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
CENTRAL INTELLIGENCE AGENCY,	)	
Defendant.	)	

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

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INTRODUCTION

Defendant Central Intelligence Agency ("the CIA") hereby submits this memorandum in opposition to Plaintiffs' motion for partial summary judgment and in further support of its motion for summary judgment. Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "the ACLU") have made an extraordinary request for records relating to targeting decisions and uses of a specific weapons platform – the unmanned aerial vehicle or "drone." As previously explained, the Freedom of Information Act ("FOIA") does not require the provision of information that would reveal classified material or statutorily-protected information related to intelligence activities, sources and methods and/or CIA functions. The CIA's determination to acknowledge the existence of records, but to withhold the number and descriptions of the requested records is amply justified by the D.C. Circuit's reasoning and the CIA's expertise in the national security realm.

The U.S. Government has made thoughtful and robust disclosures about its use of targeted lethal force to the greatest extent possible without harming national security. These disclosures, however, have not revealed the properly classified and privileged information at issue here, including the number and nature of responsive CIA documents. That information is properly exempt from disclosure under FOIA Exemptions 1 and 3. Plaintiffs' opposition ignores the explicit finding of the D.C. Circuit that disclosures to date have not acknowledged whether or not the CIA uses drones and urges the Court to penalize the Defendant for these disclosures. ACLU argues that the cumulative effect of these disclosures, along with purported leaks and media speculation, waives FOIA exemptions asserted over properly classified information. Plaintiffs' approach is not supported by any case law and would have the perverse effect of discouraging voluntary disclosures about important national security matters. Accordingly, the Defendant requests that the Court grant its motion for summary judgment.

ARGUMENT

As set forth in its Motion for Summary Judgment, the CIA acknowledges possessing certain records responsive to the ACLU request, but beyond that limited acknowledgement, the details of those records, including the number and nature of responsive documents, remain currently and properly classified facts exempt from disclosure under FOIA Exemptions 1 and 3. The CIA has properly asserted a "No Number, No List" response, which should be accorded substantial deference in light of the CIA's considerable national security expertise.

I. THE CIA PROPERLY PROVIDED A NO NUMBER, NO LIST RESPONSE PURSUANT TO EXEMPTIONS 1 AND 3

Plaintiffs fail to understand the nature of a No Number No List response and make only a cursory attempt to refute the substantial justification for withholding the number and nature of responsive documents under Exemptions 1 and 3. Primarily, they argue that the disclosure of the number and nature of records would not reveal anything beyond a CIA intelligence interest in drone strikes. As the declarations – both public and classified – have already established, the number or nature of responsive records would in fact reveal more than what has been officially acknowledged by authorized government officials. Disclosing this information would reveal properly classified information that reasonably could be expected to harm national security and would reveal certain functions of the CIA and intelligence activities, sources and methods.[1]

A. Plaintiffs Misunderstand the No Number, No List Response

In an ordinary FOIA case, the agency defendant provides documentation regarding the number and nature of the withheld documents in order to facilitate judicial review of the asserted exemptions. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). It is well-settled law that this

[1] The D.C. Circuit decision in this matter left undisturbed this Court's reasoning upholding the applicability of Exemptions 1 and 3. Although the bases for those Exemptions are somewhat different in light of the modified CIA response, much of this Court's analysis still applies.

documentation, whether it is in the form of an index or a simple declaration, need not adhere to any particular form and need not disclose exempted information. *See ACLU v. CIA*, 710 F.3d 422, 432 (D.C. Cir. 2013). An agency issues a No Number No List response when the number of responsive documents is itself properly exempt information. *Id.*; *see also Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004); *Jarvik v. CIA*, 741 F. Supp. 2d 106, 111-13 (D.D.C. 2010); *NY Times v. DOJ*, 915 F. Supp. 2d 508, 550 (S.D.N.Y. 2013), appeal pending. Plaintiff mistakenly argues that such an approach is "virtually never legitimate." Pls' Opp. at 15. However, the D.C. Circuit expressly recognized that a pure No Number No List response was among the spectrum of possible responses available to an agency; the D.C. Circuit allowed that in certain instances such a response may be appropriate and that it should be accompanied by a "particularly persuasive affidavit," which the CIA has provided in this case. *ACLU v. CIA*, 710 F.3d at 433. In short, there is no question that the number of responsive documents can be withheld by an agency when the very provision of that information would create the harm from which the exemption is designed to protect. This rationale has been recognized by the D.C. Circuit, the Seventh Circuit, and district courts in this Circuit – and it is not seriously disputed by the ACLU in this case.

