IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, et al.,	
Plaintiffs,	
v.	Civil Action No. 1:10-cv-00436-RMC
DEPARTMENT OF JUSTICE, et al.,	
Defendants.	

DEFENDANT CIA'S MOTION FOR SUMMARY JUDGMENT

Defendant United States Central Intelligence Agency ("the CIA") hereby moves for summary judgment pursuant to Fed. R. Civ. P. 56(b) and Local Rule 7(h)(2).

Dated: October 1, 2010

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CIA'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Pursuant to the Freedom of Information Act ("FOIA"), Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "the ACLU") have sought a variety of records from Defendant Central Intelligence Agency ("CIA") related to "the use of unmanned aerial vehicles ('UAVs') — commonly referred to as 'drones' … — by the CIA and the Armed Forces for the purposes of killing targeted individuals." The types of records sought include, for example, targeting information, damage assessments, information about cooperation with foreign governments, and legal opinions about general and specific uses of weaponized drones to conduct these alleged strikes. The CIA has informed Plaintiffs that it can neither confirm nor deny the existence or nonexistence of records responsive to this request without compromising the national security concerns that animate FOIA's disclosure exemptions — specifically the exemptions set forth at 5 U.S.C. §§ 552 (b)(1) and (b)(3) ("Exemption 1" and "Exemption 3"). The CIA's determination in this regard is proper and entitles it to summary judgment.

BACKGROUND

This action arises from several FOIA requests from Plaintiffs to the CIA, the Department of Defense ("DOD"), the Department of State ("State"), and the Department of Justice ("DOJ"). Plaintiffs' requests, dated January 13, 2010, seek records pertaining to the following ten categories of information, each of which concerns "drone strikes": [1]

1. The "legal basis in domestic, foreign and international law" for such drone strikes, including who may be targeted with this weapon system, where and why;

[1] The ACLU's request uses the term "drone strike" to mean "targeted killing" with a drone. This Memorandum and accompanying declaration will use the term "drone strikes" for convenience while not confirming or denying the CIA's involvement or interest in such drone strikes. *See* Declaration of Mary Ellen Cole ("Cole Decl.") ¶ 7, Exhibit A at 5 ("CIA Request").

2. "Agreements, understandings, cooperation or coordination between the U.S. and the governments of Afghanistan, Pakistan, or any other country regarding the use of drones to effect targeted killings in the territory of those countries;"
3. "The selection of human targets for drone strikes and any limits on who may be targeted by a drone strike;"
4. "[C]ivilian casualties in drone strikes;"
5. The "assessment or evaluation of individual drone strikes after the fact;"
6. "[G]eographical or territorial limits on the use of UAVs to kill targeted individuals;"
7. The "number of drones strikes the have been executed for the purpose of killing human targets, the location of each such strike, and the agency of the government or branch of the military that undertook each such strike;"
8. The "number, identity, status, and affiliation of individuals killed in drone strikes;"
9. "[Wh]o may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings;" and
10. The "training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone."

See Declaration of Mary Ellen Cole ("Cole Decl.") Exhibit A (the "CIA Request"). In the original request, most of these categories include several sub-categories seeking specific information about drone strikes.

By letter dated March 9, 2010, the CIA issued a final response to Plaintiffs' request stating that "[i]n accordance with section 3.6(a) of Executive Order 12958, as amended, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to [Plaintiffs'] request," citing FOIA Exemptions 1 and 3, because "[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended." This response is commonly known as a Glomar response.[2] The CIA also informed Plaintiffs that they had a right to appeal the finding to the Agency Release Panel (the body within the CIA that considers FOIA appeals). *See* Cole Decl. ¶ 8, Exhibit B.

By letter dated April 22, 2010, Plaintiffs appealed the March 9 determination. *See* Cole Decl. ¶ 9, Exhibit C. CIA acknowledged receipt of Plaintiffs' letter challenging the CIA's Glomar response and noted that arrangements would be made for its consideration by the appropriate members of the Agency Release Panel. *Id*. ¶ 10, Exhibit D. While this appeal was pending, Plaintiffs filed an Amended Complaint in this matter on June 1, 2010, adding the CIA as a co-defendant to their previously-filed lawsuit against DOD, State, and DOJ. As a result of the filing of the Amended Complaint, and pursuant to its FOIA regulations at 32 C.F.R. §1900.42(c), the CIA terminated the administrative appeal proceedings on June 14, 2010. *Id.* ¶ 11, Exhibit E.

[2] *See Moore v. Bush*, 601 F. Supp. 2d 6, 14 n.6 (D.D.C. 2009) ("The '*Glomar*' response is named after the ship involved in *Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009, 1011 (D.C. Cir. 1976). In that case, the FOIA requester sought information regarding a ship named the 'Hughes Glomar Explorer,' and the CIA refused to confirm or deny whether it had any relationship with the vessel because to do so would compromise national security or would divulge intelligence sources and methods.").

ARGUMENT

As set forth below and in the attached declaration, whether or not the CIA possesses responsive records concerning drone strikes is a currently and properly classified fact that is exempt from disclosure under FOIA Exemptions 1 and 3. Official CIA acknowledgment of the existence or nonexistence of responsive records would reveal sensitive national security information concerning intelligence activities, intelligence sources and methods, and the foreign relations and foreign activities of the United States. To confirm the existence of responsive records would provide important insights into the CIA's interests and activities to terrorist organizations, foreign intelligence services, or other hostile groups; conversely, to confirm the nonexistence of responsive records would provide these same entities with valuable information about potential gaps in the CIA's interests and capabilities. *See* Cole Decl. ¶ 19, 21, 24-25. Because the CIA has properly asserted a Glomar response, it is entitled to a grant of summary judgment in its favor.

I. THE APPLICABLE FOIA AND SUMMARY JUDGMENT STANDARDS

FOIA's "basic purpose" reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal citation omitted). "Congress recognized, however, that public disclosure is not always in the public interest[.]" *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). Accordingly, in passing FOIA, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.'" *John Doe Agency*, 493 U.S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). As this Circuit has recognized, "FOIA represents a balance struck by

Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exemptions. *See* 5 U.S.C. § 552(b). "A district court only has jurisdiction to compel an agency to disclose improperly withheld agency records," *i.e.*, records that do "not fall within an exemption." *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996); *see also* 5 U.S.C. § 552(a)(4)(B) (providing the district court with jurisdiction only "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'"). While narrowly construed, FOIA's statutory exemptions "are intended to have meaningful reach and application," *John Doe Agency*, 493 U.S. at 152; *see also Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

Summary judgment is the procedural vehicle by which most FOIA actions are resolved. *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007); *Valfells v. CIA*, No. 09-1363, 2010 WL 2428034, *2 (D.D.C. June 17, 2010), *appeal docketed sub nom Thomas Moore, III v. CIA*, No. 10-5248 (D.C. Cir. Aug. 24, 2010). The government bears the burden of proving that the withheld information falls within the exemptions it invokes. *See* 5 U.S.C. § 552(a)(4)(B); *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). In a FOIA case, a court may grant summary judgment to the government entirely on the basis of information set forth in an agency's affidavits or declarations that provide "the justifications for

nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Such declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal quotation marks omitted); *Valfells*, 2010 WL 2428034, *2.

In reviewing the applicability of FOIA Exemptions 1 and 3 for purposes of deciding Defendant CIA's Motion for Summary Judgment, it is important to note that the information sought by Plaintiffs directly "implicat[es] national security, a uniquely executive purview." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926-27. While courts review *de novo* an agency's withholding of information pursuant to a FOIA request, "de novo review in FOIA cases is not everywhere alike." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Although *de novo* review provides for "an objective, independent judicial determination," courts nonetheless defer to an agency's determination in the national security context, acknowledging that "the executive ha[s] unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record." *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (internal quotation marks omitted). Courts have specifically recognized the "propriety of deference to the executive in the context of FOIA claims which implicate national security." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927-28.

For these reasons, courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927; *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C.

Cir. 2009) ("Today we reaffirm our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security."). Consequently, "in the national security context, the reviewing court must give 'substantial weight'" to agency declarations. *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 265 F. Supp. 2d 20, 27 (D.D.C. 2003) (quoting *King*, 830 F.2d at 217); *see Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (holding that the district court erred in "perform[ing] its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"); *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (because "courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security). Accordingly, FOIA "bars the courts from prying loose from the government even the smallest bit of information that is properly classified or would disclose intelligence sources or methods." *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

The following discussion and accompanying declaration establish that, pursuant to these standards of review, the CIA's Glomar response is appropriate in this case, and the CIA is therefore entitled to summary judgment in its favor.

II. THE CIA PROPERLY DECLINED TO CONFIRM OR DENY THE EXISTENCE OR NONEXISTENCE OF RECORDS RESPONSIVE TO PLAINTIFFS' REQUEST PURSUANT TO EXEMPTIONS 1 AND 3

"The *Glomar* doctrine is well settled as a proper response to a FOIA request because it is the only way in which an agency may assert that a particular FOIA statutory exemption covers the 'existence or nonexistence of the requested records' in a case in which a plaintiff seeks such records." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2nd Cir. 2009) (quoting *Phillippi v. CIA*, 546 F.2d 1009, 1012 (D.C. Cir. 1976)). The invocation of a Glomar response is appropriate

when "to confirm or deny the existence of records … would cause harm cognizable under an FOIA exception." *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982).

The CIA has properly invoked Exemptions 1 and 3 in response to Plaintiffs' request. "These exemptions cover not only the content of protected government records but also the fact of their existence or nonexistence, if that fact itself properly falls within the exemption." *Larson*, 565 F.3d at 861 (citing *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)). "FOIA Exemptions 1 and 3 are independent; agencies may invoke the exemptions independently and courts may uphold agency action under one exemption without considering the applicability of the other." *Larson*, 565 F.3d at 862-63 (citing *Gardels*, 689 F.2d at 1106-07).

The CIA invokes a Glomar response "consistently in all cases where the existence or nonexistence of records responsive to a FOIA request is a classified fact, including instances in which the CIA does not possess records responsive to a particular request." Cole Decl. ¶ 18. For example, "[i]f the CIA were to invoke a Glomar response only when it actually possessed responsive records, the Glomar response would be interpreted as an admission that responsive records exist." *Id.* Such a "practice would reveal the very information that the CIA must protect in the interest of national security." *Id.*

Courts in this Circuit have consistently upheld Glomar responses where, as here, confirming or denying the existence of records would either reveal classified information protected by FOIA Exemption 1 or disclose information protected by statute in contravention of FOIA Exemption 3. *See, e.g.*, *Larson*, 565 F.3d at 861-62 (upholding the National Security Agency's use of the Glomar response to plaintiffs' FOIA requests regarding past violence in Guatemala pursuant to Exemptions 1 and 3); *Frugone*, 169 F.3d at 774-75 (finding that CIA properly refused to confirm or deny the existence of records concerning plaintiff's alleged

employment relationship with CIA pursuant to Exemptions 1 and 3, despite the allegation that another government agency seemed to confirm plaintiff's status as a former CIA employee); *Morley v. CIA.*, 699 F. Supp. 2d 244, 257-58 (D.D.C. 2010) (upholding CIA's Glomar response to plaintiff's request concerning covert CIA operations pursuant to Exemptions 1 and 3); *Wheeler v. CIA*, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (ruling that CIA properly invoked a Glomar response to plaintiff's request for records concerning plaintiff's activities as a journalist in Cuba during the 1960s pursuant to Exemption 1). Here, the CIA has submitted a detailed declaration explaining why the fact of the existence or nonexistence of the requested records is exempt from disclosure pursuant to FOIA Exemptions 1 and 3. The CIA has examined each of the individual requests and properly determined that the fact of existence or nonexistence of responsive CIA records is protected from disclosure under Exemptions 1 and 3. Cole Decl. ¶ 5.

A. The CIA's Glomar Response Is Proper Under Exemption 1

Exemption 1 of FOIA "protects matters 'specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and . . . in fact properly classified pursuant to such Executive order.'" *Larson*, 565 F.3d at 861; *see* 5 U.S.C. § 552(b)(1). Executive Order 13526 governs the classification of national security information. *See* Classified National Security Information, Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009) ("E.O. 13526"); *see also Wolf v. CIA*, 473 F.3d 370, 375 (D.C. Cir. 2007).[3] Notably, section 3.6(a) of E.O. 13526 expressly authorizes an agency to "refuse to confirm or deny the existence" of the records. *See also Wilner*, 592 F.3d at 71 (observing that "the Executive Order specifically countenances the Glomar Response, permitting a classifying agency

[3] E.O. 13526 superseded Executive Order No. 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995).

to refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified") (internal citations omitted).

An agency can establish that it has properly withheld information under Exemption 1 if it demonstrates that it has met the classification requirements of E.O. 13526. Section 1.1 of the Executive Order sets forth the following four requirements for the classification of national security information: (1) an original classification authority classifies the information; (2) the United States Government owns, produces, or controls the information; (3) the information is within one of eight protected categories listed in section 1.4 of the Order; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security, and the original classification authority is able to identify or describe the damage. E.O. 13526, § 1.1(a). As noted above, when it comes to matters affecting the national security, courts accord "substantial weight" to an agency's declarations concerning classified information, *King*, 830 F.2d at 217, and deference to the expertise of agencies involved in national security and foreign relations. *Fitzgibbon*, 911 F.2d at 766; *Frugone*, 169 F.3d at 775. Given that the CIA has met both the procedural and substantive prerequisites for classification under the Executive Order, the existence or nonexistence of responsive CIA records is exempt from disclosure under FOIA Exemption 1.

1. An Original Classification Authority Has Classified the Information

Mary Ellen Cole, the Information Review Officer for the CIA's National Clandestine Service, has affirmed that she holds original classification authority under a delegation of authority pursuant to section 1.3(c) of E.O. 13526. Cole Decl. ¶ 3. She found that "the existence or nonexistence of responsive records is a currently and properly classified fact . . . the disclosure

of which reasonably could be expected to cause damage to the national security of the United States." *Id.* at ¶ 5. Thus, the information withheld satisfies the Executive Order's classification requirement that an original classification authority classified the information.

2. The United States Owns, Produces, or Controls the Information

The Cole Declaration confirms that the fact of the existence of nonexistence of records responsive to Plaintiffs' requests is owned by and under the control of the United States Government. *Id.* at ¶ 30. Accordingly, the withheld information satisfies the second classification requirement regarding U.S. Government information.

3. The Information Falls Within the Protected Categories Listed in Section 1.4 of E.O. 13526

The CIA has determined, and has articulated with reasonable specificity, that the information protected from disclosure falls squarely within certain delineated categories of information set forth in sections 1.4(c) and (d) of E.O. 13526. Cole Decl. ¶¶ 32-38.[4] First, Section 1.4(c) of the Order permits the classification of information concerning "intelligence activities (including covert action), intelligence sources or methods, or cryptology."). As the Cole Declaration explains:

> Hypothetically, if the CIA were to respond to this request by admitting that it possessed responsive records, it would indicate that the CIA was involved in drone strikes or at least had an intelligence interest in drone strikes – perhaps by providing supporting intelligence, as an example. In either case, such a response would reveal a specific clandestine intelligence activity or interest of the CIA, and it would provide confirmation that the CIA had the capability and resources to be involved in these specific activities – all facts that are protected from disclosure . . . .

