UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, -v- DEPARTMENT OF DEFENSE, DEPARTMENTOF JUSTICE, and DEPARTMENT OF STATE, Defendants.	:	17 Civ. 9972 (ER) 20 Civ. 0043 (ER)
THE NEW YORK TIMES COMPANY, Plaintiff, -v- UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants the United States Department of Defense ("DoD"), the United States Department of Justice ("DoJ"), and the United States Department of State ("DoS") (collectively, the "government") respectfully submit this memorandum of law in support of their consolidated motion for summary judgment in these actions brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

The government has properly refused to confirm or deny the existence of an alleged document reflecting the current status of a Presidential Policy Guidance on the use of direct action against terrorists abroad. In 2016, the Obama Administration released a redacted version of this Presidential Policy Guidance, titled "Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities" (the "PPG"). Plaintiffs allege that the Trump Administration replaced the PPG with a purported new set of standards. They submitted FOIA requests to DoD and, in ACLU's case, also to DoJ and DoS, seeking the alleged replacement to the PPG. The government refused to confirm or deny the existence of records responsive to plaintiffs' FOIA requests because whether or not the PPG remains in place—or has been modified, rescinded or replaced—is classified and protected from disclosure by statute, and thus exempt under FOIA exemptions 1 and 3, 5 U.S.C. § 552(b)(1) ("Exemption 1") & (3) ("Exemption 3").

As explained in the accompanying Declaration of Ellen J. Knight (the "Knight Declaration"), a senior National Security Council ("NSC") official and an original classification authority, whether or not the PPG has been rescinded, replaced, or modified is currently and

properly classified.[1] In the judgment of senior national security officials, public disclosure of the procedures and standards currently in place for approving direct action against terrorist targets outside the United States—and, in particular, whether or not the procedures and standards set forth in the PPG remain in place—could reasonably be expected to cause harm to the national security by allowing potential terrorist targets to modify their operations to avoid detection or targeting by the U.S. government. This information is therefore currently and properly classified, and exempt from disclosure under Exemption 1.

Pursuant to Exemption 3, the current status of the PPG is also protected from disclosure by statute. Specifically, the National Security Act (the "NSA"), codified as amended at 50 U.S.C. § 3024(i)(1), prohibits the unauthorized disclosure of intelligence sources and methods. As explained in the Knight Declaration, the current status of the PPG relates to intelligence sources and methods protected by the NSA because revealing the existence or non-existence of updated guidance could undermine intelligence operations. And because it is well-established that the NSA is an Exemption 3 statute, information about the current status of the PPG is exempt from disclosure under Exemption 3.

The government has not waived the protections of FOIA Exemptions 1 or 3. Contrary to plaintiffs' argument that an alleged disclosure by DoD waived the government's right to assert a Glomar response, DoD does not have the authority to declassify or officially disclose

[1] The unredacted version of the Knight Declaration contains classified information that cannot be provided on the public record, and is provided solely for the Court's review *ex parte* and *in camera*. *See* 5 U.S.C. § 552(a)(4)(B) (providing for *in camera* review); *see ACLU v. Office of the DNI*, No. 10 Civ. 4419 (RJS), 2011 WL 5563520, at *12 (S.D.N.Y. Nov. 15, 2011) ("[W]hen national security is at issue, '*in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm.'" (quoting *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003)). The full, classified version of the Knight Declaration has been lodged with a Department of Justice Classified Information Security Officer for secure transmission to the Court. A redacted version of the declaration is being filed herewith on the public docket.

information concerning the current status of the PPG. Executive Order 13526, which governs classification of national security information, provides that only the authority that originally classified information (or that authority's delegate) can properly declassify information. An original classification authority at NSC classified the current standards and procedures for direct action against terrorist targets, including whether or not the PPG remains in place. The NSC has not declassified or officially disclosed the current status of the PPG—or delegated any authority to do so. Moreover, the oblique reference in the document cited by plaintiffs does not match the specific information sought in their FOIA requests. The asserted public disclosure of that document, which according to plaintiffs is no longer available on DoD's website, leaves ample lingering doubt as to whether or not the PPG remains in place. Accordingly, the current status of the PPG remains properly classified and statutorily protected from disclosure, notwithstanding any alleged disclosure by DoD.