Plaintiffs thus fundamentally misunderstand the nature of a No Number No List response when they argue that the response is only justifiable "if no responsive document can be described on a Vaughn." Pls' Opp. at 17. First, the No Number No List response is necessitated by the fact that the *number* of responsive records is classified. If the number were not classified, which is the case in most FOIA cases, then the CIA might have been able to provide some version of a public *Vaughn* index or declaration and justify its withholdings in the normal course, while avoiding disclosure of classified information. But where the number of responsive documents is

classified, as it is in this case, the CIA cannot index them without revealing classified information. Hypothetically, then, even if the documents could be described only as either "five" or "five thousand classified memoranda," with no further detail given, the number itself would tend to reveal classified information. Here, as the Lutz Declaration establishes, if the CIA were to publicly acknowledge possessing thousands of records responsive to the ACLU's request, that response would tend to reveal that the CIA either engages in drone strikes or is directly involved in their execution; conversely, a small volume of records would be more consistent with a passive role. Lutz Dec. ¶¶31-32. Any description of the volume of responsive documents would tend to reveal the level of CIA resources expended in relation to drone strikes. *Id*. ¶36. This concern, never refuted by the ACLU, is compounded by the fact that, when the CIA's response to this request is compared to the responses given by other agencies, it could reveal the extent and nature of CIA's involvement. In fact, the ACLU submitted this request to the other original Defendants in this case, and it recently submitted an updated FOIA request to the CIA and several other agencies seeking precisely the same information from the more recent time period. The other sorts of information that normally appear on a *Vaughn*, including dates, titles, authors, *et cetera*, are also classified, and the CIA cannot further enumerate or describe such documents on the public record without revealing classified information. *See id.* ¶¶35, 37-39. But again, the concern about revealing such descriptive information is secondary to revealing the number of responsive records. Because the CIA cannot even enumerate its responsive records, generating a *Vaughn* in any form is simply not possible.

Plaintiffs also argue that the number and nature of responsive records would reveal only the CIA's intelligence interest in drone strikes.[2] Pls' Opp. at 19-22. Essentially, Plaintiffs

[2] Plaintiffs make this argument in the context of their "official acknowledgment" argument. *See*

disagree as a factual matter with the CIA declarant's assessment of the harm to national security, namely, that an adversary could infer damaging information (i.e., information beyond the existence of an "intelligence interest") from the volume and nature of responsive documents. But the CIA's judgment in this regard is entitled to substantial deference. *See* Def's MSJ at 10-11; *see also Center for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 932 (D.C. Cir. 2003) (holding "that the courts must defer to the executive on decisions of national security. In so deferring, we do not abdicate the role of the judiciary. Rather, in undertaking a deferential review we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role.").

As the Lutz declaration establishes, Plaintiffs' request "is plainly designed to uncover records about the specific operational role the CIA purportedly plays in the execution of drone strikes." Lutz Dec. ¶ 28. The request repeatedly alleges such an operational role and seeks information about the "rules and standards" governing the CIA's alleged use of this technology and specific information about, for example, the piloting of U.S. drones to conduct strikes. *Id*. In fact, this Court previously found that "Plaintiffs' FOIA request – sent to multiple agencies – is clearly designed, at least in part, to determine which agencies, and its personnel are involved in

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Pls' Opp at 19-22. There is, however, no dispute about whether or not the CIA has acknowledged an intelligence interest of some sort in drone strikes. Indeed, that is why the CIA sought a remand during the appeal. Plaintiffs are mistaken, however, in believing that an intelligence interest is all that could be inferred from the number and nature of responsive records.

drone strikes and in what capacities." *ACLU v. CIA*, 808 F. Supp. 2d 280, 288, *rev'd on other grounds*, 710 F.3d 422.[3]

Because the request is so plainly geared towards uncovering an alleged operational involvement, especially as compared to other agencies, revealing the volume of responsive documents "would go much further than admitting that the CIA had a mere 'intelligence interest' in the topic" and instead "would tend to reveal whether or not the CIA itself has the authority to engage in targeted lethal strikes against terrorists using drones." Lutz Dec. ¶32. Plaintiffs speculate that CIA might possess large numbers of records for reasons other than CIA's alleged direct involvement, including the existence of an intelligence interest in the technology generally, an interest in "vulnerabilities" of drones, or an interest in the technological capacities of allied governments. Pls' Opp. at 20-21. But none of these items that Plaintiffs raised in their opposition would even be responsive to their FOIA request, which is focused on operational records relating to the execution of U.S. drone strikes – not analytical assessments of the technological capabilities of drones or their use by foreign governments.

