who participated in a rogue CIA domestic "black operation" at IMC and his "rigging" of the HHS and SSA computers not to apply the "acquiescence" standards as explained in the sworn July 25, 1985 Congressional testimony of DAAGG Kuhl that the HHS nonacquiescence policy of HHS General Counsel del Real had ended on June 3, 1985. Therefore, is respectfully submitted that you consult with DAG Comey prior to rendering any decision.

Please render your decision within 30 days. Please be advised that given the gravity of the allegations, that the putative FOIA action Robert VII v. DOJ will be filed on or about March 18, 2004. Thank you for your prompt decision.

Sincerely,

Charles Robert

CR:aj

DAG James Comey
IG Glenn Fine
EOUSA Deputy Legal Assistant Leslie Mc Clendon
Easeterm District of New York U.S. Attorney Roslynn Mauskopf
Chief Susan Riley (Robert II v. CIA and DOJ)
AUSA Kathleen Mahoney (Robert I v CIA)



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U.S. Department of Justice

Office of Intelligence, Policy and Review

Washington, D.C. 20530

Charles Robert
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100 Merrick Road
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Rockville Centre, NY 11570

MAR - 1 2004

Re: FOIA/PA #04-0016

Dear Mr. Robert:

This responds to your February 17, 2004, request for access to records pertaining to "all FISA Affidavits that were relied upon by the FISA Court to authorize the wiretaps of the telephones of Charles Robert, Esq., a/k/a Snowflake 5391 to the DOJ and the CIA." Your Freedom of Information (FOIA) Act request was received by this Office on February 19, 2004.

The Office of Intelligence, Policy and Review (OIPR) maintains copies of all Foreign Intelligence Surveillance Court (FISC) applications, as well as requests for approval of various foreign intelligence and counterintelligence collection techniques such as physical searches or mail covers. We did not search these records in response to your request because the existence or nonexistence of such records on specific persons or organizations is properly classified under Executive Order 12958, as amended. To confirm or deny the existence of such materials in each case would tend to reveal which persons or organizations are the subjects of such requests. Accordingly, we can neither confirm nor deny the existence of records responsive to your request pursuant to 5 U.S.C. § 552(b)(1).

Furthermore, if there were any records in these files responsive to your request, they would be exempt from disclosure under section (b)(1) of the Freedom of Information Act. As stated earlier, however, you should not construe this response as either confirming or denying the existence of any such records pertaining to your request.

If you are not satisfied with this response you may administratively appeal by writing to the Co-Director, Office of Information and Privacy, United States Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001, within sixty days from the date of this letter. Both the letter and envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

James A. Baker
Counsel for Intelligence Policy

EXHIBIT B

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