UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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American Civil Liberties Union and The American Civil Liberties Union Foundation

Plaintiff,

-v-

U.S. Department of Justice, including its component the Office of Legal Counsel, U.S. Department of Defense, including its component U.S. Special Operations Command, and Central Intelligence Agency

Defendant.

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12-CV-00794-CM

MEMORANDUM IN SUPPORT OF PLAINTIFFS THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT SUBMITTED BY THE CIA AND DOD

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INTRODUCTION

Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (together the "ACLU") submit this memorandum in support of their cross-motion for disclosure of certain records withheld by the Department of Defense ("DOD") and Central Intelligence Agency ("CIA"). CIA and DOD offered no-number-no-list responses with respect to these records, but the Second Circuit has rejected those responses and required the agencies to produce public *Vaughn* indices. *New York Times v. Dep't of Justice*, 756 F.3d 100, 124 (2d Cir. 2014).

The agencies have now provided the ACLU with public *Vaughn* indices but they contend that all but two of the listed records are properly withheld in their entirety. The agencies also offer *Glomar* responses to the ACLU's request for records concerning the factual basis for the strikes that killed Abdulrahman al-Aulaqi and Samir Khan.

This Court should reject the agencies' arguments. As explained below, the government has officially acknowledged central aspects of its legal analysis for the targeted-killing program and key information regarding the deaths of Anwar al-Aulaqi, Abdulrahman al-Aulaqi, and Samir Khan—including enough information about the strikes that killed Abdulrahman al-Aulaqi and Samir Khan to render the agencies' *Glomar* response unjustified. Legal analysis must be released even if it has not been publicly acknowledged, because legal analysis cannot lawfully be withheld under Exemptions 1 or 3 and the agencies' public declarations are not detailed enough to justify the invocation of Exemption 5. More generally, the agencies' public declarations are insufficiently detailed to meet the requirements of the Freedom of Information Act ("FOIA").

Plaintiffs respectfully ask the Court to (i) review certain records *in camera* to determine whether redacted portions contain information which the government may not withhold under

FOIA, and (ii) direct the government to file *Vaughn* indices and declarations enumerating and describing documents relating to the strikes that killed Samir Khan and Abdulrahman al-Aulaqi.

PROCEDURAL HISTORY

The ACLU first submitted the FOIA request underlying this suit in 2011, in an effort to help the public better assess the wisdom and lawfulness of the government's use of unmanned aerial vehicles ("drones") to carry out targeted killings of U.S. citizens.[1] DOD did not provide any substantive response to the ACLU's request, while the CIA issued a *Glomar* response, refusing to confirm or deny the existence of responsive records. After exhausting administrative appeals, the ACLU filed suit on February 1, 2012. The agencies subsequently modified their responses in various ways. With respect to the records now at issue, both agencies offered no-number-no-list responses. Declaration of Robert Neller, Dist. Ct. Dkt. 30 at ¶26; Declaration of John Bennett, Dist. Ct. Dkt. 28 at ¶28.[2]

After considering cross-motions for summary judgment, this Court entered judgment for the defendants. *New York Times v. Dep't of Justice*, 915 F. Supp. 2d 508, 553 (S.D.N.Y. 2013). The Court concluded, in brief, that the agencies' withholdings were proper under Exemptions 1, 3, and/or 5, and that the government had not waived its withholdings by official acknowledgment.

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[1] The ACLU submitted its FOIA request to three agencies: the Department of Justice ("DOJ") (including the DOJ's component agencies, Office of Information Policy ("OIP") and Office of Legal Counsel ("OLC")), the Central Intelligence Agency ("CIA"), and the Department of Defense ("DOD"). The parties have filed cross-motions for summary judgment with respect to OLC records pursuant to a separate briefing schedule. Dist. Ct. Dkt. 78.

[2] While offering a no-number-no-list response, the CIA acknowledged its "general interest in" records relating to "the legal basis . . . upon which U.S. citizens can be subjected to targeted killing," and in records relating to "the process by which U.S. citizens can be designated for targeted killing." Declaration of John Bennett, Dist. Ct. Dkt. 28 at ¶ 27-28. DOD disclosed the existence of one responsive document, the July 2010 Office of Legal Counsel Opinion ("July 2010 OLC-DOD Memorandum"), which it withheld in full under Exemptions 1 and 5. Declaration of Robert R. Neller, Dist. Ct. Dkt. 30 at ¶ 17.

