

January 8, 2020

The Honorable Edgardo Ramos  
United States Courthouse  
40 Foley Square, Courtroom 619  
New York, NY 10007

**Re: *ACLU et al. v. DOD et al.*, No. 17 Civ. 9972**

Dear Judge Ramos,

Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”) write to describe the basis of their anticipated motion for partial summary judgment against defendants Department of Defense (“DOD”), Department of Justice (“DOJ”), and Department of State (“State Department”) (collectively, “Defendants”) in the above-referenced Freedom of Information Act (“FOIA”) litigation. The ACLU’s motion will argue that Defendants cannot lawfully maintain “Glomar responses”—refusing to confirm or deny the existence or nonexistence of responsive records—to the ACLU’s FOIA request. Per the Court’s Individual Practice 2.A.ii, the ACLU seeks to arrange a pre-motion conference at the Court’s convenience.<sup>1</sup>

**1. Background.** The U.S. government has carried out lethal strikes abroad, outside of war zones, since at least 2001—including through the use of armed drones. In May 2013, the Obama administration set forth guidelines governing these strikes. Those guidelines were known as the “Presidential Policy Guidance,” or “PPG.” In August 2016, the ACLU secured the public release of the PPG through a FOIA lawsuit.<sup>2</sup>

In October 2017, the Trump administration reportedly replaced the PPG with a new, less restrictive policy.<sup>3</sup> This new policy is known as the “Principles, Standards, and Procedures,” or “PSP.”<sup>4</sup> The PSP reportedly eliminates safeguards contained in the previous policy, such as measures intended to limit civilian deaths.<sup>5</sup> To provide the public with information on the Trump administration’s approach to using lethal force abroad, the ACLU submitted a FOIA request to Defendants seeking the release of the PSP. After receiving no responses, the ACLU initiated this

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<sup>1</sup> The New York Times recently filed suit against the DOD seeking to enforce a FOIA request for the PSP, and that suit is before this Court as a related case. *See N.Y. Times Co. v. DOD*, No. 20 Civ. 43 (filed Jan. 3, 2020). By email, the Times has notified the government that it intends to move for summary judgment against the DOD and has asked the government to consent to briefing the Times’ anticipated motion on the same schedule as the ACLU’s anticipated motion.

<sup>2</sup> *See* Charlie Savage, *U.S. Releases Rules for Airstrike Killings of Terror Suspects*, N.Y. Times, Aug. 6, 2016, <https://nyti.ms/2aJL3w6>.

<sup>3</sup> *See* Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, N.Y. Times, Oct. 28, 2017, <https://nyti.ms/2BbxmDC>.

<sup>4</sup> *See* Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. Times, Sept. 21, 2017, <https://nyti.ms/2jPwvnB>.

<sup>5</sup> *See* Savage, *supra* note 3.

lawsuit to enforce its request. In their answer to the ACLU's complaint, Defendants issued a "Glomar response," stating that they were "unable to confirm or deny the existence of" the PSP "without revealing information that [was] exempt from disclosure under FOIA"; Defendants did not cite a specific exemption.<sup>6</sup>

In June 2019, the DOD released a public report (the "Report") on the results of an administrative investigation into a tragic military raid in Niger that left four U.S. soldiers, four Nigerien soldiers, and a Nigerien interpreter (in addition to at least 20 alleged Islamic State militants) dead.<sup>7</sup> The DOD publicly posted the Report on one of its own websites.<sup>8</sup> It also provided the Report to members of the news media, which proceeded to publish stories about it.<sup>9</sup>

The Report renders Defendants' Glomar responses untenable. It explicitly refers to the PSP, and also states that the PSP "supersedes" the PPG.<sup>10</sup> In the wake of the Report's publication, the ACLU asked Defendants to withdraw their Glomar responses and process the ACLU's FOIA request.<sup>11</sup> But the government refused, stating that Defendants would "maintain" their Glomar responses because the DOD did not "have authority to declassify the information at issue."<sup>12</sup> At some later point, the DOD removed the Report from its website.

**2. Legal Standards.** The government must disclose all records responsive to a FOIA request unless it can demonstrate that the disclosure of information would meet one of FOIA's nine "narrow[]" exemptions. *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011) (quotation marks omitted); see 5 U.S.C. § 552(b)(1)–(9). In "unusual circumstances," the very fact that an agency has (or does not have) information responsive to a FOIA request is exempt from disclosure. *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 122 (2d Cir. 2014). If that is so, the agency may issue a Glomar response: it may refuse to either confirm or deny that responsive records exist. But the Glomar doctrine is exceedingly narrow. Such a response must be both "logical and plausible," and will be justified "only by a particularly persuasive affidavit." *Florez v. CIA*, 829 F.3d 178, 182 (2d Cir. 2016) (quoting *Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161, 167 (2d Cir. 2014), and *N.Y. Times*, 765 F.3d at 122).

