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.	

DEFENDANT'S SUPPLEMENTAL BRIEF

Pursuant to the order dated May 19, 2014, Defendant Central Intelligence Agency ("the CIA") hereby responds to Plaintiffs' Notice of Supplemental Authority, dated February 12, 2014. ECF No. 56. That notice quoted a portion of response to a question by the Director of National Intelligence in front of Congress. *Id.* The *Wall Street Journal* article linked by Plaintiffs describes the exchange more completely:

> **Sen. Nelson**: It is — you tell me if this is correct — the administration's policy that they are exploring shifting the use of drones, unmanned aerial vehicle strikes, from the CIA to the DOD. Is that an accurate statement?
>
> **Mr. Clapper:** Yes, sir, it is. And again, that would also be best left to a closed session.
>
> **Sen. Nelson**: OK. Well, I just want to state at the outset that my opinion is that that is a mistake. And I think that what I consider to be a mistake, I will ask with this question: One of the avowed reasons, so stated, is that by it being the DOD, it would not be covert, it would be overt, and therefore, when the enemy says that we killed so many innocent civilians, which is usually not accurate by any stretch of the imagination, that we would be able to publicly state that. Is that one of the justification for the policy?

> **Mr. Clapper:** That — yes, sir — it's awkward discussing this in public — that is, but I wouldn't characterize that as the primary reason.
>
> Asked whether Mr. Clapper intended to publicly acknowledge the program, Mr. Clapper's spokesman Shawn Turner said, "He clearly said the topic should be discussed in closed session."

See Siobhan Gorman, *CIA's Drones, Barely Secret, Receive Rare Public Nod*, Wall St. J. Washington Wire Blog (Feb. 11, 2014, 4:19 PM), http://on.wsj.com/1aUUN53.

Plaintiffs claim that this statement constitutes an "official acknowledgement" of the U.S. Government that the CIA directly operates drones for the purpose of conducting strikes. ECF No. 56. As described in the Defendant's Motion for a Stay, however, allegations of waiver similar to those raised here and in the summary judgment briefing, remain before the Second Circuit.[1] *See* ECF No. 58, Def's Mot. to Stay. Accordingly, the government's ultimate position in this case could turn on the outcome of the appellate process in New York. For that reason, the government continues to urge the entry of a temporary stay. As matters stand, however, the *Wall Street Journal* article does not affect the "No Number No List" response to the FOIA request in this case.

First, Mr. Clapper's statement should not be considered as part of the pending motions for summary judgment. An agency must process a FOIA request at a particular point in time and make its administrative determinations based on the facts at that time. The fact that subsequent developments might have led an agency to respond differently if the same FOIA request were submitted at a later date does not establish that the agency's initial response was inadequate.[2] *See, e.g., Meeropol v. Meese*, 790 F.2d 942, 959 (D.C. Cir. 1986); *Bonner v. Dep't of State*, 928

[1] The Government in that matter has indicated its intention to file a limited petition for rehearing. *See New York Times Co. v. DOJ*, Nos. 13-0422-cv (L), 13-0445-cv (CON), ECF No 216 (May 28, 2014) (ruling on Defendants' motion for leave to file *ex parte* petition for rehearing).

[2] On appeal, the D.C. Circuit considered subsequent statements, noting only that the Government had not objected to judicial notice of such statements. *ACLU v. CIA*, 710 F.3d 422, 431 & n.10 (D.C. Cir. 2013). The CIA is objecting to consideration of such statements here.

F.2d 1148, 1152 (D.C. Cir. 1991). Similarly, when an agency submits declarations in support of summary judgment in district court, defending the adequacy of the administrative response to a FOIA request, those declarations are based on the information known to the declarant at that time. Judicial review "properly focuses on the time the determination to withhold is made," *Bonner*, 928 F.2d at 1152, and this Court should consider the facts available to the agency at the time the agency moved for summary judgment. Because Mr. Clapper's statement postdates the No Number No List determination, it is not properly part of the Court's review. [3]

Second, as matters currently stand, Mr. Clapper's statement itself does not materially impact the government's No Number No List response. 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 ACLU v. CIA*, 710 F.3d 422, 426-27 (D.C. Cir. 2013); *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). Plaintiffs "bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Id*. The Plaintiffs must show (1) that the requested information is "as specific 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*, "[t]he 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)).

Here, only the Senator makes any reference to the CIA or strikes, and even the Senator does not explain exactly what role either CIA or DOD played with respect to drone strikes, only

[3] If the Court were to find changed circumstances (i.e., subsequent disclosure) should be considered here, the Government requests the opportunity to provide a supplemental declaration addressing the impact of this development on the CIA's No Number, No List response.

that consideration was being given to some unidentified role shifting. *See Military Audit Project v. Casey*, 656 F.2d 724, 742-745 (D.C. Cir. 1981) (Congress cannot waive Exemptions); *see also Moore v. CIA*, 666 F.3d 1330, 1333 n.4 (D.C. Cir. 2011). He indicated repeatedly that the matter should not be discussed publicly. Indeed, it seems that the *Wall Street Journal* reporter needed clarification on what Mr. Clapper intended.

In any event, Mr. Clapper's statement is insufficiently specific to waive the defendant's ability to rely upon the No Number No List response asserted in this case, because it does not detail the depth, breadth, or precise nature of any CIA role, much less the volume or details of responsive documents. *See, e.g., Moore*, 666 F.3d at 1334 (finding no waiver of Glomar where the alleged disclosure did not detail any specific records matching the FOIA request). The Lutz Declaration supports the No Number No List response. Ms. Lutz explained that "Plaintiff's request is plainly designed to uncover records about the specific operational role the CIA purportedly plays in the execution of drone strikes," ¶ 28, and that "[d]isclosure of information about the depth or breadth of CIA's operational involvement (or lack thereof) would expose protected activities, sources, methods, and functions of the Agency," ¶ 29. Ms. Lutz further declared that revealing the number and nature of responsive records would tend to reveal "what role the Agency plays (if any) in the execution of drone strikes – especially in comparison to other agencies, and/or the amount of resources it devotes to this area." *Id*. ¶¶ 31, 36 ("[I]nformation about the CIA's budget, priorities, resources and workforce is classified not only in the aggregate but also when limited to a specific aspect of its operations."). Moreover, as Ms. Lutz elaborated, providing information about the responsive records, in combination with other publicly available information, could reveal particularly sensitive information, such as a timeline of strikes in which CIA had a role, if any, and any other operational details, all of which could cause harm to national security. *Id*. ¶ 38 ("Providing this timeline could reveal information

about CIA intelligence activities, sources, and methods – including the specific countries in which the CIA had a presence (or not) at a particular point in time, whether the CIA had an intelligence interest in the targeted individual, and/or the existence or absence of human source reporting."); *id*. ¶¶ 39, 46.

In short, the record is far too ambiguous to find the sort of deliberate disclosure that would forfeit the ability to assert a no number, no list. Nothing in Mr. Clapper's response to the Senator's question even arguably reveals this kind of information about the specific nature of any CIA role, the depth and breadth of such a role, or details about any specific operation. Accordingly, even if some ambiguous disclosure was made about a CIA interest, *see also ACLU v. CIA*, 710 F.3d 422, 430 (D.C. Cir. 2013), it was insufficiently specific to waive the No Number, No List response. *See 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. 1999) ("[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.").

Dated: June 2, 2014

Respectfully submitted,

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