On appeal, the Second Circuit affirmed in part, reversed in part, and remanded. *New York Times v. Dep't of Justice*, 756 F.3d at 124. The Court concluded that portions of a July 2010 Office of Legal Counsel ("OLC") opinion ("July 2010 OLC-DOD Memorandum"), which the Second Circuit published together with its revised opinion, "no longer merit[ed] secrecy" because the government had officially acknowledged certain relevant facts and legal analysis. *Id.* at 117. The Court ordered that "other legal memoranda prepared by OLC . . . be submitted to the District Court for in camera inspection and determination of waiver of privileges and appropriate redaction." *Id.* at 124. In addition, the Court ordered the government to produce a redacted version of the OLC's classified *Vaughn* index—which had earlier been submitted to this Court *ex parte*—for adjudication of the government's claimed withholdings. *Id.*

With respect to the CIA and DOD, the Second Circuit held that the CIA had acknowledged its "operational role in targeted drone killings" and that this acknowledgement invalidated both agencies' "main argument for the use of *Glomar* and no number, no list responses . . . ." *Id.* at 122. Accordingly, the Second Circuit ordered CIA and DOD to submit *Vaughn* indexes to this Court "for *in camera* inspection and determination of appropriate disclosure and appropriate redaction." *Id.* at 124.

On November 14, 2014, the government moved for summary judgment before this Court. Dist. Ct. Dkt. 99. The CIA's *Vaughn* index identified 144 documents responsive to the ACLU's FOIA request. Declaration of Martha M. Lutz ("Second Lutz Decl.") ¶ 4 & n.5. With only two exceptions—(i) a redacted version of former CIA Director Leon Panetta's classified declaration in support of the government's assertion of the state secrets privilege in a civil suit brought by Anwar al-Aulaqi's father, *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010) ("Panetta Declaration"), and (ii) the unclassified declaration submitted in the same litigation—the CIA

withheld all of the records in their entirety under Exemptions 1, 3, and/or 5. Second Lutz Decl. ¶¶ 8-9; 17-21. The DOD withheld in full all 80 responsive documents listed on its *Vaughn* index under Exemption 1, 3 and/or 5. Declaration of Sinclair M. Harris ("Second Harris Decl.") ¶ 4 & Exh. A.[3] In addition, both agencies issued a *Glomar* response for records containing information relating to factual basis for the strikes that killed Samir Khan and Abdulrahman al-Aulaqi, pursuant to Exemptions 1 and 3. Second Lutz Decl. ¶¶ 11-12; Harris Decl. ¶ 18.

The ACLU now challenges the agencies' withholding of all records listed on their respective *Vaughn* indices (including the redacted portions of CIA Index No. 22, the classified Panetta Declaration), except that the ACLU withdraws its request for:

(i) Records identified as drafts or outlines of records that are also listed on the indices;

(ii) Records that are already being processed by the OLC;

(iii) Records identified as emails, letters, notes, fax correspondence, slide presentations, briefings, or talking points.

Thus, still at issue in this case is the agencies' withholding of the following records:

- CIA Index Nos. 2, 3, 12, 14, 15, 22 (Panetta Declaration), 33, 34, 35, 36, 45, 59, 61, 62, 78, 94, 95, 96, 105, 106, 107, 109, 110, 111, 112, 113, 117, 118, 119, 120, 123, 124, 140, 142;
- DOD Index Nos. 1, 31, 38, 39, 46, 55.

[3] Although then-Secretary of Defense Robert Gates also submitted a classified Declaration in support of the state secrets privilege in the suit, *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010); Robert Gates, Public Declaration and Assertion of Military and State Secrets Privilege, 10-cv-1469, Dkt. 15-5 (September 25, 2010) (discussing classified declaration), the document does not appear on DOD's *Vaughn* index. Plaintiffs will confer with government counsel concerning the omission and raise the issue again with the Court only if necessary.

The ACLU also challenges the lawfulness of the agencies' *Glomar* response for information about the strikes that killed Abdulrahman al-Aulaqi and Samir Khan.