[4] The Cole Declaration also asserts that the fact of the existence or nonexistence of the requested records has not been classified in order to conceal violations of law, or inefficiency, administrative error; to prevent embarrassment to a person, organization or agency; to restrain competition; or prevent or delay the release of information that does not require protection in the interest of national security. Cole Decl. ¶ 31.

> On the other hand, if the CIA were to respond by admitting that it did not possess any responsive records, it would indicate that the CIA had no involvement or interest in drone strikes. Such a response would reveal sensitive information about the CIA's capabilities, interests, and resources that is protected from disclosure . . . .

Cole Decl. ¶ 19, 21; *see also* ¶¶ 32, 33, 36.

Although each of the categories requested by Plaintiffs relates to drone strikes in some manner and therefore animates these concerns, some of the categories seek even more detailed information about the CIA's activities, sources, and methods related to drone strikes. For example, several of the requests seek particular types of intelligence and analysis related to drone strikes, such as target selection and "after the fact" evaluations or assessments of individual drone strikes. *See* CIA Request, ¶¶ 3, 4, 5, 7, and 8; Cole Decl. ¶ 22. Confirming the existence or non-existence of records responsive to these requests would therefore divulge whether or not the CIA has an interest in or engages in intelligence analysis related to these activities. Other requests seek information about training and supervision of drone pilots. *See* CIA Request ¶¶ 9, 10. Confirming the existence or nonexistence of such records would reveal whether or not CIA is involved in drone strikes. Cole Decl ¶ 22. Finally, a non-Glomar response to categories 1.B and 2 could reveal information about the existence or nonexistence of any cooperation, contact, or other relationships between the CIA and foreign governments with respect to drone strike operations. Cole Decl. ¶¶ 22, 23, 25, 36-38; *see also Fitzgibbon*, 911 F.2d at 759, 760 (Exemption 3 protects even "nonsensitive contacts" between CIA and foreign officials). All of this information concerns CIA intelligence activities and intelligence sources and methods and thus falls within section 1.4(c).[5]

[5] Furthermore, if CIA were required to respond to Plaintiffs' requests by either confirming or denying whether responsive records exist, the ordinary processing of any such records in FOIA litigation, if they existed, could likely expose additional classified information even if the substantive content of the

Second, section 1.4(d) of the Order permits classification of information concerning "foreign relations or foreign activities of the United States, including confidential sources." The CIA has determined that official acknowledgement of the existence or nonexistence of responsive records would reveal information pertaining to the foreign relations and foreign activities of the United States. "As an initial matter, because CIA's operations are conducted almost exclusively overseas or otherwise concern foreign intelligence matters, they generally are U.S. 'foreign' activities by definition." Cole Decl. ¶ 36. The CIA has likewise determined that official confirmation of the existence or nonexistence of CIA records concerning drone strikes would reveal information that impacts the foreign relations of the United States. As explained in the Cole Declaration, "[a]lthough it is generally known that the CIA conducts clandestine intelligence operations, identifying an interest in a particular matter or publicly disclosing a particular intelligence activity could well cause the affected or interested foreign government to respond in ways that would damage U.S. national interests." Cole Decl. ¶¶ 37-38. "An official acknowledgement that the CIA possesses the requested information," she explains, "could be construed by a foreign government, whether friend or foe, to mean that the CIA has operated undetected within that country's borders or has undertaken certain intelligence operations against its residents." *Id.* Several of the categories also further implicate the foreign relations of the United States by specifically seeking information about potential intelligence cooperation or

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underlying records were protected from disclosure. *See generally Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) (requiring agencies to prepare an itemized index of withheld documents so that the trial court can make a rational decision about whether the withheld material must be produced). The Cole Declaration explains that this processing could reveal valuable information about depth, breadth, and timing of any potential CIA involvement or interest in drone strikes (or lack thereof). Cole Decl. ¶ 20; *see also Bassiouni v. C.I.A.*, 392 F.3d 244, 245 (7th Cir. 2004) (recognizing that "[a] list of documents could show clusters of dates that reveal when the agency acquired the information. Knowing which documents entered the files, and when, could permit an astute inference [regarding] how the information came to the CIA's attention-and, in the intelligence business, 'how' often means 'from whom.'").

coordination with foreign governments in relation to drone strikes. *See* CIA Request, paragraphs 1.B, 2, 6 & 7. This type of information falls squarely with section 1.4(d) of E.O. 13526.

4. An Original Classification Authority Has Properly Determined that the Unauthorized Disclosure of the Requested Information Could Be Expected to Result in Damage to the National Security and Has Identified that Damage

Finally, the CIA has determined, and explained in reasonably specific detail, that the unauthorized disclosure of this information reasonably could be expected to cause damage to the national security of the United States. As explained in the Cole Declaration, if CIA were to confirm or deny the existence or nonexistence of responsive records, it would reveal whether or not the CIA has an intelligence interest in drone strikes or is involved in drone strikes, as well as potentially revealing the depth and breadth of such an interest or involvement. Cole Decl. ¶¶ 32-35. Such a disclosure would cause damage to national security by providing insight into the CIA's capabilities and interests and by harming foreign relations. *Id*.

As the Cole Declaration explains, "[c]landestine intelligence techniques, capabilities, or devices are valuable only so long as they remain unknown and unsuspected. Once an intelligence source or method (or the fact of its use in a certain situation) is discovered, its continued successful use by the CIA is seriously jeopardized." Cole Decl. ¶ 34. Furthermore, "terrorist organizations and other hostile groups have the capacity and ability to gather information from myriad sources, analyze it, and deduce means and methods from disparate details to defeat the CIA's collection efforts. Thus, even seemingly innocuous, indirect references to an intelligence source or method could have significant adverse effects when juxtaposed with other publicly-available data." *Id*. ¶ 35; *see also* ¶ 32.

With this understanding, the Cole Declaration explains that "[i]t would greatly benefit hostile groups, including terrorist organizations, to know with certainty what intelligence

activities the CIA is or is not engaged in or what the CIA is or is not interested in." Cole Decl. ¶ 24. "To reveal such information would provide valuable insight into the CIA's capabilities, interests, and resources that our enemies could use to reduce the effectiveness of the CIA's intelligence operations." *Id.* "Terrorist organizations, foreign intelligence services, and other hostile groups use this information to thwart CIA activities and attack the United States and its interests." *Id.* ¶ 32. The Cole Declaration therefore concludes that these "revelation[s] could be expected to cause damage to U.S. national security." Cole Decl. ¶¶ 24-26.

Furthermore, the CIA has determined that confirming the existence or nonexistence of requested CIA records could negatively impact United States foreign relations. The Cole Declaration articulates this concern as follows:

> [A]ny response by the CIA that could be seen as a confirmation of its alleged involvement in drone strikes could raise questions with other countries about whether the CIA is operating clandestinely inside their borders, which in turn could cause those countries to respond in ways that would damage U.S. national interests. Moreover, … some of the individual categories of requested records specifically concern the potential involvement of foreign governments in drone strikes. If the CIA is forced to acknowledge the existence or nonexistence of records responsive to a request concerning the assistance of a foreign partner, such acknowledgement would be seen as a tacit confirmation or denial of a clandestine foreign intelligence relationship and/or the involvement of a foreign government in a clandestine activity. When foreign governments cooperate with the CIA, most of them require the CIA to keep the fact of their cooperation in the strictest confidence. Any violation of this confidence could weaken, or even sever, the relationship between the CIA and its foreign intelligence partners, degrading the CIA's ability to combat hostile threats abroad.

Cole Decl. ¶ 25; *see also Riquelme v. CIA*, 453 F. Supp. 2d 103, 109 (D.D.C. 2006) (upholding CIA's Glomar response under Exemption 1 because "officially acknowledging that the CIA has recruited or collected intelligence information on a foreign national, or conducted clandestine activities in a foreign country, may also qualify for classification on the ground that it could hamper future foreign relations with the government of that country" and a "denial that the CIA

has records ... could serve to damage national security by alerting certain individuals that they are not CIA intelligence targets") (internal quotations and citations omitted).

Although a Glomar response may be vexing to a FOIA requester, it is necessary to ensure that an agency does not reveal classified information simply though a pattern of responses. As the Cole Declaration observes, it would be nonsensical for an agency only to invoke a Glomar response if it had responsive records, and notify requesters when it does not have responsive records, because such an approach would construe a Glomar response as an acknowledgment that responsive records do in fact exist. Cole Decl. ¶ 18. As Ms. Cole notes, "[t]his practice would reveal the very information that CIA must protect in the interest of national security." *Id.* Given these critical national security concerns, Defendant's only protection in circumstances where, as here, the fact of the existence or nonexistence of responsive records is classified, is to provide a consistent response regardless of whether or not it actually possesses responsive records. *Id.*

B. The CIA's Glomar Response Is Proper Under Exemption 3

Information withheld pursuant to Exemption 1 may also be withheld pursuant to Exemption 3. In refusing to confirm or deny the existence or nonexistence of responsive records, the CIA has properly invoked Exemption 3. Exemption 3 sanctions the use of a Glomar response as authorized by a separate statute, "provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). To qualify as a statute that permits the withholding of information pursuant to Exemption 3, a court must examine the statute to ascertain whether (1)

the claimed statute is a statute of exemption under FOIA, and (2) whether the withheld material satisfies the criteria of the exemption statute.

The CIA's mandate to withhold information under Exemption 3 is broader than its authority under Exemption 1 pursuant to Executive Order 13526. *See Gardels*, 689 F.2d at 1107 (executive order governing classification of documents "not designed to incorporate into its coverage the CIA's full statutory power to protect all of its 'intelligence sources and methods'"). Most importantly, unlike Section 1.1(a)(4) of Executive Order 13526, these statutes do not require a determination that the disclosure of information would be expected to result in damage to the national security. *See Sims*, 471 U.S. at 167; *Fitzgibbon*, 911 F.2d at 761-62 ("the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage."); *Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993). *Compare* 50 U.S.C. §§ 403-1(i)(1), 403g, *with* E.O. 13526, § 1.1(a)(4). Although the CIA has properly determined that the national security would be harmed if any of the information at issue were released, if the Court is satisfied that the CIA's Glomar response is proper under Exemption 3, it need not even conduct the additional analysis required under Exemption 1. *See Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 n.3 (D.C. Cir. 2003) ("Because we conclude that the Agency easily establishes that the records ... are exempt from disclosure under Exemption 3, we do not consider the applicability of Exemption 1.").

1. The CIA's Glomar Response is Proper Under the CIA Act

It is well-established that the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403-4 *et seq.* (the "CIA Act") satisfies the criteria for withholding of information pursuant to Exemption 3. *See Fitzgibbon*, 911 F.2d at 761 (recognizing that courts have determined that the CIA Act is an Exemption 3 statute and noting that "[t]his conclusion is

supported by the plain meaning of the statute, by the legislative history of FOIA, and by every federal court of appeals that has considered the matter"); *Baker v. CIA*, 580 F.2d 664, 667 (D.C. Cir. 1978). Section 6 of the CIA Act exempts CIA from the provision of any law requiring the publication or disclosure of several categories of information relating to the CIA's operations, including its "functions." *See* 50 U.S.C. § 403g; *see also* Cole Decl. ¶ 41. Accordingly, the CIA Act protects information that would reveal the functions of the CIA, which "plainly include clandestine intelligence activities, intelligence sources and methods and foreign liaison relationships." Cole Decl. ¶ 41; *see, e.g., Goland v. CIA*, 607 F.2d 339, 351 (D.C. Cir. 1978) (holding that intelligence sources and methods are "functions" of the CIA within the meaning of the CIA Act, and thus exempt from disclosure under Exemption 3); *Riquelme*, 453 F. Supp. 2d at 111-12 (same). Indeed, Executive Order 12333, as amended, provides that the CIA shall, among other functions, "[c]ollect . . ., analyze, produce, and disseminate foreign intelligence and counterintelligence," "[c]onduct covert action activities approved by the President," and "[c]onduct foreign intelligence liaison relationships." *See* United States Intelligence Activities, Exec. Order No. 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981), amended most recently by Exec. Order No. 13470, 75 Fed. Reg. 45325 (July 30, 2008); *see also* 50 U.S.C. §403-4a(d)(1), 4a(f) (authorizing functions of the CIA, including intelligence collection and coordinating intelligence relationships with foreign governments and international organizations).

The Cole Declaration explains that "acknowledging the existence or nonexistence of the requested records would require the CIA to disclose information about its core functions." Cole Decl. ¶ 41. As described above, confirming the existence or nonexistence of responsive records would reveal whether the CIA has an intelligence interest in drone strikes or is involved in drone strikes, including the existence, breadth and depth of any such interest or involvement, and the

CIA's capabilities or lack thereof with respect to drones. Cole Decl. ¶¶ 19-23. Such a disclosure could also confirm the existence or nonexistence of potential foreign intelligence activities and any cooperation, contact, or other relationship, between the CIA and foreign governments. Cole Decl. ¶¶ 36-38; *see also Fitzgibbon*, 911 F.2d at 762-63. The CIA has therefore determined that acknowledging the existence or nonexistence of the requested records would require the CIA to disclose information about its functions, an outcome the CIA Act expressly prohibits. *Id*.

2. The CIA's Glomar Response is Proper Under the NSA

The National Security Act of 1947, as amended, 50 U.S.C. § 401 et seq. (the "NSA") also satisfies the criteria for withholding of information pursuant to Exemption 3. *See, e.g.*, *Sims,* 471 U.S. at 167-68 (finding that the NSA "qualifies as a withholding statute under Exemption 3"); *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) ("Section 403 [of the NSA] is an Exemption 3 statute."). The NSA provides that the "Director of National Intelligence ("DNI") shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1); Cole Decl. ¶ 40.[6] In *CIA v. Sims*, the Supreme Court, recognizing the "wide-ranging authority" provided by the NSA to protect intelligence sources and methods, held that it was "the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead

[6] Courts have recognized that not just the DNI, but also CIA and other agencies may rely upon the amended NSA to withhold records under FOIA. *See, e.g.*, *Larson*, 565 F.3d at 862-63, 865; *Talbot v. CIA*, 578 F. Supp. 2d 24, 28-29 n.3 (D.D.C. 2008). Furthermore, the President specifically preserved CIA's ability to invoke the NSA to protect its intelligence sources and methods. *See, e.g.*, Exec. Order No. 12,333, § 1.6(d) (as revised after the NSA was amended) (reprinted in 50 U.S.C. § 401 note) (requiring that the CIA Director "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the [DNI]"). Here, the CIA has explained that "[u]nder the direction of the DNI … and consistent with section 1.6(d) of Executive Order 12333, the CIA is authorized to protect CIA sources and methods from unauthorized disclosure." Cole Decl. ¶ 40.

to an unacceptable risk of compromising the Agency's intelligence-gathering process." 471 U.S. at 180. The Court observed that Congress did not limit the scope of "intelligence sources and methods" in any way. *Id*. at 183. Rather, it "simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence." *Id*. at 169-70.

