UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
....x
AMERICAN CIVIL LIBERTIES UNION and
THE AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

15 Civ. 1954 (CM)

U.S. DEPARTMENT OF JUSTICE, including its
components the OFFICE OF LEGAL COUNSEL
and OFFICE OF INFORMATION POLICY,
DEPARTMENT OF DEFENSE,
DEPARTMENT OF STATE, and CENTRAL
INTELLIGENCE AGENCY,

Defendants.
....x

CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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Preliminary Statement

In this follow-up lawsuit to *ACLU v. Department of Justice*, 12 Civ. 794(CM) ("*ACLU I*"), plaintiffs (the "ACLU") seek a wide range of classified, statutorily protected and privileged records from five federal agencies and components—the Department of Justice's Office of Legal Counsel ("OLC") and Office of Information Policy ("OIP"), the Department of Defense ("DOD"), the Department of State ("State Department"), and the Central Intelligence Agency ("CIA")—concerning the United States' use of targeted lethal force against terrorists. The Government respectfully submits this memorandum of law in support of its motion for summary judgment with respect to the documents withheld in response to items (1) and (2) of the ACLU's Freedom of Information Act ("FOIA") request, which seek records pertaining to the "legal basis" for the use of targeted lethal force against terrorists and terrorist groups, and the "process" by which such individuals and groups are designated for targeting.[1] As demonstrated by the Government's unclassified declarations, as well as the classified declarations and index submitted for the Court's *ex parte* review, the records withheld by the Government are protected from disclosure, in whole or in part, because they are currently and properly classified, statutorily protected from disclosure, and/or privileged, and thus exempt under FOIA exemptions 1, 3 and/or 5, 5 U.S.C. § 552(b)(1), (3) and/or (5). Certain personally identifying information in the documents is also protected from disclosure under FOIA exemption 6, 5 U.S.C. § 552(b)(6). None of the "officially acknowledged facts" found by the Court in *ACLU I*, nor any of the purported disclosures identified by the ACLU, have waived the protections of these privileges and exemptions. Accordingly, the Government is entitled to summary judgment with regard to the

[1] By Order dated July 9, 2015, the Court stayed proceedings with regard to items (3) and (4) of the ACLU's FOIA request, which seek records relating to casualties. ECF No. 16.

withheld records, and the ACLU's motion for partial summary judgment should be denied.

BACKGROUND

This lawsuit concerns a FOIA request by the ACLU dated October 15, 2013, which was submitted to the CIA, State Department, DOD, OLC and OIP. *See* ECF No. 1, ¶¶ 7, 17. As relevant here, the FOIA request seeks:

> 1. Any and all records pertaining to the legal basis in domestic, foreign, and international law upon which the government may use lethal force against individuals or groups, including any record indicating which groups are considered to be "associated forces" of Al-Qaeda under the Authorization for Use of Military Force . . . , and
>
> 2. Any and all records pertaining to the process by which the government designates individuals or groups for targeted killing, including who is authorized to make such determinations and against what evidentiary standard factual evidence is evaluated to support such designations. Specifically included in this Request is the counterpart to the Presidential Policy Guidance, which Attorney General Holder described in his May 2013 letter to Congress . . . .

See, e.g., Second Declaration of John F. Hackett ("Hackett Decl."), Exh. 2. Following consultations between the Government and the ACLU, the ACLU narrowed its requests as follows:

- The ACLU agreed to exclude records created before September 11, 2001;
- The ACLU agreed to exclude publicly available records;
- The ACLU agreed to exclude records already processed in connection with the ACLU's FOIA requests that have been the subject of litigation before this Court in *ACLU I* and/or Judge Collyer in *ACLU v. CIA*, No. 1:10-cv-436 (D.D.C.)"[2];

[2] Because the ACLU has agreed to exclude records processed in its prior lawsuits, the Court need not address whether *res judicata* would apply to the same documents in another agency's files. *See* Order dated July 9, 2015, ECF No. 25, at No. 2. Of course, the ACLU would be barred from relitigating in this case any discrete issues that meet the standards for collateral estoppel. *See*

- The ACLU agreed that item (1) of the request is limited to strikes against al Qaeda, the Taliban, associated forces, or any other organization the State Department, Defense Department, or CIA consider to be a terrorist organization, whatever the source of authority for the strike, outside of Afghanistan, Iraq and Syria;

- The ACLU agreed to exclude drafts of documents that were eventually finalized, where the final versions of the drafts have been disclosed to the ACLU or are listed individually on the relevant agency's public *Vaughn* index;

- The ACLU agreed to exclude documents created by other defendant agencies, where the documents have been disclosed to the ACLU or are listed individually on the other agency's public *Vaughn* index;

- The ACLU agreed to exclude communications that were purely internal to a DOJ component;

- With regard to the State Department, the ACLU agreed to limit item (2) of its request to the process described in the penultimate paragraph of Attorney General Holder's May 23, 2013 letter to Senator Leahy and other members of Congress;

- The ACLU agreed to exclude all documents created for purposes of litigation or in connection with the processing or litigation of FOIA requests; and

- The ACLU agreed to exclude documents relating to the raid that resulted in the death of Osama bin Laden.

See ACLU Br. at 3-4; Hackett Decl., Exh. 7.

Each defendant agency and component conducted a search for documents responsive to items (1) and (2) of the ACLU's FOIA request, as narrowed. *See* Declaration of John E. Bies (OLC) ("Bies Decl."), ¶¶ 15-24; Hackett Decl. (State Department) ¶¶ 11-21; Declaration of

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Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003) ("Under federal law, collateral estoppel applies when (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to relitigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." (internal quotation marks omitted)).

Andrew L. Lewis (DOD) ("Lewis Decl.") ¶¶ 7-9; Declaration of Martha M. Lutz (CIA) ("Lutz Decl.") ¶ 9; Declaration of Douglas Hibbard (OIP) ¶¶ 10-21. As directed by the Court, *see* ECF Nos. 16, 25, the Government is submitting a classified, *ex parte* index describing in detail each of the responsive classified records that have been withheld, the bases for their withholding, and why the applicable privileges and exemptions have not been waived by virtue of any prior disclosure of the Executive Branch. The Government is also filing public *Vaughn* indexes, although those indexes are considerably less detailed given the highly classified nature of many of the responsive records. *See* Lewis Decl., attached Index (DOD); Lutz Decl., attached Index (CIA); Hackett Decl., Exh. 8 (State Department); Wiegmann Decl., Exh. A (NSD); Bies Decl., Exh. A (OLC); Hibbard Decl., Exh. E (OIP).

ARGUMENT

FOIA represents a balance struck by Congress "'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. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423); *accord Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003). Thus, while FOIA generally requires disclosure of agency records, the statute recognizes "that public disclosure is not always in the public interest," *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982); *accord ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012), and mandates that records need not be disclosed if "the documents fall within [the] enumerated exemptions," *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001).

Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough

search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden" on summary judgment. *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) (footnote omitted). The agency's declarations in support of its determinations are "accorded a presumption of good faith." *Id.* (quotation marks omitted).[5]

Moreover, courts must accord "substantial weight" to agencies' affidavits regarding national security. *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009); *accord New York Times Co. v. U.S. DOJ*, 756 F.3d 100, 112 (2d Cir. 2014); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). In FOIA cases involving matters of national security, "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*, 681 F.3d at 70-71 ("Recognizing the relative competencies of the executive and the judiciary, we believe that it is bad law and bad policy to second-guess the predictive judgments made by 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*, 331 F.3d at 927 (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"); *accord Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990). Rather, "an agency's justification for invoking a FOIA

[5] Because agency affidavits alone will support a grant of summary judgment in a FOIA case, Local Rule 56.1 statements are unnecessary. *See Ferguson v. FBI*, 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting "the general rule in this Circuit"), *aff'd*, 83 F.3d 41 (2d Cir. 1996).

exemption is sufficient if it appears logical or plausible." *Wilner*, 592 F.3d at 73 (internal quotation marks omitted; quoting *Larson*, 565 F.3d at 862); *accord ACLU*, 681 F.3d at 69; *Wolf*, 473 F.3d at 374-75.

The Government is entitled to summary judgment as to the withheld documents and information, especially applying this deferential standard to the government's declarations regarding national security matters. The government's submissions—including both classified and unclassified declarations and the detailed classified index ordered by the Court—amply demonstrate that the defendant agencies and components conducted reasonable searches, and the withheld documents and information are exempt from disclosure under FOIA Exemptions 1, 3, 5, and 6.

