LEGAL DEPARTMENT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

January 12, 2018

BY ECF

The Honorable Paul A. Engelmayer
United States District Court
Southern District of New York
40 Foley Square, Room 2201
New York, New York 10007

Re: *ACLU et al. v. DOD et al.*, No. 17 Civ. 3391 (PAE)

Dear Judge Engelmayer:

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Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU") write to respond to Defendant CIA's January 11, 2018 letter, ECF No. 53, concerning an out-of-circuit district court decision, *James Madison Project v. DOJ*, No. 17-cv-00144 (APM), 2018 WL 294530 (D.D.C. Jan. 4, 2018). The decision does not constitute authority that this Court is bound to consider, and in any event, it does not undermine Plaintiffs' arguments.

The CIA first argues that *James Madison* shows the "continued vitality of '*Fitzgibbon*'s three-pronged test in the Glomar context subsequent to [*Drones FOIA*].'" CIA Letter at 1–2 (citation omitted). But the D.C. district court's reading of *Drones FOIA* does not change the analysis in this case. To the contrary, the court provides an example of how the official acknowledgment "specificity" test can be met, which supports Plaintiffs' arguments here: "as in [*Drones FOIA*], if a requester seeks records about drone strikes, and the agency refuses to confirm or deny the existence of those records, the public acknowledgment *must* bear out the existence of records concerning drone strikes, not something different." 2018 WL 294530, at *6. Here, the government's official acknowledgments establish that CIA Director Pompeo was present at the meeting to approve the January 29, 2017 "intelligence-gathering raid" in Yemen. There should be no question that these acknowledgments "bear out the existence of records" concerning that raid, and "not something different." *See id.* Moreover, even though the government's acknowledgments in this matter would satisfy the D.C. Circuit's test, the Second Circuit follows a less rigid approach. *See N.Y. Times Co. v. DOJ*, 756 F.3d 100, 120 n.19 (2d Cir. 2014) (explaining that "a rigid application of [the three-pronged *Wilson* test] may not be warranted in view of its questionable provenance," specifically casting doubt on *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)).

The CIA also asserts that the court in *James Madison* declined to adopt the attempt by plaintiffs in that case to "import" the "logical and plausible" standard into the official acknowledgment test, and argues that "[t]o the extent the 'logical or plausible' standard is applied in connection with an official acknowledgment analysis, that standard is . . . strict." CIA Letter at 2. This, too, does not alter the analysis as applied in this case. The court in *James Madison* gives examples of the kind of proof that

would satisfy the official acknowledgment test in two types of cases: (1) those in which the existence of records is plain from the face of the acknowledgment, and (2) those in which "the substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist." 2018 WL 294530, at *6. The court's discussion of the evidence needed in the second kind of case—*Drones FOIA*—is consistent with Plaintiffs' evidence and reasoning here, and Plaintiffs have established an "inescapable inference." *See* ACLU Mem. Supp. Mot. Partial S.J. 15–19, ECF No. 36; *see also id.* at 12–15 (addressing what information would and would not be revealed by disclosing the existence of records).

Finally, the CIA states that "the *James Madison* court rejected the notion that the FBI's Glomar response was improper" even though it may be "professional malpractice" if the FBI did not possess the document in question. CIA Letter at 2 (citation omitted). The CIA claims that "Plaintiffs have similarly argued that the CIA 'must' possess the requested records" because Sean Spicer characterized the Raid as an "intelligence-gathering" operation. *Id.* But Plaintiffs' argument is not based on this characterization alone. It is also based on Director Pompeo's officially acknowledged presence at the approval meeting. ACLU Mem. in Opp. 8; *see also id.* at 7 n.3.

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In sum, the CIA's arguments regarding the court's opinion in *James Madison* do not undermine Plaintiffs' arguments.

Thank you for your consideration of this matter.

Respectfully,

/s/ *Anna Diakun*

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