Following the invocation of a Glomar response to a FOIA request pursuant to Exemption 3, the only question for the court is whether the agency has demonstrated that responding to the request "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." *Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980); *see, e.g.*, *Wolf*, 473 F.3d at 377-78 (relying on the NSA in holding that CIA's affidavits "establish that disclosure of information regarding whether or not CIA records of a foreign national exist would be unauthorized under Exemption 3 because it would be reasonably harmful to intelligence sources and methods"); *Riquelme*, 453 F. Supp. 2d at 111-12 (affirming CIA's Glomar response pursuant to the NSA and CIA Act regarding certain alleged CIA activities in Paraguay and, *inter alia*, information relating to a foreign national because the fact of the existence or nonexistence of such records "are pertinent to the Agency's intelligence sources and methods"). Such broad discretion is proper under the Exemption 3 analysis because even "superficially innocuous information" might reveal valuable intelligence sources and methods. *Sims*, 471 U.S. at 178; *see also Fitzgibbon*, 911 F.2d at 762 ("the fact that the District Court at one point concluded that certain contacts between CIA and foreign officials were 'nonsensitive' does not help [plaintiff] because apparently innocuous information can be protected and withheld").

The Cole Declaration explains in great detail that confirming or denying the existence of the records requested by Plaintiffs can reasonably be expected to lead to unauthorized disclosure

of CIA intelligence sources and methods. *See* Cole Decl. ¶¶ 19-26, 33-35. As further explained therein, "to confirm or deny that the CIA possesses records responsive to Plaintiffs' request could risk the disclosure of the existence or nonexistence of several potential intelligence sources and methods, including the CIA's possible relationships with foreign liaison partners relating to drone strikes, any CIA interest in drone strikes, and the CIA's capabilities relating to that particular device." Cole Decl. ¶ 33. Information about such relationships, interests, activities, and capabilities of the CIA (or lack thereof) is intelligence sources and methods information that is protected from disclosure by the NSA.

Accordingly, the CIA has properly concluded that a Glomar response is necessary to safeguard CIA functions and intelligence sources and methods from unauthorized disclosure. The records sought by Plaintiffs – information that would disclose the existence or nonexistence of clandestine CIA functions, intelligence activities, sources and/or methods – falls squarely within the scope of the protective mandate under the CIA Act and the NSA. Thus, the CIA's decision neither to confirm nor deny the existence of responsive records is justified by Exemption 3.

III. THE CIA HAS NOT OFFICIALLY ACKNOWLEDGED THE EXISTENCE OR NONEXISTENCE OF RESPONSIVE RECORDS

Plaintiffs have alleged in their administrative appeal that the CIA has previously acknowledged "facts at issue in the Request" and that therefore a Glomar response is improper. *See* CIA Appeal at 2. An agency may be compelled to provide information over a valid FOIA exemption claim only when the specific information at issue has already been fully, publicly, and officially disclosed. *See Wolf*, 473 F.3d at 378. Plaintiffs "bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Id*.

(quoting *Afshar*, 702 F.2d at 1130). The Plaintiffs must show (1) that the requested information is "as specfic as the information previously released;" (2) that the requested information "match[es] the previous information;" and (3) that the information has "already . . . been made public through an official and documented disclosure." *Id*. As this Circuit noted in *Wolf*, "the insistence on exactitude recognizes 'the Government's vital interest in information relating to national security and foreign affairs.'" *Id*. (quoting *Public Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993).

The Cole Declaration confirms that the CIA has not officially acknowledged the existence or nonexistence of responsive CIA records related to drone strikes, Cole Decl. ¶ 43, which is the relevant legal inquiry under the Glomar doctrine. *See Wolf*, 473 F.3d at 379; *see also Wilner*, 592 F.3d at 70 ("The Glomar doctrine is applicable … in cases in which the existence or nonexistence of a record is a fact exempt from disclosure under a FOIA exception. An agency is therefore precluded from making a Glomar response if the existence or nonexistence of the specific records sought by the FOIA request has been the subject of an official public acknowledgment."); *Valfells*, 2010 WL 2428034 at *3 ("Resolution of this matter … turns on whether the CIA has already 'officially acknowledged' that it has any record concerning the [subject of the request].") Nor has it officially acknowledged any of the protected underlying information implicated by Plaintiffs' request, such as any involvement or intelligence interest the CIA may or may not have in drone strikes. Cole Decl. ¶ 43. Plaintiffs have attempted to infer such an acknowledgement from a variety of news sources and quotes, none of which approaches official confirmation that responsive records exist.

Many of the statements cited by Plaintiffs are either unsourced or come from former government officials or are attributed to anonymous individuals. Other statements constitute

attempts at deduction or mere conjecture. As the Second Circuit recently explained, "anything short of [an official] disclosure necessarily preserves some increment of doubt regarding the reliability of the publicly available information." *Wilson v. CIA*, 586 F.3d 171, 195 (2nd Cir. 2009). Morever, "the law will not infer official disclosure . . . from . . . widespread public discussion of a classified matter," and such publicity or statements are insufficient to undermine the CIA's predictions of harm from official confirmation or denial. *See id*. at 195; *see also Wolf,* 473 F.3d at 378 ("An agency's official acknowledgment of information by prior disclosure, however, cannot be based on mere public speculation, no matter how widespread."); *Military Audit Project v. Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981) (explaining importance of maintaining "lingering doubts"); *Students Against Genocide v. Dep't of State,* 50 F. Supp. 2d 20, 25 (D.D.C. 1995) ("[T]here is certainly no 'cat out of the bag' philosophy underlying FOIA so that any public discussion of protected information dissipates the protection which would otherwise shield the information sought."); *see also Snepp v. United States*, 444 U.S. 507, 510 n.3 (1980) (recognizing government's "compelling interest in protecting ... the appearance of confidentiality so essential to the effective operation of our foreign intelligence service").[7]

Plaintiffs also cite statements by former government employees and others not authorized to speak for the CIA. The courts have been clear, however, that "statements made by a person not authorized to speak for the Agency," do not waive a Glomar response. *Wilson*, 586 F.3d at 186-87; *see also Afshar*, 702 F.2d at 1130-31 ("Unofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of

[7] Even in cases where there arguably has been some limited acknowledgement of the alleged information at issue or related topics – which is not the case here – courts have upheld the use of a Glomar response. *See Wilner*, 592 F.3d at 70 ("[T]he fact that the [program's] existence has been made public reinforces the government's continuing stance that it is necessary to keep confidential the details of the program's operations and scope."); *Phillippi v. CIA*, 655 F.2d 1325, 1331 (D.C. Cir. 1981) ("There may be much left to hide, and if there is not, that itself may be worth hiding.").

their cooperation with the CIA, but official acknowledgement may force a government to retaliate."); *Military Audit Project*, 656 F.2d at 744 (requiring "authoritative" disclosure); *Schlesinger v. CIA*, 591 F. Supp. 60, 66 (D.D.C. 1984) (construing official disclosure to mean "direct acknowledgments by an authoritative government source.")

In addition to these non-authoritative media reports, Plaintiffs cite several public statements by CIA Director Leon Panetta to reporters and one by former DNI Dennis Blair to Congress. *See* Cole Decl. ¶ 9, Exhibit C at 3-4 ("CIA Appeal"). Even as selectively quoted in the administrative appeal, none of these statements acknowledge the existence or nonexistence of responsive CIA records. Cole Decl. ¶ 45. Accordingly, the specific information withheld has not been publicly acknowledged. Nor, when read accurately, do these statements reveal the protected underlying information, such as the existence or extent of any CIA interest or involvement in drone strikes (or lack thereof) or the existence or extent of any CIA cooperation with foreign governments with respect to drone strikes (or lack thereof). Plaintiffs' administrative appeal did not cite a single official acknowledgment of the information at issue. Instead, Plaintiffs relied on partial quotes and the inferences drawn by journalists. Such sources clearly do not constitute the formal, official acknowledgement that Courts have envisioned as a waiver of FOIA exemptions. *Cf. Wolf*, 473 F.3d at 379 (finding CIA may have waived Glomar response where the CIA Director had read responsive documents into the Congressional record). *See also Valfells*, 2010 WL 2428034 at *4 ("Logical deductions are not, however, official acknowledgments.").

In sum, at no time has the CIA specifically acknowledged the existence or nonexistence of responsive records; nor has the CIA acknowledged CIA interest or involvement in drone strikes as defined by the Plaintiffs. The ACLU apparently believes that its intelligence expertise,

or the intelligence expertise of journalists, is adequate to infer such a conclusion from the publicly available information. However, such inferences, even if the ACLU finds them compelling, do not constitute official acknowledgements on behalf of the CIA. *See Phillippi*, 655 F.2d at 1331; *Military Audit Project*, 656 F.2d at 745; *Afshar*, 702 F.2d at 1130-31.

CONCLUSION

For the foregoing reasons, Defendant CIA respectfully requests that the Court grant summary judgment in its favor.

Dated: October 1, 2010

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, et al., Plaintiffs, v. DEPARTMENT OF JUSTICE, et al., Defendants.	Case No. 1:10-CV-00436-RMC

DECLARATION OF MARY ELLEN COLE
INFORMATION REVIEW OFFICER
NATIONAL CLANDESTINE SERVICE
CENTRAL INTELLIGENCE AGENCY

I. INTRODUCTION

I, MARY ELLEN COLE, hereby declare and state:

1. I am the Information Review Officer ("IRO") for the National Clandestine Service ("NCS") of the Central Intelligence Agency ("CIA"). I was appointed to this position in June 2010. I have held operational and managerial positions in the CIA since 1979.

2. The NCS is the organization within the CIA responsible for conducting the CIA's foreign intelligence and counterintelligence activities. As the IRO for the NCS, I am authorized to assess the current, proper classification of CIA information based on the classification criteria of Executive Order 13526 and applicable CIA regulations. As the IRO, I am

responsible for the classification review of documents and information originated by the NCS or otherwise implicating NCS interests, including documents which may be the subject of court proceedings or public requests for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. As part of my official duties, I ensure that any determinations regarding the public release or withholding of any such documents or information are proper and do not jeopardize the national security by disclosing classified NCS intelligence methods, operational targets, or activities or endanger NCS personnel, facilities, or sources.

3. As a senior CIA official and under a written delegation of authority pursuant to section 1.3(c) of Executive Order 13526, I hold original classification authority at the TOP SECRET level. Therefore, I am authorized to conduct classification reviews and to make original classification and declassification decisions.

4. I am submitting this declaration in support of the CIA's motion for summary judgment in this proceeding. Through the exercise of my official duties, I have become familiar with this civil action and the underlying FOIA request. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

5. Plaintiffs' FOIA request seeks ten categories of records "pertaining to the use of unmanned aerial vehicles ('UAVs') - commonly referred to as 'drones'… - by the CIA and the Armed Forces for the purposes of killing targeted individuals." As an original classification authority for the CIA, I have determined that the CIA can neither confirm nor deny the existence or nonexistence of responsive records because the existence or nonexistence of any such records is a currently and properly classified fact that is exempt from release under FOIA exemptions (b)(1) and (b)(3). Official CIA acknowledgement of the existence or nonexistence of the requested records would reveal information that concerns intelligence activities, intelligences sources and methods, and U.S. foreign relations and foreign activities, the disclosure of which reasonably could be expected to cause damage to the national security of the United States. I explain the basis for this determination, commonly referred to as a Glomar response,[1] in Part III.

6. This declaration will explain, to the greatest extent possible on the public record,[2] the basis for the CIA's Glomar response to Plaintiffs' FOIA request and to identify the

[1] The origins of the Glomar response trace back to this Circuit's decision in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), which affirmed CIA's use of the "neither confirm nor deny" response to a FOIA request for records concerning CIA's reported contacts with the media regarding Howard Hughes' ship, the "Hughes Glomar Explorer."

[2] If the Court desires, the CIA is prepared to supplement this unclassified declaration with a classified declaration containing additional information that the CIA cannot file on the public record.

applicable FOIA exemptions that support the Glomar response in this case.

II. PLAINTIFFS' FOIA REQUEST

7. In a letter to the CIA's Information and Privacy Coordinator dated 13 January 2010,[3] Plaintiffs submitted a FOIA request seeking "records pertaining to the use of unmanned aerial vehicles ('UAVs') - commonly referred to as 'drones' and including the MQ-1 Predator and MQ-9 Reaper - by the CIA and the Armed Forces for the purposes of killing targeted individuals." The request refers to this subject as "drone strikes" for short, a term I will use for convenience in this declaration while not confirming or denying the CIA's involvement or interest in such drone strikes. According to Plaintiffs' Amended Complaint, Plaintiffs submitted identical FOIA requests to the Department of Defense ("DOD"), the Department of State ("State"), the Department of Justice ("DOJ"), and DOJ's Office of Legal Counsel ("OLC") on the same day. A true and correct copy of the 13 January 2010 letter is attached as Exhibit A.

8. By letter dated 9 March 2010, the CIA issued a final response to Plaintiffs' request stating that "[i]n accordance with section 3.6(a) of Executive Order 12958, as amended, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to [Plaintiffs'] request," citing FOIA

[3] The letter is misdated as 13 January 2009.

exemptions (b)(1) and (b)(3) and "[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended." The CIA informed Plaintiffs that they had a right to appeal the finding to the Agency Release Panel, the body within the CIA that considers FOIA appeals. A true and correct copy of the CIA's 9 March 2010 letter is attached as Exhibit B.

9. By letter dated 22 April 2010, Plaintiffs appealed the CIA's final response. A true and correct copy of the 22 April 2010 letter is attached as Exhibit C.

10. By letter dated 6 May 2010, the CIA acknowledged receipt of counsel for Plaintiffs' letter challenging the CIA's Glomar response. The CIA accepted Plaintiffs' appeal and noted that arrangements would be made for its consideration by the appropriate members of the Agency Release Panel. A true and correct copy of the CIA's 6 May 2010 letter is attached as Exhibit D.

11. While this appeal was pending, Plaintiffs filed an Amended Complaint in this matter on 1 June 2010, which added the CIA as a co-defendant to their previously-filed lawsuit against DOD, State, and OLC. As a result of the filing of the Amended Complaint, and pursuant to its FOIA regulations at 32 C.F.R. §

1900.42(c), the CIA terminated the administrative appeal proceedings on 14 June 2010. A true and correct copy of the CIA's 14 June 2010 letter is attached as Exhibit E.

III. THE CIA'S GLOMAR DETERMINATION

12. The CIA has invoked the Glomar response in this case because confirming or denying the existence or nonexistence of CIA records responsive to Plaintiffs' FOIA request would reveal classified information that is protected from disclosure by statute. An official CIA acknowledgement that confirms or denies the existence or nonexistence of records responsive to Plaintiffs' FOIA request would reveal, among other things, whether or not the CIA is involved in drone strikes or at least has an intelligence interest in drone strikes. As discussed below, such a response would implicate information concerning clandestine intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities. The CIA's only course of action is to invoke a Glomar response by stating that it can neither confirm nor deny the existence or nonexistence of the requested records.

13. The CIA is charged with carrying out a number of important functions on behalf of the United States, which include, among other activities, collecting and analyzing foreign intelligence and counterintelligence. A defining characteristic of the CIA's intelligence activities is that they

are typically carried out through clandestine means, and therefore they must remain secret in order to be effective. In the context of FOIA, this means that the CIA must carefully evaluate whether its response to a particular FOIA request could jeopardize the clandestine nature of its intelligence activities or otherwise reveal previously undisclosed information about its sources, capabilities, authorities, interests, strengths, weaknesses, resources, etc.

