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.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTIONS 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 (collectively, the "government") respectfully submit this reply memorandum of law in further support of their consolidated motion for summary judgment and in opposition to plaintiffs' cross-motions for summary judgment in these actions brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

The government's Glomar response to plaintiffs' FOIA requests remains valid because the government has not officially acknowledged whether or not the PPG has been rescinded, replaced, or modified. The asserted disclosure on which plaintiffs rely came from DoD, but there is no genuine dispute that DoD lacked the authority to declassify whether or not the PPG has been rescinded, replaced, or modified. Because DoD lacked the authority to declassify such information, it could not officially acknowledge it. Moreover, the asserted disclosure on which plaintiffs rely is ambiguous, and lingering doubt remains about its contents. It is therefore not as specific as and does not match the information withheld here.

The government has carried its burden to logically and plausibly explain why exemptions 1 and 3 support its Glomar response. The Declaration of Ellen J. Knight (the "Knight Declaration"), an Original Classification Authority, explains that disclosure of whether or not the PPG has been rescinded, replaced, or modified could reasonably be expected to result in serious harm to the national security—the only element of the government's required showing under exemption 1 that plaintiffs challenge. The Knight Declaration similarly explains that whether or not the PPG has been rescinded, replaced, or modified relates to intelligence methods, justifying the government's reliance on exemption 3.

The DoD disclosure asserted by plaintiffs does not render the government's assertion of a Glomar response to the FOIA requests illogical or implausible. To the contrary, the Knight Declaration explains why the government's prediction of harm to national security remains valid regardless of the asserted disclosure by DoD. Accordingly, the government has carried its burden to logically and plausibly explain its Glomar response. The Court should grant the government's motion for summary judgment and deny plaintiffs' cross-motions for summary judgment.

ARGUMENT

I. The Government Has Not Waived Its Right To Assert a Glomar Response Because It Has Not Officially Disclosed the Current Status of the PPG

Plaintiffs fail to satisfy the "strict" requirements to show an official disclosure of classified information. *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009). "Classified information that a party seeks to obtain or publish is deemed to have been officially disclosed only if it (1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure." *Id*. Plaintiffs fail to show that the asserted DoD disclosure was "official" because DoD lacked the authority to declassify whether or not the PPG has been rescinded, replaced, or modified. Plaintiffs also fail to show that the asserted DoD disclosure is as specific as, or matches, such information.

A. Because DoD Did Not Have Declassification Authority, It Cannot and Did Not Officially Acknowledge the Classified Information at Issue

Plaintiffs have not shown that the asserted DoD disclosure constitutes an "official" public disclosure. DoD did not have authority to disclose the current status of the PPG, and an agency or individual without declassification authority cannot *officially* disclose classified information. DoD therefore cannot and has not waived its own or any other agency's right to assert a Glomar response to the FOIA requests. Plaintiffs' efforts to avoid this conclusion fall short.

Although plaintiffs suggest that the government's position is without support in the case law, they overlook the Second Circuit's statement in *Wilson* that "the law will not infer official disclosure of information classified by [one government entity] from . . . statements made by a person not authorized to speak for the [classifying agency]." *Wilson*, 586 F.3d at 186 (internal citations omitted). In *Wilson*, a CIA employee without declassification authority, but purporting to speak on behalf of the CIA, the classifying agency, disclosed classified information. *Wilson v. McConnell*, 501 F. Supp. 2d 545, 554-55 (S.D.N.Y. 2007). The Circuit held that this did not amount to an official disclosure by the CIA. *See Wilson*, 586 F.3d at 187-91, 195. Plaintiffs have failed to adequately explain why *Wilson* should not guide the Court in this case. It is true that the disclosing CIA employee in *Wilson* purported to speak on behalf of the classifying agency. However, this distinction cuts against plaintiffs' position in the present case: an agency or official that does not purport to speak for the classifying entity would have even less authority to make an official disclosure of classified information that belongs to that separate entity.

