

# **WHY IS DOJ DELIBERATELY HIDING INFORMATION RESPONSIVE TO ACLU'S ANWAR AL-AWLAKI FOIA?**

As part of its strategy to not respond to the Anwar al-Awlaki FOIAs, the government seems to have decided to bury the NYT and ACLU under declarations. It submitted declarations and exhibits from 3 departments in DOJ, CIA, DOD, and DIA. Each attempts to appear helpful while (usually) blathering on at length but in no detail about why the President's authority to kill an American citizen must remain hidden.

That said, the declarations can be distinguished by how convincing (or not) are their claims to have searched for relevant documents. In particular, DOJ Office of Information Policy was patently unresponsive, probably to hide the intelligence DOJ has on Anwar al-Awlaki (and possibly Samir Khan).

DOJ OLC presented by far the most convincing evidence of a real search. As described by Deputy Assistant Attorney General John Bies, the department conducted searches for the following terms: target! kill!, drones, assassinat!, extrajudicial killing, UAV, unmanned, awlaki, aulaki, lethal force, lethal operation.

DOD primarily searched legal officers. While Lieutenant General Robert Neller didn't provide a full list of search terms used, he claimed the search "included relevant key words," including "Citizen," "AG Speech," "al-Awlaki," and "Samir Khan." While Neller says DOD used "multiple spellings" of al-Awlaki, it's not clear whether they only searched hyphenated names. And there are some terms clearly missing—such as anything to do with targeted killing. And "citizen"?

Really?!?!?

CIA, meanwhile, had this to say about their search:

In light of these recent speeches and the official disclosures contained therein, the CIA decided to conduct a reasonable search for records responsive to the ACLU's request. Based on that search, it has determined that it can now publicly acknowledge that it possesses records responsive to the ACLU's FOIA request.

The DOJ response provides this nonsensical excuse for why CIA can't reveal how it searched for relevant documents.

Although the CIA acknowledges its possession of some records responsive to the FOIA 6 requests, information concerning the depth and breadth of that interest, including the number of documents, is classified. See *infra* Point II; Bennett Decl. ¶¶ 27-28. We therefore do not describe the CIA's search on the public record; it is described in the Classified Declaration of John Bennett.

Given the CIA's well-documented history of not searching where they know the most interesting documents are, I think it safe to assume the search was completely negligent. But I find it mighty interesting they didn't even tell us what their search consisted of—the better to avoid contempt proceedings in the future, I guess.

Nevertheless, I think the least defensible search comes from Deputy Chief of the Initial Request Staff at Office of Information Policy Joseph Hibbard. OIP conducted the search in offices of top DOJ officials like the Attorney General, the Deputy Attorney General, and so on. Their search terms were: "targeted killings," "kill lists," "lethal operation," "lethal

force," "al-Aulaqi" and "target," "al-Awlaki" and "target," "Samir Khan" and "target," and "Abdulrahman" and "target." The use of the hyphens in Awlaki might miss documents. The search for the plural rather than the singular of "targeted killing" and "kill list" almost surely would miss documents even assuming those terms are used at DOJ. The use of Samir Khan's full name and the choice not to search on Anwar might likewise miss some documents.

Most problematic of all, however, is that searching on these men's names only with "target" would miss a lot of responsive information.

Remember, in addition to general information about the legal authorization process, ACLU asked for:

Facts supporting a belief that al-Awlaki posed an imminent threat to the United States or United States interests;

[snip]

Facts supporting the assertion that al-Awlaki was operationally involved in al-Qaeda, rather than being involved merely in propaganda activities;

[snip]

All documents and records pertaining to the factual basis for the killing of Samir Khan

DOJ probably has information pertaining to the assessment—for example—that Samir Khan could leave the US and travel to Yemen even though a long line of FBI terror investigation subjects have gotten arrested for doing the same. There's also information submitted in the Mohamed Osman Mohamud prosecution pertaining to Khan which also probably would have received high level attention.

And we know that DOJ claims to have evidence that proves that Awlaki was operational, much of

it pertaining to Umar Farouk Abdulmutallab's attempted attack and subsequent interrogation (indeed, two of the few documents OIP says were responsive date to January and February 2010 and almost certainly pertain to the aftermath of Abdulmutallab's attempted attack). But there are other documents that almost surely should be there—such as discussions after the CIA added Awlaki to their kill list after April 6, 2010 and DOJ attempted to use that to get more intelligence out of Abdulmutallab. Or deliberations in September 2010 about whether to charge Awlaki or not. And I highly doubt that no one in top DOJ offices reviewed the opening argument in the Abdulmutallab case and/or discussed the strategy of keeping Awlaki's name silent, even while presenting information that—DOJ later claimed—was really about Awlaki in the first place.

All of this would be responsive to ACLU's request. Some of it is obviously unclassified.

Note, too, that while the other offices that described their search searched right through the present, OIP decided,

The cut-off day for documents responsive to plaintiffs' request was November 3, 2011, the day the search for records commenced.

[snip]

The speech of Attorney General Eric Holder at Northwestern University School of Law on March 5, 2012 was delivered after the searches had been initiated, and the speech is therefore not included in the responsive material. A true and exact copy of those prepared remarks is nonetheless attached here as Exhibit E.

Of course, Holder's speech was not the only unclassified material from the period after November 3, 2011. By far the most relevant materials—more so probably than even the Holder speech—were released with Abdulmutallab's

sentencing, when DOJ all of a sudden released information they had previously suppressed, in part to explicitly make claims about Abdulmutallab's ties to Awlaki.

The Supplemental Factual Appendix is included in order to provide the Court with additional information regarding "the nature and circumstances of the offenses," particularly Count One. It provides the Court with relevant details regarding other terrorists with whom defendant interacted overseas as part of this plot, including Anwar Awlaki.

Even beyond what DOJ claimed to the judge in the case, DOJ presented the appendix as proof that Awlaki's killing was legally justified. If it's proof, then why wasn't it turned over under FOIA?

Yet in the face of a legal request to turn these documents (or the underlying interrogations) over under FOIA, DOJ has contorted its response to ignore them.

DOJ twice before—in the ACLU/CCR suit to establish the basis for Awlaki's presence on the kill list and with the Abdulmutallab opening arguments—decided not to present the evidence that purportedly justified Awlaki's killing in a legally antagonistic setting. They appear to have done so again.

Not only should the ACLU be demanding a more honest response to their FOIA. But Americans ought to be asking why DOJ has repeatedly backed off of presenting the evidence they say justifies killing an American citizen.

Update: I just counted. There are 48 email chains involving OAG and/or ODAG that OLC was able to find but OIP (the people supposedly good at finding things) failed to find. Of those, 18 are after OIP's self-imposed cut-off for search (in effect, it cut off its search just as Holder's aides were in the middle of a big debate about how to explain the killing of

Awlaki). But that still means OIP failed to find 30 responsive email chains. Also note that OLC found two of the documents that appear in OIP's Vaughn index, and the implication is that OIP did not find the second one—a February 9, 2010 email from ODAG to OLC, at all.

On April 18, 2012, the Office of Legal Counsel referred two responsive documents to OIP that are subject to the FOIA. One of these documents was duplicative of material previously located by OIP and identified in OIP's Vaughn Index as document one. The responsive portions of the second document, totally three pages, have been withheld in full and the document is listed in the attached Vaughn Index as document four.

I wonder whether OIP would have admitted to either of these if OLC hadn't formally referred them for declassification.