I. THE DEFENDANT AGENCIES AND COMPONENTS CONDUCTED REASONABLE SEARCHES

An agency can show that it has conducted an adequate search for records responsive to a FOIA request by demonstrating, through affidavits or declarations, that it has conducted a search reasonably calculated to uncover all relevant documents. *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). "The adequacy of a search is not measured by its results, but rather by its method." *New York Times*, 756 F.3d at 124; *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (adequacy of search turns on "whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant" (internal quotation marks omitted)). The agency is not required to search every record system, only those systems in which it believes responsive records are likely to be located. *See Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 497 (S.D.N.Y. 2010). The classified and unclassified declarations submitted by the defendant agencies and components establish that their searches

were reasonable.

CIA interpreted the request as seeking programmatic documents that discuss the "legal basis" for the U.S. Government's use of lethal force and/or detail the broader "process" for designating individuals or groups for targeted lethal operations. Lutz Decl. ¶ 6.[3] CIA located 30 responsive records, all of which are classified and withheld in full pursuant to FOIA Exemptions 1 and 3. *Id.* ¶¶ 10, 26. Nineteen of the responsive CIA records are also withheld under Exemption 5 and the deliberative process and/or attorney-client privileges. *Id.* ¶¶ 10, 30. In conducting its searches, CIA personnel identified knowledgeable officials to ascertain the types and locations of potentially responsive documents, and those officials in turn identified the CIA offices that were likely to maintain responsive records. Lutz Decl. ¶ 9. Following discussions with knowledgeable personnel in those offices, CIA conducted manual and electronic searches in those locations for documents. *Id.* CIA's search was reasonably calculated to identify all records responsive to the ACLU's request.

After initially interpreting the request more expansively and conducting searches that generated tens of thousands of potentially responsive records, the State Department narrowed its search with respect to item (1) of the FOIA request to focus on records that pertain to the legal basis for covered strikes as a general matter, but not records that simply refer to such legal basis as applied to the facts of a particular strike or that simply reiterate the applicable legal basis or standards. Hackett Decl. ¶ 13. Based on this narrowing, the State Department focused its efforts

[3] CIA thus did not interpret the request to include records that simply refer to established legal standards or apply them to specific circumstances, or records that apply established processes to individual circumstances. Lutz Decl. ¶¶ 7-8. To the extent the request could be construed more broadly, whether or not the CIA has had any operational role in any particular lethal operation carried out by the U.S. Government beyond the Aulaqi operation, as well as the nature and extent of any such involvement, is classified, and any records revealing such a role would be classified. Lutz Decl. ¶ 8.

on the records retrieved in the searches of two offices—the Bureau of Intelligence and Research and the Office of the Legal Adviser. Hackett Decl. ¶¶ 14-21. Even this narrowed search resulted in the retrieval of an estimated 8000 or more potentially responsive records, which were reviewed document-by-document for responsiveness to items (1) and (2) of the FOIA request. Hackett Decl. ¶ 14. The State Department identified 26 responsive records, which it is withholding in full. Twenty-three (23) of these records contain classified information that is exempt from disclosure under Exemption 1; 16 of the records contain statutorily protected information that is exempt under Exemption 3; and 25 of the records contain privileged information that is exempt under Exemption 5. Hackett Decl. ¶ 22. The State Department's search was reasonable, particularly in light of the massive volume of potentially responsive records generated by its initial, more expansive searches.

DOD's search was also reasonable. Based on discussions with DOD personnel familiar with the subject matter of the FOIA request, DOD determined that three offices within the Office of General Counsel were likely to contain records responsive to items (1) and (2) of the request: Legal Counsel, International Affairs and Intelligence. Lewis Decl. ¶ 7. Litigation counsel spoke directly with attorneys with proper clearances and responsibility for the subject matter, who searched their electronic and paper files and provided potentially responsive material to counsel, who in turn reviewed the material for responsiveness. *Id.* Litigation counsel also asked the Office of Legal Counsel to the Chairman of the Joint Chiefs of Staff to review their electronic and paper files for potentially responsive documents. *Id.* Searches of the identified DOD offices included searches for both electronic, including email, and paper records, at all levels of classification. *Id.* ¶ 8. DOD's search, together with documents referred by other agencies and components, yielded 50 responsive classified records, three of which have been released to

plaintiffs in part and the rest of which are withheld in full. Lewis Decl. ¶¶ 9, 12 & attached Index. DOD also located and released two unclassified records in full. *Id.* ¶ 10 & Index.

Taking into account the fact that OLC's role is to provide legal advice to Executive Branch clients on potential actions, OLC conducted a broad search that treated as responsive any records it identified that had been provided to OLC in connection with a request for legal advice relating to a potential use of lethal force against any individual or group covered by the FOIA request, as well as records addressing the legal basis and process for the use of lethal force generally. Bies Decl. ¶ 23. To identify responsive records, OLC personnel first conducted a search for any potentially responsive final legal advice provided by OLC on the subjects of the ACLU's FOIA request, in the relevant unclassified and classified records systems. Bies Decl. ¶ 18. OLC then identified six current and four former attorneys as individual custodians who might potentially have responsive records. Bies Decl. ¶ 20. OLC personnel searched the paper files of each current employee custodian, secure locations (such as individual safes) identified by such custodians as potentially containing responsive records, and any individual paper files left by the four departed custodians. Bies Decl. ¶ 21. An OLC attorney also reviewed the results of keyword searches of the classified and unclassified e-mails of all ten potential custodians, and then reviewed all potentially responsive emails generated by those searches. Bies Decl. ¶ 22. As a result of its search, OLC is producing 171 unclassified documents in whole or in part, and is withholding 87 unclassified documents in full pursuant to Exemptions 5 and 6. *Id.* ¶ 24 & Exh. A. In addition, OLC is withholding in full approximately 244 classified documents, pursuant to Exemptions 1, 3, 5 and/or 6, as detailed in the classified, *ex parte* index. *Id.* OLC also referred a number of documents to other agencies or components for direct response. *Id.* ¶ 24. OLC's comprehensive search was more than reasonable.

Finally, OIP's searches were reasonably calculated to locate responsive documents in DOJ's leadership offices. *See* Hibbard Decl. ¶¶ 10-22. As a result of the searches conducted in the Office of Attorney General (OAG) and Office of the Deputy Attorney General (ODAG), and review of the records indices of former officials of those offices covering the administrations of former Attorneys General Ashcroft, Gonzales, and Mukasey, and former staff from the administration of Attorney General Holder, OIP identified a total of fourteen current and former officials who may maintain potentially responsive records. *Id.* ¶ 22. As appropriate, OIP searched the unclassified e-mail, classified e-mail, computer records, unclassified paper files, and classified paper files of the identified officials, as well as the electronic database of the Departmental Executive Secretariat, to locate records responsive to the ACLU's request. *Id.* As a result of its searches, OIP referred a number of documents to other agencies or components for direct response, and is withholding in full 25 classified documents, pursuant to Exemptions 1, 3, 5 and/or 6, as reflected on OIP's *Vaughn* index and the classified, *ex parte* index. *Id.*, Exh. E.[4]

II. THE WITHHELD DOCUMENTS AND INFORMATION ARE EXEMPT FROM DISCLOSURE UNDER FOIA

A. The Government Has Properly Withheld Classified Documents and Information Under Exemption 1

Exemption 1 exempts from public disclosure matters that are "(A) specifically authorized

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[4] OIP identified approximately 2000 pages of potentially responsive unclassified emails, from the offices of OAG and ODAG, which contained deliberative discussion within the Department of Justice and components of the intelligence community about a variety of subjects. Hibbard Decl. ¶ 23. Many of these emails were non-responsive to the FOIA request because they contained no substantive legal analysis regarding lethal strikes, nor any discussion of the process for targeting. Even with respect to those emails that were broadly responsive, OLC located many of the same emails in its search of unclassified email, which OLC has redacted and is releasing in part to the plaintiffs. Accordingly, OIP did not process these unclassified emails from ODAG and OAG for release to plaintiffs. To do so would be largely redundant and enormously burdensome on the Department and the Court. In addition, all substantive information in the emails was deliberative and protected by Exemption 5 and the deliberative process privilege. *Id.*

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 current standard for classification is set forth in Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009) ("E.O. 13526"). Section 1.1 of the Executive Order lists four requirements for the classification of national security information: (1) an "original classification authority" must classify the information; (2) the information must be "owned by, produced by or for, or [] under the control of the United States Government;" (3) the information must fall within one or more of eight protected categories of information listed in section 1.4 of the E.O., including *inter alia* (a) military plans, weapons systems or operations, (b) foreign government information, (c) intelligence activities, sources, or methods, and (d) foreign relations of the United States; and (4) an original classification authority must "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." E.O. 13526 § 1.1(a)(1)-(4).

