U.S. Department of Justice
Civil Division, Appellate Staff
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October 10, 2013

Hon. Catherine O'Hagan Wolfe
U.S. Court of Appeals for the Second Circuit

RE: *New York Times Co. v. U.S. Dep't of Justice,* Nos. 13-422, -445 (2d Cir.)

Dear Ms. Wolfe:

Pursuant to the Court's October 1, 2013 order, defendants-appellees file this supplemental letter brief to clarify a statement made at p. 47 of the government's brief, and to address the impact of the D.C. Circuit's decision in *ACLU v. CIA,* 710 F.3d 422 (2013). As we explain below, the statement on p. 47 of the government's brief provides some additional information about responsive classified documents but did not suggest that the agencies would not continue to maintain a "no number, no list" response. In addition, the D.C. Circuit decision does not undermine the district court's decisions in this case or warrant remand.

1. The government explained in its brief that, after the district court decisions below, the Executive Branch disclosed additional information about the use of targeted lethal force. Those disclosures have no bearing on the question before this Court−whether the district court properly upheld the agencies' determinations that certain records and information are exempt from disclosure

under FOIA. An agency's determination that a document or information is exempt under FOIA "ordinarily must be evaluated as of the time it was made." *Bonner v. Dep't of State,* 928 F.2d 1148, 1152 (D.C. Cir. 1991). "To require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing." *Id.*[1] It would also be inequitable to conclude that government declarations justifying the administrative determination that a document or information is exempt from disclosure under FOIA could be undercut by public statements or other disclosures that post-date those declarations. *Cf. Meeropol v. Meese,* 790 F.2d 942, 958 (D.C. Cir. 1984) ("The government cannot be expected to follow an endlessly moving target.").

However, as a voluntary matter and in order to provide greater transparency, appellees evaluated their prior responses to the plaintiffs' FOIA requests in light of subsequent disclosures. The agencies did not alter their "no number, no list" responses but the Department of Justice (DOJ) was able to provide a generalized description of responsive classified documents−*i.e.,* the description provided at p. 47 of the government's brief. The government did *not* indicate that any

[1] The D.C. Circuit has made an exception for "extraordinary" and "unusual circumstances," remanding a case in which the *pro se* requester sought a single document, which had been withheld in its entirety and held not to be segregable, after the government subsequently disclosed significant portions of the document. *Powell v. Bureau of Prisons,* 927 F.2d 1239, 1243-44 (D.C. Cir. 1991). No comparable circumstances are presented here, where none of the documents sought by the plaintiffs have been released.

responsive documents would be subject to compelled disclosure or voluntarily disclosed. Indeed, the next sentence on pp. 47-48 specifies that DOJ is not in a position to provide additional details that would tend to reveal information protected by FOIA Exemptions. Responsive documents are still being withheld in full under Exemptions 1, 3, and/or 5, for reasons identified in the government's brief and the public and classified declarations filed in district court.

2. As the government explained in its brief (at pp. 39-40, 42), the D.C. Circuit's decision in *ACLU v. CIA* does not undermine the district court decisions in this case. Nor, as the ACLU agrees (Transcript 49), does that decision warrant remand of this case to district court.

The FOIA request in that case sought all records in CIA's possession "pertaining to the use of" drones. 710 F.3d at 425. The CIA issued a "*Glomar*" response refusing to acknowledge whether it had responsive documents, on the ground that FOIA exempted from disclosure information that would "reveal that the CIA was either involved in, or interested in, drone strikes." *Id.* at 427. On appeal, the D.C. Circuit held that the *Glomar* response was not warranted because CIA's "intelligence interest" (as opposed to any CIA involvement in) in drone strikes had been officially acknowledged, and therefore the existence or nonexistence of responsive records that would reveal such an intelligence interest was no longer exempt. *Id.* at 429.

The D.C. Circuit specifically distinguished, however, between a CIA "intelligence interest" in drone strikes and any possible operational involvement in such strikes. The D.C. Circuit held that the public statements on which the ACLU relied (and on which it relies here) did not constitute official acknowledgment of whether "the CIA itself operates drones." 710 F.3d at 429. The district court here similarly held that none of the public statements on which plaintiffs relied constitutes "a specific acknowledgement of the CIA's involvement in" the use of drones. SPA 65. On remand in the D.C. case, the CIA made a "no number, no list" response−the same response as made here in response to the ACLU's similar request.

In response to the New York Times FOIA requests to DOJ for OLC opinions or memoranda that address the legal status of targeted killing, the government declined to acknowledge whether or not there are responsive documents insofar as the request pertains to agencies other than the Department of Defense. Acknowledging whether OLC provided legal advice on the use of targeted lethal force by the CIA or another agency would "tend to reveal whether [that agency] was operationally involved" in using targeted lethal force or had been granted the authority to do so. JA 221. That information, which is protected under Exemptions 1 and/or 3 of FOIA, is the same type of information that the D.C. Circuit held has not been officially disclosed.

Respectfully,

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cc: Plaintiffs-appellants (via CM/ECF)