STANDARD OF REVIEW

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed . . . to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The statute contemplates a "strong presumption in favor of disclosure." *Associated Press v. Dep't of Defense*, 554 F.3d 274, 283 (2d Cir. 2009). It requires disclosure of responsive records except to the extent that the records fall within specific statutory exemptions, and these exemptions are given "a narrow compass." *Milner v. Dep't of Navy*, 131 S.Ct. 1259, 1265 (2011). Even where portions of a record fall within one of the statutory exemptions, "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b); *Inner City Press/Cmty. on the Move v. Board of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.10 (2d. Cir. 2006).

At summary judgment, the heavy burden of justifying the withholding of responsive records belongs to the government. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010). The court's review of an agency's claimed withholdings is *de novo*, and "all doubts [are] resolved in favor of disclosure." *Id.*; 5 U.S.C. § 552(a)(4)(B). The agency must provide "reasonably detailed explanations why any withheld documents fall within an exemption." *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). "[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not . . . carry the government's burden." *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009).

The agency's burden–and the court's obligation to review the agency's withholdings *de novo*–applies with equal force to cases invoking national security concerns. *See CIA v. Sims*, 471 U.S. 159, 188-89 (1985) ("[T]his sort of judicial role is essential if the balance Congress believed ought to be struck between disclosure and national security is to be struck in practice.") (citation omitted); *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (courts do not "relinquish[] their independent responsibility" to review agency's withholdings *de novo* in national security context); *ACLU v. Dep't of Defense*, 389 F. Supp. 2d 547, 552 (S.D.N.Y. 2005).

ARGUMENT

I. The "official-acknowledgment" doctrine precludes the CIA and DOD from withholding much of the information they now seek to withhold.[4]

A. The withheld records must be disclosed to the extent the government has otherwise disclosed the same or similar information.

"Voluntary disclosures of all or part of a document may waive an otherwise valid exemption." *New York Times*, 756 F.3d at 114 (citing *Dow Jones & Co., Inc. v. Dep't of Justice*, 880 F.Supp. 145, 150-51 (S.D.N.Y. 1995)). Thus, even if one assumes that all of the information the CIA and DOD now seek to withhold could *once* have been withheld under Exemptions 1, 3, and 5 (an assumption that is incorrect in at least one important respect, *see* Section III, *infra*), the government cannot lawfully withhold information if it has already disclosed the same or closely related information in other contexts. *New York Times*, 756 F.3d at 114 (discussing application of official-acknowledgement doctrine to Exemption 5); *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (discussing application of official-acknowledgement doctrine to Exemptions 1 and 3).

[4] The argument in this Section largely mirrors the argument that Plaintiffs have already submitted to the Court in connection with the OLC's withholdings. ACLU's Summ. J. Memo, Dist. Ct. Dkt. 92, 6-17.

The government does not take issue with the general proposition that an agency cannot lawfully withhold information that has been officially acknowledged, but it contends that the official-acknowledgement doctrine must be applied rigidly. Gov't Memo Summ. J., Dist, Ct. Dkt. 99 at 24. It bases its position on *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009), which stated that the doctrine would apply where withheld information "[is] as specific as the information previously released" and "match[es] the information previously disclosed." But that case did not purport to describe exhaustively all of the circumstances in which the official-acknowledgement doctrine would apply, and recent decisions of the Second Circuit and D.C. Circuit make clear that the doctrine should *not* be applied overly rigidly. In the instant case, for example, the Second Circuit considered disclosures by legislators and former executive-branch officials as well as disclosures by current executive-branch officials. *Id.* at 118-19, 119 n.18. It found that "[e]ven if [statements by government officials] assuring the public of the lawfulness of targeted killings are not themselves sufficiently detailed to establish waiver . . . they establish the context in which [other disclosures] . . . should be evaluated." *New York Times*, 756 F.3d at 115. Even as it described *Wilson* as "the law of this Circuit," the Court cautioned that an overly stringent application of it "may not be warranted." *Id.* at n.19 (discussing "questionable provenance" of *Wilson's* "matching" test); *see also ACLU v. CIA*, 710 F.3d 422, 429 (D.C. Cir. 2013). And in *Ameziane v. Obama*, 699 F.3d 488, 493 (D.C. Cir. 2012), the D.C. Circuit rejected the proposition that the doctrine applied only to disclosures by the executive branch, finding in that case that the doctrine would apply to a disclosure made by counsel to a prisoner held at Guantanamo Bay.[5]