The Government's submissions amply demonstrate that these standards have been met with regard to the classified records withheld by each agency or component. These records are described generally below. In addition, as directed by the Court, the Government's classified, *ex parte* index addresses the specific grounds for withholding each classified record.

1. **Classified Records Withheld by DOD**

DOD properly withheld several categories of classified documents. Lewis Decl. ¶¶ 11-34. First, DOD withheld a classified document known as the Presidential Policy Guidance, or "PPG." *Id.* ¶¶ 17-19. The classified portions of the PPG are exempt from disclosure under Exemption 1. This document provides policy standards and procedures for the use of force in

counterterrorism operations outside the United States and areas of active hostilities. *Id.* ¶ 17.[5] The classified portions of the document are exempt from disclosure under E.O. 13526, sections 1.4(a) (military plans, weapons systems, or operations) and 1.4(c) (intelligence sources and methods). *Id.* ¶ 18. Providing our adversaries with detailed information about the process for the approval of military action would help terrorists modify their profile and behavior to avoid potential targeting; such details could enable adversaries to design countermeasures or deduce intelligence sources or methods. *Id.* For similar reasons, Exemption 1 also protects classified documents that discuss DOD's application of the PPG, including the Secretary of Defense's classified guidance for implementation of the PPG, analysis of implementation of the PPG, and deliberations regarding whether any changes to the PPG should be considered. *Id.* ¶¶ 26-28.

Second, DOD properly withheld classified operational plans for potential military operations, created in accordance with the PPG, under Exemption 1. *Id.* ¶¶ 21-25. These documents include final and draft operational plans for military strikes against individuals and terrorist organizations in various geographic regions or countries, which are currently and properly classified because they pertain to military plans, weapons systems, or operations under section 1.4(a) of E.O. 13526, as well as intelligence sources and methods under section 1.4(c). *Id.* ¶¶ 22-23. Public disclosure of this information would harm national security in numerous ways. Disclosure of operational details of potential strikes would assist our adversaries in avoiding future counterterrorism operations by confirming whether or not the United States considers them a target, and by identifying the sort of conduct that would make them susceptible to a U.S. counterterrorism operation. *Id.* ¶ 23. Disclosure of this information would also notify

[5] The PPG is also protected in full by Exemption 5 and the presidential communications privilege, as explained *infra* in Point II.C.3.

individuals or terrorism organizations that the U.S. government has approved counterterrorism operations in particular countries or geographic regions. *Id.* In addition, disclosure could lead to the identification of intelligence sources and methods of DOD's underlying intelligence collection efforts, including facts available to DOD at a specific point in time, which could show the breadth, capabilities and limitations of the U.S. military and its intelligence collection apparatus. *Id.* ¶ 24.

Third, DOD properly withheld under Exemption 1 classified legal analysis by DOD's General Counsel, including legal reviews of proposed operational plans against individuals or groups and legal analysis of terrorist organizations in consideration of whether they are an associated force of al Qaeda. *Id.* ¶ 29. These documents include informal e-mails and formal memoranda, as well as deliberations within DOD and among Executive Branch attorneys involved in national security matters. *Id.* The documents are properly classified because they contain classified factual information that would tend to reveal intelligence sources and methods under section 1.4(c) of E.O. 13526, and they concern military plans, weapons systems or operations, under section 1.4(a). *Id.* ¶ 35. Release of this information would harm national security by informing individuals or groups of their status as contemplated targets, thereby allowing them to heighten security and implement evasive techniques, or alternatively by emboldening terrorist organizations by implying that their actions will not elicit a response by the United States. *Id.*

Finally, DOD correctly withheld under Exemption 1 the classified portions of three reports to Congress, created pursuant to the National Defense Authorization Act for fiscal year 2014, which provided information on the definitions and process for determining if an entity is an affiliate, associated force and/or adherent of al Qaeda or the Taliban, as well as an explanation of the legal and policy considerations and approval process used in determining whether an individual or group could be a target, and quarterly briefings outlining DOD counterterrorism

operations and related activities. *Id.* ¶¶ 11-12. The withheld portions of these documents are currently and properly classified because they detail military operations and plans, including information about the process for determining proper targets, policy considerations and operational factors, and thus fall within section 1.4(a) of E.O. 13526. Disclosure of these classified targeting procedures, considerations and factors would assist adversaries in avoiding U.S. counterterrorism operations, and thus harm national security. *Id.* ¶ 16.

2. **Classified Records Withheld by the State Department**

The classified information withheld by the State Department under Exemption 1 falls into four categories. Hackett Decl. ¶¶ 22-35. First, the State Department has properly withheld classified information discussing military plans, weapons, operations, or relationships, within the meaning of section 1.4(a) of E.O. 13526, including information regarding particular foreign countries, which, if disclosed, could reasonably be expected to compromise national security. Hackett Decl. ¶ 29. Release of information regarding the details of those relationships, as well as the military capabilities and limitations of these nations, would jeopardize our defense posture. *Id.* Second, the State Department has withheld foreign government information that is properly classified under section 1.4(b) of the E.O. *Id.* ¶ 31. As Mr. Hackett explains in his declaration, protecting foreign government information provided to the United States in confidence, and in some cases even the fact that information has been provided, is critical to our diplomatic relationships and the conduct of foreign relations. *Id.* Third, the State Department has correctly withheld information pertaining to sensitive intelligence sources and methods, within the meaning of section 1.4(c) of E.O. 13526, the disclosure of which would permit adversaries to thwart U.S. intelligence collection and counterterrorism measures. *Id.* ¶ 32.

Finally, the State Department has withheld information that is properly classified because

it pertains to the foreign relations or foreign activities of the United States, under section 1.4(d) of E.O. 13526. *Id.* ¶¶ 34-35. This information concerns sensitive aspects of U.S. foreign relations, including issues relating to potential threats to U.S. national security in various regions of the world, discussions of sensitive nationals security topics involving the advancement of U.S. strategic interests in various regions, as well as candid assessments of the U.S. government's bilateral relationships with the countries in those regions. *Id.* ¶ 35. Release of this classified information has the potential to inject friction into, or cause damage to, a number of our bilateral relationships with countries whose cooperation is vital to U.S. national security, including some in which public opinion might not currently favor close cooperation with the United States. *Id.* Disclosure of sensitive information pertaining to U.S. strategic interests in these regions could compromise the ability of the United States to advance those interests through its foreign policy, and could pose a particular threat to U.S. national security in light of the political instability in the regions in question. *Id.*

3. **Classified Records Withheld by CIA**

Although the CIA is unable to describe its responsive classified records on the public record because the contents of those records are classified, the CIA's unclassified declaration confirms that the records pertain to intelligence sources, methods and activities of the CIA and/or foreign relations or foreign activities of the United States, including confidential sources, within the meaning of sections 1.4(c) and 1.4(d) of E.O. 13526. Lutz Decl. ¶¶ 22, 26-28. The classified information withheld by the CIA includes sources of information and capabilities, techniques and applications of certain methods that are unknown to foreign intelligence services or terrorist organizations. *Id.* ¶ 27. As Ms. Lutz explains, "it would greatly benefit terrorist organizations to know which clandestine sources and methods were used to obtain information about certain

individuals and groups, as well as the specific intelligence that these techniques produced"; such information "could be used by terrorist organizations to uncover current collection activities and take countermeasures to avoid detection by Intelligence Community agencies." *Id.* ¶ 28. Disclosure of the records at issue therefore could reasonably be expected to cause serious – and in some cases, exceptionally grave, damage to national security. *Id.*

4. **Classified Records Withheld by OLC and OIP**

Finally, both OLC and OIP properly withheld classified documents under Exemption 1. OLC withheld approximately 244 classified records, which generally fall into the following categories:

> a. Classified documents providing confidential OLC legal advice to Executive Branch policymakers that pertain to or discuss, inter alia, (1) legal analysis of the use of lethal force against individual terrorists or terrorist groups; (2) the development and implementation of Executive Branch processes for making determinations regarding the use of such force; or (3) the content of speeches or public statements regarding such legal analysis or Executive Branch processes;
>
> b. Classified documents containing or reflecting confidential, predecisional legal advice provided by OLC or other Executive Branch attorneys to Executive Branch policymakers that pertain to or discuss, inter alia, (1) legal analysis of the use of lethal force against individual terrorists or terrorist groups; (2) the development and implementation of Executive Branch processes for making determinations regarding the use of such force; or (3) the content of speeches or public statements regarding such legal analysis or Executive Branch processes;
>
> c. Classified requests from Executive Branch officials for such legal advice, and including confidential and classified factual information potentially relevant to the requests;
>
> d. Classified interagency Executive Branch communications reflecting legal deliberations regarding the appropriate legal analysis of potential actions or legal determinations pertaining to or discussing, inter alia, (1) legal analysis of the use of lethal force against individual terrorists or terrorist groups; (2) the development and implementation of Executive Branch processes for making determinations regarding the use of such force; or (3) the content of speeches or public statements regarding such legal analysis or Executive Branch processes, and including communications seeking and providing factual information determined

> to be potentially relevant to that analysis, as well as comments and legal deliberations regarding draft legal advice and analysis, including views provided to OLC by other agencies regarding the appropriate legal analysis, many of which include classified factual information conveyed as part of those legal deliberations;
>
> e. Classified interagency Executive Branch communications reflecting policy deliberations that pertain to or discuss, inter alia, (1) legal analysis of the use of lethal force against individual terrorists or terrorist groups; (2) the development and implementation of Executive Branch processes for making determinations regarding the use of such force; or (3) the content of speeches or public statements regarding such legal analysis or Executive Branch processes,
>
> f. Classified and confidential Executive Branch documents provided to OLC in connection with interagency legal deliberations or requests for legal advice that pertain to or discuss, inter alia, (1) legal analysis of the use of lethal force against individual terrorists or terrorist groups; (2) the development and implementation of Executive Branch processes for making determinations regarding the use of such force; or (3) the content of speeches or public statements regarding such legal analysis or Executive Branch processes.

Bies Decl. ¶¶ 23, 46. In addition, OIP withheld 25 responsive classified documents. Hibbard Decl., Exh. E. These OLC and OIP documents are properly classified for the reasons set forth in the Government's classified, *ex parte* index.

OLC and OIP also referred responsive classified documents to other agencies and components, including the National Security Division ("NSD") and the Office of the Director of National Intelligence ("ODNI"). Wiegmann Decl. ¶ 4; Declaration of Jennifer Hudson ("Hudson Decl.") ¶¶ 12-18. The Government's declarations, and its classified, *ex parte* index, establish that all of these documents are currently and properly classified, as they pertain to military plans, intelligence sources and methods, and/or foreign relations, under sections 1.4(a), (c) and/or (d) of E.O. 13526, and their disclosure could reasonably be expected to harm national security. Wiegmann Decl. ¶¶ 5-8; Hudson Decl. ¶¶ 9-22; Lewis Decl. ¶¶ 9, 21-37.

B. The Government Has Properly Withheld Documents and Information Under Exemption 3

Under Exemption 3, matters "specifically exempted from disclosure" by certain statutes need not be disclosed. 5 U.S.C. §' 552(b)(3). In examining an Exemption 3 claim, the Court need only examine whether the claimed statute is an exemption statute under FOIA and whether the withheld material satisfies the criteria for the exemption statute. *CIA v. Sims*, 471 U.S. 159, 167 (1985); *Wilner*, 592 F.3d at 72. As the Second Circuit has explained, "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Wilner*, 592 F.3d at 72 (internal quotation marks omitted); *see also Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993) (court should "not closely scrutinize the contents of a withheld document; instead, [it should] determine only whether there is a relevant statute and whether the document falls within that statute").

Therefore, to support its claim that information may be withheld pursuant to Exemption 3, the Government need not show that there would be harm to national security from disclosure, only that the withheld information logically or plausibly falls within the purview of the exemption statute. *Wilner*, 592 F.3d at 73; *accord Larson*, 565 F.3d at 868. The Government's submissions in this case, including its classified, *ex parte* index, easily meet this standard.

The principal exemption statute at issue in this case is the National Security Act ("NSA"), as amended, 50 U.S.C. § 3024. That statute provides that "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." It is well settled that the NSA is an exemption statute under Exemption 3. *Id.* (citing *Larson*, 565 F.3d at 865).

The Government properly withheld documents and information under Exemption 3 and the NSA, because its release would disclose intelligence sources and methods. For example, DOD properly asserted Exemption 3 and the NSA to protect information concerning intelligence sources and methods that is contained in the PPG, operational plans detailing potential military strikes, and documents reflecting legal analysis of contemplated military operations. Lewis Decl. ¶¶ 19, 24, 33. Information concerning intelligence sources and methods in the responsive records located by the State Department, CIA, OLC and OIP is similarly exempt from disclosure pursuant to the NSA and Exemption 3. Hackett Decl. ¶¶ 36-37; Lutz Decl. ¶¶ 23, 28; Bies Decl. ¶¶ 37-39.

In addition, the names of Intelligence Community personnel were properly withheld from the responsive records pursuant to both the NSA, 50 U.S.C. § 3024(m)(1), and Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 3507 ("CIA Act"). Hudson Decl. ¶¶ 23-26; Lutz Decl. ¶¶ 24, 29; Hibbard Decl. ¶ 27.

C. The Government Has Properly Withheld Documents and Information Under Exemption 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991); *accord Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5." *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (citation omitted).

1. Deliberative Process Privilege

In enacting Exemption 5, "[o]ne privilege that Congress specifically had in mind was the 'deliberative process' or 'executive' privilege." *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999). "An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Id.*; *accord Tigue*, 312 F.3d at 76–77; *Hopkins*, 929 F.2d at 84. A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd.*, 421 U.S. at 184 (*quoted in Tigue*, 312 F.3d at 77; *Grand Cent. P'ship*, 166 F.3d at 482; *Hopkins*, 929 F.2d at 84). While a document is predecisional if it "precedes, in temporal sequence, the 'decision' to which it relates," *Grand Cent. P'ship*, 166 F.3d at 482, the government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record. *Sears*, 421 U.S. at 151 n.18; *accord Tigue*, 312 F.3d at 80. Rather, so long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is predecisional. *Tigue*, 312 F.3d at 80.

"A document is "deliberative' when it is actually . . . related to the process by which policies are formulated." *Grand Cent. P'ship*, 166 F.3d at 482 (internal quotation marks omitted; alteration in original). In determining whether a document is deliberative, courts inquire as to whether it "formed an important, if not essential, link in [the agency's] consultative process," *Grand Cent. P'ship*, 166 F.3d at 483, whether it reflects the opinions of the author rather than the policy of the agency, *id.* at 483; *Hopkins*, 929 F.2d at 84, and whether it might "reflect inaccurately upon or prematurely disclose the views of [the agency]," *Grand Cent. P'ship*, 166 F.3d at 483. Predecisional deliberative documents include "recommendations, draft documents, proposals,

suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Tigue*, 312 F.3d at 80 (internal quotation marks omitted); *Grand Cent. P'ship*, 166 F.3d at 482; *see also Hopkins*, 929 F.2d at 84–85 (privilege applies to "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated'" (quoting *Sears*, 421 U.S. at 150)). Legal advice, no less than other types of advisory opinions, "fits exactly within the deliberative process rationale for Exemption 5." *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980); *accord Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356–57 (2d Cir. 2005).