Plaintiffs' attempts to distinguish *Wilson* are not persuasive. The ACLU's primary response is that *Wilson* was not a FOIA case. *See* Memorandum of Law in Support of Plaintiffs' Partial Motion for Summary Judgment & in Opposition to Defendants' Motion for Summary Judgment ("ACLU MOL"), at 18-19, No. 17-cv-9972 (ER), ECF No. 33. But the Second Circuit explicitly stated in *Wilson* that it was applying the official disclosure "doctrine . . . developed in the FOIA context." *Wilson*, 586 F.3d at 186. And *Wilson* has been applied repeatedly by the Second Circuit and district courts in this District to evaluate whether information is no longer protected by FOIA exemptions 1 or 3 on account of an alleged official disclosure. *See, e.g.*, *New York Times Co. v. Dep't of Justice*, 756 F.3d 100, 120 (2d Cir. 2014); *Osen LLC v. U.S. Dep't of State*, 360 F. Supp. 3d 258, 264 (S.D.N.Y. 2019); *Johnson v. C.I.A.*, 309 F. Supp. 3d 33, 37

(S.D.N.Y. 2018). Indeed, the district court in *New York Times* continued to apply *Wilson*, and apply it "stringent[ly]," in subsequent decisions on remand in the same case. *See, e.g.*, *ACLU v. Dep't of Justice,* No. 12-cv-794 (CM), 2015 WL 4470192, at *3 (S.D.N.Y. July 16, 2015).

The ACLU's reliance on *Ameziane v. Obama*, 699 F.3d 488 (D.C. Cir. 2012), as a response to *Wilson* is misplaced. As ACLU admits, *Ameziane* did not involve classified information, and thus it is immaterial that the question of declassification authority did not enter into the official disclosure analysis in that case. *See* ACLU MOL at 19. The effect of declassification authority on an entity's ability to officially acknowledge properly classified information simply was not at issue in *Ameziane*. When presented with the issue of official acknowledgment of classified information, the D.C. Circuit has made clear that an agency or official of a non-classifying agency lacks authority to officially disclose information that belongs to another agency or entity. *See, e.g.*, *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999).

The ACLU's attempt to distinguish *Frugone* falls short because DoD, despite its role in protecting national security, is not the same entity as the NSC. *See* ACLU MOL at 20-21. The ACLU suggests that the D.C. Circuit in *Frugone* was concerned only that agencies without significant national security duties not be able to obligate agencies with national security duties to release classified information. *See id.* But this is not what *Frugone* says. The D.C. Circuit was concerned about *any* agency, regardless of its role in the Executive branch, obligating other agencies with national security duties to release classified information: "If [plaintiff] were right, however, 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." *Frugone*, 169 F.3d at 775. By its plain language, *Frugone*'s observation that the serious concerns raised by a ruling in favor of the plaintiff would "includ[e]" agencies without

any duties related to national security does not mean that the concerns are limited to such agencies. Indeed, the Second Circuit has recognized that the Federal Bureau of Investigation could not waive the Central Intelligence Agency's right to assert a Glomar response, notwithstanding that both the FBI and CIA have a role in protecting national security. *Florez v. CIA*, 829 F.3d 178, 186 (2d Cir. 2016).

The fundamentally different roles of DoD and the NSC bear out the *Frugone* Court's concerns. The NSC is unique in its role of "advis[ing] 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; *Main Street Legal Servs., Inc. v. National Security Council*, 811 F.3d 542, 549-552 (2d Cir. 2016) (describing the statutory functions of the NSC). The Knight Declaration underscores the distinctive nature of the NSC in formulating and articulating White House policy. Knight Decl. ¶ 2. Agencies with fundamentally different roles than NSC, including in relation to national security, cannot obligate NSC to disclose (or permit disclosure of) information it has properly classified.[1]

The New York Times's efforts to distinguish *Wilson* and rebut the proposition that an agency or official must have declassification authority to officially acknowledge classified information are also not persuasive. The Times's first response is to point to cases, including the district court's decision in *Wilson*, where district courts have first considered the question

[1] The ACLU's suggestion that "the government's position, if adopted, would permit executive agencies to selectively discuss, in public and with impunity, any classified information that they were not officially authorized to declassify," ACLU MOL at 21, overlooks that Executive Order 13,526 subjects Executive branch officials to sanctions if they disclose classified information publicly, or any other manner not in accordance with the requirements of the Executive Order. *See* Executive Order 13,526 § 5.5(b), 75 Fed. Reg. 707 (Jan. 5, 2010).

