UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....x

THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE, and SCOTT SHANE,

Plaintiffs,

v. 11 Civ. 9336 (CM)

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

.....x

AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

12 Civ. 794 (CM)

U.S. DEPARTMENT OF JUSTICE, including its component the Office of Legal Counsel, U.S. DEPARTMENT OF DEFENSE, including its component U.S. Special Operations Command, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

.....x

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO REMAINING OFFICE OF LEGAL COUNSEL DOCUMENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

Preliminary Statement

Defendants the U.S. Department of Justice ("DOJ"), the Central Intelligence Agency ("CIA") and the Department of Defense ("DOD") respectfully submit this memorandum of law in support of their motion for summary judgment with regard to the remaining documents withheld by DOJ's Office of Legal Counsel ("OLC"). These documents, which consist largely of documents containing legal advice, confidential information conveyed by clients to OLC in the course of requesting or obtaining legal advice, Executive Branch legal deliberations, and internal OLC work product, are privileged and exempt from disclosure under Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5). The documents, including a DOJ White Paper released to plaintiffs in redacted form, also contain classified factual information protected from public disclosure under Exemptions 1 and 3, 5 U.S.C. § 552(b)(1), (3). None of these privileges or exemptions has been waived under the Second Circuit's analysis, and all reasonably segregable, non-exempt information has been produced. Defendants are therefore entitled to summary judgment with regard to the remaining OLC documents.

BACKGROUND

A. Procedural History on Remand

On June 23, 2014, the Second Circuit Court of Appeals issued a revised opinion, which attached a redacted version of a July 2010 OLC opinion pertaining to the use of force against Anwar al-Aulaqi (referred to in this litigation as the "OLC-DOD Memorandum"). The Second Circuit issued a partial mandate on June 26, 2014, directing this Court to implement that portion of its June 23, 2014 revised opinion requiring that "other legal memoranda prepared by OLC and at issue here . . . be submitted to [this Court] for in camera inspection and determination of waiver of privileges and appropriate redaction." *New York Times et al. v. US. Dep't of Justice*, 756 F.3d

100, 124 (2d Cir. 2014) (paragraph (3)). Shortly thereafter, this Court directed the government to provide the Court with unredacted copies of those OLC legal memoranda, for review *in camera*, together with a sealed, *ex parte* memorandum explaining why each such memorandum in whole or part does not fall within the Second Circuit's waiver analysis. *See* Orders dated June 30, and July 9, 2014. The government made this classified, *ex parte* submission on August 15, 2014. On the same date, the government also released to plaintiffs a redacted version of a second OLC memorandum pertaining to Aulaqi, dated February 2010.

On October 2, 2014, this Court provided its decision to the government for classification review. This decision resolves all issues relating to the OLC legal memoranda. *See* Memo-Endorsed Order dated Sept. 22, 2014.

On August 18, 2014, the Second Circuit issued the remainder of its mandate. By Order dated September 5, 2014, this Court directed the ACLU to identify, by September 19, those entries on the OLC index that the Second Circuit ordered disclosed in redacted form (the "redacted OLC index") for which the ACLU wishes the underlying document to be disclosed. With regard to those OLC documents identified by the ACLU, the Court ordered the government to submit "affidavits and briefs explaining, on a document-by-document basis, (i) why that document is exempt from disclosure; (ii) why there has been no waiver o[f] that exemption; *and* (iii) what would have to be redacted from a document were either the Government or the court to conclude that disclosure was otherwise appropriate." Order dated September 5, 2014.[1]

[1] The September 5 Order also addressed the production of *in camera* indexes by the CIA and DOD, together with supporting affidavits or briefs. By memo-endorsed Order dated September 22, 2014, the Court approved the parties' jointly proposed schedule for briefing the CIA and DOD indexes and underlying documents, pursuant to which the government will file its motion for summary judgment, supporting declarations, and *in camera* indexes on November 14, 2014.

B. The Remaining OLC Documents Sought by the ACLU

By letter dated September 19, the ACLU advised that it "seeks disclosure of all records listed on the OLC's *Vaughn* index except for: [i] records identified as drafts of Doc Nos. 4 and 5 (Doc Nos. 113; 131-143; 148-237; 238-242); and [ii] records identified as 'open source materials' (Doc Nos. 123-130)." The ACLU further advised that it "is willing to forego its claim to other draft legal memoranda listed on the OLC's *Vaughn* index where the index also lists a final version of those memoranda," although the ACLU was not able to identify such draft legal memoranda because of the redactions on the redacted OLC index.[2] Thereafter, the ACLU advised the government that it is also willing to forego any claim to emails listed on the OLC index, but not to any attachments thereto (except to the extent the attachments fall into another category of records the ACLU is not seeking, such as drafts of legal memoranda whose final version has been provided to the Court). *See* Second Declaration of John E. Bies ("Second Bies Decl.") ¶ 9. As the Court directed in its September 22 Order, the government is providing the Court, for its review *ex parte* and *in camera*, with a revised classified OLC index reflecting only those documents that the ACLU continues to seek. A redacted version of that revised index, with redactions consistent with the Second Circuit's August 11, 2014 Order, is also submitted herewith. *See* Second Bies Decl., Exh. A.