Moreover, an agency waives the ability to maintain a Glomar response when it officially

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<sup>6</sup> Answer at 9 (Feb. 1, 2018), ECF No. 14.

<sup>7</sup> See, e.g., Rukmini Callimachi et al., 'An Endless War': Why 4 U.S. Soldiers Died in a Remote African Desert, *N.Y. Times*, Feb. 20, 2018, <https://nyti.ms/2C4ny25>.

<sup>8</sup> The Report was posted to the Executive Services Directorate's website, at <https://www.esd.whs.mil>. It is now preserved at <https://perma.cc/TPF3-U79E>.

<sup>9</sup> See, e.g., Eric Schmitt, *Pentagon Ends Review of Deadly Niger Ambush, Again Blaming Junior Officers*, *N.Y. Times*, June 6, 2019, <https://nyti.ms/2XvkROf> ("The Pentagon provided copies of the 176-page redacted report to reporters on Wednesday.")

<sup>10</sup> Findings and Recommendations at 8, *Army Regulation (AR) 15-6 Investigation Findings: 4 October 2017 Enemy Contact Event in Tongo Tongo, Niger*, available at <https://perma.cc/TPF3-U79E>; see also Exhibit A.

<sup>11</sup> Exhibit A.

<sup>12</sup> Exhibit B.

acknowledges the existence of information sought by a FOIA requestor. *See, e.g., Florez*, 829 F.3d at 186; *ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013); *ACLU v. DOD*, 322 F. Supp. 3d 464, 479 (S.D.N.Y. 2018). Official acknowledgement occurs when an agency releases information that (1) is as specific as the information sought by a FOIA requestor, (2) matches the information sought by a FOIA requestor, and (3) “was ‘made public through an official and documented disclosure.’” *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (quoting *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)).<sup>13</sup> Finally, even where there has been no waiver, an agency cannot maintain a Glomar response when evidence in the record controverts the agency’s justifications for the response. *Florez*, 829 F.3d at 187.

**3. The ACLU’s Motion.** In its motion for partial summary judgment, the ACLU will argue that Defendants cannot maintain their Glomar responses. The DOD made explicit reference to the PSP, as well as the fact that it supersedes the PPG, in the Report—a public document that was approved by high-ranking agency officials, disseminated to the press, and published through the agency’s regular channels. This has two consequences. First, the DOD has officially acknowledged the existence of the PSP and waived its ability to maintain a Glomar response. Second, irrespective of waiver, all of Defendants’ Glomar responses are unlawful because, in light of the Report’s publication, they are illogical and implausible.

*The DOD Has Waived Its Ability to Maintain a Glomar Response.* The Report’s statements concerning the PSP plainly satisfy the official acknowledgment test. The statements specifically confirm the existence of the PSP, and its replacement of the PPG. And the Report undoubtedly qualifies as a statement by a person who was both authorized to speak for the DOD and in a position to officially know of the PSP’s existence. *See Wilson*, 586 F.3d at 187; *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 765 (D.C. Cir. 1990). Accordingly, the DOD has officially acknowledged the existence of the PSP and waived the ability to maintain a Glomar response.<sup>14</sup>

*None of the Defendants’ Glomar Responses Are Logical or Plausible.* Regardless of waiver, the Report confirms that the PSP exists. Given that evidence, it is neither logical nor plausible for any of the Defendants to maintain that acknowledging the existence of the PSP in a FOIA response would cause the type of harm that justifies invoking Glomar. *See Florez*, 829 F.3d at 184–85. Consequently, the Defendants’ Glomar responses are unlawful.

Therefore, in its motion for partial summary judgment, the ACLU will ask this Court to order each Defendant to conduct a search for all responsive records, release all non-exempt records, and produce a *Vaughn* index describing all documents withheld in full or in part and detailing the reasons for their withholding.

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<sup>13</sup> The Second Circuit has explained that “a rigid application of [the three-part official acknowledgment test] may not be warranted in view of its questionable provenance.” *N.Y. Times*, 756 F.3d at 120 n.19.

<sup>14</sup> Defendants assert that the DOD did not have the authority to “declassify” the fact of the PSP’s existence. Exhibit B. But that assertion is irrelevant here. Neither of the critical questions—(1) whether the source of the acknowledgement was “in a position to know of [the classified information] officially,” *Fitzgibbon*, 911 F.2d at 765 (quotation marks omitted), and (2) whether the public disclosure of the information is attributable to the agency, *Wilson*, 586 F.3d at 189—is genuinely in doubt.



Respectfully,

A handwritten signature in blue ink, appearing to read "Brett", written over a horizontal line.