[5] Courts have held that even private actors may officially acknowledge "state secrets" if they have been afforded privileged access to information at issue. *See Terkel v. AT & T Corp.*, 441

Common sense also weighs against an overly strict reading of *Wilson's* "matching" test. FOIA's exemptions were meant to accommodate the government's legitimate interest in protecting information that is classified or otherwise sensitive. They were not meant to facilitate propaganda campaigns in the course of which government officials disclose information selectively in order to cast their own decisions in the most favorable light, or to mislead the public about the nature or import of the government's policies. Government officials have made copious disclosures meant to persuade the public that the drone program is lawful and effective and that the government's killing of three Americans in Yemen was justified. FOIA now forecloses CIA and DOD from withholding information that is the same or closely related to the information already disclosed.[6]

B. Some of the information that the CIA and DOD seek to withhold has been disclosed by the government in other contexts.

As the ACLU has explained, the government has officially acknowledged basic facts about the drone program and about the program's legal basis. It has disclosed that it carried out the targeted killing of Anwar al-Aulaqi, and it has disclosed information relating to why it targeted him. For a full description of the facts that the government has officially acknowledged, Plaintiffs respectfully refer the Court to the brief in which they addressed the OLC's withholdings. ACLU's Summ. J. Memo, Dist. Ct. Dkt. 92, 8-17.

F.Supp.2d 899, 913 (N.D. Ill. 2006) (citing *Hepting v. AT & T Corp.*, 439 F.Supp.2d 974, 987-89, 991-94 (N.D. Cal. 2006).

[6] Selective disclosure was one of the evils that FOIA was meant to address. *See e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966) ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear."), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles at 59 (1974).

C. Given the government's previous disclosures, CIA and DOD have not justified the withholding of legal analysis and factual-basis information.

The government has disclosed central aspects of its legal analysis of the targeted-killing program, including analysis of statutory, constitutional and international law, its definition of "imminence," as well as key information about the strikes that killed the three American citizens at issue in this request. To the extent that the records at issue on remand also contain this information, the government must disclose them. Again, the Second Circuit specifically recognized that waiver may apply even if the withheld legal analysis does not precisely match the legal analysis already released. *See, e.g.*, *New York Times*, 756 F.3d at 116 ("[e]ven though the DOJ White Paper does not discuss 18 U.S.C. § 956(a), which the OLC–DOD Memorandum considers, the substantial overlap in the legal analyses in the two documents fully establishes that the government may no longer validly claim that the legal analysis in the Memorandum is a secret."); *id.* at 120 (observing that because the government had already disclosed the legal framework for the program, "additional discussion of 18 U.S.C. § 956(a) in the OLC–DOD Memorandum adds nothing to the risk"). Indeed, the public interest in disclosure may be especially great if the legal rationales the government has offered publicly do not match the legal rationales in the records still withheld.

Many of the records withheld by the CIA and DOD here likely contain legal analysis and factual information that meets the Second Circuit's standard for official acknowledgement. To take just one example, the CIA has withheld all sections of the classified Panetta declaration that were sealed when that declaration was first filed in *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010). But that declaration was filed *before* the government had made any of the disclosures referenced above—*i.e.*, before senior officials had spoken publicly about the killing of Anwar al-Aulaqi, Abdulrahman al-Aulaqi, and Samir Khan; before they had publicly spoken

at such length about the legal basis for the program; and before the Second Circuit had published the July 2010 OLC Memorandum. It is not plausible that everything that had to be sealed in 2010 still has to be withheld from the public now. Since 2010, the government has disclosed both legal analysis and factual information—precisely the kind of information that the sealed portions of the declaration are likely to contain. *See Al-Aulaqi v. Obama,* Gov't Reply Br. at 24, 10-cv-01469, Dkt. 31 (explaining that Panetta declaration meant to support government's contention that litigation would require disclosure of "information needed to address whether or not, or under what circumstances, the United States may target a particular foreign terrorist organization and its senior leadership, the specific threat posed by al-Qaeda, AQAP, or Anwar al-Aulaqi, and other matters that plaintiff has put at issue, including any criteria governing the use of lethal force").[7]

Moreover, the government's contention that the withheld records "*contain* classified information" and "*include* intelligence products containing sensitive reporting," (Gov't Memo Summ. J., Dist. Ct. Dkt. 99 at 8 (emphases added)), are insufficient to meet the government's burden. As noted above, FOIA requires the government to segregate releasable material from material that can legitimately be withheld. Neither the CIA nor the DOD has done that here.