The government's Glomar response to the FOIA requests therefore remains proper, and the Court accordingly should grant the government's motion for summary judgment.

BACKGROUND

I. The National Security Council

"The National Security Act of 1947, as amended, established the National Security Council (NSC) to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security." Presidential Memorandum, Organization of the National Security Council, the Homeland Security Council, and Subcommittees ("NSC PM"), 82 Fed. Reg. 16,881 (April 4, 2017); *see* 50 U.S.C. § 3021. The President—or, in his absence, his delegate—presides at NSC meetings. *Id.* § 3021(d). The Secretary of Defense and the Secretary of State are statutory members of the NSC, 50 U.S.C. § 3021(c)(1), and the

Attorney General and the Director of National Intelligence (the "DNI")—a "statutory advisor to the NSC"—are regular attendees, NSC PM, 82 Fed. Reg. at 16882. By statute, the NSC has a professional staff "to perform such duties as may be prescribed by the President in connection with performance of the functions of the [NSC]." 50 U.S.C. § 3021(e)(2).

II. Standards for Direct Action Against Terrorists Abroad

On May 22, 2013, President Obama implemented standards for direct action against terrorists outside the United States and outside of war zones. *See* Barack Obama, President, Remarks of President Barack Obama at the National Defense University (May 23, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university. These standards were set out in the PPG. *See* PPG (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download. Officials at the NSC originally classified the PPG. Knight Decl. ¶ 9. In 2016, following an intensive inter-agency review, redacted portions of the PPG were publicly disclosed. *See id.* ¶ 10; PPG. The complete, unredacted version of the PPG remains classified. Knight Decl. ¶ 10.

The current status of the PPG—that is, whether or not the PPG remains in place, or has been modified, rescinded or replaced—is classified and statutorily protected from disclosure. *See id.* ¶¶ 12, 27-28. NSC has determined that disclosure of the current standards and procedures for direct action against terrorists, including whether or not the PPG remains in place, could reasonably be expected to result in serious damage to the national security. *See id.* ¶¶ 15-18. Revealing the existence or absence of new guidance could reasonably be expected to undermine military and intelligence operations by allowing potential terrorist targets to modify their operations to avoid detection or targeting by the U.S. government. *Id.* ¶ 15.

III. The Present Action

Plaintiffs have alleged that the Trump Administration replaced the PPG with a purported set of rules allegedly titled "Principles, Standards, and Procedures" ("PSP"). Complaint, Dkt. No. 1, *ACLU et al. v. DoD et al.*, No. 17-cv-9972 (ER) ("ACLU Complaint") ¶¶ 2, 17; Complaint, Dkt. No.1, *New York Times Co. v. DoD*, No. 20-cv-43 (ER) ("Times Complaint") ¶¶ 2, 9. On October 30, 2017, the ACLU submitted a FOIA request to defendants DoD, DoJ,[2] and DoS seeking the alleged PSP, or other alleged records containing the Trump Administration's rules governing the use of lethal force abroad. *See* ACLU Compl., *id.* Ex. A. On December 21, 2017, the ACLU filed suit under FOIA to compel the release of the alleged PSP. *See* ACLU Compl. In defendants' Answer, each defendant agency—including each component within DoJ—asserted a Glomar response, neither admitting nor denying plaintiffs' allegations concerning the alleged PSP, as doing so would reveal information exempt from disclosure under FOIA. *See* Answer, Dkt. No. 14, *ACLU et al. v. DoD et al.*, No. 17-cv-9972 (ER).