14. In a typical scenario, a FOIA requester submits a request to the CIA for information on a particular subject and the CIA conducts a search of non-exempt records and advises whether responsive records were located. If records are located, the CIA provides non-exempt records or reasonably segregable non-exempt portions of records and withholds the remaining exempt records and exempt portions of records. In this typical circumstance, the CIA's response - either to provide or not provide the records sought - actually confirms the existence or nonexistence of CIA records related to the subject of the request. Such confirmation may pose no harm to the national security or clandestine intelligence activities because the response focuses on releasing or withholding specific substantive information. In those circumstances, the fact that the CIA possesses or does not possess records is not itself a classified fact.

15. In the present situation, however, the CIA asserted a Glomar response to Plaintiffs' request because the existence or nonexistence of CIA records responsive to this request is a currently and properly classified fact, the disclosure of which reasonably could be expected to cause damage to the national security. What is classified is not just individual records themselves on a document-by-document basis, but also the mere fact of whether or not the CIA possesses responsive records that pertain to drone strikes.

16. To illustrate, consider a FOIA request for all records within the CIA's possession regarding a specific clandestine technology. The CIA's acknowledgement of responsive records, even if the CIA withheld the records pursuant to a FOIA exemption, would reveal that the CIA has an interest in this clandestine technology and may be employing the technology. Moreover, if CIA were required to provide information about the number and nature of the responsive records it withheld (including the dates, authors, recipients, and general subject matter of each record), as is typically required in FOIA litigation, the CIA's response would reveal additional information about the depth and breadth of the CIA's interest in or use of that technology.

17. Conversely, if the CIA were to confirm that no responsive records existed, that fact would tend to reveal that

the CIA does not have an interest in or is not able to use the technology at issue. That fact could be extremely valuable to the targets of CIA intelligence efforts, who could carry out their activities with the knowledge that the CIA would be unable to monitor their activities using that particular technology.

18. To be credible and effective, the CIA must use the Glomar response consistently in all cases where the existence or nonexistence of records responsive to a FOIA request is a classified fact, including instances in which the CIA does not possess records responsive to a particular request. If the CIA were to invoke a Glomar response only when it actually possessed responsive records, the Glomar response would be interpreted as an admission that responsive records exist. This practice would reveal the very information that the CIA must protect in the interest of national security.

19. In this case, Plaintiffs seek ten categories of records concerning the use of drones "by the CIA and the Armed Forces for the purposes of killing targeted individuals." Hypothetically, if the CIA were to respond to this request by admitting that it possessed responsive records, it would indicate that the CIA was involved in drone strikes or at least had an intelligence interest in drone strikes - perhaps by providing supporting intelligence, as an example. In either case, such a response would reveal a specific clandestine

intelligence activity or interest of the CIA, and it would provide confirmation that the CIA had the capability and resources to be involved in these specific activities - all facts that are protected from disclosure by Executive Order 13526 and statute.

20. Still further, if the CIA were to admit having responsive records but withhold them under a FOIA exemption, normally it would be required to create an index that revealed the number and nature of those withheld records (including their date, authors, recipients, and general subject matter). This disclosure would reveal additional information about the depth and breadth of the CIA's involvement, or interest, in drone strikes. If, for instance, the CIA possessed 10,000 responsive records, that might indicate a significant CIA involvement or interest in drone strikes whereas 10 responsive records might indicate minimal involvement or interest. Similarly, disclosing the dates of the responsive records would provide a timeline of the CIA's activities that could provide a roadmap to when and where the CIA is operating or not operating.

21. On the other hand, if the CIA were to respond by admitting that it did not possess any responsive records, it would indicate that the CIA had no involvement or interest in drone strikes. Such a response would reveal sensitive information about the CIA's capabilities, interests, and

resources that is protected from disclosure by Executive Order 13526 and statute.

22. As each of the ten categories of records requested by Plaintiffs relate to the topic of drone strikes in some manner, a response other than a Glomar would implicate all of the concerns outlined above. For illustration purposes, however, I will address some of the categories individually.

- Category No. 1 seeks records regarding the legal basis for drone strikes. Whether or not the CIA possesses legal opinions concerning drone strikes would itself be classified because the answer provides information about the types of intelligence activities in which the CIA may be involved or interested.
- Category No. 3 requests records concerning "selection of human targets for drone strikes …" If the CIA were required to confirm or deny the existence or nonexistence of such records, the response would reveal whether or not the CIA was specifically involved in target selection, which would itself be a classified fact as the CIA has never officially acknowledged whether or not it is involved in drone strikes.
- Category No. 5 seeks records concerning "after the fact" evaluations or assessments of individual drone

strikes. Confirming or denying the existence or nonexistence of such records would reveal a classified fact - i.e., specific intelligence collection activities and interests of the CIA, or lack thereof.

- Category No. 10 requests records regarding the "training, supervision, oversight, or discipline of UAV operators and other individuals involved in the decision to execute a targeted killing using a drone." If the CIA were to respond with anything other than a Glomar, it would unquestionably reveal whether or not the CIA was involved in drone strike operations, which is a classified fact.

23. Two categories that merit additional attention are Category No. 2, which seeks records concerning any "agreements, understandings, cooperation, or coordination between the U.S. and the governments of Afghanistan, Pakistan," or other countries concerning drone strikes, and Category No. 1.B, which requests records relating to the potential involvement of foreign governments, including the government of Pakistan, in drone strikes. Responding to these requests with anything other than a Glomar would reveal not only whether or not the CIA plays a role in drone strikes, but also whether or not foreign governments are involved in drone strikes in some manner. This

fact also is protected from disclosure by Executive Order 13526 and statute.

24. Under any of these scenarios, the CIA's confirmation or denial that it does or does not possess responsive records regarding drone strikes reasonably could be expected to cause damage to national security. It would greatly benefit hostile groups, including terrorist organizations, to know with certainty in what intelligence activities the CIA is or is not engaged or in what the CIA is or is not interested. To reveal such information would provide valuable insight into the CIA's capabilities, interests and resources that our enemies could use to reduce the effectiveness of CIA's intelligence operations.

25. The CIA's admission or denial that it does or does not possess responsive records reasonably could be expected to cause damage to the national security by negatively impacting U.S. foreign relations. Any response by the CIA that could be seen as a confirmation of its alleged involvement in drone strikes could raise questions with other countries about whether the CIA is operating clandestinely inside their borders, which in turn could cause those countries to respond in ways that would damage U.S. national interests. Moreover, as noted, some of the individual categories of requested records specifically concern the potential involvement of foreign governments in drone strikes. If the CIA is forced to acknowledge the existence or

nonexistence of records responsive to a request concerning the assistance of a foreign liaison partner, such acknowledgement would be seen as a tacit confirmation or denial of a clandestine foreign intelligence relationship and/or the involvement of a foreign government in a clandestine activity. When foreign governments cooperate with the CIA, most of them require the CIA to keep the fact of their cooperation in the strictest confidence. Any violation of this confidence could weaken, or even sever, the relationship between the CIA and its foreign intelligence partners, thus degrading the CIA's ability to combat hostile threats abroad. Given the sensitivity of these foreign relationships and their importance to the national security, Plaintiffs' request reflects precisely the situation in which CIA finds it necessary to assert a Glomar response.

26. In sum, for the CIA to officially confirm or deny the existence or nonexistence of the requested records would reveal classified national security information that concerns intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities. I have determined that such a revelation could be expected to cause damage to U.S. national security. As discussed below, I have determined that the fact of the existence or nonexistence of records responsive to Plaintiffs' FOIA request is currently and

properly classified and exempt from release under FOIA exemptions (b)(1) and (b)(3).

IV. APPLICATION OF FOIA EXEMPTIONS

A. FOIA Exemption (b)(1)

27. FOIA exemption (b)(1) provides that FOIA does not require the production of records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

28. Section 1.1(a) of Executive Order 13526 provides that information may be originally classified under the terms of this order only if all of the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of Executive Order 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage.

29. Furthermore, section 3.6(a) of Executive Order 13526 specifically states that "[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." Executive Order 13526 therefore explicitly authorizes precisely the type of response that the CIA has provided to Plaintiffs in this case.

30. Consistent with sections 1.1(a) and 3.6(a) of Executive Order 13526, and as described below, I have determined that the existence or nonexistence of the requested records is a properly classified fact that concerns sections 1.4(c) ("intelligence activities . . . [and] intelligence sources or methods") and 1.4(d) ("foreign relations or foreign activities of the United States"). This fact constitutes information that is owned by and under the control of the U.S. Government, the unauthorized disclosure of which reasonably could be expected to result in damage to national security.

31. My determination that the existence or nonexistence of the requested records is classified has not been made to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security.

1. Intelligence Activities

32. Clandestine intelligence activities lie at the heart of the CIA's mission. As previously described, an acknowledgment of information regarding specific intelligence activities can reveal the CIA's specific intelligence capabilities, authorities, interests, and resources. Terrorist organizations, foreign intelligence services, and other hostile groups use this information to thwart CIA activities and attack the United States and its interests. These parties search continually for information regarding the activities of the CIA and are able to gather information from myriad sources, analyze this information, and devise ways to defeat the CIA activities from seemingly disparate pieces of information. In this case, as detailed in Part III, acknowledging the existence or nonexistence of the requested records reasonably could be expected to cause damage to the national security by disclosing whether or not the CIA is engaged in or otherwise interested in clandestine intelligence activities related to drone strikes.

2. Intelligence Sources and Methods

33. For the same reasons, the existence or non-existence of records responsive to Plaintiffs' requests also implicates intelligence sources and methods; disclosure of this information likewise reasonably can be expected to cause damage to national security. Intelligence sources and methods are the basic

practices and procedures used by the CIA to accomplish its mission. They can include human assets, foreign liaison relationships, sophisticated technological devices, collection activities, cover mechanisms, and other sensitive intelligence tools. As articulated in Part III, to confirm or deny that the CIA possesses records responsive to Plaintiffs' request could risk the disclosure of the existence or nonexistence of several potential intelligence sources and methods, including the CIA's possible relationships with foreign liaison partners relating to drone strikes, any CIA interest in drone strikes, and the CIA's capabilities relating to that particular device.

34. Intelligence sources and methods must be protected from disclosure in every situation where a certain intelligence capability, technique, or interest is unknown to those groups that could take countermeasures to nullify its effectiveness. Clandestine intelligence techniques, capabilities, or devices are valuable only so long as they remain unknown and unsuspected. Once an intelligence source or method (or the fact of its use in a certain situation) is discovered, its continued successful use by the CIA is seriously jeopardized.

35. The CIA must do more than prevent explicit references to an intelligence source or method; it must also prevent indirect references to such a source or method. One vehicle for gathering information about the CIA capabilities is by reviewing

officially-released information. We know that terrorist organizations and other hostile groups have the capacity and ability to gather information from myriad sources, analyze it, and deduce means and methods from disparate details to defeat the CIA's collection efforts. Thus, even seemingly innocuous, indirect references to an intelligence source or method could have significant adverse effects when juxtaposed with other publicly-available data.

3. Foreign Relations and Foreign Activities of the United States

36. Responding to Plaintiffs' FOIA request with anything other than a Glomar response also would reveal information concerning U.S. foreign relations and foreign activities, the disclosure of which reasonably can be expected to cause damage to the national security. As an initial matter, because CIA's operations are conducted almost exclusively overseas or otherwise concern foreign intelligence matters, they generally are U.S. "foreign" activities by definition. In this case, that means that information concerning the CIA's involvement in drone strikes, if such information existed, would concern a potential foreign activity that would fall within section 1.4(d) of Executive Order 13526.

37. As described in Section III, to confirm or deny the existence of responsive records also could reveal information

that would negatively impact the foreign relations of the United States. In carrying out its legally authorized intelligence activities, the CIA engages in activities that, if known by foreign nations, reasonably could be expected to cause damage to U.S. relations with affected or interested nations. Although it is generally known that the CIA conducts clandestine intelligence operations, identifying an interest in a particular matter or publicly disclosing a particular intelligence activity could cause the affected or interested foreign government to respond in ways that would damage U.S. national interests. An official acknowledgement that the CIA possesses the requested information could be construed by a foreign government, whether friend or foe, to mean that the CIA has operated undetected within that country's borders or has undertaken certain intelligence operations against its residents. Such a perception could adversely affect U.S. foreign relations with that nation.

38. U.S. foreign relations are further implicated by the categories of the FOIA request that specifically concern the potential involvement of foreign countries in drone strikes. If the CIA is required to deny the existence of such records, it would have the same impact on foreign relations as described in the preceding paragraph. If the CIA is required to confirm the existence of such records, it could be interpreted by some to

mean that certain foreign liaison partners of the CIA are involved in drone strikes, which could have political implications in those countries and also make them less willing to cooperate with the CIA in the future.

B. FOIA Exemption (b)(3)

39. FOIA exemption (b)(3) provides that FOIA does not apply to matters that are:

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .

5 U.S.C. § 552(b)(3).

40. Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-1(i)(1) (the "National Security Act"), provides that the Director of National Intelligence ("DNI") "shall protect intelligence sources and methods from unauthorized disclosure." Accordingly, the National Security Act constitutes a federal statute which "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3). Under the direction of the DNI pursuant to section 102A, and consistent with section 1.6(d) of Executive Order 12333, the CIA is authorized to protect CIA sources and methods

from unauthorized disclosure.[4] Parts III and IV(A) of this declaration demonstrate that acknowledging the existence or nonexistence of the requested records would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect.

41. Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403g (the "CIA Act"), provides that the CIA shall be exempted from the provisions of "any other law" (in this case, FOIA) which requires the publication or disclosure of, *inter alia*, the "functions" of the CIA. Accordingly, under section 6, the CIA is exempt from disclosing information relating to its core functions - which plainly include clandestine intelligence activities, intelligence sources and methods and foreign liaison relationships. The CIA Act therefore constitutes a federal statute which "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). As this declaration has explained in detail, acknowledging the existence or nonexistence of the requested records would require

[4] Section 1.6(d) of Executive Order 12333, as amended, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C.A. § 401 note at 25 (West Supp. 2009), and as amended by Executive Order 13470, 73 Fed. Reg. 45,323 (July 30, 2008) requires the Director of the Central Intelligence Agency to "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the [DNI][.]"

the CIA to disclose information about its core functions, an outcome the CIA Act expressly prohibits.

42. Given that Plaintiffs' request falls within the ambit of both the National Security Act and the CIA Act, revealing the existence or nonexistence of the requested records is a classified fact that is exempt from disclosure under FOIA exemption (b)(3). In contrast to Executive Order 13526, these statutes do not require the CIA to identify and describe the damage to the national security that reasonably could be expected to result should the CIA confirm or deny the existence or nonexistence of records responsive to Plaintiffs' FOIA request. Nonetheless, I refer the Court to the paragraphs above for a description of the damage to the national security should anything other than a Glomar response be required of the CIA in this case. FOIA exemptions (b)(1) and (b)(3) thus apply independently and co-extensively to Plaintiffs' request.

V. THE ABSENCE OF AUTHORIZED OFFICIAL DISCLOSURES

43. In their administrative appeal, Plaintiffs reference a number of statements of current and former U.S. Government officials, news reports, and other publicly available information to support their argument that the CIA has "waived [its] ability to invoke a Glomar response..." Contrary to Plaintiffs' suggestion, no authorized CIA or Executive Branch official has disclosed whether or not the CIA possesses records

regarding drone strikes or whether or not the CIA is involved in drone strikes or has an interest in drone strikes. These news reports largely amount to media speculation and conjecture by individuals who do not have the authority to make an official and documented disclosure on behalf of the CIA.