The Government properly withheld privileged materials under Exemption 5 and the deliberative privilege process. All of the withheld unclassified OLC documents (or portions of documents) and, except as noted in OLC's classified declaration, all of the classified OLC documents are protected by the deliberative process privilege because they are confidential, predecisional and deliberative. Bies Decl. ¶ 41. With respect to its unclassified records, OLC withheld deliberative content, and legal advice or communications seeking legal advice, regarding (1) contemplated, draft, or proposed public statements by employees of the Department of Justice or members of the Executive Branch, Bies Decl. ¶ 26; (2) contemplated, draft, or proposed congressional testimony by employees of the Department of Justice or members of the Executive Branch, *id.* ¶ 27; (3) contemplated, draft, or proposed filings or presentations before an international body by the Executive Branch on behalf of the United States Government, *id.* ¶ 28; (4) contemplated, draft, or proposed responses by the Executive Branch to proposed legislation, *id.* ¶ 29; and (5) the PPG, *id.* ¶ 30. OLC's classified records also contained substantial material protected by the deliberative process privilege, such as (1) confidential, predecisional legal advice

provided to Executive Branch policymakers or internal Executive Branch legal deliberations regarding such advice; (2) deliberations regarding and comments on draft legal analysis or other work product; (3) predecisional materials and recommendations related to potential policy decisions; and (4) factual information or other confidential Executive Branch information provided to OLC or other Executive Branch attorneys in connection with interagency legal deliberations or requests for legal advice. Bies Decl. ¶¶ 50-53. With regard to each category of predecisional and deliberative material, OLC's declarations establish that compelled disclosure would undermine the deliberative processes of government, by chilling the candid and frank communications necessary for effective decisionmaking. *Id.* ¶¶ 34-43, 46-53; *see also Hopkins*, 929 F.2d at 84 (privilege "protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions"); *accord* H.R. Rep. No. 89-1497, at 10 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427 ("a full and frank exchange of opinions would be impossible if all internal communications were made public," and "advice . . . and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl'"); *Klamath*, 532 U.S. at 8–9 ("officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news"); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–51 (1975) ("those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process" (internal quotation marks omitted)).

The other agencies and components also properly applied Exemption 5 and the deliberative process privilege to protect predecisional and deliberative documents. Lewis Decl. ¶¶ 26, 30, 32 (DOD withheld draft operational plans; predecisional deliberations addressing the application of the PPG, including preliminary recommendations regarding possible changes to the PPG; and

predecisional legal analysis, including recommendations regarding whether a military strike can be conducted under the Authorization for the Use of Military Force); Hibbard Decl. ¶¶ 31-32 & Exh. H (OIP withheld deliberative notes, email, and talking points); Wiegmann Decl. ¶¶ 9-10 (NSD withheld records referred by OLC and/or OIP reflecting deliberations by NSD, in conjunction with other DOJ components, regarding the legal framework for direct action); Lutz Decl. ¶ 30 (CIA); Hackett Decl. ¶ 39 (State Department).

2. Attorney-Client Privilege

"The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance. Its purpose is to encourage attorneys and their clients to communicate fully and frankly and thereby to promote 'broader public interests in the observance of law and administration of justice.'" *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (quoting *Upjohn v. United States*, 449 U.S. 383, 389 (1981)) (citation omitted). The privilege operates in the government context as it does between private attorneys and their clients, "protect[ing] most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance." *Id.* To invoke the attorney-client privilege, a party must demonstrate that there was: "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *Id.* at 419.

The materials withheld by the Government under the attorney-client privilege easily meet this standard. All of the withheld unclassified OLC documents and portions of documents and, except as noted in OLC's classified declaration, all of the classified OLC documents are protected by the attorney-client privilege. Bies Decl. ¶ 44, 49-53. These documents either (a) are

confidential legal advice provided to OLC's Executive Branch clients, (b) reflect confidential communications between OLC and Executive Branch clients made for the purpose of providing legal advice, and/or (c) are internal drafts by OLC attorneys that contain confidences OLC received from its Executive Branch clients for the purpose of providing legal advice. *Id.* ¶¶ 44, 49. As such, they fall squarely within the attorney-client privilege. *Id.*; *County of Erie*, 449 F.3d 419. The considerations outlined above regarding the need to maintain the confidentiality of the legal deliberations are particularly compelling in the context of the provision of legal advice by OLC. Bies Decl. ¶ 36; *see id.* ¶¶ 2-6.

The attorney-client privilege and Exemption 5 also protect attorney-client communications withheld by the other defendant agencies and components. *See* Lewis Decl. ¶ 34 (DOD); Lutz Decl. ¶ 32 (CIA); Hackett Decl. ¶ 40 (State Department); Wiegmann Decl. ¶¶ 11-12 (NSD).

3. Presidential Communications Privilege

The presidential communications privilege is "closely affiliated" with the deliberative process privilege. *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). However, unlike the deliberative process privilege, which applies to decisionmaking of executive officials generally, the presidential communications privilege applies specifically to decisionmaking of the President. *Id.* at 745. In particular, it applies "to communications in performance of a President's responsibilities, . . . and made in the process of shaping policies and making decisions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1997) (citation and internal quotation marks omitted).

Although the presidential communications privilege is in this sense more narrow than the deliberative process privilege, the protection afforded by the presidential communications privilege is broader. Documents subject to the presidential communications privilege are

shielded in their entirety. *See In re Sealed Case*, 121 F.3d at 745 ("Even though the presidential privilege is based on the need to preserve the President's access to candid advice, none of the cases suggest that it encompasses only the deliberative or advice portions of documents."). The presidential communications privilege protects not only predecisional advice, but also closely-held presidential directives and decisional documents. *Sealed Case*, 121 F.3d at 745-46; *Amnesty Int'l*, 728 F. Supp. 2d at 522.

The Government also withheld certain records, including the PPG, pursuant to Exemption 5 and the presidential communications privilege. Bies Decl. ¶ 54; Lewis Decl. ¶ 17, 20, 27, 33; Hackett Decl. ¶ 41. The privileged presidential communications consist of either advice or recommendations conveyed to the President or his senior advisers, or direct, confidential communications from the President to senior officials on sensitive topics, where disclosure would inhibit the President's ability to engage in effective communications and decisionmaking. Bies Decl. ¶ 54; Hackett Decl. ¶ 41; Lewis Decl. ¶ 17. They plainly fall within the scope of the privilege, and are protected from disclosure in their entirety under Exemption 5. *See Sealed Case*, 121 F.3d at 745; *Amnesty Int'l*, 728 F. Supp. 2d at 522.

4. Attorney Work Product

Exemption 5 also permits an agency to withhold attorney work product, material that is "prepared in anticipation of litigation." *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 369 (D.C. Cir. 2005). Protected attorney work product is not limited to "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation," *FTC v. Grolier*, 462 U.S. 19, 25 (1983), but also includes "factual material . . . when it appears within documents that are attorney work product," *Judicial Watch*, 432 F.3d at 371. If a record constitutes attorney work product, "then segregability is not required." *Id.*

OLC withheld a number of documents containing attorney work product prepared with respect to ongoing or anticipated litigation. Bies Decl. ¶¶ 24, 40. These documents fall squarely within Exemption 5 and the work product doctrine, and were properly withheld in full.

D. The Government Has Properly Withheld the Names and Other Identifying Information of Lower-Level Government Personnel Under Exemption 6

Exemption 6 to FOIA allows agencies to withhold "personnel and medical files and similar files" whenever "disclosure . . . would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To determine whether a file qualifies as "similar" to "personnel or medical files," courts examine whether information in that file "applies to a particular individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *see also Wood v. FBI*, 432 F.3d 78, 87 (2d Cir. 2005). If the threshold requirement is met, courts next "balance the public need for the information against the individual's privacy interest in order to assess whether disclosure would constitute a clearly unwarranted invasion of personal privacy." *Associated Press v. U.S. DOD*, 554 F.3d 274, 291 (2d Cir. 2009). Courts examine the "public need for the information" in light of "the basic purpose of [FOIA] to open agency action to the light of public scrutiny, rather than . . . the particular purpose for which the document is being requested." *U.S. DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772 (1989) (internal quotation marks and citations omitted). "That purpose . . . is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about the agency's own conduct." *Id.* at 773.

Here, the names and other identifying information of lower-level government employees are protected from disclosure by Exemption 6, as the employees have substantial privacy interests and disclosure of their identities would shed no light on agency operations. *See* Lewis Decl. ¶¶

38-39 (personally identifying information of DOD personnel at or below the military rank of Colonel or the civilian rank of GS-15); Bies Decl. ¶ 58 (same for names of OLC employees and employees of other departments and agencies); Wiegmann Decl. ¶¶ 13-15 (names of DOJ personnel); Hibbard Decl. ¶ 33 (email addresses and names of intelligence community and military personnel).

III. THE GOVERNMENT HAS NOT WAIVED THE PROTECTIONS OF ANY PRIVILEGE OR EXEMPTION WITH RESPECT TO THE WITHHELD DOCUMENTS OR INFORMATION

The ACLU's so-called "Waiver Table" fails to establish that there has been any official disclosure, or other basis for finding a waiver, with regard to any of the documents or information withheld by the various defendant agencies or components. The ACLU attempts to show waiver as to two categories of "disclosures—"legal analysis" and "facts"—but falls short on both counts.