Plaintiffs further speculate that the CIA could provide some details about some of the documents without revealing classified information. Pls' Opp. at 22. That speculation, however, is incorrect. First, because the *volume* of responsive records itself reveals classified information, as discussed above, there is no possibility of describing records in a public index. To do so would reveal the number of records. Second, even if the ACLU's suppositions were not directly contradicted by declarations entitled to substantial weight, its analysis does not survive even cursory scrutiny. If, as ACLU posits, the CIA "enumerate[d] and describe[d] records concerning

[3] With the revised response, the CIA is protecting precisely this information and not the broader interest that the D.C. Circuit found to be acknowledged.

specific . . . strikes" (including unacknowledged operations), Pls' Opp. at 22, that response, when compared to other agencies, would reveal the depth and breadth of any CIA involvement, and could be used to generate a timeline of alleged CIA activity, all of which would be plainly sensitive and classified. *See* Lutz Dec. ¶¶35-36, 38-39. If the CIA "enumerate[d] and describe[d] legal memoranda setting out the government's authority to use drones for targeted killing without revealing which (if any) it solicited itself," Pls' Opp. at 22, the same concerns would apply. Moreover, there would be little reason for the CIA to possess formal legal advice about the legality of drone operations if it possessed merely a passive intelligence interest in the operations; accordingly, a large volume of responsive documents would tend to suggest an operational role. Lutz Dec. ¶33. Conversely, minimal or no responsive records would tend to suggest that possession of such documents was incidental to a general interest in the subject. *Id*.

B. <u>The Number and Nature of Responsive Documents Are Exempt from Disclosure Under Exemption 3</u>.

Plaintiffs argue that CIA's interpretation of the National Security Act and the CIA Act is inappropriately broad. *See* Pls' Opp. at 35. But CIA is not seeking "a virtually categorical exemption from the FOIA." *Id*. Rather, the precise information withheld here falls firmly within the ambit of the CIA Act, 50 U.S.C. § 3507, and the National Security Act, 50 U.S.C. § 3024(i)(1).

With respect to the CIA Act, this Court previously found that the request was aimed specifically at uncovering the functions of CIA personnel. *See* 808 F. Supp. 2d at 288. Accordingly the No Number No List response is not an attempt to hide "all information that relates to such functions" in any way, as Plaintiffs' contend. *See* Pls' Opp. at 37. Plaintiffs rely heavily on a recent interlocutory decision in which the district court held that certain information

about CIA's FOIA processing and information management practices was not exempt as a "function" of CIA. *See Nat'l Sec. Counselors v. CIA*, 2013 WL 4111616, *54-55 (D.D.C. Aug. 13, 2013); Pls' Opp. at 37-38. The CIA respectfully disagrees with that decision because it inappropriately narrows the "functions" language of the CIA Act to mean "personnel-related functions." One need look no further than the language of the statute to see that it is entitled "Protection of Nature of Agency's Functions" and that its preamble provides that it was enacted "in the interests of the security of foreign intelligence activities of the United States. *See* 50 U.S.C. § 3507; *cf. Goland v. CIA*, 607 F.2d 339, 351 (D.C. Cir. 1978). Nevertheless, as established above, the No Number No List response is necessary to protect the existence or non-existence of direct CIA involvement in drone strikes. The existence or non-existence of authorities for CIA personnel to engage in drone strikes is much more obviously a "function" of CIA personnel than the details of CIA's FOIA processing and information management practices and easily fits within even the narrow interpretation proposed by that decision. *See, e.g.*, FOIA Request at 7 (seeking information about the performance of personnel involved in drone strikes); 8 (seeking records "pertaining to the involvement of CIA personnel").