On October 7, 2019, the Times submitted a FOIA request to defendant DoD, also seeking alleged records containing the Trump Administration's rules governing lethal force abroad. *See* Times Complaint ¶ 9. On January 3, 2020, the Times filed suit under FOIA to compel the release of the alleged PSP. *See id*. In its Answer, DoD again asserted a Glomar response, neither admitting nor denying plaintiffs' allegations concerning the alleged PSP, as doing so would reveal information exempt from disclosure under FOIA. *See* Answer, Dkt. No.12, *New York Times Co. v. DoD*, No. 20-cv-43 (ER).

After the parties filed pre-motion letters, the Court set a briefing schedule for the parties' cross-motions for summary judgment on the government's Glomar response. *See* Dkt. Nos. 23-

[2] ACLU sent its FOIA request to the Office of Information Policy ("OIP"), the National Security Division ("NSD"), and the Office of Legal Counsel ("OLC") within DoJ.

27, *ACLU et al. v. DoD et al.*, No. 17-cv-9972 (ER); Dkt. Nos. 8-11, *New York Times Co. v. DoD*, No. 20-cv-43 (ER). Each defendant agency—including each component within DOJ—relies on the Knight Declaration in support of its Glomar response to plaintiffs' FOIA requests.

ARGUMENT

I. Legal Standards for Summary Judgment in FOIA Actions

FOIA generally requires federal agencies to make records "available to the public," 5 U.S.C. § 552(a), unless they fall within one or more of the nine statutory exemptions to disclosure, *see id.* § 552(b). Congress adopted this structure "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess., 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). The nine exemptions to FOIA's disclosure requirements reflect Congress's determination that "public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166–67 (1985). Accordingly, the government may properly withhold information that falls within any of the nine exemptions. *Id.*

Moreover, "'an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception,'" which is commonly referred to as a Glomar response. *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir. 2009) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982) (brackets omitted)). Indeed, a Glomar response "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." *Id.* (quoting *Phillippi v. CIA*, 546 F.2d 1009, 1012 (D.C. Cir. 1976)); *see Larson v. Dep't of State*, 565 F.3d 857, 861 (D.C. Cir. 2009) (FOIA 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"). The "agency must tether its refusal to respond to one of the nine FOIA exemptions." *Wilner*, 592 F.3d at 68 (internal quotation marks and citation omitted). "[W]hen the [a]gency's position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the [a]gency's refusal." *Wolf v. CIA*, 473 F.3d 370, 374 n.4 (D.C. Cir. 2007) (internal quotation marks omitted).

Most FOIA actions are resolved through motions for summary judgment. *See, e.g., Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994); *N.Y. Times Co. v. NSA*, 205 F. Supp. 3d 374, 380 (S.D.N.Y. 2016). The defendant federal agency bears the burden of proving that the withheld information falls within the exemptions it invokes. *See* 5 U.S.C. § 552(a)(4)(B). Summary judgment is warranted on the basis of agency declarations when those submissions "'describe 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.'" *Wilner*, 592 F.3d at 73 (quoting *Larson*, 565 F.3d at 862).[3]

An agency's declaration in support of its determinations is "accorded a presumption of good faith." *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 191 (2d Cir. 2012) (quoting *Carney*, 19 F.3d at 812). An agency's justification for asserting an exemption "is sufficient if it appears logical

[3] Defendants have not submitted a Local Civil Rule 56.1 statement, as "the general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment," and a Local Civil Rule 56.1 statement thus "would be meaningless." *Ferguson v. FBI*, No. 89 Civ. 5071 (RPP), 1995 U.S. Dist. LEXIS 7472, at *6 (S.D.N.Y. June 1, 1995), *aff'd*, 83 F.3d 41 (2d Cir. 1996); *N.Y. Times. Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012) (noting that a Local Civil Rule 56.1 statement is not required in FOIA actions in this Circuit); *Doyle v. U.S. Dep't of Homeland Sec.*, No. 17 Civ. 2542 (KPF), 2018 U.S. Dist. LEXIS 125614, *25 n.11 (S.D.N.Y. July 26, 2018).

and plausible." *ACLU v. U.S. Dep't of Def.*, 901 F.3d 125, 133 (2d Cir. 2018), *as amended* (Aug. 22, 2018) ("*ACLU v. DoD*"); *see ACLU v. Dep't of Justice*, 681 F.3d 61, 69 (2d Cir. 2012) ("*ACLU v. DoJ*"); *Wilner*, 592 F.3d at 73 ("Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." (internal quotation marks omitted)).