A. **The ACLU Misunderstands the Doctrines of Waiver as Applied to Legal Analysis**

The ACLU's theory of waiver of "legal analysis" is patently erroneous. In part I of its "Waiver Table," the ACLU identifies certain "disclosures" of legal analysis of various legal authorities, including constitutional provisions (the Fourth and Fifth Amendments), statutes (18 U.S.C. §§ 956(a), 1119 and 2441(a), and the 2001 AUMF), the assassination ban in Executive Order 12,333, and other legal doctrines or concepts (*e.g.*, the "public authority" doctrine and the terms "imminence" and "feasibility of capture"). Most of the identified disclosures are derived from the draft Department of Justice White Paper (Exhibit 15), the OLC memoranda concerning a contemplated operation against Anwar al-Aulaqi (Exhibits 5 and 8), or other legal analysis

pertaining to the potential use of force against a U.S. citizen.[6] The ACLU appears to contend that, simply because the Executive Branch has released legal analysis addressing these legal authorities as they relate to the acknowledged Aulaqi operation, it has thereby "waived any right to withhold" legal analysis of any of the legal authorities *in any other document*—without regard to the context of the legal analysis at issue, or the type of communication or deliberation in which it was prepared. ACLU Br. at 14-15. This argument is fundamentally incorrect, and conflates the doctrines of official acknowledgement and waiver of privilege.

Under the doctrine of official disclosure, the Court examines whether the government is precluded from withholding particular information as classified if the same information has been the subject of a prior, official and authorized disclosure. To meet the standard for official disclosure, the withheld information must be "as specific as the information previously released," "match the information previously disclosed," and be "made public through an official and documented disclosure." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009); *see also New York Times*, 756 F.3d at 120 n.19 (recognizing that *Wilson* "remains the law of this Circuit"); *ACLU I* Decision on Remand, filed October 31, 2014, ECF No. 90 ("First Remand Decision"), at 12; *ACLU I* Memorandum Decision and Order, filed July 16, 2015, ECF No. 128 ("Second Remand Decision"), at 5-8 (both applying *Wilson* standard for official disclosure).[7] But as the Second

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[6] *See* 12 (May 2011 DOJ classified white paper), 22, 28 (government briefs in Nasser al-Aulaqi litigation).

[7] ACLU attempts to read the "match" requirement out of this test, *see* ACLU Br. at 7-10, but the Second Circuit panel in *New York Times* applied the match requirement, as did this Court in its two decisions on remand. *See* 756 F.3d at 120 & n.19; First Remand Decision at 16-17; Second Remand Decision at 7-8. And while the *New York Times* panel did not interpret this element as requiring "absolute identity," 756 F.3d at 120, it did require a "substantial overlap" and "virtual parallel" between the legal analysis in the draft DOJ White Paper and the OLC-DOD Memorandum, *see id.* at 116. Contrary to the ACLU's contention, ACLU Br. 1-2, 9, the Second

Circuit has made clear, the mere fact that legal analysis has been disclosed in one context does not mean that it does not remain protected in another context. *New York Times*, 756 F.3d at 119. For example, the very fact that legal analysis was undertaken in a particular circumstance may reveal classified information, such as the fact that a particular operation was contemplated. *Id.* The Second Circuit also recognized that "in some circumstances legal analysis may be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts." *Id.* This Court's decisions on remand applied this principle. Recognizing that the Government had disclosed legal analysis concerning the application of certain legal authorities in the context of an operation against Aulaqi, the Court nevertheless upheld the Government's withholding of legal analysis in other documents, even though the withheld analysis may have cited or discussed some of the same legal authorities that had been addressed in the publicly disclosed analysis. *See, e.g.*, First Remand Decision at 15-16; Second Remand Decision at 44-47. In arguing that *any* legal analysis of the Fourth or Fifth Amendment, or the AUMF, in the targeting context is subject to waiver—simply because those legal authorities were discussed in the draft DOJ White Paper or the OLC-DOD Memorandum—the ACLU vastly overstates the claim of official acknowledgment. *See, e.g.*, ACLU Br. at 14 & Table at 1.

The doctrine of official disclosure of classified information, moreover, is distinct from the doctrines of waiver that apply to privileged information, including privileged legal advice and analysis. In order to determine whether there has been a waiver of privilege, it is necessary to

Circuit did not apply a "materiality test," nor can such a test be derived from *Afshar v. Dep't of State*, 702 F.2d 1125 (D.C. Cir. 1983). Indeed, the D.C. Circuit made clear in *Afshar* that there is no official disclosure unless the withheld information "appears to duplicate" information in the public domain, *see id.* at 1130, a test that the D.C. Circuit itself later equated to a matching requirement. See *Assassination Archives & Res. Ctr. v. CIA*, 334 F.3d 55, 60 (D.C. Cir. 2003).

examine the particular document at issue, the nature and context of the alleged disclosure, and the specific privilege(s) asserted. With respect to the attorney-client privilege, for example, the privilege is not "lost by the mere fact that the information communicated [between attorney and client] is otherwise available to the public." *United States v. Cunningham*, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982). That is because the privilege attaches to *communications*, not information. *Id.*; *accord Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981); *Matter of Grand Jury Subpoenas*, 959 F.2d 1158, 1165 (2d Cir. 1992); *see also* Kenneth W. Graham, Jr., *Federal Practice & Procedure, Federal Rules of Evidence* § 5729 (updated April 2015) (waiver "requires disclosure of a privileged communication; revealing the information communicated is not a waiver regardless of how much such disclosure may sap the value of the privilege"). It is well-settled in this circuit, moreover, that disclosures of attorney-client privileged information outside the context of litigation do not waive privilege as to other, undisclosed attorney-client communications. *See In re Von Bulow*, 828 F.2d 94, 102-03 (2d Cir. 1987); *accord In re John Doe Corp.*, 350 F.3d 299, 305-06 (2d Cir. 2003); *In re Grand Jury Proceedings*, 219 F.3d 175, 183 (2d Cir. 2000).

Like the attorney-client privilege, the deliberative process privilege does not depend on the specific facts or analysis at issue; rather, it is the authors' advice and recommendations, and the selection of particular facts or information to be provided to the decisionmaker, that are protected. *See Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999); *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979); *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 465 (D.C. Cir. 2014). Each deliberation is independently entitled to protection, regardless of the content of the advice or information communicated to the decisionmaker. Courts have therefore recognized that waiver of the deliberative process privilege is generally limited to the specific document or

information that has been disclosed, and does not encompass related material. *See, e.g.*, *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) ("all-or-nothing" approach of subject matter waiver is not applied to claims of deliberative process privilege); *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 700-01 (9th Cir. 1989); *Agility Pub. Warehousing Co. K.S.C. v. DOD*, No. CV 14-1064 (JDB), 2015 WL 3867978, at *4 (D.D.C. June 23, 2015); *Lehman Bros. Holdings, Inc. v. United States*, No. 10 Civ. 6200 (RMB), 2014 WL 715525 at *2 (S.D.N.Y. Feb. 24, 2014). This limited concept of waiver ensures that government officials do not voluntarily limit public disclosures in order to protect other, more sensitive documents or information. *See Sealed Case*, 121 F.3d at 741.[8]

Moreover, an Executive Branch official's public discussion of his or her understanding of the legal principles that apply to a particular action or policy, without reference to any confidential legal advice that Executive Branch decisionmakers may have received before deciding to take the action or adopt the policy, does not vitiate the privileges protecting such advice. *See Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 206, 208 (2d Cir. 2012) (holding that although the protections of Exemption 5, and the deliberative process and attorney-client privileges, can be vitiated when an agency expressly adopts predecisional legal advice as agency policy, express adoption occurs only when Executive Branch decisionmakers make public reference to privileged legal advice, and even then only when the policymaker expresses agreement with the reasoning as

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[8] Furthermore, in this case several of the documents are protected by the presidential communications privilege, a privilege "rooted in constitutional separation of powers principles and the President's unique constitutional role." *Sealed Case*, 121 F.3d at 745. As such, the presidential communications privilege affords even "greater protection against disclosure" than the deliberative process privilege, and "is more difficult to surmount." *Id.* at 746.

well as the conclusion of that advice); *accord Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 358, 360 (2d Cir. 2005). Indeed,

> if merely explaining publicly the legal basis for Executive Branch conduct were understood to remove the protection of the deliberative process and attorney-client privileges from the confidential legal advice provided as part of the Executive Branch's internal deliberations, it would substantially harm the ability of Executive Branch decisionmakers to request, receive, and rely upon full and frank legal advice from government lawyers as part of the decisionmaking process, and it would also harm the public by discouraging the Executive Branch from explaining its understanding of the legal basis for its actions publicly in the future.