44. Indeed, many of the statements cited by Plaintiffs are either unsourced or come from former government officials or anonymous individuals. These statements do not constitute officially authorized disclosures by the CIA. If the CIA was precluded from issuing a Glomar response to FOIA requests as a result of such non-authoritative statements, the U.S. Government's ability to protect classified information would be eviscerated, thereby causing significant and far reaching damage to the U.S. national security.

45. Pages 3-4 of Plaintiffs' administrative appeal also cite several statements from the CIA Director and the Director of National Intelligence (DNI) to support their argument that the CIA has waived its right to invoke the Glomar response. I have reviewed these statements. In none of the statements did the CIA Director or the DNI acknowledge whether or not the CIA possesses responsive records regarding drone strikes - the relevant inquiry here. Nor did they acknowledge whether or not the CIA is involved in drone strikes or has an intelligence interest in drone strikes. When focusing on what the CIA

Director and DNI specifically said in these remarks, it is apparent that these two officials made no admissions that would imperil the CIA's ability to invoke a Glomar response.

VI. CONCLUSION

46. In this case the existence or nonexistence of the requested records is itself a properly classified fact and is so intricately intertwined with intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities that this fact must remain classified. Accordingly, I have determined the only appropriate response is for the CIA to neither confirm nor deny the existence of the requested records under FOIA exemptions (b)(1) and (b)(3).

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of September 2010.

Mary Ellen Cole
Information Review Officer
Central Intelligence Agency

Exhibit A

NATIONAL SECURITY PROJECT

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January 13, 2009

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Re: REQUEST UNDER FREEDOM OF INFORMATION ACT/ Expedited Processing Requested

To Whom it May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Department of State implementing regulations, 22 C.F.R. § 171.1 *et seq.*, the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.*, and the President's Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009) and the Attorney General's

Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sep. 29, 2009). The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU").[1]

This Request seeks records pertaining to the use of unmanned aerial vehicles ("UAVs")—commonly referred to as "drones" and including the MQ-1 Predator and MQ-9 Reaper—by the CIA and the Armed Forces for the purpose of killing targeted individuals. In particular, we seek information about the legal basis in domestic, foreign, and international law for the use of drones to conduct targeted killings. We request information regarding the rules and standards that the Armed Forces and the CIA use to determine when and where these weapons may be used, the targets that they may be used against, and the processes in place to decide whether their use is legally permissible in particular circumstances, especially in the face of anticipated civilian casualties. We also seek information about how these rules and standards are implemented and enforced. We request information about how the consequences of drone strikes are assessed, including methods for determining the number of civilian and non-civilian casualties. Finally, we request information about the frequency of drone strikes and the number of individuals—Al Qaeda, Afghan Taliban, other targeted individuals, innocent civilians, or otherwise—who have been killed or injured in these operations.

According to recent investigative reports, over the past year the United States has greatly increased the frequency with which it has attempted targeted killings using UAVs. *See, e.g.*, James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009), http://www.newamerica.net/publications/policy/revenge_drones; Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15.

[1] The American Civil Liberties Union is a national organization that works to protect civil rights and civil liberties. Among other things, the ACLU advocates for national security policies that are consistent with the Constitution, the rule of law, and fundamental human rights. The ACLU also educates the public about U.S. national security policies and practices including, among others, those pertaining to the detention, treatment, and process afforded suspected terrorists; domestic surveillance programs; racial and religious discrimination and profiling; and the human cost of the wars in Iraq and Afghanistan and other counterterrorism operations.

Some of these strikes are reportedly occurring outside conventional battlefields. Strikes have been reported not only in Afghanistan and Iraq—present theaters of war—but also in countries where the United States is not at war, including Pakistan and Yemen. *See* Scott Shane, *C.I.A. Drone Use is Set to Expand inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1 ("For the first time in history, a civilian intelligence agency is using robots to carry out a military mission, selecting people for killing in a country where the United States is not officially at war."); Mark Mazetti, *C.I.A. Takes on Bigger and Riskier Role on the Front Lines*, N.Y. Times, Jan. 1, 2010, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15; Greg Miller, *Drones Based in Pakistan*, L.A. Times, Feb. 13, 2001, at 3; David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. Times, Nov. 6, 2002, at A16.

The use of drones to target individuals far from any battlefield or active theater of war dates back several years, and has resulted in the killing of at least one American citizen. In November 2002, the United States fired a Hellfire missile from a Predator drone in Yemen, killing six men travelling in a car. The apparent target of the strike was a Yemeni suspect in the October 2000 bombing of the USS Cole. *See* James Risen & Judith Miller, *CIA Is Reported To Kill A Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at A1; David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. Times, Nov. 6, 2002, at A16.; Howard Witt, *U.S.: Killing of al Qaeda Suspects Was Lawful*, Chi. Trib., Nov. 24, 2002, at 1. The strike also killed an American citizen, Ahmed Hijazi, also known as Kamal Derwish. Mr. Hijazi had recently been identified as a suspect wanted for questioning in an ongoing terrorism prosecution in federal court in Buffalo, New York. *See* John Kifner & Marc Santora, *U.S. Names 7th Man in Qaeda Cell Near Buffalo and Calls His Role Pivotal*, N.Y. Times, Sep. 18, 2002, at A19; Greg Miller & Josh Meyer, *U.S. Citizen Killed by C.I.A. May Have Led Buffalo Cell*, Orlando Sentinel, Nov. 9, 2002, at A3. *See generally* Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. Times, Oct. 12, 2003, at 11 (recounting the story of the Buffalo terrorism trial).

Reports suggest that the targets of drone strikes are not limited to members of al Qaeda in Afghanistan or the Afghan Taliban. Rather, the scope of the drone program appears to have expanded to include the targeted killing of members of Pakistani insurgent groups, individuals selected as targets by the Pakistani government and others. In Afghanistan, targeting authority seems to extend to Afghan drug kingpins.

See, e.g., James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Craig Whitlock, *Afghans Oppose U.S. Hit List of Drug Traffickers*, Wash. Post., Oct. 24, 2009; James Risen, *Drug Chieftains Tied to Taliban are U.S. Targets*, N.Y. Times, Aug. 10, 2009, at A1. The limits on who may be killed in this manner are unknown, and may in some circumstances permit the targeting of American citizens. *See* John J. Lumpkin, *CIA Can Kill Americans in al Qaeda*, Chi. Trib., Dec. 4, 2002, at 19 ("U.S. citizens working for Al Qaeda overseas can legally be targeted and killed by the CIA . . . when other options are unavailable."). There is significant concern that drones may be used to target individuals who are not legitimate military targets under domestic or international law. *See generally* Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010.

Reports also suggest that in addition to Air Force and Special Forces personnel, non-military personnel including CIA agents are making targeting decisions, piloting drones, and firing missiles. Defense contractors also appear to be playing an important role in the drone program. *See* Leon Panetta, Director, Central Intelligence Agency, Remarks at the Pacific Council on International Policy (May 18, 2009) (discussing drone strikes in Pakistan); James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Mark Mazetti, *C.I.A. Takes on Bigger and Riskier Role on the Front Lines*, N.Y. Times, Jan. 1, 2010, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Jeremy Scahill, *The Secret War in Pakistan*, The Nation, Nov. 23, 2009. It appears, therefore, that lethal force is being exercised by individuals who are not in the military chain of command, are not subject to military rules and discipline, and do not operate under any other public system of accountability or oversight.

Perhaps the greatest public concern regarding the use of drones to execute targeted killings, however, is that their use may have resulted in an intolerably high proportion of civilian casualties. Without official sources of information, current estimates of the number and proportion of civilians killed vary widely. *See* David Kilcullen and Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. Times, May 17, 2009, at WK13 (reporting that up to 98% of deaths are civilians); Daniel Byman, *Do Targeted Killings Work?*, Foreign Policy, July 14, 2009 (suggesting that 10 civilians are killed for each militant); Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009) (reporting, based on a review of publicly available sources, that between 31 and 33 percent of those killed are civilians); Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1 (reporting on the estimates of civilian casualties offered by non-governmental analysts,

as contrasted with the estimate of an anonymous government official, who cited a figure of approximately 20 total civilians deaths); *Over 700 Killed in 44 Drone Strikes in 2009*, Dawn (Pakistan), Jan. 2, 2010 (reporting that Pakistani authorities believe 90% of those killed in drone strikes in 2009 were civilians); Leon Panetta, Director, Central Intelligence Agency, Remarks at the Pacific Council on International Policy (May 18, 2009) (describing drone strikes as involving "a minimum of collateral damage").

Despite all of these concerns, the parameters of the program and the legal basis for using drones to execute targeted killings remain almost entirely obscure. It is unclear who may be targeted by a drone strike, how targets are selected, what the geographical or territorial limits of the targeted killing program are, how civilian casualties are minimized, and who is making operational decisions about particular strikes. The public also has little information about any internal accountability mechanisms by which laws and rules governing targeted killings are enforced. Nor does the public have reliable information about who has been killed, how many civilians have been killed, and how this information is verified, if at all. Without this information the public is unable to make an informed judgment about the use of drones to conduct targeted killings, which "represents a radically new and geographically unbounded use of state-sanctioned lethal force." Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009. We make the following requests for information in hopes of filling that void.

I. Requested Records

1. All records created after September 11, 2001 pertaining to the legal basis in domestic, foreign and international law upon which unmanned aerial vehicles ("UAVs" or "drones") can be used to execute targeted killings ("drone strikes"), including but not limited to records regarding:

   A. who may be targeted by a drone strike (e.g. members of al Qaeda in Afghanistan or the Afghan Taliban; individuals who merely "support," but are not part of these two groups; individuals who belong to other organizations or groups; individuals involved in the Afghan drug trade);

   B. whether drones may be used against individuals who are selected or nominated as targets by a foreign government, including the Government of Pakistan;

   C. limits on civilian casualties, or measures that must or should be taken to minimize civilian casualties;

D. the verification, both in advance of a drone strike and following it, of the identity and status or affiliation of individuals killed (e.g. whether killed persons were members of al Qaeda or the Afghan Taliban, "supporters" of these groups, members or supporters of other groups, individuals involved in the drug trade, innocent civilians, etc.);

E. where, geographically or territorially, drones may be used to execute targeted killings and whether they may be used outside Afghanistan and Iraq and, if so, under what conditions or restrictions;

F. whether drones can be used by the CIA or other government agencies aside from the Armed Forces in order to execute targeted killings; and, if such use is permitted, in what circumstances and under what conditions; and

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G. whether and to what extent government contractors can be involved in planning or providing support for, or executing a targeted killing using a drone.

2. All records created after September 11, 2001 pertaining to agreements, understandings, cooperation or coordination between the U.S. and the governments of Afghanistan, Pakistan, or any other country regarding the use of drones to effect targeted killings in the territory of those countries, including but not limited to records regarding:

   A. the selection of targets for drone strikes, or the determination as to whether a particular strike should be carried out; and

   B. the limits on the use of drone strikes in Afghanistan, Pakistan or other countries, including geographical or territorial limitations, limitations on who may be targeted, measures that must be taken to limit civilian casualties, or measures that must be taken to assess the number of casualties and to determine the identity and status or affiliation of individuals killed.

3. All records created after September 11, 2001 pertaining to the selection of human targets for drone strikes and any limits on who may be targeted by a drone strike.

4. All records created after September 11, 2001 pertaining to civilian casualties in drone strikes, including but not limited to measures regarding the determination of the likelihood of civilian casualties,

measures to limit civilian casualties, and guidelines about when drone strikes may be carried out despite a likelihood of civilian casualties.

5. All records created after September 11, 2001 pertaining to the assessment or evaluation of individual drone strikes after the fact, including but not limited to records regarding:

    A. how the number of casualties of particular drone strikes is determined;

    B. how the identity of individuals killed in drone strikes is determined;

    C. how the status and affiliation of individuals killed in drone strikes is determined, i.e. whether individuals killed were members of al Qaeda or the Afghan Taliban, "supporters" of these groups, members or supporters of other groups, individuals involved in the drug trade, innocent civilians, or any other status or affiliation; and

    D. the assessment of the performance of UAV operators and others involved in executing a targeting killing using a drone.

6. All records created after September 11, 2001, pertaining to any geographical or territorial limits on the use of UAVs to kill targeted individuals.

7. All records created after September 11, 2001, including logs, charts, or lists, pertaining to the number of drone strikes that have been executed for the purpose of killing human targets, the location of each such strike, and the agency of the government or branch of the military that undertook each such strike.

8. All records created after September 11, 2001, including logs, charts or lists, pertaining to the number, identity, status, and affiliation of individuals killed in drone strikes, including but not limited to records regarding:

    A. the number (including estimates) of individuals killed in each drone strike;

    B. the number (including estimates) of individuals of each particular status or affiliation killed in each drone strike, (e.g. members of al Qaeda or the Afghan Taliban, "supporters" of these groups, members or supporters of other groups, individuals involved in the Afghan drug trade, civilians,

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members of some other group, etc.), including the number of individuals of unknown status or affiliation killed in each strike.

C. the total number (including estimates) of individuals killed in drone strikes since September 11, 2001 and the total number (including estimates) of individuals of each particular status or affiliation killed, including those whose status or affiliation is unknown.

9. All records created after September 11, 2001 pertaining to who may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings, including but not limited to any records pertaining to the involvement of CIA personnel, government contractors, or other non-military personnel in the use of UAVs for the purpose of executing targeted killings.

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10. All records created after September 11, 2001 pertaining to the training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone, including but not limited to CIA personnel, government contractors, and military personnel.[2]

II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a "compelling need" for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal Government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a "breaking news story of general

[2] To the extent that records responsive to this Request have already been processed in response to ACLU FOIA requests submitted on June 22, 2006 to the Department of Defense, the Chief of Naval Operations, the Commandant of the Marine Corps and the U.S. Army, the ACLU is not seeking those records here. The ACLU has worded these requests as precisely and narrowly as possible given the public interest in the topic and given the limited information the ACLU has about the nature of responsive documents in the agencies' possession. It may, of course, be possible to sharpen or narrow the requests further with input from the agencies about the nature and volume of documents responsive to these requests. The ACLU is willing to do so in the context of good faith discussions with each agency, so as to eliminate unnecessary administrative burdens and to focus agency efforts on the substance of these requests.

public interest." 22 C.F.R. § 171.12(b)(2)(i); 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence").

The ACLU is "primarily engaged in disseminating information" within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 22 C.F.R. § 171.12(b)(2); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. *See ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information" (internal citation omitted)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused.