II. The "official-acknowledgment" doctrine precludes the CIA and DOD from offering "Glomar" responses to the ACLU's request for information about the factual basis for the strikes that killed Samir Khan and Abdulrahman al-Aulaqi.

The agencies' *Glomar* response with respect to factual-basis information about the killings of Samir Khan and Adbulrahman al-Aulaqi is also unjustified.[8] An agency may decline

[7] The District Court dismissed the case on other grounds, and did not decide the applicability of the state-secrets privilege. *Al-Aulaqi v. Obama,* 727 F.Supp.2d 1 (D.D.C. 2010)

[8] This portion of the ACLU's request seeks disclosure of:

> (5) All documents and records pertaining to the factual basis for the killing of Samir Khan, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the

to submit a *Vaughn* index to explain its withholdings only where doing so would itself require it to disclose information that, in the agency's view, is protected by one of FOIA's exemptions. *Wilner v. NSA*, 592 F.3d 60, 68 (2d. Cir. 2009). In such cases, the agency may issue a *Glomar* response, and "refuse to confirm or deny the existence of certain records . . . if the FOIA exemption would itself preclude the *acknowledgment* of such documents." *Id.* at 71 (emphasis added, citation omitted). As with any withholding under a FOIA exemption, the agency invoking a *Glomar* response has the burden of proving that the mere acknowledgment of the existence of such records would itself undermine the claimed exemption. *Id.*

Because *Glomar* responses "encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret what the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods," *ACLU v. Dep't of Defense*, 389 F.Supp.2d at 561 (S.D.N.Y. 2005), they are rarely appropriate.[9] A *Glomar* response is justified only if *no responsive document* can be described on a *Vaughn* index without the disclosure of information properly protected by one of FOIA's exemptions. See *New York Times*, 756 F.3d at 122 ("With CIA identified . . . main argument for the use of *Glomar* . . . evaporates"). With respect to officially acknowledged information, "the plaintiff can overcome a

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> missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, *and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death*;
>
> (6) All documents and records pertaining to the factual basis for the killing of Abdulrahman al-Awlaki, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, *and any other factors relevant to the decision to kill him or the failure to avoid causing his death*.

[9] Although the Plaintiffs do not concede that the responsive records cannot be described with reasonable specificity in a public declaration, a *Vaughn* index is flexible enough to accommodate protection for legitimately withheld information. *Vaughn v. Rosen*, 484 F.2d 820, 826-27 (D.C. Cir. 1973).

Glomar response by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a *Glomar* response seeks to protect . . . in the context of a *Glomar* response, the public domain exception is triggered when 'the prior disclosure establishes the *existence* (or not) of records responsive to the FOIA request,' regardless whether the contents of the records have been disclosed." *ACLU v. CIA*, 710 F.3d at 427 (citations omitted).

Here, the government does not dispute that it has already acknowledged that Abdulrahman al-Aulaqi and Samir Khan were killed by U.S. drone strikes in Yemen. *See* Letter from Eric H. Holder, Jr., Attorney General, to Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary (May 22, 2013) (stating that the two were killed in U.S. drone strikes but asserting that neither was specifically targeted.).[10] The government argues, however, that disclosing the "existence or nonexistence of [the requested] records could indicate whether or not CIA or DOD had an intelligence interest in, or specific intelligence relating to, either individual. . . . [and] could also reveal whether CIA did or did not have authority to participate in specific counterterrorism operations or gather intelligence on specific individuals, and whether DOD played an operational role in specific counterterrorism operations." Gov't Memo in Summ. J. at 22.

The government's *Glomar* response is premised on an overly narrow reading of Plaintiffs' request. The ACLU is not seeking only records that would indicate whether the government had an intelligence interest in Abdulrahman al-Aulaqi and Samir Khan; rather, the relevant paragraphs of the ACLU's FOIA request seek, among other things, "all documents and

[10] A copy of the Attorney General's letter is contained at Exhibit 9 to the Declaration of Colin Wicker ("Wicker Dec.") submitted in connection with the ACLU's briefing on the OLC's withholdings, Dkt. 93.

records . . . relevant to . . . the failure to avoid causing [their] death[s]." Such records would include pre-strike analyses in which the government considered the possibility that the strikes would result in bystander casualties, as well as pre- and post-strike analyses assessing compliance with the requirements of international law. Listing and enumerating these kinds of records would not disclose whether or not the agencies had an intelligence interest in these two individuals. Nor would it disclose whether the CIA and DOD had an operational role in the strikes. *See ACLU v. CIA*, 710 F.3d at 429. In any event, as the Second Circuit has held, the government has already acknowledged that both the CIA and DOD have operational roles and intelligence interests in targeted killings in Yemen. *New York Times*, 756 F.3d at 118-19, 122.