In cases involving national security information, moreover, courts must give "substantial weight" to the government's declarations, and particularly the government's predictive judgments regarding whether disclosure of particular information would harm national security. *See ACLU v. DoJ,* 681 F.3d at 69; *Wilner*, 592 F.3d at 73. In such matters, "the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *see also ACLU v. DoJ*, 681 F.3d at 70-71 ("Recognizing the relative competencies of the executive and judiciary, we believe that it is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies regarding whether disclosure of the [withheld information] would pose a threat to national security.") (quoting *Wilner*, 592 F.3d at 76) (internal quotation marks omitted)); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) (courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review"); *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) ("courts have little expertise in either international diplomacy or counterintelligence operations"). Because assessment of harm to national security is entrusted to the Executive Branch, "the government's burden is a light one," and "searching judicial review" is inappropriate. *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 624 (D.C. Cir. 2011); *ACLU v. DoD*, 901 F.3d at 136 ("Judges do not abdicate their judicial role by acknowledging their limitations

and deferring to an agency's logical and plausible justification in the context of national security; they fulfill it."); *see also Wilner*, 592 F.3d at 73; *ACLU v. DoJ*, 681 F.3d at 69.

II. The Government Properly Invoked FOIA Exemption 1 to Refuse to Confirm or Deny Whether or Not the PPG Has Been Rescinded, Replaced, or Modified

The government's Glomar response with respect to whether or not the PPG has been rescinded, replaced or modified is proper under FOIA Exemption 1 because the current status of the PPG is properly classified.

Exemption 1 protects from disclosure 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). Executive Order 13526 sets forth the current standard for classification of information in the interest of national defense or foreign policy. Classified National Security Information, Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009). Section 3.6(a) of Executive Order 13526 specifically contemplates 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 § 3.6(a).

Executive Order 13526 lists four requirements for the classification of national security information: (1) that an "original classification authority" classify the information; (2) that the information be "owned by, produced by or for, or [] under the control of the United States Government;" (3) that the information falls within one or more of eight protected categories listed in § 1.4 of Executive Order 13526; and (4) that an original classification authority "determine[] that the unauthorized disclosure of the information reasonably could be expected to

result in damage to the national security" and be "able to identify or describe the damage." *Id.* § 1.1(a)(1)-(4).[4]

The declaration of Ellen J. Knight, a senior NSC official with original classification authority, logically and plausibly demonstrates that whether or not the PPG remains in place—or has been rescinded, replaced, or modified—is properly classified pursuant to Executive Order 13526. First, in 2017, an original classification authority at the NSC classified the current standards and procedures for direct action against terrorist targets, including whether or not the PPG remains in place. Knight Decl. ¶ 12. Second, information about the current status of the PPG is owned by and under the control of the United States Government. Knight Decl. ¶ 13. Third, information about the status of the PPG, including whether or not it has been rescinded, replaced, or modified, falls within the classification categories set out in § 1.4 of Executive Order 13526. In particular, Ms. Knight attests that such information pertains to the categories of "military plans, weapons systems, or operations," and "intelligence activities (including covert action), intelligence sources or methods, or cryptology." Executive Order 13526 § 1.4(a), (c); Knight Decl. ¶ 14.