The ACLU website specifically includes features on information obtained through the FOIA. *See, e.g.*, www.aclu.org/torturefoia; http://www.aclu.org/olcmemos/; http://www.aclu.org/safefree/torture/csrtfoia.html; http://www.aclu.org/natsec/foia/search.html; http://www.aclu.org/safefree/nsaspying/30022res20060207.html; www.aclu.org/patriotfoia; www.aclu.org/spyfiles; http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html; www.aclu.org/exclusion. For example, the ACLU's "Torture FOIA" webpage, www.aclu.org/torturefoia, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA, and advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. *See* Jamcel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to

subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. The ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.[3]

Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal Government activity; specifically, the records sought relate the U.S. Government's use of unmanned aerial vehicles to target and kill individuals in Afghanistan, Pakistan and elsewhere, including individuals who are not members of either al Qaeda or the Afghan Taliban, and who may not be proper military targets. The records sought will help determine what the government's asserted legal basis for these targeted killings is, whether they comply with domestic and international law, how many innocent civilians have been killed, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct. For these reasons, the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

There have been numerous news reports about drone attacks in Afghanistan, Pakistan and elsewhere. *See, e.g.*, Joshua Partlow, *Drones In More Use in Afghanistan*, Wash. Post, Jan. 12, 2010; James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; *Officials: Alleged US Missiles Kill 2 in Pakistan*, Assoc. Press, Nov. 4, 2009; David Rhode, *Held by the Taliban: A Drone Strike and Dwindling Hope*, N. Y. Times, Oct. 21, 2009, at A1; Declan Walsh, *In Pakistan, US drone strike on Taliban kills 12*, Guardian, Apr. 2, 2009; Tim Reid, *U.S. Continues with Airstrikes*, Times (U.K.), Jan. 24, 2009; James Risen & Judith Miller, *CIA Is Reported To Kill A Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at A1.

The Obama administration's increased reliance on the use of drones to execute targeted killings in Pakistan has served to spark widespread and increasing media interest in, and public concern about, this practice. *See, e.g.*, James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8,

[3] In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

2010; Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jeremy Scahill, *The Secret War in Pakistan*, The Nation, Nov. 23, 2009; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); Bill Roggio and Alexander Mayer, *US Predator Strikes in Pakistan: Observations*, The Long War Journal (July 21, 2009); Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15.

News stories and investigative reports have also suggested that drone attacks are being used outside Iraq and Afghanistan, in places where there is no active war. *See, e.g.*, Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009, at 36-45; Eric Schmitt and Christopher Drew, *More Drone Attacks in Pakistan Planned*, N.Y. Times, Apr. 6, 2009 at A15. Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); James Risen & Judith Miller, *CIA Is Reported To Kill A Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at A1.

These reports have instigated serious concerns that the geographically unbounded use of drones to execute targeted killings is contrary to domestic and international law and may amount to illegal state-sanctioned extrajudicial killing. *See, e.g.*, Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010; Roger Cohen, *Of Fruit Flies and Drones*, Int'l Herald Trib., Nov. 13, 2009, at 9; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/11/2/Add.5, at 71-73 (May 28, 2009).

News reports also suggest that drones are not only being used to target members of al Qaeda or the Afghan Taliban, but also Afghan drug lords, Pakistani insurgents, and others identified as enemies of the Pakistani government. *See, e.g.*, James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Scott Shane, *C.I.A. Drone Use is Set To Expand Inside Pakistan*, N.Y. Times, Dec. 4, 2009, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Craig Whitlock, *Afghans oppose U.S. hit list of drug traffickers*, Wash. Post., Oct. 24, 2009.

Such reports have caused public concern that the expansion of the range of permissible targets allows the extrajudicial killing of individuals properly regarded as criminal suspects rather than military targets. Commentators have suggested that these strikes may not comply with

domestic or international law, and that they open up significant possibilities for abuse. *See, e.g.*, Shane Harris, *Are Drone Strikes Murder?*, Nat'l J., Jan. 9, 2010; Roger Cohen, *Of Fruit Flies and Drones*, Int'l Herald Trib., Nov. 13, 2009, at 9; Interview with Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, DemocracyNow! (Oct. 28, 2009); Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/11/2/Add.5, at 71-73 (May 28, 2009); U.N. General Assembly, Social, Humanitarian and Cultural Affairs Committee, Statement by Prof. Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions (Oct. 27, 2009).

Several reports have been published estimating the number of civilian casualties that have resulted from drone strikes, and the proportion of civilian casualties in relation to targeted individuals. These estimates vary widely. *See* Bill Roggio and Alexander Mayer, *US Predator Strikes in Pakistan: Observations*, The Long War Journal (July 21, 2009); Peter Bergen and Katherine Tiedemann, *Revenge of the Drones: An Analysis of Drone Strikes in Pakistan*, New America Foundation (Oct. 19, 2009); Daniel Byman, *Do Targeted Killings Work?*, Foreign Policy, July 14, 2009; Andrew M. Exum, Nathaniel C. Fick, Ahmed A. Humayun & David J. Kilcullen, *Triage: The Next Twelve Months in Afghanistan and Pakistan*, at 17-20 Center for New American Security (June 2009); Over 700 Killed in 44 Drone Strikes in 2009, Dawn (Pakistan), Jan. 2, 2010.

These reports have created a significant concern that the number of civilian casualties is simply too high. One British jurist has gone as far as to suggest that UAVs should perhaps be banned as an instrument of war. *See* Murray Wardop, *Unmanned Drones Could be Banned, Says Senior Judge*, London Daily Telegraph, July 6, 2009. Others, however, suggest that the proportion of casualties in fact compares favorably to other weapons. *See, e.g.*, Editorial, *Predators and Civilians*, Wall St. J., July 13, 2009, at A12.

A public debate has also emerged about the wisdom of using drones to carry out targeted killings. Experts and commentators from diverse backgrounds have expressed concerns that the use of drones in Afghanistan and Pakistan—and especially the high number of civilian casualties—are creating widespread hostility to the United States in the local populations, are providing hostile organizations with a powerful propaganda tool, and are therefore contributing to the growth of such organizations. *See, e.g.*, Rafia Zakaria, *Drones and Suicide Attacks*, Dawn (Pakistan), Oct. 14, 2009; David Kilcullen and Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. Times, May 17, 2009, at WK13; Andrew M. Exum, Nathaniel C. Fick, Ahmed A. Humayun & David J. Kilcullen, *Triage: The Next Twelve Months in Afghanistan and*

Pakistan, 17-20 Center for New American Security (June 2009); Peter W. Singer, *Attack of the Military Drones*, Brookings Institution, June 27, 2009; Declaration of Gen. David Petraeus, Appendix to the Petition for a Writ of Certiorari at 191a, *U.S. Dep't of Defense v. American Civil Liberties Union*, No. 09-160 (U.S. filed Aug. 7, 2009) ("Anti-U.S. sentiment has already been increasing in Pakistan. Most polling data reflects this trend, especially in regard to cross-border operations and reported drone strikes, which Pakistanis perceive to cause unacceptable civilian casualties.").

Other commentators contend that the use of drones for targeted killings is a useful counterterrorism tactic. *See, e.g.*, Peter Bergen and Katherine Tiedemann, *Pakistan drone war takes a toll on militants -- and civilians*, CNN.com, Oct. 29, 2009; Daniel Byman, *Do Targeted Killings Work?*, Foreign Policy, July 14, 2009; Daniel Byman, *Taliban vs. Predator: Are Targeted Killings Inside Pakistan a Good Idea?*, Foreign Affairs, Mar. 18, 2009; Editorial, *Predators and Civilians*, Wall St. J., July 13, 2009, at A12.

The public is unable to engage meaningfully with or to assess these policy and legal debates because there is a paucity of reliable information about the scope of the drone program, its legal underpinnings, and its results. While there are differing opinions as to whether and how drones should be used for targeted killings, commentators on all sides agree that the government should release to the public more details about the operation of this program and its legal underpinnings. *See, e.g.*, Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Editorial, *Predators and Civilians*, Wall St. J., July 14, 2009, at A12 ("We'd also say that the Obama Administration—which, to its credit, has stepped up the use of Predators—should make public the kind of information we've seen."); Roger Cohen, *Of Fruit Flies and Drones*, Int'l Herald Trib., Nov. 13, 2009, at 9 ("The Obama administration should not be targeting people for killing without some public debate about how such targets are selected, what the grounds are in the laws of war, and what agencies are involved. Right now there's an accountability void."); Interview with Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, DemocracyNow! (Oct. 28, 2009); Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/11/2/Add.5, at 71-73 (May 28, 2009); Michele Nichols, *U.N. Envoy Slams U.S. for Unanswered Drone Questions*, Reuters, Oct. 27, 2009.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 22 C.F.R. § 171.17(a); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will contribute significantly to public understanding of the operations and activities of the Departments of Defense, Justice, State, and the Central Intelligence Agency with regard to the use of UAVs to execute targeted killings. *See* 22 C.F.R. § 171.17(a)(1); 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2). Moreover, disclosure is not in the ACLU's commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii); 28 C.F.R. § 16.11(d). Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 32 C.F.R. § 1900.13(i)(2); 22 C.F.R. 171.15(c); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to "representatives of the news media").

The ACLU meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004)

(finding non-profit public interest group to be "primarily engaged in disseminating information"). The ACLU is a "representative of the news media" for the same reasons it is "primarily engaged in the dissemination of information." *See Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of FOIA); *see supra*, section II.[4]

* * *

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

[4] On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in January 2010, the State Department, Department of Defense, and Department of Justice all granted a fee waiver to the ACLU with regard to a FOIA request submitted in April 2009 for information relating to the Bagram Theater Internment Facility in Afghanistan. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the United States Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU with regard to a request submitted that month regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

Jonathan Manes
National Security Project
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely,

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Jonathan Manes
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 519-7847
Fax: (212) 549-2654

Exhibit B

Central Intelligence Agency

Washington, D.C. 20505

9 March 2010

Mr. Jonathan Manes
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Reference: F-2010-00498

Dear Mr. Manes:

This is a final response to your 13 January 2009 [sic] Freedom of Information Act (FOIA) request for "records pertaining to the use of unmanned aerial vehicles ('UAVs')—commonly referred to as 'drones' and including the MQ-1 Predator and MQ-9 Reaper—by the CIA and the Armed Forces for the purpose of killing targeted individuals."

In accordance with section 3.6(a) of Executive Order 12958, as amended, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended. Therefore, your request is denied pursuant to FOIA exemptions (b)(1) and (b)(3). I have enclosed an explanation of these exemptions for your reference and retention. As the CIA Information and Privacy Coordinator, I am the CIA official responsible for this determination. You have the right to appeal this response to the Agency Release Panel, in my care, within 45 days from the date of this letter. Please include the basis of your appeal.

Sincerely,

Delores M. Nelson

Delores M. Nelson
Information and Privacy Coordinator

Enclosure

Explanation of Exemptions

Freedom of Information Act:

(b)(1) exempts from disclosure information currently and properly classified, pursuant to an Executive Order;

(b)(2) exempts from disclosure information, which pertains solely to the internal personnel rules and practices of the Agency;

(b)(3) exempts from disclosure information that another federal statute protects, provided that the other federal statute either requires that the matters be withheld, or establishes particular criteria for withholding or refers to particular types of matters to be withheld. The (b)(3) statutes upon which the CIA relies include, but are not limited to, the CIA Act of 1949;

(b)(4) exempts from disclosure trade secrets and commercial or financial information that is obtained from a person and that is privileged or confidential;

(b)(5) exempts from disclosure inter-and intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency;

(b)(6) exempts from disclosure information from personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy;

(b)(7) exempts from disclosure information compiled for law enforcement purposes to the extent that the production of the information (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source or, in the case of information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source; (E) would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or (F) could reasonably be expected to endanger any individual's life or physical safety;

(b)(8) exempts from disclosure information contained in reports or related to examination, operating, or condition reports prepared by, or on behalf of, or for use of an agency responsible for regulating or supervising financial institutions; and

(b)(9) exempts from disclosure geological and geophysical information and data, including maps, concerning wells.

Exhibit C

NATIONAL SECURITY PROJECT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Apr. 22, 2010

Agency Release Panel
c/o Delores M. Nelson, Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Re: FOIA Appeal, Reference # F-2010-00498

Dear Ms. Nelson,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
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OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Requesters American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "ACLU") write to appeal the Central Intelligence Agency's ("CIA") refusal to confirm or deny the existence or nonexistence of records requested by Freedom of Information Act request number F-2010-00498 ("Request"). The Request seeks records pertaining to the use of unmanned aerial vehicles – commonly known as drones – by the CIA and the armed forces for the purpose of killing targeted individuals. *See* Ex. A (FOIA Request of January 13, 2010[1]). The CIA's letter refusing to confirm or deny the existence or nonexistence of responsive records ("Response Letter") is dated March 9, 2010. *See* Ex. B (Response Letter). The ACLU respectfully requests reconsideration of this determination and the processing and release of records responsive to the Request.

The ACLU has requested the release of 10 distinct categories of information pertaining to a widely reported program in which the CIA and other agencies use drones to conduct targeted killings of individuals. In outline, the Request seeks information about the legal basis for, and limits on, the program; basic information about the strikes, including the number of civilians and non-civilians killed; and information about how the program is overseen and supervised internally. The FOIA office denied the ACLU's FOIA request with a "Glomar" response. The response letter stated, in conclusory terms, that "the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request [because t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended." Ex. B.

[1] Note that the FOIA Request was incorrectly dated – the date was rendered January 13, 2009 instead of 2010.

The Glomar response provided here is far too sweeping and categorical. Under the Freedom of Information Act ("FOIA"), an agency may invoke the "Glomar" response – refusing to confirm or deny the existence of requested records – only if the very fact of existence or nonexistence of the records is itself properly classified under FOIA exemption (b)(1), properly withheld pursuant to statute under exemption (b)(3), or properly subject to another FOIA exemption. *Philippi v. CIA* ("*Philippi I*"), 546 F.2d 1009 (D.C. Cir. 1976); Exec. Order No. 12,958, § 3.6(a), *as amended by* Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003). It is unlikely in the extreme that that merely confirming or denying the existence of particular records pertaining to the use of drones to conduct targeted killing would reveal a classified fact or intelligence sources or methods.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The Response Letter fails adequately to justify the sweeping and categorical Glomar response. The Response Letter does not explain the basis for invoking the Glomar response beyond the conclusory statement that "[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by [statute]." Ex. B. The Response Letter does not explain why acknowledging the existence or nonexistence of *any* responsive records would reveal a classified fact. The Response Letter does not explain why acknowledging the existence or nonexistence of *any* responsive records would reveal an intelligence source or method. The Response Letter does not explain how the requested records even *relate* to intelligence sources or methods. Most importantly, the Response Letter makes no attempt to distinguish between the ten distinct categories of information contained in the ACLU's Request or to explain why confirming or denying *any particular category* of requested records would reveal a classified fact or intelligence sources and methods. The summary and categorical justification provided in the Response Letter is not an adequate justification for denying the ACLU's FOIA request *in toto*. *See Riquelme v. C.I.A.*, 453 F. Supp. 2d 103, 112 (D.D.C. 2006) ("[A] Glomar response does not . . . relieve [an] agency of its burden of proof." (citing *Philippi I*, 546 F.2d at 1013)).

