REDACTED

17-157

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 17-157

AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellees,

—v.—

DEPARTMENT OF JUSTICE, including its components THE OFFICE OF LEGAL COUNSEL AND OFFICE OF INFORMATION POLICY, DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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[redacted]

(U) PRELIMINARY STATEMENT

(U) In this Freedom of Information Act ("FOIA") case, defendants-appellants the Department of Justice, Department of State, Department of Defense and Central Intelligence Agency (the "Government") ask the Court to vacate an erroneous and inappropriate ruling by the district court regarding information that remains currently and properly classified. By including this ruling in its decision, the district court has improperly compelled the disclosure of classified information.

[redacted] Relying on [redacted], the district court found that [redacted] makes clear, however, that [redacted] As explained in a classified declaration by [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] The district court's ruling, which failed to address the substance of [redacted] declaration, was not only incorrect; it was entirely unnecessary and inappropriate in this FOIA case. The only question presented to the district court was whether the specific records requested by plaintiffs-appellees (the "ACLU") are protected by one or more of FOIA's exemptions. The district court identified only two records that potentially implicated information concerning [redacted], and correctly determined that those records remain classified and exempt from disclosure in their entirety—determinations that the ACLU has not appealed. In light of those determinations, a ruling as to whether the United States has officially acknowledged [redacted] serves no purpose. Furthermore, public disclosure of this classified information would cause substantial harm to the national security of the United States. The district court's erroneous and inappropriate ruling should be vacated, and the district court should be directed to

[redacted]

[redacted]

remove from its decision the still-classified information [redacted].[1]

(U) STATEMENT OF JURISDICTION

[redacted] The district court had jurisdiction over this FOIA action under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). The district court issued a final decision dated July 21, 2016, which contains an erroneous and inappropriate ruling that the United States has officially acknowledged certain classified information that the Government sought to withhold under Exemption 1 of FOIA, 5 U.S.C. § 552(b)(1). Supplemental Classified Appendix ("CA") [redacted]. The district court entered judgment on November 16, 2016, and the Government filed a timely notice of appeal on January 17, 2017. Joint Appendix ("JA") 11, 954; Special Appendix ("SPA") 192. This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's July 21, 2016 decision is a final order that compels

[1] (U) The district court permitted the Government to redact the relevant passages of its decision to preserve the Government's ability to protect this information from public disclosure pending appellate review. CA 207.

[redacted]

[redacted]

disclosure of classified information that the Government sought to withhold under FOIA Exemption 1.[2]

(U) STATEMENT OF ISSUE PRESENTED

[redacted] Whether the district court erred in ruling that the United States has officially acknowledged [redacted], which would be disclosed publicly as a result of being included in the district court's decision.

(U) STATEMENT OF THE CASE

A. (U) Procedural Background

(U) The ACLU filed this lawsuit on March 16, 2015, seeking to compel the Department of Justice, Department of State, Department of Defense, and Central Intelligence Agency to disclose documents in response to its FOIA request seeking records concerning the United States' use of lethal force against terrorists. JA 12-

[2] (U) In addition, this Court would have mandamus jurisdiction to review the order compelling disclosure of classified information. *See In re City of New York*, 607 F.3d 923, 928-29 (2d Cir. 2010).

[redacted]

[redacted]

20; *see* JA 72-84.[3] During the course of the litigation, the ACLU narrowed its FOIA request to 128 responsive records. SPA 4-5. The Government withheld most of the records in full because they are classified, protected from disclosure by statute, and/or privileged, and thus exempt from public disclosure under 5 U.S.C. § 552(b)(1) ("Exemption 1"), 5 U.S.C. § 552(b)(3) ("Exemption 3"), and/or 5 U.S.C. § 552(b)(5) ("Exemption 5"). The Government also withheld portions of five responsive records on the same grounds. The parties cross-moved for summary judgment. JA 21-22, 865-66.