Finally, the NSC has determined that disclosure of whether or not the PPG has been rescinded, replaced, or modified could reasonably be expected to result in serious harm to the national security. *See* Knight Decl. ¶¶ 15-18. Specifically, the NSC has determined that revealing

[4] The addition in 2016 of the so-called "foreseeable harm" standard, *see* 5 U.S.C. § 552(a)(8)(A)(i)(I), did not alter the standard for withholding under Exemption 1 because Executive Order 13526 requires a showing of foreseeable harm in the form of damage to the national security. Moreover, the legislative history of the 2016 amendment expressly acknowledges that it "does not alter the scope of information that is covered under an exemption," and that it was intended to codify existing government policy. H.R. Rep. No. 114-391, at 9, 10 (2016); *accord* Attorney General Eric Holder, Memorandum for Heads of Executive Departments and Agencies Regarding the Freedom of Information Act, at 1-2 (Mar. 19, 2009), available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf.

the existence or absence of new guidance could reasonably be expected to undermine military and intelligence operations by allowing potential terrorist targets to modify their operations to avoid detection or targeting by the U.S. government. *Id.* ¶ 15. The more information terrorists have about the standards and procedures currently in place, the more easily they will be able to modify their behavior to thwart military and intelligence operations. *Id.* In the classified portions of her declaration, Ms. Knight provides additional detail about the harms to national security that can reasonably be expected to flow from official disclosure of the current status of the PPG. Knight Decl. ¶¶ 16-18.

Accordingly, whether or not the PPG has been rescinded, replaced, or modified is properly classified and therefore protected from disclosure by FOIA Exemption 1.

III. The Government Properly Invoked Exemption 3 to Refuse to Confirm or Deny Whether or Not the PPG Has Been Rescinded, Replaced, or Modified

The government's Glomar response with respect to whether or not the PPG has been rescinded, replaced or modified is also proper under FOIA Exemption 3 because information concerning the current status of the PPG is protected from unauthorized disclosure by the NSA.

Exemption 3 "permits an agency to withhold records that are 'specifically exempted from disclosure by statute.'" *Murphy v. Exec. Office for U.S. Attorneys*, 789 F.3d 204, 206 (D.C. Cir. 2015) (quoting 5 U.S.C. § 552(b)(3)). Unlike most other FOIA exemptions, the applicability of Exemption 3 does not depend on the "detailed factual contents of specific documents." *Wilner*, 592 F.3d at 72 (quotation marks omitted). Instead, the only questions are whether the government has identified a relevant statute and whether the withheld material falls within that statute's coverage. *Id.*; *accord Sims*, 471 U.S. at 167. Moreover, in contrast to the requirements of Exemption 1, the government need not show that there would be any harm to national security from disclosure to justify nondisclosure under Exemption 3. Rather, to invoke Exemption 3, it is

enough for the government to show that the withheld information falls within the protected scope of the exempting statute. *See Larson*, 565 F.3d at 868.[5]

The NSA protects intelligence sources and methods from unauthorized disclosure. 50 U.S.C. § 3024(i)(1) (formerly codified at 50 U.S.C. § 403-1(i)(1)). Specifically, the NSA provides that "the [DNI] shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). Courts have uniformly held that the NSA is a statute of exemption within the meaning of Exemption 3. *See, e.g.*, *ACLU v. DoJ*, 681 F.3d at 73 (citing cases); *Sims*, 471 U.S. at 167-68 (citing predecessor statute). Accordingly, as long as the withheld information falls within the scope of the NSA, which in the case of the NSA requires a only a showing that the information "relates to . . . intelligence method[s]," *ACLU v. DoJ*, 681 F.3d at 73, it is properly withheld under Exemption 3.[6]

The government has made that showing here. As Ms. Knight explains in her declaration,

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[5] 5 U.S.C. § 552(a)(8)(A)(i) does not alter the standard for withholding under Exemption 3 because that amendment to FOIA carved out Exemption 3. *See id*. § 552(a)(8)(B) ("Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3)."); *accord id*. § 552(a)(8)(A)(i) (an agency shall withhold information only if either (I) the foreseeable harm standard is met, or if (II) "disclosure is prohibited by law").