To fall within the protection of the National Security Act, the CIA must establish that the disclosure of the number and nature of responsive records "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods," *see Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980) (internal citations omitted), not, as Plaintiffs allege, that the number and nature of responsive records are themselves sources and methods. *See* Pls' Opp. at 35. Plaintiffs attack a strawman, arguing that if "'number and nature' information is . . . a source or method, anything beyond 'mere' interest will always be exempt, opening a massive loophole in the FOIA." Pl's Opp. at 36. Defendant has not claimed, however, that "number or nature"

information is *itself* a "source or method." Nor has Defendant claimed that the number or nature information is *always* exempt in response to every FOIA request; there are countless FOIA cases in this district alone where the CIA has not made this response. Instead, the declarant has explained that, based on the specific nature of Plaintiffs' request, to reveal the number or nature of responsive records would reveal in this case information that "pertains to" intelligence sources and methods. *See generally* Def's MSJ at 19; Lutz Dec. ¶¶41, 43, 46. This concern is animated both by revealing the existence or nonexistence of CIA operational involvement in drone strikes, and thus the operational deployment of sources and methods, *see* Lutz Dec. ¶41, and the provision of additional details on any U.S. strikes in which CIA has an interest, *see id*. ¶¶38-39. It is worth noting that "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 authorities, capabilities, interests, and resources that would provide valuable insight to hostile intelligence services, terrorist groups, or other enemies of the United States." Lutz Dec. ¶26. It is with this backdrop in mind that the CIA made its determination that such adversaries of the United States could analyze the requested information and the publicly available information to deduce information about sources and methods. As this Court previously recognized, the authority to protect sources and methods sweeps broadly and is not limited to direct revelation of particular sources and methods. *See* 808 F. Supp. 2d at 289-93.

C. The Number and Nature of Responsive Documents Are Exempt from Disclosure Under Exemption 1

Plaintiffs barely dispute the applicability of Exemption 1. As previously established by both public and *ex parte* declarations, providing any additional information about the number and nature of responsive records tends to reveal information about "foreign relations," "foreign

activities" and "intelligence activities (including covert action), sources and methods," the disclosure of which could reasonably be expected to harm national security.

Plaintiff argues that the withheld information does not constitute "intelligence sources and methods," but does not even attempt to dispute that the withheld information tends to reveal information about "foreign activities" or "intelligence activities." *See* Pls' Br. 33-37; *see ACLU v. CIA*, 808 F. Supp. 2d at 298-99. Plaintiffs have effectively conceded that the number and nature of responsive records falls within a protectable category of information under section 1.4 of Executive Order 13526. As discussed above, the withheld information also could reasonably be expected to reveal "intelligence sources and methods."

Plaintiffs also opine that disclosure of this information would not harm national security and scoff at the CIA declaration establishing that official confirmation of the existence or non-existence of CIA authorities would have repercussions for both our enemies and our allies. Pls' Opp. at 38-39. This approach wholly ignores the proper standard. *See* Def's MSJ at 6-7. Courts should not second-guess the facially reasonable concerns of the Executive Branch in this area. *See Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (remarking, "[m]indful that courts have little expertise in either international diplomacy or counterintelligence operations," that the court was "in no position to dismiss the CIA's facially reasonable concerns" about the potential security risk that disclosure would cause); *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").

Here, the Lutz Declaration establishes that the distinction between U.S. Government action as opposed to a CIA action is a significant one: "[T]he U.S. military and CIA have different roles, capabilities, and authorities, and admissions of their respective activities result in

different responses by unfriendly foreign powers, including terrorist organizations, as well as by U.S. foreign partners." Lutz Dec. ¶43. Hypothetically, the revelation that the CIA in particular was carrying out these kinds of operations would confirm or heighten suspicions that the CIA was responsible for particular activities and cause countries to respond in ways that would damage foreign relations and U.S. interests and hinder future operations. *Id*. ¶ 44-45. And any confirmation that the CIA is not carrying out such operations could reveal gaps in U.S. Government capabilities, leaving terrorists in certain areas with the ability to operate openly. *Id*. ¶ 44.

The ACLU's own speculation that terrorist organizations and foreign allies should not make a meaningful distinction between actions of the U.S. military and actions of the CIA is wholly baseless, and in any case, is entitled to no weight. Plaintiffs argue that it is commonplace that the CIA engages in "non-traditional intelligence activities" and CIA conspiracy theories abound. But the fact that the CIA may have, at some point in the past, acknowledged a different kind of non-traditional intelligence activity does not mean that no harm could be caused by disclosure of the precise information withheld here at this point in time.[4] The Lutz Declaration specifically acknowledges that there is a certain amount of information in the public sphere about U.S. drone strikes and about CIA activities. But the CIA determined that further revelations could cause the specific harm described. This is consistent with long-standing case law holding that the existence of some information related to a certain subject in the public domain "does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods, and operations." *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 835 (D.C. Cir.

