



**U.S. Department of Justice**  
Office of Information Policy  
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May 18, 2016

Mr. Steven Aftergood  
Project Director  
Federation of American Scientists  
1725 DeSales Street NW, Suite 600  
Washington, DC 20016  
[saftergood@fas.org](mailto:saftergood@fas.org)

Re: OLA/13-01851 (F)  
VRB:DRH:NJS

Dear Mr. Aftergood:

This responds to your Freedom of Information Act (FOIA) request dated and received in this Office on February 8, 2013, for the Attorney General's written responses to post-hearing questions from the House Judiciary Committee following a hearing on June 7, 2012. This response is made on behalf of the Office of Legislative Affairs.

Please be advised that a search has been conducted of the electronic database of the Departmental Executive Secretariat, which maintain certain records for the Office of Legislative Affairs, including official correspondence, and two documents, totaling forty-one pages, were located that are responsive to your request. I have determined that this material is appropriate for release without excision and copies are enclosed. I apologize for the delay of this response.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2012). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal at <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within sixty days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in blue ink, appearing to read "Vanessa R. Brinkmann", with a small "BR" monogram at the end.

Vanessa R. Brinkmann  
Senior Counsel

Enclosures



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

**MAY 02 2013**

The Honorable Bob Goodlatte  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder before the Committee on June 7, 2012. We apologize for our delay and hope that this information is of assistance to the Committee. Please note that the Department is currently in litigation with Congress regarding the investigation pertaining to Operation Fast and Furious and, accordingly, we are not able to respond to questions related to that matter.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter J. Kadzik".

Peter J. Kadzik  
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable John Conyers, Jr.  
Ranking Member

**QUESTIONS FROM REPRESENTATIVE JERROLD NADLER**

**35. You issued a memo on September 23, 2009 setting forth policies and procedures governing the executive branch's invocation of the state secrets privilege (the "state secrets memo"). That policy requires your personal approval for the Department to defend assertion of the privilege in litigation.**

**A. In how many cases (since September 2009) have you approved invocation of the privilege?**

**Response:**

Some matters involving classified or sensitive information may need to be litigated under seal, and thus it should be noted that it may not be possible or appropriate for the Department to indicate the precise number or names of matters in which the Attorney General has approved the Department's defense of an invocation of the privilege. With that understanding, since the September 2009 policy was issued, the Attorney General has approved the Department's defense of an assertion of the state secrets privilege under that policy in the following six cases:

*Shubert, et al. v. Obama et al.* (07-cv-00693) (N.D. Cal.)

*Al-Aualqi v. Obama, et al.* (10-cv-1469) (D.D.C.)

*Fazaga et al. v. Federal Bureau of Investigation et al.* (SA11-cv-00301) (C.D. Cal.)

*Roule v. Petraeus*, (10-cv-4632) (N.D. Cal.)

*Jewel, et al. v. Obama, et al.* (3:08-cv-04373) (N.D. Cal.)

*Ibrahim v. Department of Homeland Security, et al.* (3:06-cv-0545) (N.D. Cal.)

**B. Where you have approved the privilege, have you ever referred allegations of wrongdoing raised in the case to an Inspector General of any agency or department for investigation (as is contemplated by the policy)?**

**Response:**

Please see response to question 35(B)(iii), below.

**i. If so, how many cases?**

**Response:**

Please see response to question 35(B)(iii), below.

**ii. What have been the results of those IG referrals and have you shared those with Congress? Will you share them with this Committee?**

**Response:**

Please see response to question 35(B)(iii), below.

- iii. Where you have not referred it to an Inspector General, what evidence have you required to conclude that the allegations of wrongdoing are not credible?**

**Response:**

Under the September 2009 policy, the Department of Justice will not defend an invocation of the state secrets privilege in order to (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States Government; (iii) restrain competition; or (iv) prevent or delay the release of information which would not reasonably be expected to cause significant harm to national security. If the Attorney General concludes that it would be proper to defend invocation of the privilege in a particular case, but the case raises credible allegations of government wrongdoing, the Department will refer those allegations to the Inspector General of the appropriate department or agency for further investigation, and will provide prompt notice of the referral to the head of the appropriate department or agency.

The Department's policy is not to disclose referrals made to Inspectors General regarding possible misconduct of employees of other agencies or referrals to the Department's Office of Professional Responsibility. Consistent with that policy, we could not provide the number of cases, if any, that may have been referred to an IG pursuant to the Department's policy on the state secrets privilege. However, to the extent IG investigations are undertaken, the Government typically has released public versions of final IG reports.

- C. In how many cases/instances have you disapproved of invocation of the privilege?**

**Response:**

In a circumstance in which the Attorney General were to not approve the Department's defense of a state secrets privilege assertion, deliberations within the Executive Branch on such a matter should remain confidential because there may be various reasons why, in the context of ongoing litigation, the Department might decline to pursue a privilege assertion (for example, to pursue alternative grounds for dismissal or settlement of a case).