whether information has been declassified before considering the official acknowledgment doctrine. *See* Memorandum of Law in Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment ("Times MOL"), at 14, No. 20-cv-43 (ER), ECF No. 18. But the fact that district courts have analyzed these questions separately and in that order has no bearing on the government's position in this case. If information has been properly declassified, there may be no need to reach the question of official acknowledgment at all, let alone the question whether or not a separate agency has proper declassification authority. Moreover, in one of the cases cited by the Times, *New York Times Co. v. CIA*, 314 F. Supp. 3d 519, 526–30 (S.D.N.Y. 2018), *appeal pending*, No. 18-2112 (2d Cir.), the statements that the plaintiff argued served to declassify the information at issue and the statements that the plaintiff argued officially acknowledged that information were both made by the President himself. *See* Times MOL at 14. That case accordingly did not present the question whether declassification authority is necessary to officially acknowledge classified information. The other case cited by the Times on this point is *Wilson* itself, *see id.*, where the Circuit held that an official lacking declassification authority did not officially disclose the classified information at issue. *See Wilson*, 586 F.3d at 187-91, 195. The Court should reach the same conclusion here.

The Times's second response is to cite case law holding that a waiver by one agency does not bind another. *See* Times MOL at 14-15 (citing, *inter alia*, *Frugone*). That only underscores that DoD cannot waive the protections of FOIA exemptions 1 and 3 with regard to information that has been classified by NSC.

The Times states that because a waiver by one agency does not bind another, "[t]he contrapositive is equally true: while an agency may need authorization to bind other agencies

through formal declassification, it need not be authorized to bind itself through waiver." Times MOL at 15. But this does not follow. In order to *officially* acknowledge information and thereby waive its ability to withhold the information under FOIA exemptions, an agency or official must have the authority to do so. The classification scheme in Executive Order 13,526 controls who has lawful authority to officially disclose information. Thus, the proposition that waiver by one agency does not bind another does not imply that an agency can waive its ability to withhold classified information belonging to another entity without obtaining authority to do so from the classifying entity. The Times offers no authority for its statement that an agency need not have declassification authority to waive its ability to withhold classified information, which is contrary to *Wilson*.

The Times's reliance on *Florez v. CIA*, 829 F.3d 178 (2d Cir. 2016), fails for the same reasons. The Times relies on *Florez* for its distinction between "first-party and third-party disclosures," but, as discussed above, this distinction is irrelevant to the present case. Times MOL at 16. The Times also quotes the statement in *Florez* that, "[p]ut simply, an agency is prohibited from 'providing a *Glomar* response when the existence or nonexistence of the particular records covered by the *Glomar* response has been officially and publicly disclosed . . . by the same agency providing the *Glomar* response.'" Times MOL at 16 (quoting *Florez*, 829 F.3d at 186). But the key word in this statement for purposes of the present case is "officially." An agency without declassification authority does not have the capacity to *officially* disclose classified information, such that it waives a Glomar response.

It is therefore of no moment that here, unlike in *Florez*, the agency that made the asserted disclosure without authority is the agency (or, in the ACLU case, one of the agencies) that received the FOIA request. The principle is the same. Because the PPG was classified by the

NSC, and belongs to the NSC, DoD had no authority to disclose its present status without authorization from NSC, and it has no authority now to confirm or deny the existence of the document sought in the FOIA requests. Knight Decl. ¶ 20. DoD is constrained to follow NSC's direction to issue a Glomar response to the FOIA request. *Id*. ¶ 7. Just as the FBI had no authority to officially acknowledge information classified by the CIA in *Florez*, DoD has no authority to officially acknowledge information classified by the NSC, even in response to a FOIA request directed at DoD.

The Times's argument that the government has not shown that DoD lacked the authority to declassify whether or not the PPG has been rescinded, replaced, or modified is belied by the record. *See* Times MOL at 14. The Declaration of Ellen J. Knight, the Senior Director for Records Access and Information Security Management at the National Security Council and an Original Classification Authority, attests that "DoD does not have authority to declassify information about the current status of the PPG." Knight Decl. ¶ 20. The Knight Declaration also states that "[n]o NSC official has declassified information concerning the current status of the PPG, nor delegated classification authority, in writing or otherwise, to any other agency or person." *Id.* ¶ 19. These statements are entitled to a presumption of good faith, *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994), and they are amply sufficient to establish that DoD lacked authority to declassify information about the current status of the PPG.

