

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES)
UNION OF MASSACHUSETTS, INC.,)
)
Plaintiff,)
)
vs.)
)
THE CENTRAL INTELLIGENCE)
AGENCY, *et al.*,)
)
Defendants.)
)
_____)

Civil Action No. 1:22-cv-11532

**DEFENDANTS’ RESPONSE TO PLAINTIFF’S
STATEMENT OF ADDITIONAL MATERIAL FACTS**

As to each fact listed in Plaintiff’s Statement of Additional Materials Facts, Defendants dispute the materiality of the fact listed for the reasons set forth in their Opposition to Plaintiff’s Motion for Summary Judgment and Reply in Support of Defendants’ Motion for Summary Judgment, filed concurrently herewith.

16. ACLUM’s FOIA requests, dated August 15 or 16, 2022, were directed to the Department of Homeland Security (“DHS”), the National Geospatial-Intelligence Agency (“NGA”), and the National Reconnaissance Office (“NRO”) in addition to CIA, ODNI, DoD, and NSA. *See* D.E. 9-1 and McFadden Decl., Exhibits A–F.

Response: Undisputed.

17. In a letter dated September 8, 2022, the NGA stated that an “extensive search of National Geospatial-Intelligence Agency records failed to identify any documents in our files that are responsive to your request.” McFadden Decl., Exhibit G.

Response: Undisputed.

18. In a letter dated September 12, 2022, DHS stated that, after a “comprehensive search of files with The Office of the Executive Secretary (ESEC) and the Office of the Chief Information Officer (OCIO),” DHS was “unable to locate or identify any responsive records.” McFadden Decl., Exhibit H.

Response: Undisputed.

19. In a letter dated February 24, 2023, NRO stated that “[a]fter a thorough search” of its record and databases, NRO “located no NRO-originated records” responsive to the requests. McFadden Decl., Exhibit N.

Response: Undisputed.

20. CIA, ODNI, NSA, and DoD responded to ACLUM’s FOIA requests in January 2023, McFadden Decl., Exhibits I–L, after the statutory timeframe in which to respond had passed and after this lawsuit had been filed.

Response: This paragraph states a legal conclusion rather than a fact, and therefore no response is required.

21. On September 3, 2021, President Joe Biden issued a public Executive Order regarding the declassification of certain documents concerning the terrorist attacks of September 11, 2001.¹

Response: Undisputed.

22. On January 19, 2021, then-President Trump issued a public memorandum declassifying documents related to an FBI investigation.²

¹ Executive Order on Declassification Review of Certain Documents Concerning the Terrorist Attacks of September 11, 2001 (Sep. 3, 2021), *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/03/executive-order-on-declassification-review-of-certain-documents-concerning-the-terrorist-attacks-of-september-11-2001/>.

² Memorandum on Declassification of Certain Materials Related to the FBI’s Crossfire Hurricane Investigation to the Attorney General, Director of the National Intelligence, and Director of the Central Intelligence Agency (Jan. 19, 2021), *available at* <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-declassification-certain-materials-related-fbis-crossfire-hurricane-investigation/>.

Response: Undisputed.

23. In 2013, defendant ODNI publicly announced the declassification of information pertaining to the so-called Terrorist Surveillance Program active during former President George W. Bush's administration.³

Response: Disputed as to the characterization of the program as "so-called." The characterization is unsupported by the cited materials. Otherwise undisputed.

24. In 1994, then-President Clinton issued a public bulk declassification order for records from World War II and the Vietnam War.⁴

Response: Undisputed.

25. Former Presidents Barack Obama, George W. Bush, and Bill Clinton all issued public standing orders for declassification, in the form an automatic declassification process built into their orders regulating national security information.⁵

Response: Undisputed insofar as the cited orders were public and include processes for automatic declassification under certain circumstances. Disputed as to plaintiff's characterization of those order as "standing orders for declassification"

26. To the extent the Alleged Declassification Standing Order might exist, it would have been issued by former President Trump during his presidency from January 20, 2017, through

³ Press Release, DNI Announces the Declassification of the Existence of Collection Activities Authorized by President George W. Bush Shortly After the Attacks of September 11, 2001 (Dec. 13, 2013), *available at* <https://www.dni.gov/index.php/newsroom/press-releases/press-releases-2013/item/991-dni-announces-the-declassification-of-the-existence-of-collection-activities-authorized-by-president-george-w-bush-shortly-after-the-attacks-of-september-11-2001>.