Indeed, the government has already disclosed that it conducts both before- and after-the-fact factual analyses to determine the lawfulness of the drone strikes it conducts. In March 2012, Attorney General Holder asserted in a speech at Northwestern University that "any . . . use of lethal force by the United States will comply with the four fundamental law of war principles governing the use of force,"[11] which he then summarized:

> The principle of necessity requires that the target have definite military value. The principle of distinction requires that only lawful targets – such as combatants, civilians directly participating in hostilities, and military objectives – may be targeted intentionally. Under the principle of proportionality, the anticipated collateral damage must not be excessive in relation to the anticipated military advantage. Finally, the principle of humanity requires us to use weapons that will not inflict unnecessary suffering.

According to Holder, that analysis is done before each lethal force operation because it "may help to ensure . . . that the risk of civilian casualties can be minimized or avoided altogether." *Id.*; *see also* May 2011 White Paper (drone strikes comply with principles of proportionality and

[11]Wicker Dec. Ex. 13.

distinction);[12] November 2011 White Papers (same);[13] July 2010 OLC-DOD Memorandum (same);[14] Fact Sheet on US Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (precondition for authorization for authorization of lethal force is "near certainty that non-combatants will not be injured or killed") (*contained in* Declaration of Michael Weinbeck ("Weinbeck Dec."), Ex. 1). In keeping with those assertions, Attorney General Holder's May 23, 2013 letter to Congress specifically discussed the application of these principles to the drone strike that killed Samir Khan, (Wicker Dec., Ex. 9), stating that "*before* carrying out the operation that killed al-Aulaqi . . . senior officials determined that the operation would be conducted consistent with applicable law of war principles, including the cardinal principles of necessity . . . distinction . . . proportionality . . . and humanity." (emphasis added). The Attorney General's acknowledgement that Abdulrahman al-Aulaqi and Samir Khan were killed in U.S. drone strikes makes clear that the government conducted after-the-fact analyses of these strikes as well.

To be clear, the government may well have good reason to withhold some of the records, or some portion of some of the records, that are responsive to Plaintiffs' request. See e.g. Second Lutz Decl. ¶ 11 ("notwithstanding the limited official acknowledgment that Khan and Aulaqi's son were killed in the course of U.S. counterterrorism operations, the specifics of those operations remains classified"). The crucial point here, however, is that the government can enumerate and describe those records in a *Vaughn* index without disclosing any information that is protected by FOIA. The agencies' Glomar responses should accordingly be rejected.

[12]Wicker Dec. Ex. 3 at 14.
[13]Wicker Dec. Ex. 2 at 8.
[14] July 2010 OLC-DOD Memorandum at 28-29.

III. CIA and DOD have not justified the withholding of legal analysis under Exemptions 1, 3, and 5.[15]

As discussed above, the government has already waived its authority to withhold legal analysis to the extent the analysis is closely related to the analysis already disclosed. Even to the extent the government has not waived its authority to withhold legal analysis, however, the legal analysis must be disclosed because it is not withholdable under the exemptions the government invokes. Legal analysis is not a source or method, and accordingly it cannot be withheld under exemptions 1 and 3. While in some circumstances legal analysis can be withheld under exemption 5, the CIA and DOD have not established a factual basis for the applications of that exemption here.

A. CIA and DOD have not justified the withholding of legal analysis under Exemptions 1 and 3.

To the extent that documents withheld under Exemptions 1 and 3 contain legal analysis, this information must be disclosed. The targeted-killing program and the legal analysis purporting to authorize it are not intelligence sourced or methods within the meaning of the Executive Order No. 13526 § 1.4 (c), 75 Fed. Reg. 707 (Dec. 29, 2009); the CIA Act, 50 U.S.C. § 403g; or the National Security Act, 50 U.S.C. § 403-1(i)(1).