The Times' invocation of Executive Order 13,526 § 3.2(a) is misplaced because it points to no evidence that any alleged documents or information at issue in this suit were transferred from NSC as part of a "transfer of functions." *See* Times MOL at 14 (quoting Executive Order 13,526 § 3.2). Indeed, the Times does not identify any potentially relevant transfer of functions between NSC and DoD. Moreover, as noted above, the Knight Declaration explicitly states that

"[n]o NSC official has declassified information concerning the current status of the PPG, nor delegated classification authority, in writing or otherwise, to any other agency or person." Knight Decl. ¶ 19. Section § 3.2(a) accordingly is not relevant here.

B. The Reference in the DoD Report on Which Plaintiffs Rely Is Not as Specific As, and Does Not Match, the Withheld Information

Plaintiffs also fail to show that the asserted disclosure is as specific as, and matches, the information withheld. The language in the DoD report—which concerned an investigation into a military raid in Niger resulting in multiple casualties (the "DoD Report" or the "Report")—is ambiguous at best, and that ambiguity precludes any finding of waiver.

Under the first two prongs of *Wilson*'s "strict" test, classified information "is deemed to have been officially disclosed only if it (1) is as specific as the information previously released, [and] (2) matches the information previously disclosed." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009). While "the 'matching' aspect of the *Wilson* test" may not "require absolute identity," *New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 120 (2d Cir. 2014), the Second Circuit has recognized that "anything short of [an official] disclosure necessarily preserves some increment of doubt regarding the reliability of the publicly available information." *Wilson*, 586 F.3d at 195 (declining to "discount the importance of . . . 'lingering doubts'" in the context of official disclosures) (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 745 (D.C. Cir. 1981)).

At the very least, the ambiguity of the DoD Report preserves some increment of doubt about its contents. Plaintiffs concede that the CT-PPG referred to in the DoD Report has a different title than the PPG. *See* ACLU MOL at 10-11; Times MOL at 10-11. And the term "PSP" used in the DoD Report is not defined there. *See* Declaration of Charles Hogle ("Hogle Decl."), ECF No. 34, No. 17-cv-9972 (ER), Ex. 2.7 at 169-77 (defining terms used in the Report,

but not the term "PSP"). The language of the DoD Report is also ambiguous about the relationship between the CT-PPG and the Report's undefined term "PSP." At one point, the DoD Report states that the undefined term "PSP" "supersedes the CT-PPG." Hogle Decl., Ex. 2.3 at 9; Ex. 2.7 at 110; *see* ACLU MOL at 10. But elsewhere, it suggests that the CT-PPG and the Report's undefined term "PSP" co-exist by describing "advise, assist, and accompany activity" as "relat[ing]" to both in the present tense. *See* Hogle Decl., Ex. 2.3 at 10 and Ex. 2.7 at 112; ACLU MOL at 10.

Contrary to the New York Times's characterization, the government is not arguing that the DoD Report "must" mean anything in particular with respect to the CT-PPG and the Report's undefined term "PSP." *See* Times MOL at 11. Instead, the government's position is that the DoD Report is ambiguous, such that "some increment of doubt" remains about whether the asserted DoD disclosure is as specific as, or matches, the information withheld by defendants. *Wilson*, 586 F.3d at 195. The existence of such "lingering doubt" precludes any finding of official acknowledgment. *Id.*; *Military Audit Project*, 656 F.2d at 745.

II. The Government's Reliance on FOIA Exemption 1 Is Logical and Plausible

The government has logically and plausibly explained why exemption 1 protects whether or not the PPG has been rescinded, replaced, or modified. *See ACLU v. U.S. Dep't of Def.*, 901 F.3d 125, 133 (2d Cir. 2018), *as amended* (Aug. 22, 2018) (an agency's justification for asserting an exemption "is sufficient if it appears logical and plausible"); *see* Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Opening MOL"), at 7-8, No. 20-cv-43 (ER), ECF No. 16, No. 17-cv-9972 (ER), ECF No. 31.

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). The government's opening brief lists Executive Order 13,526's four requirements for the classification of national security information. *See* Opening MOL at 9-10. Plaintiffs do not contest that the first three requirements have been meet here, and challenge only the fourth: that disclosing whether or not the PPG has been rescinded, replaced, or modified would reasonably be expected to result in harm to the national security.