(U) In a classified memorandum decision and order dated July 21, 2016, the district court (Hon. Colleen McMahon) largely granted the Government's motion for summary judgment, and denied the ACLU's motion. SPA 1-191; *see also* CA 1-191. The district court ruled that the records withheld in full are exempt from disclosure under FOIA Exemptions 1, 3, and/or 5. SPA 42-191. With regard to the five records withheld in part, the district court upheld the Government's

[3] (U) A related lawsuit filed by the ACLU involving a similar FOIA request resulted in three prior appeals to this Court. *See* 13-445, 14-4764, 15-2956 (2d Cir.); *ACLU v. DOJ*, 844 F.3d 126, 128-31 (2d Cir. 2016) (describing litigation history).

[redacted]

[redacted]

redactions to one document, SPA 122-23, and ordered the Government to disclose limited additional information from the other four documents, SPA 42-65, 120-21, 123-28. Neither the ACLU nor the Government has appealed the district court's rulings as to specific records, and the Government has produced the four redacted documents to the ACLU, as ordered by the district court. CA 207-08.

[redacted] In addition to ruling on the specific records sought by the ACLU, the district court ruled that [redacted] Upon reconsideration, the district court amended its decision, but ultimately adhered to its ruling that this classified information had been officially disclosed and effectively ordered the information disclosed in the district court's public decision.[4]

[4] (U) The district court's initial ruling, and its ruling on reconsideration, are both contained in the final version of the decision dated July 21, 2016. *See* JA 939 (explaining that before concluding its classification review of the district court's decision dated June 21, 2016, the Government made a sealed submission, and the court "responded to the Government's submission by adding a few paragraphs and

[redacted]

[redacted]

[redacted] The Government conducted a classification review of the July 21, 2016 decision and provided the district court with a redacted version of the decision for public filing. CA 207. The Government explained that it had redacted the passages of the decision regarding [redacted] in order to preserve the Government's ability to protect this information pending appeal to this Court. *Id.* On August 8, 2016, the district court filed the redacted version of its decision on the public docket. SPA 1-191. Judgment was entered on November 16, 2016. JA 11; SPA 192. This appeal followed. JA 11, 954.

B. [redacted] The District Court's Ruling That the United States Officially Acknowledged [redacted]

1. (U) The District Court's Initial Ruling

[redacted] The district court's initial ruling was based [redacted]

making a few modest changes (none of which altered the conclusions reached) to the decision, which is now the decision of July 21, rather than June 21, 2016").

[redacted]

[redacted]

[redacted] On the basis of [redacted], the district court made the following ruling:

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] The district court found, however, that [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] Based upon this reasoning, the district court found that the United States had officially acknowledged [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

2. (U) The Government's Request for Reconsideration

[redacted] The Government submitted a classified letter asking the district court to reconsider its ruling. CA 192-96. The Government noted that the district court's ruling had been based [redacted]

[redacted] As the Government explained, [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] The Government also explained that [redacted]

[redacted]

[redacted]

[redacted]

[redacted] as set forth in the classified declaration that the Government had previously submitted from [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] The Government noted in its letter that it appeared that the district court may have overlooked [redacted] and [redacted] declaration, neither of which had been cited by the district court in making its ruling on official acknowledgment. CA 195-96.[5]

[redacted] The Government further noted that the district court's ruling was unnecessary to resolution of the legal issues before the court. CA 196. The district court concluded that although one of the documents sought by the ACLU contains information regarding [redacted]

[5] [redacted] The Government also noted that [redacted]

[redacted]

[redacted]

[redacted] the document remains exempt from disclosure in its entirety. [redacted] [redacted][6] The court similarly held that another document remains exempt from disclosure even if it contains information concerning [redacted]

[redacted] The Government thus asked the district court to reconsider its ruling that the United States had officially acknowledged [redacted], or at least to decline to reach the question. CA 196.