This Court previously held that legal analysis cannot be protected under Exemption 3 because "legal analysis is not an intelligence source or method" under the NSA. *New York Times*, 915 F.Supp.2d at 540 (citing *ACLU v. Dep't of Defense*, 389 F.Supp.2d 547, 565 (S.D.N.Y.2005)). However, the Court also concluded that there was "no reason why legal analysis cannot be classified pursuant to E.O. 13526 if it pertains to matters that are themselves

[15] As with Section I, above, Plaintiffs' argument mirrors the argument they have already submitted to the Court in connection with the OLC's withholdings. ACLU's Summ. J. Memo, Dist. Ct. Dkt. 92, 17-21.

properly classified" and protected under Exemption 1. *Id.* at 535. It is not clear to Plaintiffs' whether this Court's reasoning with respect to the withholding of legal reasoning under Exemption 1 survives the Second Circuit's ruling. *New York Times*, 756 F.3d at 124. Because the Second Circuit determined that withholding of legal analysis in the OLC-DOD Memorandum had been waived, it expressly declined to decide whether legal analysis was an intelligence source or method subject to classification. *New York Times*, 756 F.3d at 114 n.13 ("We therefore need not consider the Appellants' claim that the legal analysis in the OLC–DOD Memorandum was not subject to classification").

In any event, Plaintiffs respectfully submit that this Court's earlier conclusion was incorrect. Courts have uniformly held that the category of information classifiable under section 1.4(c) is co-extensive with the category of "intelligence sources and methods" in the NSA. *See e.g.*, *Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981); *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976). A contrary conclusion would dramatically expand the scope of government's withholdings authority. If legal analysis could be protected simply because it "pertain[ed]" to classified information, it is not clear why the government could not withhold every record relating in some way to national security. Moreover, the classification of legal analysis that "pertains" to any properly classified subject would quickly create a body of secret law, a harm that FOIA was intended to prevent. *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 153-54 (1975).[16]

Because neither of the government's withholding authorities protects legal analysis, the only question with respect to these exemptions is whether the legal analysis in the records can be

[16] If this Court's earlier ruling with respect to the withholding of legal analysis under Exemption 1 is the law of the case notwithstanding the Second Circuit's ruling, Plaintiffs respectfully reserve the right to seek further review of this Court's earlier ruling in the Second Circuit.

segregated from material that is exempt. *New York Times*, 756 F.3d at 119. Under FOIA, the burden is on the government to demonstrate that it may properly withhold responsive documents. *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (*citing* S.Rep. No. 813, 89th Cong., 2nd Sess., 8 (1965) ("Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it"); H.R.Rep. No. 1497, 89th Cong., 2d Sess., 9 (1966)).

Here, the government's public declarations are insufficient to determine which documents are withheld on the basis of legal analysis. Although the government does not expressly invoke the classification of legal analysis in non-draft documents, previously in this litigation the government has asserted that legal analysis is withholdable as an "intelligence source and method."[17] To the extent that the government's declarations address the contents of the withheld records, they strongly suggest that the government has not segregated legal analysis. For example, the government states that "the classified records withheld by CIA also include inter-agency correspondence consisting of legal analysis some of which has already been processed in connection with this litigation, such as copies of the OLC opinions pertaining to Aulaqi and the DOJ Classified White Paper." Gov't Memo Summ. J., Dist. Ct. Dkt. 99 at 8. The Panetta Declaration also likely contains legal analysis discussing the government's purported authority for the targeted-killing program, and the legal standards for targeting determinations.[18]

[17] In the Second Circuit, the government argued that "legal analysis relating to the use of targeted lethal force" could be properly classified and withheld under Exemption 1 because it pertained to an "intelligence source and method," and information about the targeted-killing program could be withheld under Exemption 3, as an "intelligence source and method" as well as a "function" of the CIA. Govt's Mot. in Opp. 31. Sec. Cir. Dkt. 95.

[18] In *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010), the government invoked the state secret privilege on the basis of harms arising from disclosure of "information needed to address whether or not, or under what circumstances, the United States may target a particular foreign terrorist organization and its senior leadership, the specific threat posed by al-Qaeda, AQAP, or

B. CIA and DOD have not justified the withholding of legal analysis under Exemption 5.

Exemption 5 protects information that would be shielded in litigation by traditional common-law privileges. *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005). Here, CIA and DOD claim that many of the withheld documents are protected under the deliberative-process, attorney-client, work-product, and presidential-communications privileges.

