



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

October 24, 2016

BY HAND (with enclosures) and ECF (letter only)

Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *ACLU v. United States Dep't of Justice*,
15-2956(L), 15-3122(XAP) (2d Cir.)

Dear Ms. Wolfe:

In accordance with the Court's Order dated October 21, 2016, the Government respectfully submits the following classified documents for the Court's review *ex parte* and *in camera*: (1) Central Intelligence Agency ("CIA") Document 61, including two attachments, one of which is an Office of Legal Counsel ("OLC") memorandum, (2) CIA Document 96, and (3) Department of Defense ("DOD") Document 1, without attachments.

We note that the OLC memorandum attached to CIA Document 61 was previously considered by this Court in the second appeal in this case, *New York Times Co. v. DOJ*, 806 F.3d 682 (2d Cir. 2015) ("*NYT II*"). In *NYT II*, the Court sustained the Government's withholding in full of this document (there identified as Exhibit I to the Second Classified Declaration of Deputy Assistant Attorney General John E. Bies) pursuant to FOIA Exemptions 1, 3 and 5. *See id.* at 687.

We further note that DOD Document 1 is a cover memorandum enclosing and commenting on two OLC memoranda concerning a contemplated strike against Anwar al-Aulaqi. This Court has previously addressed those OLC memoranda, in *New York Times Co. v. DOJ*, 756 F.3d 100, 112-21 (July 2010 OLC-DOD Memorandum), and *NYT II*, 806 F.3d at 685, 687 (February 2010 memorandum regarding Aulaqi, described as Exhibit B (unredacted) and Exhibit K (redacted)). We are not resubmitting those OLC memoranda at this time, but will do so if the Court wishes to review them.¹

As with the prior appeals in this case, to the extent the Court includes in any opinion a discussion of the enclosed classified documents, or any other classified information at issue in

¹ We attempted to obtain copies of the attachments to DOD 1, but DOD was unable to securely transmit the documents to New York by today because of the applicable handling restrictions.

this case, the Government respectfully requests the opportunity to review the opinion before it is filed publicly to ensure that no classified information is inadvertently released.

We thank the Court for its consideration of this matter.

Respectfully,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

PREET BHARARA
United States Attorney for the
Southern District of New York

MATTHEW COLLETTE
SHARON SWINGLE
U.S. Department of Justice
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Encls. (submitted *ex parte*)

cc: Counsel of Record (letter only, by ECF)