- 36. The state secrets memo indicates that the Department will provide "periodic reports" to "appropriate oversight committees" with respect to all cases in which the privilege is invoked.**

- A. How many periodic reports have been filed and with which committees?**

**Response:**

The Department submitted its first periodic report on April 29, 2011, to the House and Senate Judiciary and Intelligence Committees. This is the only report submitted to date. We expect a second report to be submitted in the near future.

- B. Please provide copies of all such reports to the House Judiciary Committee. To the extent you object to doing so, please provide the basis for that objecting, including an explanation of why these reports, which involve the invocation of an evidentiary privilege in Article III courts, do not fall within the Judiciary Committee's oversight jurisdiction.**

**Response:**

The April 2011 report was provided to the Committee.

- 37. You do not indicate in the state secrets memo whether this Administration will agree to judicial review of the basis for invoking the privilege. The prior Administration took the position that information could not even be disclosed in camera to an Article III judge, thus ensuring that there was no judicial review of whether the privilege had been properly invoked.**

**What is your position as to judicial review of the information that the government seeks to withhold in two key respects:**

- A. Can a judge review the allegedly privileged information?**

**Response:**

As set forth by the Supreme Court, the law governing the state secrets privilege does not require that the Executive Branch submit classified information subject to the privilege to the district court with a state secrets privilege assertion. *See Reynolds v. United States*, 353 U.S. 1, 10 (1953) ("It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."); *see also id.* at 8 (courts must decide a state secrets privilege "without forcing a disclosure of the very thing the privilege is designed to protect"). In some instances, the privilege can properly be asserted by describing the privileged information in unclassified terms alone.

However, as the Department's April 2011 report indicates, the Executive Branch has committed to continue its practice of supporting any invocation of the privilege with detailed evidentiary submissions that provide a firm foundation for the court to evaluate whether the Government has demonstrated a risk of significant harm to national security. The Department recognizes that courts have an essential and independent role to play in reviewing the Executive Branch's assertion of the privilege and will continue to assist courts in carrying out their role.

Accordingly, it is the Executive Branch's normal practice to provide reviewing courts with declarations, solely for *in camera, ex parte review*, that describe the privileged information in classified terms so that the courts may rule based on a robust understanding of the information at issue and why disclosure would harm national security.

We do not believe your description of the position taken by the prior Administration is accurate. As the Department's 2011 report indicates, all privilege assertions pending when this Administration took office in 2009 were reviewed by a Task Force appointed by the Attorney General, and the Task Force concluded that, in each of the cases reviewed, the risk to national security was sufficiently significant, and the evidentiary submission made to the court to support the privilege was sufficiently strong, that invocation of the privilege was warranted and should be maintained. In addition, in each pending case evaluated by the Task Force, the Government had provided reviewing courts with lengthy, well documented classified submissions setting forth the information that the litigation threatened to expose, the national security interests at stake, and other relevant information. These factual submissions uniformly provided the court with an ample basis for understanding why the evidence in question could not be made public and why the claims and defenses at issue could not be litigated without causing significant harm to national security.

**B. Can a judge disagree with the executive branch's decision as to whether the privilege is properly invoked?**

**Response:**

Yes. *Reynolds* provides that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." See 345 U.S. at 8.

**38. We have made several requests to you to allow us to review the Office of Legal Counsel memo that reportedly provides the legal justification for the lethal targeting of U.S. citizens who are terror suspects. Your Department has sought dismissal of cases seeking judicial review of lethal targeting by arguing, among other things, that the appropriate check on executive branch conduct here is the Congress and that information is being shared with Congress to make that check a meaningful one. Yet we have yet to get any response to our requests.**

**A. Will you commit to providing the memo?**

**Response:**

As a general matter, the Department of Justice does not disclose confidential legal advice that it has provided. Nonetheless, the Administration has undertaken significant steps to accommodate the interests of the appropriate committees of Congress in the general subject of your question. The Department has provided Members of the Judiciary Committee with, and released publicly, a draft white paper that sets forth a legal framework for considering the circumstances in which the U.S. government could conduct a lethal operation directed against a U.S. citizen who is a senior operational leader of Al-Qa'ida or an associated force. In addition, the Attorney General made a public address at Northwestern University School of Law in March 2012 explaining that

framework, and several other administration officials have also made public remarks to help explain the legal framework that would apply in this area. As the Attorney General indicated in his address, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the applicable legal framework, and would of course follow the same practice where lethal force is used against U.S. citizens. As a general matter, the department or agency that engages in any particular counterterrorism activity is in the best position to explain the legal basis for that activity to its appropriate oversight committee. Consistent with that, it is our understanding that those departments and agencies involved in our nation's counterterrorism efforts regularly keep their appropriate oversight committees informed regarding those activities, including the legal basis for them.

Without confirming or addressing any particular program or operation, the President's recent decision to provide members of the Intelligence and Judiciary Committees with access to classified OLC advice related to the subject of the draft white paper was an extraordinary accommodation in the context of ongoing activities by the Executive Branch. The decision to share the advice on a limited basis was designed to accommodate the interest of those committees in the underlying subject matter of the advice while at the same time seeking to protect the sensitive and deliberative information contained in the documents.

**B. Will you also commit to briefing interested Committee members?**

**Response:**

See response to Question 38A, above.