[4] ACLU does not even attempt to dispute that revelation of details of operations – such as dates, location, targets, *i.e.*, the sorts of information that might normally appear on a *Vaughn* – could reveal highly damaging information about sources and methods and Agency resources. *Id*. ¶ 46.

2001) (internal quotations omitted) (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990)); *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983) ("Unofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of their cooperation with the CIA, but official acknowledgement may force a government to retaliate."); *Military Audit Project v. Casey*, 656 F.2d 724, 725 (D.C. Cir. 1981); *Riquelme v. CIA*, 453 F. Supp. 2d 103, 109 (D.D.C. 2006). As this Court previously explained, the "test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather, the issue is whether on the whole record the CIA's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role." *ACLU v. CIA*, 808 F. Supp. 2d at 299-300, quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982).

II. CIA HAS NOT OFFICIALLY DISCLOSED THE WITHELD INFORMATION

The CIA has not officially acknowledged the information withheld here. Plaintiffs argue that (1) CIA has acknowledged having an intelligence interest in drone strikes; and (2) the CIA has officially acknowledged direct involvement in drone strikes. The first contention is true, but as discussed above, does not undermine the assertions of Exemptions 1 or 3. The second contention is wholly untrue, and Plaintiffs have not identified any official disclosure of the withheld information, instead relying on their own dubious inferences drawn from the official disclosures previously discussed and from media speculation based on purported leaks.

As discussed in Defendant's Memorandum in support of Summary Judgment, the officially acknowledged information must match precisely the withheld information in order to waive an Exemption claim over that information. Def's MSJ at 27-31. The withheld information–the number and nature of responsive records, and the nature of the CIA's

involvement in U.S. drone strikes–has not been disclosed. Lutz Dec. ¶ 48. Indeed, the D.C. Circuit explicitly rejected Plaintiffs' interpretation of certain disclosures, specifically stating that the "official acknowledgments" that it found otherwise significant in revealing some level of a CIA "interest" in drones strikes "do not acknowledge that the CIA itself operates drones." *ACLU v. CIA*, 710 F.3d at 429-30. This is consistent with the official disclosures described by the Lutz Declaration – a carefully considered Executive Branch decision to disclose the existence of and legal basis for U.S. drone strikes generally without providing any operational information or disclosing the nature of any CIA involvement. *See* Lutz Dec. ¶¶ 11-16, 48.

Plaintiffs continue to ignore the well-settled D.C. Circuit case law on what constitutes an official disclosure, pressing the Court to consider selective quotations of ambiguous statements, statements by unauthorized individuals and media analysis. *See* Pls' Opp. at 23-33.[5] Nothing in the remand decision by the D.C. Circuit changes the exacting standard for finding official disclosure – that the precise information at issue must have been officially and specifically

[5] Plaintiffs urge this Court to consider disclosures post-dating the agency's No Number No List response. *See* Pls Opp. at 29. It is clearly inappropriate in general for a reviewing Court to consider information that postdated the decision at issue. *See 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."). Although 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, after the government subsequently disclosed significant portions of the document, *see Powell v. BOP*, 927 F.2d 1239, 1243-44 (D.C. Cir. 1991), no comparable circumstances are presented here, where the CIA has not released any documents sought by Plaintiffs. In the present matter, there is no reason for the Court to reach the issue. CIA volunteered to reconsider its position prior to the appeal and in fact did so prior to moving for summary judgment in this matter. And Plaintiffs do not now claim that any material post-dating that motion constitutes official disclosure.

disclosed by an authorized official. *See Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007); Def's MSJ at 27-31. Not a single statement cited by Plaintiffs meets this standard.[6]

Statements by Current Officials. First, Plaintiffs rehash the Panetta statements previously considered by this Court and the D.C. Circuit. In the ABC News transcript, for example, Mr. Panetta, after a general discussion of the state of the war in Afghanistan and commenting on the possible whereabouts of Osama Bin Laden, stated:

> But having said that, the more we continue to disrupt Al Qaida's operations, and we are engaged in the most aggressive operations in the history of the CIA in that part of the world, and the result is that we are disrupting their leadership. We've taken down more than half of their Taliban leadership, of their Al Qaida leadership. We just took down number three in their leadership a few weeks ago.