3. **(U) The District Court's Ruling on Reconsideration**

[redacted] The district court provided the Government with an amended decision, dated July 21, 2016, in which the court addressed the Government's request for reconsideration. CA 23. The district court stated that it had not

[6] [redacted] The Government has redacted information that would identify the specific documents that contain information concerning [redacted]

[redacted]

[redacted]

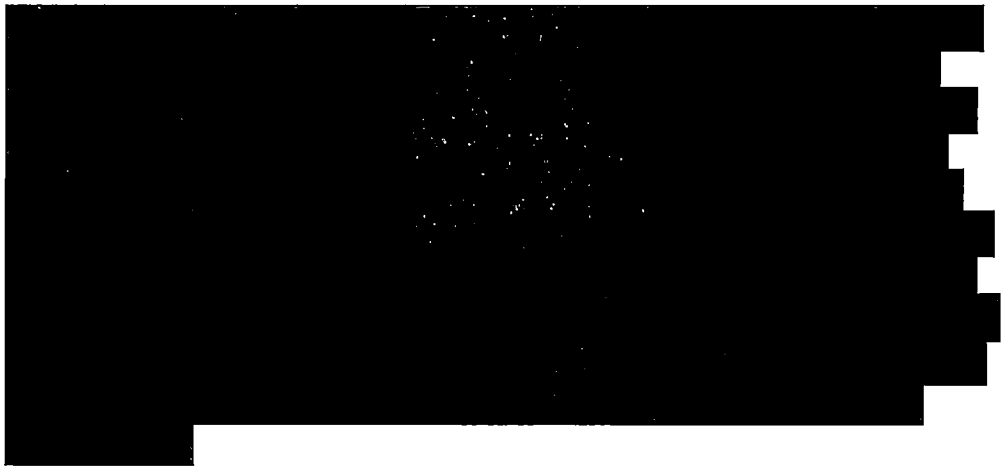
overlooked [redacted] CA 23.[7]

[redacted] In its ruling on reconsideration, the district court acknowledged the Government's position that [redacted] The court concluded, however, that [redacted] [redacted] The court reasoned:

[7] [redacted] The district court did not discuss [redacted] declaration, except to note that [redacted]

[redacted]

[redacted]



[redacted]

[redacted] However, the district court agreed with the Government that [redacted] The court thus found that [redacted]

[redacted] Nevertheless, the district court did not amend its original ruling that the United States had officially acknowledged that [redacted]

[redacted]

[redacted]

(U) SUMMARY OF ARGUMENT

[redacted] This Court should vacate the district court's erroneous ruling that the United States officially acknowledged [redacted], and should direct the district court to remove that classified information from its public decision. The district court based its ruling [redacted] Indeed, when the district court reviewed [redacted] on reconsideration, it recognized that [redacted]. Yet the court did not amend its ruling that the United States acknowledged [redacted]

[redacted] The district court's misinterpretation of [redacted] is highlighted by [redacted] classified declaration, the substance of which the district court never addressed. [redacted]

[redacted]

[redacted]

[redacted] Nor was it necessary for the district court to make any ruling on this issue in order to resolve this FOIA case. The district court determined that the purported official acknowledgment of [redacted] did not require the disclosure of any of the documents requested by the ACLU, and the ACLU has not appealed that determination. FOIA governs requests for "records," and is not a mechanism for seeking rulings on whether the United States has acknowledged certain facts. The district court's erroneous and inappropriate ruling should be vacated, and the district court should be directed to remove that classified information from its decision.

[redacted]

[redacted]

(U) STANDARD OF REVIEW

(U) This Court reviews the district court's decision *de novo*. *See Wilner v. NSA*, 592 F.3d 60, 69, 73 (2d Cir. 2009). Agency declarations are entitled to a presumption of good faith. *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). The Court accords "substantial weight" to agency declarations predicting the harm to national security that reasonably could be expected to flow from the disclosure of classified information. *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner*, 592 F.3d at 73, 75 (citation and internal quotation marks omitted).

(U) ARGUMENT

(U) POINT I

(U) The District Court's Ruling Is Erroneous

A. [redacted] The District Court's Ruling Misconstrues [redacted]

(U) This Court will find an official disclosure of classified information only if the information "(1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an

[redacted]

[redacted]

official and documented disclosure." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (quoting *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007), and *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421 (2d Cir. 1989)) (alterations and internal quotation marks omitted); *New York Times Co. v. U.S. DOJ*, 756 F.3d 100, 120 & n.19 (2d Cir. 2014) (noting that *Wilson* remains "the law of this Circuit" and applying three-part test).