[6] It is not necessary for the DNI himself to invoke the NSA in the FOIA context. *DiBacco v. U.S. Army*, 795 F.3d 178, 197-99 (D.C. Cir. 2015); *see Elec. Privacy Info. Center v. Dep't of Justice*, 296 F. Supp. 3d 109, 121 (D.D.C. 2017) ("The DNI has delegated enforcement of this National Security Act mandate to the heads of the 17 agencies that constitute the 'Intelligence Community.'"). The NSC—or Executive agencies at the NSC's direction—may invoke the NSA's mandate to protect intelligence sources and methods from unauthorized disclosure. After all, the DNI performs his responsibilities "[s]ubject to the authority, direction, and control of the President," 50 U.S.C. § 3023, and the President (or his delegate) presides over the NSC, *id.* § 3021(d). *See DiBacco*, 795 F.3d at 199 ("[T]he overall scheme for protecting . . . sensitive [national security] information leaves it to the President to dictate the duties (in addition to those statutorily enumerated) of the [DNI]."). Moreover, one of the DNI's "principal" statutory responsibilities is to "act as the principal adviser to the President [and] [NSC] . . . for intelligence matters related to the national security." 50 U.S.C. § 3023(b)(2).

the current status of the PPG relates to intelligence sources and methods because revealing the existence or non-existence of updated guidance could undermine intelligence operations against transnational terrorist targets, which by their nature involve intelligence sources and methods. Knight Decl. ¶ 27; *see also* Knight Decl. ¶ 14 ("Disclosure of [the PPG's] current status, including whether or not it has been rescinded, modified or replaced, would convey information pertaining to current . . . intelligence activities."); *see Sims*, 471 U.S. at 169 (describing the "broad sweep" of "intelligence sources and methods" in the NSA); *e.g.*, *ACLU v. DoJ*, 681 F.3d at 76 (deferring to CIA's judgment that photograph depicting person in agency custody related to sources and methods because it conveyed an "aspect of information that is important to intelligence gathering").

Thus, the current status of the PPG, including whether or not it has been rescinded, replaced, or modified, is protected from disclosure under FOIA Exemption 3 and the National Security Act.

IV. The Government Has Not Waived Its Right to Assert a Glomar Response Under Exemptions 1 and 3

The government has not waived its right to assert a Glomar response. Plaintiffs' waiver theory relies entirely on an asserted disclosure by DoD. *See* Letter dated January 8, 2020, at 2-3, Dkt. No. 23, *ACLU v. DoD et al.*, No. 17-cv-9972 (ER) ("ACLU Ltr."). But that document does not constitute an official disclosure of the specific classified and statutorily protected information at issue here, namely, the current status of the PPG.

The Second Circuit applies "[a] strict test" to claims of official disclosure: "classified information that a party seeks to obtain . . . is deemed to have been officially disclosed only if it (1) '[is] as specific as the information previously released,' (2) 'match[es] the information previously disclosed,' and (3) was 'made public through an official and documented

disclosure.'" *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (quoting *Wolf*, 473 F.3d at 378); *see N.Y. Times Co. v. Dep't of Justice*, 756 F.3d 100, 120 & n.19 (2d Cir. 2014) (applying *Wilson* test and affirming that *Wilson* "remains the law of this Circuit"); *N.Y. Times Co. v. CIA*, 314 F. Supp. 3d 519, 528 (S.D.N.Y. 2018) (applying *Wilson* to analyze Glomar response by CIA), appeal docketed, No. 18-2112 (2d Cir. July 18, 2018). The asserted DoD disclosure on which plaintiffs rely does not satisfy this strict test.

The document, which appears to be a page from an investigatory report concerning a military operation in Niger, does not match, and is not as specific as, the information sought by plaintiffs' FOIA requests. Plaintiffs' FOIA requests seek a purported document entitled "Principles, Standards, and Procedures," or "PSP," or other purported documents which plaintiffs allege replaced the PPG. While the DoD document cited by plaintiffs refers to a "PSP," the title of the document is redacted, and thus it is not clear to what "PSP" refers. Moreover, plaintiffs mischaracterize what the document says. Plaintiffs assert that the document "states that the PSP 'supersedes' the PPG," ACLU Ltr. at 2, but in fact, the document states that the "PSP" "supersedes the CT-PPG," *id.* at 7. The "CT-PPG," according to the proffered document, was a document titled "U.S. Policy Standards and Procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities," and codified Executive Branch policy governing "U.S. direct action against terrorists on the continent of Africa" on October 3, 2017. *Id.* The PPG has a different title ("Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities"), was issued in 2013, and is not limited to Africa. Knight Decl. ¶ 8.