See Transcript, This Week (ABC News broadcast dated June 27, 2010); Pls' Opp. at 23. And as this Court previously found, "Director Panetta spoke generally" and his reference to "we" or "our" could "just as easily have referred to the joint efforts of all U.S. military and civilian resources." 808 F. Supp. 2d at 296.[7] Although Panetta mentions "the most aggressive operations in the history of the CIA" as part of these U.S. efforts to disrupt Al Qaida leadership, he does not mention CIA drone strikes, much less the specific information protected here – the

[6] Having failed to identify any specific official disclosure that matches the information withheld here, Plaintiffs repeat generalities about FOIA, claiming that the Government is engaging in "selective disclosure" by disclosing the general justification for targeted lethal operations through Executive Branch officials but not disclosing other properly classified information. Certain legislators may have identified selective disclosure as one reason to enact FOIA, but the legislative solution was to put the government to its proof., *i.e.*, to require agencies to justify exemptions. The defendant agencies have done so here, and those exemptions have not been waived through official disclosure. *See* 5 U.S.C. § 552(b); *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982) (recognizing that "public disclosure is not always in the public interest"); *accord ACLU v. DOJ*, ACLU v. DOJ, 681 F.3d 61, 69 (2d Cir 2012).

[7] Although the D.C. Circuit found that CIA had acknowledged an interest in topic of U.S. drone strikes, it also found that CIA had not acknowledged the existence or nonexistence of CIA drone strikes. Accordingly, this Court's reasoning in the case of this statement is undisturbed by the D.C. Circuit decision.

nature of any CIA role in drone strikes. The most that could possibly be inferred from his statement is that CIA has an interest in the operations to disrupt Al Qaida leadership. That inference, even if it were inevitable, does not specifically match the withheld information. All of the official quotations cited by Plaintiffs tend to confirm that the Defendant has carefully and explicitly avoided disclosing the existence or non-existence of direct involvement in drone strikes.

Second, Plaintiffs cite a stray remark made by Panetta during a public speech while he was Secretary of Defense. Pls' Opp. at 24. He is quoted as saying that he was "familiar with" the "use of Predators" in his "past job," which in no way discloses any particular operational role with respect to Predators or the volume or nature of CIA records relating to drone strikes. As for his aside of "although Predators aren't bad," this statement is also too ambiguous to constitute an official disclosure that the CIA engages in drone strikes. And even if this comment could be read as acknowledging that Predators were "available" to the CIA, it does not acknowledge that the CIA uses them for lethal purposes, as opposed to surveillance and intelligence-gathering. Plaintiffs intuit from this that "the CIA operates armed drones for use in targeted-killing operations" but that is not the only possible conclusion. Indeed, even the article acknowledged that "Panetta stopped short of confirming that CIA Predators were conducting airstrikes," indicating that in context it was obvious that he did not intend any such confirmation as part of his "off-the-cuff remarks." *See U.S. Defense Secretary Refers to CIA Drone Use*, L.A. Times, Oct. 7, 2011, *available at* http://lat.ms/roREDq.

Plaintiffs also cite remarks by Panetta at the Pacific Council in May 2009 that the D.C. Circuit found disclosed a CIA interest in drone strikes, but which did *not* disclose any particular

CIA role. *See* Pls' Opp. at 24. In responding to a question about drone strikes and specific reported casualty figures, Panetta stated:

> **Q:** . . .You mentioned that you believe the strategy in Pakistan is working — the President's strategy in Pakistan in the tribal regions, which is the drone — the remote drone strikes. You've seen the figures recently from David Kilcullen and others that the strikes have killed 14 midlevel operatives and 700 civilians in collateral damage. And his assessment as a counterinsurgency expert is it's creating more anti-Americanism than it is disrupting al-Qaeda networks. . . .
> **A: . . .** [O]bviously because these are covert and secret operations I can't go into particulars. I think it does suffice to say that these operations have been very effective because they have been very precise in terms of the targeting and it involved a minimum of collateral damage. I know that some of the — sometimes the criticisms kind of sweep into other areas from either plane attacks or attacks from F-16s and others that go into these areas, which do involve a tremendous amount of collateral damage. And sometimes I've found in discussing this that all of this is kind of mixed together. But I can assure you that in terms of that particular area, it is very precise and it is very limited in terms of collateral damage and, very frankly, it's the only game in town in terms of confronting and trying to disrupt the al-Qaeda leadership.