Bies Decl. ¶ 7.

Thus, when it comes to privileged documents, whether a waiver exists depends on the particular privilege at issue and the nature of the public disclosure, and not the "official disclosure" doctrine cited by the ACLU. The ACLU's theory that the public disclosure of legal analysis of a particular constitutional or statutory provision necessarily effects a waiver of other legal analysis of the provision, regardless of the context or the particular communication or deliberation at issue, is simply wrong.

As set forth in detail in the Government's classified, *ex parte* submission, there has been no waiver of privileges or exemptions as to the legal analysis withheld by the Government in this case. *See also* Lutz Decl. ¶¶ 11-13; Bies Decl. ¶¶ 59-62; Hibbard Decl. ¶ 35; Lewis Decl. ¶ 40; Hackett Decl. ¶ 42; Wiegmann Decl. ¶ 17; Hudson Decl. ¶ 31.

B. The Supposed "Fact" Disclosures Identified by the ACLU Afford No Basis for a Finding of Waiver as to the Withheld Documents or Information

ACLU fares no better with its list (in part II of its table) of "facts" supposedly "waived" by the Executive Branch. First, certain of the ACLU's factual assertions are identical to, or

substantially overlap with, the broad facts that this Court previously found to be officially acknowledged in *ACLU I*. *Compare* ACLU Waiver Table at 19 ("The government uses drones to carry out targeted killings.") *with* Second Remand Decision at 8-9 (finding "the fact that the Government uses drones to carry out targeted killings overseas" to be officially acknowledged). Yet, with the exception of a handful of documents, the Court upheld the Government's certifications that the documents in *ACLU I* were nevertheless properly withheld in their entirety, and that there was no reasonably segregable, non-exempt information in those documents. *See ACLU I* Order dated July 16, 2015, ECF No. 129. Similarly here, the Government has demonstrated in its classified, *ex parte* index that the documents withheld in this case contain no reasonably segregable, non-exempt information. *See also* Lutz Decl. ¶¶ 11-13; Bies Decl. ¶¶ 59-62; Hibbard Decl. ¶¶ 34-35; Lewis Decl. ¶ 40; Hackett Decl. ¶ 42; Wiegmann Decl. ¶¶ 16-17; Hudson Decl. ¶ 31.

Second, the ACLU relies in its "Waiver Table" on numerous alleged disclosures that cannot, as a matter of law, constitute "official" disclosures of the Executive Branch—including statements by former agency officials, statements by members of Congress, and statements in press reports that are either unattributed or attributed to unnamed sources.[9] *See Wilson*, 586 F.3d at 186 ("the law will not infer official disclosure of information classified by the CIA from (1) widespread public discussion of a classified matter; (2) statements made by a person not authorized to speak for the agency; or (3) release of information by another agency, or even by Congress"), *quoted in New York Times*, 756 F.3d at 119 n.18; *Hudson River Sloop Clearwater,*

[9] *See, e.g.*, Exhs. 19, 24, 25, 26, 29, 35, 37, 38, 41, 44, 46, 47.

Inc. v. Dep't of Navy, 891 F.2d 414, 421-22 (2d Cir. 1989) (statements by former high-ranking Navy official "do not translate into *official* disclosures"); Second Remand Decision at 6-7.

Finally, as set forth below, many of the supposed assertions of "fact" are not actually supported by the statements or the exhibits cited by the ACLU. And the ACLU repeatedly draws broad, unsupported conclusions from statements that are substantially narrower or fact-specific. *See, e.g.*, Waiver Table at 19 (asserting that reference to single military strike targeting one individual in Libya supports far more general proposition that "[t]he government uses manned aircraft to carry out targeted killings"). Where the ACLU's assertions are not "as specific as" and do not "match" (or even "substantially overlap" with or "virtually parallel") the cited prior disclosures, they do cannot constitute "official disclosures" sufficient to waive the protections of FOIA's exemptions. *Wilson*, 586 F.3d at 186; *New York Times*, 756 F.3d at 116, 120.

<u>ACLU Assertion 1: "The government uses drones to carry out targeted killings."</u>

The Court in *ACLU I* found this fact to be officially acknowledged, Second Remand Decision at 8-9, and yet upheld the vast majority of the Government's withholdings.

<u>ACLU Assertion 2: "The government uses manned aircraft to carry out targeted killings."</u>

The ACLU cites only one exhibit for this proposition, Exhibit 49, a newspaper article describing a single military strike against a particular individual in Libya. In that exhibit, a DOD spokesman is quoted as confirming that "the target of last night's counterterrorism strike in Libya was Mokhtar Belmokhtar."

<u>ACLU Assertion 3: "The CIA and DOD have operational roles in targeted killings."</u>

The Court in *ACLU I* found this fact to be officially acknowledged, Second Remand Decision at 8-9, and yet upheld the vast majority of the Government's withholdings.

Importantly, while the Second Circuit held that it has been officially acknowledged that both DOD and CIA have an unspecified "operational role" in the use of targeted lethal force, the Court specifically declined to define the nature of the agencies' respective roles. *See New York Times*, 756 F.3d at 122 n.22. None of the statements or exhibits cited by the ACLU contains an official disclosure of the nature of the operational role played by either agency, either generally or with regard to any particular strike. Notably, several of the statements cited by the ACLU were before the Second Circuit, *see, e.g.*, Exhs. 7, 14, 36, and the Court nevertheless did not find any official disclosure of the nature of the role played by either agency, either generally or with regard to any particular strike (including the strike that killed Anwar al-Aulaqi). Moreover, several of the exhibits cited by the ACLU are statements of members of Congress, *see* Exhs. 14, 19, 24, 25, 26, 29, 37, 44, 46, 47, or bills proposed in Congress, *see* Exhs. 38, 41, which cannot constitute official disclosures. *See Wilson*, 586 F.3d at 186; *New York Times*, 756 F.3d at 119 n.18; Second Remand Decision at 6-7.

In the cited statement in Exhibit 10, Secretary Gates stated, in the course of describing "the campaign under way in Afghanistan" and "sorties in Iraq and Afghanistan," that "[t]he Air Force now has 48 Predator and Reaper combat patrols currently flying—compared to 18 CAPs in 2007—and is training more pilots for advanced UAVs than for any other single weapons system." The ACLU, however, has narrowed its FOIA request to exclude strikes undertaken in Afghanistan and Iraq (as well as Syria), and thus this statement is not relevant.

In the cited statement in Exhibit 48, Mr. Price noted that President Obama "has indicated that he will increasingly turn to the military to take the lead and provide information to the public about our efforts," but he does not refer specifically to the CIA or identify the nature of the role played by any agency in targeted strikes generally, or in any particular strike. This alleged disclosure is consistent with, and not any broader than, the disclosures previously found.

ACLU Assertion 4: "The government conducts targeted killings in Pakistan, including through the use of drones."

The ACLU relies on three statements from 2009, 2012 and 2013. But in the latest of those statements, from August 2013, Secretary of State Kerry (Exhibit 34) stated that "I think the program will end as we have eliminated most of the threat and continue to eliminate it." And the cited statement by White House Press Secretary Jay Carney in 2012 (Exhibit 20) discusses intelligence that a particular individual, al Libi, is dead; it does not discuss how he died. In fact, Mr. Carney specifically stated (at page 14) that "I can't get into the details about how his death was brought about," and ""What I can tell you is that our government has been able to confirm al-Libi's death. I don't have anything for you on the circumstances of his death or the location." In the cited statement from 2009 (Exhibit 4), Director Panetta similarly stated that "I can't go into the particulars." Moreover, this statement was before the Second Circuit in *ACLU I*, which did not find the broad "waiver" urged by the ACLU here. This Court need not revisit the findings by the Second Circuit.

ACLU Assertion 5: "The CIA conducts targeted killing in Pakistan, including through the use of drones."

Neither of the cited statements, from 2009 and 2010, referred to strikes being conducted *by the CIA*. *See* Exhs. 4, 7. Both of these statements were before the Second Circuit, which declined to

find any official acknowledgement of the nature of the CIA's "operational role" in drone strikes. *See New York Times*, 756 F.3d at 122 n.22.