⁴ Execution Order 12937 – Declassification of Certain Records Within the National Archives of the United States (Nov. 10, 1994), *available at* <https://www.govinfo.gov/content/pkg/FR-1994-11-15/html/94-28431.htm>.

⁵ See Executive Order 13526 – Classified National Security Information (Dec. 29, 2009), *available at* <https://obamawhitehouse.archives.gov/the-press-office/executive-order-classified-national-security-information>; Executive Order 13292 – Further Amendment to Executive Order 12958, as Amended, Classified National Security Information (Mar. 25, 2003), *available at* [https://www.govinfo.gov/content/pkg/WCPD-1995-04-24/pdf/WCPD-1995-04-24-Pg634.pdf](https://www.govinfo.gov/content/pkg/WCPD-2003-03-31/pdf/WCPD-2003-03-31-Pg359.pdf#:~:text=This%20order%20prescribes%20a%20uniform,activities%20of%20their%20Govern%2D%20ment; Executive Order 12958 – Classified National Security Information (Apr. 17, 1995), available at https://www.govinfo.gov/content/pkg/WCPD-1995-04-24/pdf/WCPD-1995-04-24-Pg634.pdf).

January 20, 2021.⁶

Response: Undisputed that if former President Trump issued such an order, he would have had to issue it during his Presidency. Defendants base their response solely on a private citizen's lack of authority to issue such an order, and do not, by so responding, confirm or deny the existence of the Alleged Declassification Standing Order.

27. There is no evidence that the Alleged Declassification Standing Order was secret or otherwise exempt from disclosure at the time it issued.

Response: Consistent with the responses provided to Plaintiff's FOIA requests at issue in this matter, and to avoid interference with the ongoing law enforcement investigation, Defendants decline to confirm or deny whether the Alleged Declassification Standing Order was issued, or whether any evidence related to the Alleged Declassification Standing Order exists.

28. Declassification orders are routinely public documents. *See supra* ¶¶ 21-25.

Response: Undisputed that the orders in the cited paragraphs were public, but disputed insofar as Plaintiff is generalizing to all declassification orders as that generalization is unsupported by the record.

29. To the extent that any documents were declassified pursuant to the Alleged Declassification Standing Order, those documents would have been declassified during the presidency of former President Trump. *See* McFadden Decl., ¶ 17.

Response: Defendants are unable to respond because they decline to confirm or deny the existence of the Alleged Declassification Standing Order, and the effects of any order depend upon its text.

⁶ *See* Executive Order 13526 – Classified National Security Information (Dec. 29, 2009), §§ 1.3, 1.7, *available at* <https://obamawhitehouse.archives.gov/the-press-office/executive-order-classified-national-security-information>.

30. There is no evidence (1) that Defendants collected or assembled the Alleged Declassification Standing Order or any written transmittal thereof from the Executive Office of the President of the United States or (2) that Defendants would have been anything more than passive recipients of the alleged order, if then-President Trump actually issued it.

Response: Consistent with the responses provided to Plaintiff's FOIA requests at issue in this matter, and to avoid interference with the ongoing law enforcement investigation, Defendants decline to confirm or deny whether the Alleged Declassification Standing Order was issued, or whether any evidence related to the Alleged Declassification Standing Order exists.

31. There is no evidence that ACLUM sent a FOIA request seeking the Alleged Declassification Standing Order or any records concerning it to the FBI or the Department of Justice ("DOJ").

Response: Undisputed

32. ACLUM's FOIA requests do not seek documents generated during the FBI's pending investigation. *See* D.E. 9-1 and McFadden Decl., Exhibits A–F.

Response: Undisputed.

33. The FBI's investigation described in paragraph 5, *supra*, began on or after February 9, 2022. *See* Affidavit in Support of an Application under Rule 41 for a Warrant to Search and Seize, *In re Sealed Search Warrant*, No. 22-MJ-8332 (S.D. Fla.), ECF. No. 102-1 (attached hereto as **Exhibit 1**), ¶ 1 ("The investigation began as a result of a referral the United States National Archives and Records and Administration (NARA) sent to the United States Department of Justice (DOJ) on February 9, 2022.").