Brett Max Kaufman

Hina Shamsi

American Civil Liberties Union Foundation

125 Broad Street—18th Floor

New York, New York 10004

*Counsel for Plaintiffs*

# EXHIBIT A:

Letter from ACLU  
to Defendants

June 27, 2019

**By Email**

Sarah S. Normand  
Assistant United States Attorney  
86 Chambers Street, 3rd Floor  
New York, New York 10007  
sarah.normand@usdoj.gov

**Re: *ACLU v. DOD*, No. 17 Civ. 9972 (ER) (S.D.N.Y.)**

Dear Sarah,

We write concerning the ACLU's FOIA request for "the Trump administration's rules governing the use of lethal force abroad, known as the 'Principles, Standards, and Procedures' ['PSP'], as well as any cover letter or other document attached thereto." Compl. ¶ 21, ECF No. 1 (Dec. 21, 2017). In Defendants' Answer, the agencies issued *Glomar* responses, refusing "to confirm or deny the existence of responsive records without revealing information that is exempt from disclosure under FOIA." Answer at 9, ECF No. 14 (Feb. 1, 2018).

It has come to our attention that in a newly released DOD report on the Niger "15-6" investigation, the government officially acknowledged that "the PSP supersede[d] the CT-PPG and ma[de] substantive changes to the standards and procedures for approval of U.S. direct action missions . . . ." The acknowledgment comes in the second paragraph on page 8 of Part 3 of the report, which is available on the DOD's website.\* The relevant page from the report is attached.

Given this acknowledgment, we ask the agencies to withdraw their *Glomar* responses and search for responsive records. We are happy to discuss this at your convenience.

Sincerely,

/s/ Brett Max Kaufman  
Brett Max Kaufman  
ACLU Foundation  
125 Broad Street, 18th Floor  
New York, New York 10004  
T: 212.549.2500  
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\* [https://www.esd.whs.mil/Portals/54/Documents/FOID/Special\\_Collection/Niger/3\\_Redacted\\_Consolidated\\_Findings.pdf](https://www.esd.whs.mil/Portals/54/Documents/FOID/Special_Collection/Niger/3_Redacted_Consolidated_Findings.pdf)

**SECRET//NOFORN**

**FINDING 2**

**(U//FOUO) INVESTIGATION FINDING 2:** Operational constraints meant to minimize the likelihood of USSOF engaging in direct combat are insufficient; USSOF in Niger are planning, directing, and executing direct action operations rather than advising Nigerien-led operations.

(U) DISCUSSION:

(S//NF) On 3 October 2017, the Executive Policy governing U.S. direct action against terrorists on the continent of Africa was codified in the “U.S. Policy Standards and Procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities,” (CT-PPG). Since 3 October, the President has issued new guidance on (b)(1) 1.4a

(b)(1) 1.4a  
(b)(1) 1.4a The PSP supersedes the CT-PPG and makes substantive changes to the standards and procedures for approval of U.S. direct action missions, but the core principle remains the same: decisions to use U.S. forces to conduct (b)(1) 1.4a will be made at the most senior levels after reasonable review and considerable oversight.

(U//FOUO) Advise, assist, and accompany operations that Team OUALLAM and Team ARLIT were conducting and AOB Niger was approving more closely resembled U.S. direct action than foreign partner-led operations aided by U.S. advice and assistance. Team OUALLAM’s initial mission was developed, planned, and executed entirely at the direction of the Team Commander and the AOB. The subsequent re-missioning of Team OUALLAM and Team ARLIT was also developed, planned, and executed at the direction of USSOF. No Nigerien partner forces were involved in the VTC directed by the SOCCE commander.

(S) Advise, assist, and accompany operations are authorized in CJCS EXORDS (b)(1) 1.4a  
(b)(1) 1.4a  
(b)(1) 1.4a

(S) (b)(1) 1.4a, (b)(1) 1.4g the SOCAFRICA Commander permits USSOF to accompany foreign forces on operations including movement to contact, ambushes, and raids. (b)(1) 1.4a, (b)(1) 1.4g

(b)(1) 1.4a, (b)(1) 1.4g

(S) (b)(1) 1.4a, (b)(1) 1.4g  
(b)(1) 1.4a, (b)(1) 1.4g

**SECRET//NOFORN**

## EXHIBIT B:

Letter from Defendants  
to ACLU





U.S. Department of Justice

United States Attorney  
Southern District of New York

86 Chambers Street  
New York, New York 10007

September 13, 2019

**BY EMAIL**

Brett Max Kaufman  
ACLU Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004

Re: *ACLU v. Department of Defense et al.*,  
No. 17 Civ. 9972 (ER)

Dear Brett:

We write in response to your letter dated June 27, 2019, which attached a document that your letter indicates you obtained from the Department of Defense (“DoD”). DoD does not have authority to declassify the information at issue. *See* Executive Order 13526 § 3.1(b). Accordingly, the defendant agencies maintain their Glomar response to the FOIA request.

Very truly yours,

JOSEPH H. HUNT  
Assistant Attorney General

GEOFFREY S. BERMAN  
United States Attorney for  
Southern District of New York

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