[redacted] The district court's ruling that [redacted] does not meet this "strict test." *Wilson*, 586 F.3d at 186. Contrary to the district court's conclusion, [redacted]

[redacted]

[redacted]

[redacted]

[redacted] Indeed, the district court appeared to recognize that [redacted] The court nevertheless concluded that [redacted] The district court reached this conclusion simply because [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] The [redacted], moreover, provides no support for the district court's ultimate ruling that [redacted][8]

[8] [redacted]

[redacted]

[redacted]

[redacted] Instead, the district court derived the [redacted]

[redacted]

[redacted]

[redacted]

[redacted]. But [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]. Even the district court recognized that [redacted]

[redacted]

[redacted]. And yet the district court relied on [redacted] to find that the United States officially acknowledged [redacted]

[redacted]. This was error.

[redacted]

[redacted]

B. [redacted] The District Court's Ruling Disregards [redacted] Classified Declaration and the Harm to National Security That Is Likely to Result from Disclosure

[redacted] The district court's misinterpretation of [redacted] is compounded by the court's failure to credit (or even address the substance of) the classified declaration provided by [redacted]. That declaration provides important context for [redacted], and makes abundantly clear that [redacted].

[redacted] As [redacted] attested, [redacted] explained:

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] declaration demonstrates, moreover, that [redacted]

[redacted]

[redacted]

[redacted]

[redacted] declaration, which explained the context of [redacted] and logically and plausibly articulated the harm to national security that reasonably could be expected to result from [redacted], was entitled to a presumption of good faith and substantial deference by the district court. *See ACLU v. DOJ*, 681

[redacted]

[redacted]

F.3d at 69-70; *Wilner*, 592 F.3d at 69, 73, 75. Instead, however, the district court ignored the substance of the declaration. The court's only mention of the declaration was in its ruling on reconsideration, where the court stated that [redacted]. The court then adhered to its erroneous ruling that [redacted] without any apparent consideration of the declaration.

[redacted] In addition to the district court's failure to evaluate [redacted] in context with [redacted] declaration, the court's interpretation of [redacted] The district court concluded, for example, that former White House Press Secretary Jay Carney "acknowledged nothing" at a June 2012 briefing when he "repeatedly declined to discuss either the location of [a particular leader of al-Qa'ida]'s death, or the method used to bring it about," and "simply would not respond in any meaningful way to reporters' leading questions that assumed the use of drones inside Pakistan." CA 25. The district court observed

[redacted]

[redacted]

that "[q]uestions that assume answers do not become acknowledgments when the person being questioned repeatedly refuses to play along with the questioner's assumptions." *Id.* [redacted]

[redacted] The district court similarly found no official acknowledgment when former CIA Director Leon Panetta "was not specific enough in his response to acknowledge the existence of the 'remote drone strikes' referenced by his questioner," and he "started his answer by saying he could 'not go into particulars' and thereafter referred only to unspecified 'operations.'" CA 26. [redacted]

[redacted]

[redacted]

[redacted]

[redacted] The district court's reasoning was inconsistent even with regard to [redacted]. At one point, the district court concluded that [redacted] But that conclusion is directly refuted by [redacted] declaration, which makes clear that [redacted]

[redacted] Elsewhere in its decision, the district court appeared to conclude that [redacted]. The court suggested that [redacted]

[redacted]

[redacted]

[redacted]

[redacted] But if [redacted]

[redacted]

[redacted]

cannot be treated as an official disclosure. "The touchstone of waiver is a knowing and intentional decision." *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005); *United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is the intentional relinquishment or abandonment of a known right." (citation and internal quotation marks omitted)), *quoted in United States v. Brown*, 843 F.3d 74, 81 (2d Cir. 2016). This well-established principle is particularly apt here, as the Government has demonstrated that disclosure could reasonably be expected to harm national security. *See Mobley v. FBI*, 806 F.3d 568, 584 (D.C. Cir. 2016) (declining to find official acknowledgment of classified information based upon a "mistake," as doing so "would be inconsistent with the deference granted to agency determinations in the national security context"); *see also Wilson v. McConnell*, 501 F. Supp. 2d 545, 556 n.24 (S.D.N.Y. 2007) ("inadvertent disclosure" of

[redacted]

[redacted]

classified information does not result in declassification), *aff'd sub nom. Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009); *cf.* Exec. Order 13526, 75 Fed. Reg. 707 § 1.1(c) (Dec. 29, 2009) ("Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.").