The ACLU has withdrawn its request for certain records for which the agencies have invoked exemption 5—in particular, records identified as drafts of records that are also listed on the agencies' indices; and records identified as emails, letters, notes, fax correspondence, slide presentations, briefings, and talking points, *see* Procedural History, *supra*—and accordingly the ACLU will not address the government's Exemption 5 arguments with respect to those records.

With respect to the remainder of the records, however, the agencies' public declarations do not establish the factual predicate required to invoke the various asserted privileges. For example, although the agencies invokes Exemption 5 with respect to twenty-nine records sought by Plaintiffs,[19] the agencies' public declarations address and provide justification for the withholding of only two of those documents: (i) a "[c]lassified memorandum from CIA General Counsel to various recipients in connection with a litigation matter, specifically *al-Aulaqi v. Obama*," CIA index number 14, presumably withheld under the attorney work-product privilege;[20] and (ii) a "[c]lassified info memo describing both released OLC opinions with opinions attached" produced by DOD General Counsel for the Secretary of Defense, DOD index

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Anwar al-Aulaqi, and other matters that plaintiff has put at issue, *including any criteria governing the use of lethal force*." Gov't Reply Br. at 24, 10-cv-01469. (emphasis added).

[19] See CIA index numbers 2, 3, 12, 14, 15, 33, 34, 35, 36, 59, 61, 62, 96, 109, 110, 111, 112, 113, 117, 118, 123, and 142. See DOD index numbers 1, 31, 38, 39, 46 and 55.

[20] The remaining documents identified as relating to the civil litigation are identified as "classified letters" and drafts of such letters. See CIA index numbers 16-19. The ACLU does not seek disclosure of these letters.

number 1; Second Harris Decl. ¶ 10, withheld under the attorney-client privilege. With respect to the remaining documents withheld under the attorney-client and deliberative-process privileges, the government has failed to provide any meaningful detail about how the relevant documents were used, who they were shared with, and whether they were directed at a particular case. Without such detail, and identification of the documents by number or description, it is impossible to determine whether the documents are in fact attorney-client communications, whether the attorney-client privilege has been waived, whether the documents are predecisional (rather than final), or whether once pre-decisional documents have been adopted as policy or treated as the agencies' "working law." *Brennan Ctr. for Justice v. Dep't Justice*, 697 F.3d 184, 195 (2d Cir. 2012) (privilege lost by adoption as working law or by express adoption).[21]

As with the other FOIA exemptions, it is the agency's burden to establish that a privilege protected by Exemption 5 applies, not the Plaintiffs' burden to establish they do not. Here, the governments' public declarations do not provide a foundation for the invocation of Exemption 5.

CONCLUSION

For the reasons stated above, the CIA and DOD have not justified the withholding of the records still at issue because they have not segregated legal analysis or already-acknowledged factual information. In these circumstances, the ACLU respectfully suggests that the interests of efficiency and justice would be best served if the Court reviewed the records *in camera* to determine which portions of the records must be released. While Plaintiffs understand that such a review would be time-consuming, Plaintiffs have reduced the number of records at issue substantially—from 224 records to 40. Moreover, as the Second Circuit has made clear in this case, *in camera* review is appropriate where the declarations are insufficient and there are

[21] The public declarations are just as meager with respect to the government's invocation of the presidential communications privilege, failing to provide a description of the documents or an index number. Second Lutz Decl. ¶ 21.

questions about whether the government has met its burden to segregate. *New York Times*, 756 F.3d at 121.[22]

In addition, Plaintiffs respectfully submit that the Court should order the agencies to provide *Vaughn* indices in response to paragraphs 5 and 6 of Plaintiffs' FOIA request.

[22] Another option available to the Court would be to "designate a special master to examine documents and evaluate an agency's contention of exemption." *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). *See, e.g.*, *In re Dep't of Defense*, 848 F.2d 232, 235-39 (D.C. Cir. 1988) (approving appointment of cleared special master to review FOIA withholding); *ACLU v. Dep't of Defense*, 339 F.Supp.2d 501, 504 (S.D.N.Y. 2004) (discussing possibility of appointing a special master with proper clearance to examine classified materials for which the government claims exemption).

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