Ms. Knight attests that it would. *See* Knight Decl. ¶¶ 15-18. Specifically, NSC has determined that "[r]evealing 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.* Plaintiffs attempt to dismiss these explanations in the Knight Declaration as conclusory and insufficient. But 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.

Plaintiffs invoke *Florez* to argue that the government has failed to carry its exemption 1 burden in light of the release of the DoD Report, *see* Times MOL at 20; ACLU MOL at 24-25, but unlike in *Florez*, the Knight Declaration specifically addresses the DoD Report and rebuts plaintiffs' argument. Ms. Knight confirms that "[t]he asserted DoD disclosure does not eliminate the harms . . . that could reasonably be expected to result from an official disclosure of the current status of the PPG." Knight Decl. ¶ 23. She explains that "the asserted disclosure by plaintiffs consists of an oblique reference . . . ; it is not an official statement of policy by the

White House. That is materially different from an official acknowledgment by the NSC, or by the defendant agencies with the consent of the NSC . . . ." *Id.* Ms. Knight further explains why this matters: terrorists and other adversaries monitor White House statements, and foreign governments may feel compelled to respond to official White House statements of policy. *Id.*; *cf. Wilson*, 586 F.3d at 186 ("As a practical matter, foreign governments can often ignore unofficial disclosures of CIA activities that might be viewed as embarrassing or harmful to their interests. They cannot, however, so easily cast a blind eye on official disclosures made by the CIA itself, and they may, in fact, feel compelled to retaliate." (internal citation omitted)). The government respectfully refers the Court to the classified portions of the Knight Declaration for 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.

The Knight Declaration satisfies the government's burden to logically and plausibly explain why exemption 1 protects whether or not the PPG has been rescinded, replaced, or modified, in light of the "record as a whole." *Florez*, 829 F.3d at 184 (quotation marks omitted). Ms. Knight's assessment that disclosure of this information could reasonably be expected to harm national security, regardless of the asserted DoD disclosure, is entitled to "substantial weight" from the Court. *See ACLU v. DoJ*, 681 F.3d 61, 69 (2d Cir. 2012); *see* Opening MOL at 8-9 (collecting cases); *see also 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.").

III. The Government's Reliance on FOIA Exemption 3 Is Logical and Plausible

The government has also logically and plausibly explained why exemption 3 protects whether or not the PPG has been rescinded, replaced, or modified. 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)). Plaintiffs do not challenge that, under the National Security Act, exemption 3 protects from disclosure any information that "relates to . . . intelligence method[s]," *ACLU v. DoJ*, 681 F.3d at 73, nor that the government need not make any showing of harm to withhold information under exemption 3 and the National Security Act. *See* ACLU MOL at 22-25; Times MOL at 20-21; Opening MOL at 11-12. The "only remaining inquiry" is whether the information at issue relates to intelligence sources and methods. *ACLU v. DoJ*, 681 F.3d at 73.

The Knight Declaration answers that question in the affirmative. Ms. Knight explains that "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. Plaintiffs dismiss this as insufficient, but it is entirely logical and plausible that the existence or nonexistence of guidance updating the PPG and governing potential intelligence operations would relate to intelligence sources and methods. Indeed, Chief Judge McMahon previously held that certain redacted portions of the PPG were protected by exemption 3 and the National Security Act. *See* Memorandum Decision and Order Deciding the Government's and Plaintiff's Respective Motions for Summary Judgment, *ACLU v. Dep't of Justice,* No. 15-cv-1954 (CM), Dkt. No. 83, at 42-65 (S.D.N.Y. Aug. 8, 2016).

As the Supreme Court has made clear, moreover, the statutory protection of "intelligence sources and methods" extends to any information that falls within the Intelligence Community's mandate to conduct foreign intelligence. *See CIA v. Sims*, 471 U.S. 159, 169 (1985) (describing the "broad sweep" of this statutory language in the context of the Central Intelligence Agency).

That would include the existence or nonexistence of updated guidance governing intelligence operations. Plaintiffs' narrow construction of the National Security Act is inconsistent with *Sims* and should be rejected.

CONCLUSION

For the foregoing reasons, the Court should grant the government's motion for summary judgment and deny plaintiffs' cross-motions for summary judgment.

Dated: New York, New York
April 15, 2020

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