The sweeping Glomar response provided in the Response Letter is particularly inappropriate because the government has acknowledged facts at issue in the Request. The CIA's use of drones to conduct targeted killings in Pakistan – and, on at least one occasion, in Yemen – are by no means a secret. Previous government acknowledgement of information sought in a FOIA request waives an otherwise valid Glomar claim under Exemptions 1 and 3. *Wolf v. C.I.A.*, 473 F.3d 370, 378 (D.C. Cir. 2007) ("[W]hen information has been officially acknowledged, its disclosure may be compelled even over an agency's otherwise valid exemption claim.") (internal quotation marks omitted) (citing *Fitzgibbon v. C.I.A.*,

911 F.2d 755, 765 (D.C. Cir. 1990)). Thus, the government may not refuse to confirm or deny the existence of records that detail information previously disclosed. *Id.*

CIA Director Leon Panetta has publicly discussed the CIA's drone operations in Pakistan on several occasions. As far back as February 2009, Mr. Panetta responded to "questions about CIA missile attacks, launched from unmanned Predator aircraft" by stating that "[n]othing has changed our efforts to go after terrorists, and nothing will change those efforts." Karen DeYoung & Joby Warrick, *Drone Attacks Inside Pakistan Will Continue, CIA Chief Says*, Wash. Post, Feb. 29, 2009. He described CIA "efforts . . . to destabilize al Qaeda and destroy its leadership" as "successful." *Id.*

On March 18, 2009 at a public engagement, the CIA Director responded to a question about drone strikes in Pakistan. Mr. Panetta noted that he could not "go into particulars" about the drone strikes, but proceeded to do just that, acknowledging their existence by stating that "these operations have been very effective" and going on to discuss their targeting precision by distinguishing "plane attacks or attacks from F-16s and others that go into these areas, which do involve a tremendous amount of collateral damage," from drone attacks which "involve[] a minimum of collateral damage." Remarks of the Director of Central Intelligence, Leon E. Panetta, at the Pacific Council on International Policy (Mar. 18, 2009).[2] The necessary implication of his acknowledgement of "collateral damage" is that CIA drones are being used to deploy lethal weapons. His remarks further acknowledged that drones were being used to kill individual targets, specifically, targets in the "al-Qaeda leadership." *Id.* Indeed, Mr. Panetta was surprisingly frank, describing the strikes as "the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership." *Id.* These remarks squarely acknowledge that the CIA is engaged in drone strikes that are within the scope of the FOIA Request.

Mr. Panetta has continued to acknowledge that the CIA is involved in targeted killing operations. In a recent interview with journalists, Mr. Panetta described the drone strikes in Pakistan as "the most aggressive operation that CIA has been involved in in our history." Peter Finn & Joby Warrick *Al-Qaida Crippled As Leaders Stay In Hiding, CIA Chief Says*, Wash. Post, Mar. 17, 2010. Referring to the drone/targeted killing program he stated that "[t]hose operations are seriously disrupting al-Qaida" and that "we really do have them on the run." *Id.* In response to a question about the suicide bombing in southern Afghanistan that killed several CIA officials, Mr. Panetta again acknowledged the CIA's use of lethal force in the region: "You can't just conduct the kind of aggressive

[2] https://www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html.

operations we are conducting against the enemy and not expect that they are not going to try to retaliate." Peter Finn & Joby Warrick, *Panetta Wins Friends but Also Critics With Stepped-Up Drone Strikes*, Wash. Post, Mar. 21, 2010. These statements clearly and unmistakably reveal that the CIA is involved in the use of drones to conduct targeted killings.

Mr. Panetta has gone so far as to acknowledge specific CIA strikes, commenting, with respect to the killing of an al Qaeda suspect in a March 8 drone strike, that the death sent a "very important signal that they are not going to be able to hide in urban areas." Peter Finn & Joby Warrick *Al-Qaida Crippled As Leaders Stay In Hiding, CIA Chief Says*, Wash. Post, Mar. 17, 2010. Mr. Panetta even confirmed the identity of the al Qaeda suspect that was killed. Siobhan Gorman & Jonathan Weisman, *Drone Kills Suspect in CIA Suicide Bombing*, Wall St. J., Mar. 18, 2010.

If there remained any doubt as to the CIA's involvement in drone strikes and targeted killings, Mr. Panetta put it to rest when he publicly acknowledged that he personally authorizes every strike, making the decisions regarding whom to target and kill. *See* Peter Finn & Joby Warrick, *Panetta Wins Friends but Also Critics With Stepped-Up Drone Strikes*, Wash. Post, Mar. 21, 2010 ("'Any time you make decisions on life and death, I don't take that lightly. That's a serious decision,' [Panetta] said. 'And yet, I also feel very comfortable with making those decisions because I know I'm dealing with people who threaten the safety of this country and are prepared to attack us at any moment.'"). One could hardly imagine a clearer acknowledgement of CIA involvement in drone strikes and targeted killings than a statement by its Director acknowledging that he "make[s] decisions on life and death."

The Director of National Intelligence ("DNI") – the "head of the intelligence community," 50 U.S.C. § 403 – has also acknowledged the targeted killing program in public remarks. In public testimony before the House Intelligence Committee, he stated that "[w]e take direct action against terrorists in the intelligence community." He went on to explain that such "direct action" can "involve killing an American." Ellen Nakashima, *Intelligence Chief Acknowledges U.S. May Target Americans Involved in Terrorism*, Wash. Post, Feb. 4, 2010. Not only did he confirm the existence of the targeted killing program, and that U.S. citizens may be its targets, but he also publicly stated some of the criteria that are used to pick targets. *Id.* ("The director of national intelligence said the factors that 'primarily' weigh on the decision to target an American include 'whether that American is involved in a group that is trying to attack us, whether that American is a threat to other Americans.'"). These matters fall squarely within the scope of our Request, which seeks, among other information, records relating to who may be targeted.

Given all this official confirmation and commentary on CIA drone strikes by the CIA Director and the DNI, the CIA's Glomar response is utterly unsupportable. The CIA cannot refuse to confirm or deny the existence of responsive records even as its director and the DNI acknowledge the program, comment on it, and discuss its details. The CIA's involvement in drone strike/targeted killing operations is now not simply an open secret; in light of all these public comments, it is no secret at all. The sweeping and categorical Glomar response provided in the Response Letter cannot survive in the face of these official public disclosures. See *Wolf*, 473 F.3d at 378. The above public acknowledgements are specific and relevant to the records requested here and therefore waive any FOIA exemptions that might otherwise have applied. The fact of the existence or non-existence of responsive records is not—or is no longer—properly classified, nor can it be regarded as "intelligence sources and methods" exempt from disclosure under the Section 6 of the CIA Act of 1949. FOIA exemptions 1 and 3 – the only exemptions upon which CIA bases its Glomar response – are therefore inapplicable. The official acknowledgements from the CIA Director and the DNI have long since eliminated the option of responding to our FOIA Request with a Glomar response on those grounds.

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That a Glomar response is inappropriate becomes even clearer when one considers that the public statements of the CIA Director and the DNI do not simply waive Exemptions 1 and 3, but affirmatively demonstrate the existence of records responsive to the Request. Any speaking notes, memos, or other documents prepared in anticipation of the CIA Director's public remarks or interviews are responsive to the Request. Furthermore, the CIA Director's acknowledgement that he personally signs off on the selection of targets indicates the existence of documents relating to those actions -- analytical memoranda, signed orders, legal guidance, etc. Likewise, briefing notes or memoranda prepared for the DNI in advance of his congressional testimony are responsive documents. His confirmation that "we get specific permission" if "direct action will involve killing an American" demonstrates the existence of records regarding the targeting of particular individuals, and legal guidance regarding the procedures and standards that govern the decision to hunt and kill a U.S. citizen.

The CIA's obligation under the FOIA is to disclose such documents or to explain why they must be withheld. The CIA is "not exempted from responding to a FOIA request." *ACLU v. Dep't of Def.*, 396 F. Supp. 2d 459, 462 (S.D.N.Y. 2005). The CIA cannot simply evade its FOIA obligations by asserting that it cannot confirm or deny the existence or non-existence of records, when that assertion is contradicted by the most senior officials of the intelligence community. The public

remarks of the CIA Director and the DNI demonstrate the existence of responsive documents, contrary to the CIA's Glomar response.

In addition to the statements of the CIA Director and the DNI, intelligence officials and other government sources have on numerous occasions disclosed to the press details about specific CIA drone strikes in Pakistan. These intelligence officials and government sources have disclosed details about particular CIA drone strikes, including in several cases facts about where the strike occurred, how many people were killed, who was killed, and whether there were any civilians killed. As a consequence of all of these disclosures, there is now substantial information about the subject matter of the ACLU's Request in the public domain.

In assessing whether information is properly classified and thus properly withheld under Exemption (b)(1), courts take into account whether the information is already in the public domain. *See, e.g., Washington Post v. U.S. Dep't of Def.*, 766 F. Supp. 1, 9 (D.D.C. 1991) ("[S]uppression of 'already well publicized' information would normally 'frustrate the pressing policies of the Act without even arguably advancing countervailing considerations.'") (quoting *Founding Church of Scientology v. Nat'l Sec. Agency*, 610 F.2d 824, 831-32 (D.C.Cir.1979)). When extensive information about the subject of a FOIA request is already in the public domain, courts require a "specific explanation . . . of why formal release of information already in the public domain threatens the national security." *Id.* at 10. Here, it is difficult to fathom how confirming or denying the existence of records that discuss matters already reported in the press and available to the public (and, in large part, officially acknowledged) would in any way threaten national security.

The CIA's use of drones to conduct targeted killing is widely known and has been reported numerous times in press accounts and investigative reports, as noted in the Request. *See* Ex. A. at 4, 11 (citing James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010; Mark Mazetti, *C.I.A. Takes on Bigger and Riskier Role on the Front Lines*, N.Y. Times, Jan. 1, 2010, at A1; Jane Mayer, *The Predator War*, The New Yorker, Oct. 26, 2009; Jeremy Scahill, *The Secret War in Pakistan*, The Nation, Nov. 23, 2009). Since the Request was filed, information about the CIA's program has continued to be disclosed in the press. *See infra* (citing selected articles from among the large amount of press coverage). An ongoing analysis based on the best publicly-available data reports that there have been 31 CIA-operated drone strikes in Pakistan thus far in 2010 and that those strikes have resulted in deaths numbering between 151 and 262, of which approximately 14% were not militants. *See* Peter Bergen & Katherine Tiedemann *The Year of the Drone: Online Database*, http://counterterrorism.newamerica.net/drones (last updated Apr. 16,

2010); Peter Bergen & Katherine Tiedemann, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010* (Feb. 24, 2010).

Intelligence officials have confirmed to reporters details about particular strikes. For example, intelligence officials confirmed that a strike occurred on Sunday, March 21, 2010 "in the Datta Khel area of North Waziristan" and that the strike was conducted by "drones [which] fired three missiles." *Officials: U.S. Missiles Kill 4 in Pakistan*, Assoc. Press, Mar. 21, 2010. An intelligence official confirmed the March 8, 2010 death of a senior Al Qaeda commander by drone strike "in Miram Shah in North Waziristan." David Sanger, *Drone Said to Kill a Leader of Al Qaeda*, N.Y. Times, Mar. 17, 2010 at A10. Intelligence officials also confirmed another strike in Pakistan the same day in another town in North Waziristan, which reportedly hit a vehicle carrying insurgents. Associated Press, *Pakistan: Drone Strikes Reported*, N.Y. Times, Mar. 17, 2010, at A5. Two intelligence officials and a military official confirmed another drone strike on March 27, 2010 "in the village of Hurmaz in North Waziristan." *U.S. Missiles Blamed in 4 Deaths*, Assoc. Press, Mar. 28, 2010. Additionally, an American official stated that there were "strong indications" that a drone strike had killed an Al Qaeda member in western Pakistan on December 11, 2009. Mark Mazzetti and Souad Mekhennet, *Qaeda Planner in Pakistan Killed by Drone*, N.Y. Times, Dec. 11, 2009 at A8.

Details about particular drone strikes have also been widely reported in other press accounts. For example, there was extensive reporting about a strike on Thursday, February 18. The person killed in the strike – Mohammad Haqqani, the younger brother of a leading Taliban militant – was identified, as was the location of the strike: Dande Darpakhel, in North Waziristan. Pir Zubair Shah, *Missile Strike Kills Brother of Militant in Pakistan*, N.Y. Times, Feb. 20, 2010. Eyewitnesses at the scene of Mohammad Haqqani's death provided additional details. A Pakistani government supporter reported seeing "two drones, one going in one direction, one in another direction" before seeing two blasts hit Mr. Haqqani's car. Jane Perlez and Pir Zubair Shah, *Drones Batter Al Qaeda and Its Allies Within Pakistan*, N.Y. Times, Apr. 4, 2010 at A1. Other drone strikes have also received coverage in the foreign press. *See, e.g.*, *Three militants killed in US drone attack in Pakistan*, Press Tr. of India, Apr. 12, 2010 (reporting that three militants were killed in a drone strike in the Boya area of North Waziristan);[3] *Drone strike kills four Pakistan 'militants'*, BBC, Apr. 16, 2010 (reporting that at least four people had been killed in a drone strike in North Waziristan, and quoting an official as saying, "Missiles hit a car carrying militants and as soon as other people

[3] Available at: http://www.dnaindia.com/world/report_three-militants-killed-in-us-drone-attack-in-pakistan_1370656

rushed in to help, more missiles were fired by drones");[4] S.H. Khan, *US missiles kill six militants in Pakistan: officials*, AFP, Mar. 30, 2010 (quoting a Pakistani intelligence official as stating that "a US drone attack targeted a compound and that six militants were reported to have been killed).[5]

The August 5, 2009 drone strike that killed Baitullah Mehsud has been described with remarkable and uncommon detail. *See, e.g.*, Jane Mayer, *The Predator War*, New Yorker, Oct. 26, 2009, at 36. The specific sequence of events within the CIA that led to the strike were recounted in a recent article:

> On the morning of Aug. 5, CIA Director Leon Panetta was informed that Baitullah Mehsud was about to reach his father-in-law's home. Mehsud would be in the open, minimizing the risk that civilians would be injured or killed. Panetta authorized the strike, according to a senior intelligence official who described the sequence of events.
>
> Some hours later, officials at CIA headquarters in Langley identified Mehsud on a feed from the Predator's camera. He was seen resting on the roof of the house, hooked up to a drip to palliate a kidney problem. He was not alone.
>
> Panetta was pulled out of a White House meeting and told that Mehsud's wife was also on the rooftop, giving her husband a massage. Mehsud, implicated in suicide bombings and the assassination of former Pakistani Prime Minister Benazir Bhutto, was a major target. Panetta told his officers to take the shot. Mehsud and his wife were killed.

Peter Finn & Joby Warrick, *Panetta Wins Friends but Also Critics With Stepped-Up Drone Strikes*, Wash. Post, Mar. 21, 2010.

More recently, there have been numerous reports about the CIA's efforts to hunt and kill, using drones, those responsible for the December 30, 2009 suicide bombing attack near Khost, Afghanistan that killed seven CIA employees. *See, e.g.*, Siobhan Gorman, *Drone Kills Suspect in CIA Suicide Bombing*, Wall St. J., Mar. 18, 2010, at A6; Scott Shane and Eric Schmitt, *C.I.A. Deaths Prompt Surge in U.S. Drone Strikes*, N.Y. Times, Jan. 22, 2010 at A1 (quoting a CIA officer as vowing to "avenge" the

[4] Available at: http://news.bbc.co.uk/2/hi/south_asia/8625034.stm
[5] Available at: http://www.google.com/hostednews/afp/article/ALeqM5iXKDw0vWQomHE9ISJeMypJ45pgOA

Khost attack); David E. Sanger, *Drone Said to Kill a Leader of Al Qaeda*, N.Y. Times, Mar. 17, 2010 at A10 (speaking about a drone strike that killed an Al Qaeda leader and quoting a senior intelligence official as asserting that "the deaths [of CIA officers in the December 30, 2009 Khost bombing] would be 'avenged through successful, aggressive counterterrorism operations'"); Jane Perlez and Pir Zubair Shah, *Drones Batter Al Qaeda and Its Allies Within Pakistan*, N.Y. Times, Apr. 4, 2010 at A1; Haq Nawaz Khan & Pamela Constable, *Pakistani Taliban Leader's Death Would be 'Fatal Blow' for Group*, Wash. Post, Feb. 2, 2010; Alex Rodriguez, *Pakistani Taliban Says Leader Dead*, LA Times, Feb. 10, 2010; Assoc. Press, *U.S. Drone Strike Kills 20, Pakistan Says*, Boston Globe, Jan. 18, 2010, at 3; Andrew Buncombe, *US strikes back with drone attack on leader of Taliban*, Independent (U.K.), Jan. 15, 2010.