ACLU Assertion 6: "The government conducts targeted killings in Yemen, including through the use of drones."

The Second Circuit concluded that the United States has officially acknowledged that it conducted the strike in Yemen that killed Aulaqi. *New York Times*, 756 F.3d at 111, 118. However, the cited statements do not support the ACLU's broader assertion that "[t]he government conducts targeted killings in Yemen, including through the use of drones."

The cited statements from Exhibit 21 and Exhibit 40 referred to "working closely" and "joint efforts" with the Yemeni government: "The U.S. military has been working closely with the Yemeni government to operationally dismantle and ultimately eliminate the terrorist threat posed by al-Qa'ida in the Arabian Peninsula (AQAP), the most active and dangerous affiliate of al-Qa'ida today. Our joint efforts have resulted in direct action against a limited number of AQAP operatives and senior leaders in that country to posed a terrorist threat to the United States and our interests."

The cited statement from Exhibit 50 indicated that the Intelligence Community has concluded that a particular individual, Nasir al-Wahishi" has been killed; it did not state that he was killed as a result of a United States strike.

ACLU Assertion 7: "The CIA conducts targeted killings in Yemen, including through the use of drones."

The Second Circuit concluded that the United States has officially acknowledged that it conducted the strike in Yemen that killed Aulaqi, and that CIA had an operational role in drone

strikes generally. *New York Times*, 756 F.3d at 111, 118, 122. As noted, however, the Second Circuit did not find any official acknowledgement of the particular role played by CIA or DOD in either the Aulaqi strike or in drone strikes generally. *New York Times*, 756 F.3d at 122 n.22.

The cited 2011 statement from Exhibit 12 discussed the legal basis upon which the CIA could use lethal force in Yemen against a U.S. citizen who senior officials had reasonably determined was a senior leader of al Qaida or associated forces—in other words, it addressed the legal basis for the potential use of lethal force against Aulaqi in Yemen. It did not identify the role actually played by CIA or any other agency in the Aulaqi strike, nor in drone strikes more generally.

The cited 2010 statement from Exhibit 7, which was also before the Second Circuit in *ACLU I*, simply stated that Aulaqi was on "a terrorist list." It did not indicate the role played by CIA or any other agency.

ACLU Assertion 8: "The government conducts targeted killings in Somalia, including through the use of drones."

The cited statement from Exhibit 21, from June 2012, stated that "[i]n a limited number of cases, the U.S. military has taken direct action in Somalia against members of al-Qa'ida, including those who are also members of al-Shabaab, who are engaged in efforts to carry out attacks against the United States and our interests." The remaining statements concern three particular strikes by the U.S. military in Somalia. The cited statements from Exhibits 39 and 40 stated that U.S. military forces conducted an air strike in Somalia on September 1, 2014, which killed al-Shabaab co-founder Ahmed Godane. The cited statement from Exhibit 42 stated that on January 31, 2015, U.S. military forces conducted a strike in Somalia, using unmanned aircraft and several Hellfire

missiles, against Yusuf Dheek, al-Shabaab's chief of external operations and planning for intelligence and security. The cited statement from Exhibit 43 stated that on March 12, 2015, U.S. military forces conducted a strike using unmanned aircraft that resulted in the death of Adan Garar, a member of al-Shabaab's intelligence and security wing.

<u>ACLU Assertion 9: "The government conducts targeted killings in Libya, including through the use of drones."</u>

In cited statement in Exhibit 49, a Pentagon spokesman stated only that Moktar Belmokhtar was a target of a counterterrorism strike in Libya the night before, in June 2015. The two press reports at Exhibits 11 and 13, both from 2011, generally discussed the limited use of Predator drones by the military during the war in Libya. The cited statements attributed to Secretary Gates (Exhibit 11) and Director Panetta (Exhibit 13) did not refer specifically to the use of targeted lethal force, using drones or otherwise.

<u>ACLU Assertion 10: "A September 17, 2001 Memorandum of Notification signed by President Bush authorizes the CIA to take lethal action against suspected terrorists."</u>

The statements from Exhibit 3 refer to a notification memorandum "pertaining to the CIA's authorization to detain terrorists." The cited statements did not address any authority "to take lethal action against suspected terrorists." The ACLU also cites statements from Exhibit 35, a book authored by a former CIA official. As a matter of law, statements by former government officials cannot constitute an official and authorized government disclosure. *See Wilson*, 586 F.3d at 186; *Hudson River Sloop Clearwater*, 891 F.2d at 422; Second Remand Decision at 6-7.

<u>ACLU Assertion 11: "The OLC provides advice establishing the legal boundaries of the targeted-killing program."</u>

The cited statement by Mr. Brennan (in Exhibit 23) was made in the context of a question about the potential use of lethal force against a U.S. citizen; Mr. Brennan did not articulate any general principle with regard to the use of lethal force generally, nor did he refer to any "targeted-killing program."

Similarly, the cited testimony by former Attorney General Holder addressed the November 2011 draft Department of Justice White Paper (concerning the potential use of lethal force against a U.S. citizen determined to be a senior operational leader of al Qaeda), and acknowledged a relationship between the draft DOJ White Paper and previous OLC advice on the same topic. Like the statement by Mr. Brennan, Mr. Holder was referring to OLC advice concerning the potential use of lethal force against a U.S. citizen, and did not articulate any general principle regarding OLC advice on the use of targeted lethal force more generally.

The cited statement in Exhibit 26 is a statement of Senator Feinstein, which cannot establish an official disclosure as a matter of law. *See Wilson*, 586 F.3d at 186; *New York Times*, 756 F.3d at 119 n.18.

ACLU Assertion 12: "The government conducts before- and after-the-fact legal and factual analysis of lethal strikes."

The cited statements are not as broad as the ACLU's assertion. With regard to what the ACLU terms "before-the-fact" analysis, in the first cited statement from Exhibit 27 (at page 1), Mr. Brennan described his view that "[t]here should be an interagency review process when making policy decisions associated with" targeted strikes. Mr. Brennan also stated that "the individuals who participate in this process consider . . . the information available, including the most up-to-date intelligence," and that "[t]hese reviews oftentimes generate requests to clarify

existing information or spur request for new information to provide the best available intelligence and analysis to inform the decision." The cited fact sheet in Exhibit 33 outlines the preconditions for the use of lethal force outside areas of active hostilities.

With regard to what the ACLU terms "after-the-fact" analysis, in the second cited statement from Exhibit 27 (at page 2), Mr. Brennan described the information gathered and analyzed "[w]hen civilian deaths are alleged," and stated that "[i] n those rare cases in which civilians have been killed, after-action reviews have been conducted to identify corrective actions and to minimize the risk of innocents being killed or injured in the future." In the first cited statement from Exhibit 45, Mr. Earnest stated (at page 4) that "[w]hen a counterterrorism operation is carried out, it is followed by a battle damage assessment where our intelligence professionals evaluate the region or the area where the operation was carried out to determine the results of the operation and whether or not, if any, civilian casualties occurred." In the second cited statement from Exhibit 45, Mr. Earnest noted (at page 8) that "[o]ur national security professionals after every operation try to review what had occurred."

<u>ACLU Assertion 13: "Innocent bystanders have died or been injured as a result of U.S. drone or other targeted-killing strikes."</u>

The ACLU's broad statement is not supported by the cited document (Exhibit 32), in which President Obama stated that "it is a hard fact that U.S. strikes have resulted in civilian casualties, a risk that exists in every war."

* * *

For all of these reasons, the purported "disclosures" identified by the ACLU do not constitute official disclosures beyond those previously found by the Second Circuit and this Court,

and many do not constitute official disclosures at all. In addition, the Government's submissions demonstrate that that the withheld documents and information either do not contain any officially acknowledged material, or if they do, any such material is not reasonably segregable. *See* Lutz Decl. ¶¶ 11-13; Bies Decl. ¶¶ 59-62; Hibbard Decl. ¶¶ 34-35; Lewis Decl. ¶ 40; Hackett Decl. ¶ 42; Wiegmann Decl. ¶¶ 16-17; Hudson Decl. ¶ 31.

CONCLUSION

For the foregoing reasons, the Court should grant partial summary judgment to the Government, and deny the ACLU's motion for partial summary judgment.

Dated: October 2, 2015

Respectfully submitted,

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