Director Panetta's Remarks at the Pacific Council on International Policy (May 18, 2009); Pls' Opp. at 24. Nothing in Panetta's statement indicates the volume or nature of responsive documents that the CIA possesses about U.S. operations and nothing even suggests a CIA role in drone strikes. Indeed, he declined to comment on any operational specifics.[8]

Plaintiffs also cite a Washington Post feature on then-Assistant to the President John Brennan, in which the reporter discusses the U.S. Government's use of targeted lethal force. Notably absent from the feature are any quotes attributed to Brennan that discuss the CIA's

[8] The D.C. Circuit opinion does not include the full quote, such as the question about a specific report and those sentences from Mr. Panetta's response that indicate the reports of collateral damage sometimes include damage caused by non-drone-related strikes. But even assuming that Mr. Panetta was speaking specifically about drone strikes, there is no indication anywhere in the text or in the D.C. Circuit opinion that he is speaking about "CIA drone strikes," as the Plaintiffs infer.

alleged use of targeted lethal force. The closest Plaintiffs have come is a statement by the reporter in which the reporter claims that "Brennan is leading efforts to curtail the CIA's primary responsibility for targeted killings," and a later sentence contrasting Brennan's actions to those of other officials. ("But Brennan and others described a future in which the CIA is eased out of the clandestine-killing business.") *See* Pls' Opp. at 24-25. It is not clear that Brennan is the actual source for the purported statements, and in any case, there is neither a transcript nor a direct quotation so that the Court can evaluate the claim of official acknowledgment. The only direct quotes from Mr. Brennan do not mention the CIA at all. In the absence of a documented official disclosure, Plaintiffs cannot infer such a disclosure from a journalist's surmise from unspecified sources.[9]

Statements by Former Officials. Plaintiffs next cite a handful of newspaper articles citing former CIA employees who are either quoted or paraphrased as revealing an alleged CIA role in drone strikes. Pls' Opp. at 25. Even if all of these statements were explicit and unambiguous, former officials are not authorized to speak for the agency and their statements are not official disclosures. *See Afshar*, 702 F.2d at 1134 (holding that disclosures in books written by former CIA officials could not be treated as "official disclosures"); *Wilson v. CIA*, 586 F.3d 171, 189 (2d Cir. 2009) ("A former employee's public disclosure of classified information cannot be deemed an 'official' act of the [Central Intelligence] Agency."); *Phillippi v. CIA*, 655 F.2d 1325, 1330-31 (D.C. Cir. 1981) (information reported in book by former CIA Director was not official disclosure).

[9] The only other statements by a current official that appear in Plaintiffs' brief are Brennan's responses during his Congressional hearing. But even Plaintiffs concede that Brennan did not explicitly discuss whether the CIA was operationally involved in drone strikes, but instead spoke generally. *See* Pls' Opp. at 27.

Statements by Members of Congress. Plaintiffs lean heavily on purported disclosures by Congressman Mike Rogers and Senator Diane Feinstein. Pls' Opp. at 26-27. These statements are less than clear, but in any event, it is beyond cavil that Congress lacks the authority to officially disclose information properly classified by the Executive Branch. The release of information by Congress (and, presumably, an individual Member of Congress) does not constitute official disclosure of classified information by the relevant Executive Branch agency. *See Military Audit Project v. Casey*, 656 F.2d 724, 742-745 (D.C. Cir. 1981); *see also Moore v. CIA*, 666 F.3d 1330, 1333 n.4 (D.C. Cir. 2011) ("[W]e do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought." (quoting *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999)); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 627-628 (S.D.N.Y. 1996), *aff'd,* 128 F.3d 788 (2d Cir. 1997) (cited with approval in *Wilson*, 586 F.3d at 186-187).