U.S. Intelligence officials were quoted in the press discussing the recent decision to add Anwar al-Awlaki, a U.S. citizen, to the list of individuals that the CIA is authorized to target and kill, potentially using drones. *See, e.g.*, David S. Cloud, *U.S. Citizen Anwar Awlaki Added to CIA Target List*, LA Times, Apr. 6, 2010 ("[T]he Obama administration has authorized the capture or killing of a U.S.-born Muslim cleric who is believed to be in Yemen, U.S. officials said."); Scott Shane, *U.S. approves Targeted Killing of American Cleric*, N.Y. Times, Apr. 7, 2010, at A12; Greg Miller, *Muslim Cleric Aulaqi is First U.S. Citizen on List of Those CIA is Allowed to Kill*, Wash. Post, Apr. 7, 2010; Greg Miller, *Muslim Cleric Is First U.S. Citizen On List of Those CIA Is Allowed to Kill*, Wash. Post, Apr. 7, 2010; David Williams, *Obama authorises targeted killing of radical American Muslim cleric who inspired Christmas Day bomber*, Daily Mail (U.K.), Apr. 7, 2010.[6] The existence of CIA deliberations on whether to add Mr. Awlaki to the CIA's kill list have also been disclosed to the press. *See, e.g.*, Keith Johnson, *US Cleric Backing Jihad*, Wall St. J., Mar. 26, 2010; Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, LA Times, Jan. 31, 2010. As far back as 2002, intelligence officials were publicly disclosing the fact that the CIA reserves the right to target and kill U.S. citizens. *See, e.g.*, John J. Lumpkin, *CIA Can Kill Americans in al Qaeda*, Chi. Trib., Dec. 4, 2002, at 19 ("U.S. citizens working for Al Qaeda overseas can legally be targeted and killed by the CIA . . . when other options are unavailable.").

As recounted in the Request, the CIA's role in a 2002 drone strike/targeted killing in Yemen has also been widely reported. In that case, a CIA drone fired a missile at a car, killing all of its passengers. Among those killed was Kamal Derwish (aka Ahmed Hijazi) a U.S. citizen who had been subpoenaed in connection with the criminal prosecution of the "Lackawanna Six" in Buffalo, New York. *See* James

[6] Available at: http://www.dailymail.co.uk/news/worldnews/article-1264117/Obama-authorises-killing-radical-Muslim-cleric-Anwar-al-Awlaki.html

Risen & Judith Miller, *CIA Is Reported To Kill A Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at A1; David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. Times, Nov. 6, 2002, at A16; John Kifner & Marc Santora, *U.S. Names 7th Man in Qaeda Cell Near Buffalo and Calls His Role Pivotal*, N.Y. Times, Sep. 18, 2002, at A19; Greg Miller & Josh Meyer, *U.S. Citizen Killed by C.I.A. May Have Led Buffalo Cell*, Orlando Sentinel, Nov. 9, 2002, at A3; Knut Royce, *CIA Target Tied to Sleeper Cell: Alleged Ringleader Among Those Slain in Yemen Missile Attack*, Toronto Star, Nov. 9, 2002, at A22; John J. Lumpkin, *American Killed in Yemen Strike Id'd*, Assoc. Press, Nov. 12, 2002; Phil Hirschkom & Susan Candiotti, *Buffalo Defendants Appeal Bail Decision*, CNN.com, Dec. 30, 2002;[7] *See generally* Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. Times, Oct. 12, 2003, at 11.

Intelligence officials have also been cited describing the standards and procedures that are used in order to authorize a CIA targeted killing using drones. *See, e.g.*, Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, Wash. Post, Jan. 27, 2010; Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, LA Times, Jan. 31, 2010; Peter Finn & Joby Warrick, *Panetta Wins Friends but Also Critics With Stepped-Up Drone Strikes*, Wash. Post, Mar. 21, 2010 ("Panetta authorizes every strike, sometimes reversing his decision or reauthorizing a target if the situation on the ground changes, according to current and former senior intelligence officials. 'He asks a lot of questions about the target, the intelligence picture, potential collateral damage, women and children in the vicinity,' said the senior intelligence official."). The Legal Advisor to the Department of State recently gave a speech that confirmed the existence of targeted operations and provided an outline of part of the legal basis for the targeted killing program. *See* Harold Hongju Koh, Legal Advisor, US Dep't of State, *The Obama Administration and International Law*, Speech to the Annual Meeting of the Am. Soc'y of Int'l L., Mar. 25, 2010 ("Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise.").[8]

The drone strikes have been the subject of intense public debate and comment, much of which proceeds on the understanding that the CIA is involved in these strikes. *See, e.g.*, Editorial, *Defending Drones: The Law of War and the Right to Self-Defense*, Wash. Post, Apr. 13, 2010; Micah Zenko, *Demystifying the Drone Strikes*, Wash. Indep., Apr. 2, 2010 ("After a half-decade and some 125 unmanned U.S. drone strikes in Pakistan, it is remarkable that the Obama administration maintains the false notion that such operations remain secret and are therefore beyond

[7] Available at: http://archives.cnn.com/2002/LAW/12/30/buffalo.defendants/
[8] Available at: http://www.state.gov/s/l/releases/remarks/139119.htm

public debate."); Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, Wash. Post, Mar. 12, 2010 ("In our current armed conflicts, there are two U.S. drone offensives. One is conducted by our armed forces, the other by the CIA. . . . Even if they are sitting in Langley, the CIA pilots are civilians violating the requirement of distinction, a core concept of armed conflict, as they directly participate in hostilities."); Rafia Zakaria, *Drones and Suicide Attacks*, Dawn (Pakistan), Oct. 14, 2009; David Kilcullen and Andrew McDonald Exum, *Death From Above, Outrage Down Below*, N.Y. Times, May 17, 2009, at WK13; Andrew M. Exum, Nathaniel C. Fick, Ahmed A. Humayun & David J. Kilcullen, *Triage: The Next Twelve Months in Afghanistan and Pakistan*, 17-20 Center for New American Security (June 2009); Peter W. Singer, *Attack of the Military Drones*, Brookings Institution, June 27, 2009; Declaration of Gen. David Petraeus, Appendix to the Petition for a Writ of Certiorari at 191a, *U.S. Dep't of Defense v. American Civil Liberties Union*, No. 09-160 (U.S. filed Aug. 7, 2009) ("Anti-U.S. sentiment has already been increasing in Pakistan. Most polling data reflects this trend, especially in regard to cross-border operations and reported drone strikes, which Pakistanis perceive to cause unacceptable civilian casualties."); Peter Bergen and Katherine Tiedemann, *Pakistan drone war takes a toll on militants -- and civilians*, CNN.com, Oct. 29, 2009; Daniel Byman, *Do Targeted Killings Work?*, Foreign Policy, July 14, 2009; Daniel Byman, *Taliban vs. Predator: Are Targeted Killings Inside Pakistan a Good Idea?*, Foreign Affairs, Mar. 18, 2009; Editorial, *Predators and Civilians*, Wall St. J., July 13, 2009, at A12.; Roger Cohen, *Of Fruit Flies and Drones*, Int'l Herald Trib., Nov. 13, 2009, at 9; Editorial, *Obama's Secret Shame*, Wash. Times, Apr. 20, 2010; Roger Cohen, Op-ed., *An Eye for An Eye*, Int'l Herald Trib. Feb. 12, 2010;[9] Robert Wright, *The Price of Assassination*, N.Y. Times, April 13, 2010.[10]

In light of all of these official disclosures and other publicly available information about the CIA's use of drones, it is inconceivable that the fact of the existence or non-existence of *any* records responsive to *any* aspect of the Request is properly classified and withheld under Exemption 1 or is "intelligence sources and methods" properly withheld under Exemption 3. These disclosures have waived the CIA's ability to invoke a Glomar response and demonstrate the existence of responsive records. *See supra* pp. 1-11. Furthermore, "suppress[ing this] 'already well publicized' information would . . . 'frustrate the pressing policies of the [FOIA] without even arguably advancing countervailing considerations.'" *Washington Post v. U.S. Dep't of Def.*, 766 F. Supp. 1, 9 (D.D.C. 1991) (quoting *Founding Church of Scientology v. Nat'l Sec. Agency*, 610 F.2d 824, 831-32 (D.C.Cir.1979)). The CIA's invocation of

[9] Available at: http://www.nytimes.com/2010/02/26/opinion/26iht-edcohen.html/
[10] Available at: http://opinionator.blogs.nytimes.com/2010/04/13/title-2/

Exemption 1 and Exemption 3 to support its Glomar response is therefore untenable.

Additionally, the CIA lacks any basis to invoke Exemption 3 in response to the subject matter of the Request. The Response Letter cites Section 6 of the CIA Act of 1949 as authority to withhold "intelligence sources and methods" under Exemption 3. The records responsive to this Request, however, do not constitute "intelligence sources and methods." In *CIA v. Sims*, 471 U.S. 159 (1985), the Supreme Court adopted a common-sense understanding of the statutory power to protect "intelligence sources and methods," remarking that "Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence." 471 U.S. at 170-71. The Court quoted with approval the definition of "foreign intelligence" provided by General Vandenburg, the director of the CIA's immediate predecessor: "foreign intelligence [gathering] consists of securing all possible data pertaining to foreign governments or the national defense and security of the United States." *Id.* at 170 (quoting *National Defense Establishment: Hearings on S. 758 before the Senate Committee on Armed Services*, 80th Cong., 1st Sess., 497 (1947) (Senate Hearings)).

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The Request does not seek any information about "intelligence sources and methods," but rather about a *killing* program. Basic information about the scope, limits, oversight, and legal basis of this killing program cannot sensibly be described as "intelligence sources or methods." Using drones to conduct targeted killings simply has nothing to do with "securing . . . *data* pertaining to foreign governments or . . . national defense and security." 471 U.S. at 170 (emphasis added) (internal quotation omitted). To the contrary, the CIA drone/targeted killing program is concerned with *killing* individuals who might otherwise have been potential sources of intelligence.[11] Information about a CIA targeted killing program therefore simply falls outside the scope of "intelligence sources and methods" as set out in *Sims*. Nor is the ACLU aware of any other case in which information about a CIA killing program have been regarded as "intelligence sources and methods."

To the extent that some documents encompassed by the Request would actually reveal "intelligence sources and methods," portions of those particular documents may well be withholdable under Exemption 3. But the protection afforded to particular records regarding "intelligence sources and methods" cannot justify a blanket Glomar response and does

[11] Indeed, one criticism of targeted killing programs is that they *frustrate* intelligence-gathering efforts by eliminating rich sources of information about the enemy. *See* Karen DeYoung and Joby Warrick, *U.S. emphasizes targeted killings over captures*, Wash. Post, Feb. 14, 2010, *available at* http://www.msnbc.msn.com/id/35391753.

not permit the CIA's to avoid its obligation to search for responsive records and to release all of those records (or to explain why particular documents must be withheld). The subject of the Request is a program of targeted killing, not intelligence-gathering. As such, most, if not all, of the records sought would not disclose intelligence sources or methods, but only basic information about the scope, limits, oversight, legal basis, and consequences of this targeted killing program.

For the foregoing reasons, we respectfully request that you reconsider the decision to neither confirm nor deny the existence or nonexistence of any records responsive to the Request and that you release records responsive to the Request. We look forward to your prompt response.

Sincerely,

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Jonathan Manes
Legal Fellow
American Civil Liberties Union Foundation

Encl.

[Attached Exhibits Intentionally Omitted]

Exhibit D

May 6, 2010Central Intelligence Agency

Washington, D.C. 20505

Mr. Jonathan Manes
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Reference: F-2010-00498

Dear Mr. Manes:

We received your 22 April 2010 facsimile on 23 April 2010 appealing our 9 March 2010 final response to your Freedom of Information Act (FOIA) request for **"records pertaining to the use of unmanned aerial vehicles ('UAV')--commonly referred to as 'drones' and including the MQ-1 Predator and MQ-9 Reaper--by the CIA and the Armed Forces for the purpose of killing targeted individuals."** Specifically, you appealed our determination that we can neither confirm nor deny the existence or nonexistence of records responsive to your request on the basis of FOIA exemptions (b)(1) and (b)(3).

Your appeal has been accepted and arrangements will be made for its consideration by the appropriate members of the Agency Release Panel. You will be advised of the determinations made.

In order to afford requesters the most equitable treatment possible, we have adopted the policy of handling appeals on a first-received, first-out basis. Despite our best efforts, the large number of appeals that CIA receives has created unavoidable processing delays making it unlikely that we can respond within 20 working days. In view of this, some delay in our reply must be expected, but every reasonable effort will be made to respond as soon as possible.

Sincerely,

Delores M. Nelson

Delores M. Nelson
Information and Privacy Coordinator

Exhibit E

Central Intelligence Agency

Washington, D.C. 20505

June 14, 2010

Mr. Jonathan Manes
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Reference: F-2010-00498, *American Civil Liberties Union Foundation v. Central Intelligence Agency, et. al.*

Dear Mr. Manes:

This letter further addresses your 22 April 2010 facsimile in which you appealed our 9 March 2010 final response to your Freedom of Information Act (FOIA) request for "records pertaining to the use of unmanned aerial vehicles ('UAV') – commonly referred to as 'drones' and including the MA-1 Predator and MQ-9 Reaper – by the CIA and the Armed Forces for the purpose of killing targeted individuals." Specifically, you appealed our determination that we can neither confirm nor deny the existence or nonexistence of records responsive to your request on the basis of FOIA exemptions (b)(1) and (b)(3).

Prior to a final appellate determination by the CIA's Agency Release Panel (ARP), on 1 June 2010, you filed the referenced litigation against the CIA. Based on the Agency's FOIA regulations governing exceptions to the right of administrative appeal set forth in part 1900.42(c) of title 32 of the Code of Federal Regulations, the ARP will take no further action regarding your 22 April 2010 administrative appeal, which is now the subject of pending litigation in federal court.

Sincerely,

Delores M. Nelson

Delores M. Nelson
Information and Privacy Coordinator

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, et al.,	
Plaintiffs,	
v.	Civil Action No. 1:10-cv-00436-RMC
DEPARTMENT OF JUSTICE, et al.,	
Defendants.	

[PROPOSED] ORDER

This matter is before the Court on Defendant CIA's Motion for Summary Judgment. Upon consideration of the parties' submissions, it is hereby ORDERED that Defendant CIA's Motion for Summary Judgment is GRANTED.

SIGNED and ENTERED this ___ day of _____, 2007.

_____

DISTRICT JUDGE ROSEMARY M. COLLYER