The asserted DoD disclosure also fails the third prong of the *Wilson* test, because it is not an "official disclosure" of the current status of the PPG. This requirement "acknowledges a

critical difference between official and unofficial disclosures" of classified information. *Wilson*, 586 F.3d at 186 (internal quotation marks omitted). "[T]he law will not infer official disclosure of information classified by [one government entity] from (1) widespread public discussion of a classified matter, . . . (2) statements made by a person not authorized to speak for the [classifying agency], . . . or (3) release of information by another agency, or even by Congress." *Id.* (internal citations omitted). Only the NSC has the authority to declassify or officially disclose the current status of the PPG, and it has not done so. The current status of the PPG, including whether or not it has been rescinded, replaced, or modified, therefore remains properly classified and statutorily protected from disclosure, and thus exempt from disclosure under Exemptions 1 and 3.

Executive Order 13526 provides that, outside of limited circumstances not present here, national security information can be declassified or downgraded only by (1) the official who authorized the original classification, (2) his or her current successor in function, (3) a supervisory official of the originator or successor, or (4) an official delegated declassification authority in writing by the agency head or the senior agency official of the originating agency. Executive Order 13526 § 3.1(b). An original classification authority at NSC classified the current standards and procedures for direct action against terrorist targets, including whether or not the PPG remains in place, and NSC has neither declassified information concerning the status of the PPG, nor delegated declassification authority, in writing or otherwise, to any other agency or person. Knight Decl. ¶¶ 12, 19. As a result, none of the defendants in the present actions, including DoD, has the authority to declassify or officially disclose whether or not the PPG has been rescinded, replaced, or modified. Executive Order 13526 further provides that information "shall not become declassified automatically as a result of any unauthorized disclosure of identical or similar information." Executive Order 13526 § 1.1(c). Thus, any unauthorized

disclosure by DoD, or any other agency, would not result in declassification of the current status of the PPG.

For the same reasons, the official disclosure doctrine on which plaintiffs rely does not apply here because there has been no official disclosure of the current status of the PPG. In *Wilson* itself, the Second Circuit found that certain classified information remained properly classified notwithstanding that it had been included in a letter from the agency, on CIA letterhead, that was published in the *Congressional Record*. There, a CIA human resources officer sent plaintiff Valerie Plame Wilson, a former CIA officer, a letter containing her dates of service with the CIA; the letter contained no classification markings, even though whether or not Wilson had been a CIA officer before 2002 was classified. *Id.* at 178. In holding that the CIA's letter did not amount to an official disclosure, the Second Circuit distinguished between an "official disclosure" and a "bureaucratic transmittal" that, through agency "negligence," failed to properly protect classified information. *Id.* at 195 & n.27. Similarly here, any disclosure by DoD could not amount to an official disclosure, because NSC did not authorize it.

That the asserted DoD disclosure was made public at one time—although, according to the ACLU, the document is no longer available on DoD's website, *see* ACLU Ltr. at 2—does not render the disclosure official. The CIA's letter to Wilson—redacted but still including classified information—was eventually incorporated into the *Congressional Record*. *Wilson*, 586 F.3d at 180-81. The Circuit held that because it was Wilson, not the CIA, who decided to permit public disclosure of the letter in the *Congressional Record*, that decision "d[id] not manifest official disclosure by the CIA." *Id.* at 188. The Circuit also held that "evidence of public disclosure does not deprive information of classified status." *Id.* at 174, 194-95. In reaching this holding, the Circuit explicitly relied on the predecessor to Executive Order 13526 § 1.1(c), which also

provided that "classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information." *Wilson*, 586 F.3d at 194 (quoting Executive Order 13292, Further Amendment to Executive Order 12958, As Amended, Classified National Security Information, 68 Fed. Reg. 15,315 (March 25, 2003)).