Response: Undisputed.

34. On or around June 19, 2022, former President Trump designated John Solomon as one of Mr. Trump’s representatives for access to Presidential records of his administration pursuant to the Presidential Records Act, 44 U.S.C. §§ 2201–2207 and 36 C.F.R. § 1270.44(a)(4). McFadden Decl., Exhibit O.

Response: Undisputed.

35. In a statement read aloud on a Fox News cable television segment by Mr. Solomon, Mr. Trump asserted that while President he “often took documents, including classified documents, to the residence” and “had a standing order that documents removed from the Oval Office and taken to the residence were deemed to be declassified the moment he removed them.” McFadden Decl., ¶ 17.

Response: Undisputed that Mr. Solomon stated he was making the quoted statement on behalf of former President Trump.

36. Mr. Solomon prefaced this statement by saying that, “Tonight, President Trump, through his official office in Mar-a-Lago, has provided this show here and Just the News, the following statement. . . . This is from President Trump’s office. It just came in a few minutes ago.” McFadden Decl., ¶ 17.

Response: Undisputed that Mr. Solomon so stated.

37. Mr. Trump subsequently repeated these declassification claims on social media, stating on August 12, 2022, “Number one, it was all declassified. Number two, they didn’t need to ‘seize’ anything. They could have had it anytime they wanted without playing politics and breaking into Mar-a-Lago. It was in secured storage, with an additional lock put on as per their request...[.]”⁷ On August 31, 2022, Mr. Trump stated on social media, “Terrible the way the FBI,

⁷ Post by @realDonaldTrump on Truth Social (Aug. 12, 2022 2:19 PM), available at <https://truthsocial.com/@realDonaldTrump/posts/108811278444540886>; see also Daniel Dale, *Fact check: Trump’s*

during the Raid of Mar-a-Lago, threw documents haphazardly all over the floor (perhaps pretending it was me that did it!), and then started taking pictures of them for the public to see. Thought they wanted them kept Secret? Lucky I Declassified!”⁸

Response: Undisputed that former President Trump so stated.

38. According to news reports, more than a dozen former senior Trump administration officials, including former National Security Advisor John Bolton, former United States Attorney General William Barr, and former White House Chiefs of Staff John Kelly and Mick Mulvaney, quickly came forward to deny the existence of the Alleged Declassification Standing Order.⁹

Response: Undisputed that the cited news reports so stated.

Dated: March 24 2023

Respectfully submitted,

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false and uncorroborated claims in response to the FBI search, CNN (Sep. 1, 2022 7:11 AM), <https://www.cnn.com/2022/09/01/politics/fact-check-trump-claims-fbi-search/index.html>.

⁸ Post by @realDonaldTrump on Truth Social (Aug. 31, 2022 8:38 AM), available at <https://truthsocial.com/@realDonaldTrump/posts/108917523934541907>; see also Daniel Dale, *Fact check: Trump's false and uncorroborated claims in response to the FBI search*, CNN (Sep. 1, 2022 7:11 AM), <https://www.cnn.com/2022/09/01/politics/fact-check-trump-claims-fbi-search/index.html>.

⁹ See Kanno-Youngs and M. Haberman, *Trump's Shifting Explanations Follow a Familiar Playbook*, N.Y. Times (Aug. 14, 2022), <https://www.nytimes.com/2022/08/14/us/politics/trump-documents-explanations.html>; Madeline Coggins, *Bill Barr slams Trump's special master request as 'red herring' as legal battle with DOJ continues*, Fox News (Sep. 2, 2022 3:01 PM), <https://www.foxnews.com/media/bill-barr-slams-trumps-special-master-request-redherring-legal-battle-doj-continues>; J. Gangel, E. Stuart, & J. Herb, *CNN Exclusive: 'Ludicrous.' 'Ridiculous.' 'A complete fiction.': Former Trump officials say his claim of 'standing order' to declassify is nonsense*, CNN (Aug. 18, 2022 10:27 PM), <https://www.cnn.com/2022/08/18/politics/trump-claim-standing-order-declassify-nonsensepatently-false-former-officials/index.html>

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