[redacted] Certainly, [redacted] do not constitute the sort of "official and documented disclosure" that this Court has required for a finding official acknowledgment. *See Wilson*, 586 F.3d at 186. Courts may not find an official acknowledgment unless "the government has *officially* disclosed the *specific* information being sought." *Hudson River Sloop Clearwater*, 891 F.2d at 421 (emphases in original), *quoted with approval in Wilson*, 586 F.3d at 186.

[redacted] therefore did not "*officially* disclose the *specific* information" identified by the district court: [redacted]

Hudson River Sloop Clearwater, 891 F.2d at 421.

[redacted]

[redacted]

[redacted] Indeed, the rationale for requiring an "official and documented disclosure" as a prerequisite for official acknowledgment [redacted]. As this Court explained in *Wilson*, "foreign governments can often ignore unofficial disclosures of [U.S. government] activities that might be viewed as embarrassing or harmful to their interests," but they cannot "so easily cast a blind eye on official disclosures made by the [U.S. government] itself, and they may, in fact, feel compelled to retaliate." 586 F.3d at 186. [redacted]

(U) POINT II

(U) The District Court's Ruling Was Unnecessary and Inappropriate Under FOIA

[redacted] The district court's ruling that the United States officially acknowledged [redacted] should be vacated,

[redacted]

[redacted]

and removed from the district court's decision, for the additional and independent reason that the ruling was entirely unnecessary and inappropriate in this FOIA case.[9]

(U) "The Freedom of Information Act only gives a right of access to agency records in existence." *Forsham v. Califano*, 587 F.2d 1128, 1136 (D.C. Cir. 1978); *see* 5 U.S.C. § 552(a)(3)(A) (requiring that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person"). FOIA does not require agencies to "produce or create explanatory material," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975), "generate agency records," *Forsham*, 587 F.2d at 1136, or "answer questions," *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985).

[9] (U) This Court could vacate the district court's ruling on this basis alone, and need not decide whether the ruling was correct. *Cf. ACLU v. DOJ*, 844 F.3d at 132 (concluding, in the ACLU's prior related FOIA case, that it was "unnecessary for the resolution of this appeal to determine whether [a particular fact] has been officially acknowledged").

[redacted]

[redacted]

[redacted] The district court's ruling that the United States officially acknowledged [redacted], however, was not tethered to the disclosure of any agency record. To the contrary, the district court specifically held that the ruling did *not* require disclosure of any records responsive to the ACLU's FOIA request. The court identified two responsive documents potentially containing information regarding [redacted], and held that both documents remain exempt from public disclosure in full.

[redacted] The first document, [redacted]

[redacted] The district court reviewed this document *in camera*, and found that it contains information concerning [redacted] The court concluded, however, that [redacted]

[redacted]

[redacted]

[redacted] The court further concluded that [redacted]

[redacted] The second document, [redacted] The district court found that [redacted] the district court concluded, [redacted] the document remained exempt from disclosure in full. *Id.*; *see also* [redacted]

[redacted]

[redacted]

[redacted] The district court's rulings as to the two documents were correct, and the ACLU has not appealed them. In light of these rulings, it was unnecessary and inappropriate for the district court even to decide whether [redacted] constituted an official acknowledgment of classified information. *Cf. ACLU v. DOJ*, 844 F.3d at 132 (declining to consider district court's rulings as to seven purportedly "acknowledged facts," where rulings did not require "disclosure of any document"). The district court nevertheless made such a ruling, despite the harm to national security that [redacted] predicted is likely to result.

[redacted]

[redacted]

(U) CONCLUSION

[redacted] For the foregoing reasons, this Court should vacate the district court's ruling that the United States officially acknowledged [redacted] and direct that the ruling be removed from the district court's decision.

Respectfully submitted,

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APRIL 2017

[redacted]

[redacted]

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDRUE 32(a)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionately spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7602 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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Counsel for Defendants-Appellants

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