The Court further noted that "anything short of [an official] disclosure necessarily preserves some increment of doubt regarding the reliability of the publicly available information." *Id.* at 195. As explained in the Knight declaration, there is a material difference between an oblique reference in a DoD investigatory report pertaining to a specific operation in Niger—which according to plaintiffs is no longer available on DoD's website—and official White House statements of U.S. government policy. Knight Decl. ¶ 23. Absent an official statement by NSC (or by a defendant agency with the consent of NSC) acknowledging the existence or non-existence of revised guidance, there is, at a minimum, "lingering doubt" as to whether or not the PPG remains in place. *Wilson*, 586 F.3d at 195. Therefore, as Ms. Knight logically and plausibly explains, official disclosure of the current status of the PPG can reasonably be expected to harm national security notwithstanding the asserted DoD disclosure. Knight Decl. ¶¶ 15-18, 23; *see Florez v. CIA*, 829 F.3d 178, 184-85 (2d Cir. 2016).

Decisions cited by the Second Circuit in *Wilson* further support the conclusion that the asserted DoD disclosure does not constitute an official disclosure that could waive the government's ability to assert a Glomar response to the FOIA requests. *See Wilson*, 586 F.3d at 186-87 (citing *Frugone*, 169 F.3d at 774, and *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421 (2d Cir. 1989)). In *Frugone*, the D.C. Circuit concluded that a disclosure made by an agency other than the agency that originally classified information was not an official disclosure. The plaintiff sought records from the CIA concerning his alleged

employment there, and the CIA, asserting Exemptions 1 and 3, refused to confirm or deny the existence of responsive records. The plaintiff argued that the CIA could not assert a Glomar response to the FOIA request because the Office of Personnel Management ("OPM"), a separate executive agency, had sent plaintiff letters referring to "[plaintiff's] records." *Frugone*, 169 F.3d at 145. The D.C. Circuit held that it could not "treat the statements of the OPM upon which [plaintiff] relies as tantamount to an official statement of the CIA." *Id.* at 147. The court explained:

> If [plaintiff] were right, . . . then other agencies of the Executive Branch—including those with no duties related to national security—could obligate agencies with responsibility in that sphere to reveal classified information. We think it very unlikely that the Congress intended the FOIA to create such an anomalous result.

Id. So too here. Neither DoD nor any agency can obligate NSC to declassify or officially disclose information that NSC has classified. Such a result would be contrary to Executive Order 13526 § 3.1(b), which locates declassification authority solely in the classifying authority—here, NSC. Congress did not intend FOIA "to create [the] anomalous result" urged by plaintiffs here, which would distort the Executive branch's system of classifying national security information. *Frugone*, 169 F.3d at 147. Nor could an unauthorized disclosure by DoD, or any other agency, vitiate the National Security Act's protections against "unauthorized disclosure" of intelligence sources and methods.

The *Wilson* court also relied on Second Circuit's prior decision in *Hudson River Sloop Clearwater* in holding that "the law will not infer official disclosure of information classified by [an agency] from . . . statements made by a person not authorized to speak for the [a]gency." *Wilson*, 586 F.3d at 186 (citing *Hudson River Sloop Clearwater*, 891 F.2d at 421). The plaintiff in *Hudson River Sloop Clearwater* had argued that the Navy had "declassified" classified information—namely, whether or not nuclear weapons would be deployed at the New York

Homeport—through the statements of a retired Rear Admiral. 891 F.2d at 421. The Second Circuit held that the Rear Admiral's statements could not waive the Navy's right to assert Exemptions 1 and 3, reasoning that "however credible [the retired Rear Admiral's] insights, they do not translate into *official* disclosures." *Id.* at 422. In the same way, "however credible" plaintiffs may argue the asserted DoD disclosure may be, it "do[es] not translate into [an] *official* disclosure[]" because NSC did not authorize it.

CONCLUSION

For the foregoing reasons, the Court should grant the government's motion for summary judgment.

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