To hold otherwise would permit Members of Congress who might have been provided with classified information in the course of their official duties to override an Executive Branch classification decision without authorization to do so. *See Murphy v. Dep't of Army*, 613 F.2d 1151, 1156 (D.C. Cir. 1979) (rejecting an interpretation of FOIA that would "effectively transform section [552(d)] into a congressional declassification scheme," which would pose "obvious problems, constitutional and otherwise," with regard to national security information protected under Exemption 1); *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982) ("bare discussions by this court and the Congress of NSA's methods generally cannot be equated with disclosure by the agency itself of its methods of information gathering"); *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 60 (D.D.C. 2012) (holding that a congressional committee's publication of records provided to it in confidence without

authorization does not constitute a waiver of the applicable FOIA Exemptions). Indeed, it would pose serious Constitutional questions if, as a result of legislative oversight responsibilities, members of Congress could override the Executive Branch determination that information was currently and properly classified. *Cf. Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Neither FOIA nor the Executive Order contemplate Congress taking on such a role.

Furthermore, a classifying agency's interests in withholding information can remain compelling notwithstanding congressional disclosure. Courts have recognized, for example, that the fact the CIA provides certain classified information to Congress in its oversight role does not undermine the CIA's "ongoing interest in assuring its sources of its continued adherence to its strict policy of not revealing sources" and in refusing to confirm the existence of CIA operations in other countries. *See Earth Pledge Foundation,* 988 F. Supp. at 627-628; *accord Afshar,* 702 F.2d at 1130-1131. The Second Circuit explicitly recognized that such interests can be valid even the face of a purported Congressional disclosure, stating that "the law will not infer official disclosure of information classified by the CIA from (1) widespread public discussion of a classified matter; (2) statements made by a person not authorized to speak for the Agency; or (3) release of information by another agency, *or even by Congress*" because foreign governments may feel compelled to retaliate once an admission comes directly from the CIA. *Wilson*, 586 F.3d at 186 (internal citations omitted) (emphasis added) (finding no waiver despite publication of information in the Congressional Record).

Plaintiffs' efforts to distinguish the landslide of case law refusing to find a waiver based on alleged Congressional disclosures makes clear that they cannot cite a single instance in which a court has ever found such a waiver.[10] *See* Pls' Opp. at 29-31 and n. 32. Plaintiffs rely largely

[10]The ACLU cites an unpublished D.C. Circuit decision to argue that disclosures by Members of

on a D.C. Circuit opinion in a non-FOIA matter, but *Ameziane v. Obama*, 699 F.3d 488 (D.C. Cir. 2012) does not support Plaintiffs' novel theory of official acknowledgment. In that *habeas* case, the Court found that the government's appeal was not moot because it could still order effective relief by preventing an acknowledgment of the detainee's status by counsel or the Court. The question of whether the Court in a habeas matter has the power *to prevent* disclosures that could cause harm akin to official acknowledgment is far different than the question of whether there has been an unambiguous waiver of a FOIA exemption.

Ultimately, Plaintiffs believe the cumulative effect of media speculation and purported "leaks" should force the Executive Branch to change its considered policy regarding official disclosure. As this Circuit's precedent makes clear, the purported intelligence expertise of the FOIA requestor does not substitute for that of the responsible federal agency. *See Phillippi*, 655 F.2d at 1331; *Military Audit Project*, 656 F.2d at 745; *Afshar*, 702 F.2d at 1130-31. Plaintiffs' conclusion that the purported leakers are credible is of no moment; they have not met their burden of pointing to official information in the public sphere that precisely matches the information at issue here. Finally, the public is ill-served by effort to force a broad disclosure from the limited public disclosures that have been made. *See Bassiouni v. CIA*, 392 F.3d 244, 247 (7th Cir. 2004) ("And [the FOIA requestor] is better off under a system that permits the CIA to reveal some things . . . without revealing everything; if even a smidgen of disclosure required the CIA to open its files, there would be no smidgens.") The CIA's exemption claims should be upheld.

Congress can constitute official acknowledgment. Pls' Opp. at 29. That court, however, specifically declined to reach the issue, *see Hoch v. CIA*, No. 88-5422, 1990 WL 102740, at *1 (D.C. Cir. Jul. 20, 1990), and the D.C. Circuit later held that publication by Congress did not necessarily constitute official disclosure. *See Fitzgibbon*, 911 F.2d at 765-66 (reasoning "that executive branch confirmation or denial of information contained in congressional reports could under some circumstances pose a danger to intelligence sources and methods").

CONCLUSION

For the foregoing reasons, Defendant CIA respectfully requests that the Court deny Plaintiffs' motion and grant summary judgment in its favor.

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Respectfully submitted,

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