[2] In its September 19 letter, the ACLU advised that it is also willing to forgo its claim to certain other records listed on the redacted OLC index (all of which are described on the redacted OLC index as containing "classified factual information"), but only "if the government can represent to the ACLU that these documents do not mention Abdulrahman al-Aulaqi (or any spelling variant of that name)." The government makes no representation as to whether or not the identified records contain such information. Accordingly, these records remain at issue.

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*, 756 F.3d at 112; *ACLU*, 681 F.3d at 69; *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). In 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).

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 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 on the remaining OLC documents, or portions of documents, sought by the ACLU, especially applying this deferential standard to the government's declarations regarding national security matters. The government's declarations—including the unclassified declarations submitted by OLC, CIA and DOD, as well as the classified declarations and memorandum submitted for the Court's review *ex parte* and *in camera*—demonstrate that these documents, or portions of documents, are exempt from disclosure under FOIA Exemptions 1, 3 and/or 5, there has been no waiver of those exemptions under the

Second Circuit's rulings, and all reasonably segregable, non-exempt information has been produced.

I. The Remaining OLC Documents Are Exempt from Disclosure Under FOIA

In addition to the two OLC memoranda previously released in redacted form, DOJ recently released one additional redacted document responsive to the ACLU's FOIA request, a redacted Department of Justice White Paper. The material withheld from the DOJ White Paper is classified and exempt from disclosure under Exemptions 1 and 3. All of the other OLC documents sought by the ACLU are exempt from disclosure in their entirety under FOIA Exemptions 1, 3 and/or 5. The government cannot address these documents individually in its public submission, as demonstrated by the substantial redactions to the classified OLC index authorized by the Second Circuit. As directed by the Court, however, the documents are addressed individually in the government's *ex parte* submission.

A. Deliberative Documents

The vast majority of the OLC documents sought by the ACLU are deliberative materials. These documents fall into several categories.

First, the OLC documents include predecisional OLC and/or Department of Justice legal advice documents—such as Document 5 (the July 2010 OLC-DOD Memorandum) and Document 4 (the February 2010 OLC legal memorandum pertaining to Aulaqi that was released to plaintiffs in redacted form on August 15)[3]—as well as internal Executive Branch documents reflecting such

[3] The status of both of these documents has been determined. The Second Circuit ruled on the OLC-DOD Memorandum on June 23, 2014. The status of the information withheld from Document 4 is determined in the Court's decision provided to the government on October 2, 2014.

advice. Second Bies Decl. ¶ 12.a-b; *see, e.g.*, Redacted OLC Index, Nos. 4-5. These documents consist of or contain legal advice provided to Executive Branch decisionmakers in connection with their policymaking deliberations. Second Bies Decl. ¶ 33.

Second, the OLC documents include internal and confidential Executive Branch documents reflecting information conveyed to OLC for the purpose of obtaining confidential legal advice, including privileged and/or classified factual information potentially relevant to the request for legal advice. Second Bies Decl. ¶¶ 12.c, 39; *see, e.g.*, Redacted OLC Index, No. 75.

Third, the OLC documents include documents reflecting internal Executive Branch legal deliberations. Second Bies Decl. ¶ 12.d; *see, e.g.*, Redacted OLC Index, No. 7.

Fourth, the OLC documents include deliberative internal OLC work product. Second Bies Decl. ¶ 12.e; *see, e.g.*, Redacted OLC Index, Nos. 50, 120-22, 144-47, 243, 269, 270. This category of documents includes draft OLC legal analysis or excerpts of draft legal analysis generated during the preparation of OLC advice. Second Bies Decl. ¶ 12.d. Such material often contains confidential and classified factual information provided to OLC in connection with a request for legal advice. *Id.* The category of internal OLC work product also includes other more informal internal attorney work product generated during the preparation of OLC advice, such as preliminary outlines of legal analysis or questions to consider and handwritten notes, either standing alone or in the margins of client communications or drafts of advice. *Id.* Some of this

---

No further issues remain to be decided as to Document 4. *See* Memo-Endorsed Order dated September 22, 2014. Therefore, the Court need not, and should not, address the status of Documents 4 or 5 on this motion.

informal internal attorney work product also contains confidential factual information provided to OLC in connection with a request for legal advice. *Id.*

Fifth, the OLC documents include classified and/or privileged factual information provided to OLC in connection with a request for legal advice. Second Bies Decl. ¶ 12.f; *see, e.g.*, Redacted OLC Index, Nos. 57-66, 68-71, 73, 74. Such information includes input and comments relating to draft factual sections of draft legal advice. Second Bies Decl. ¶ 12.f.

The documents in these five categories are exempt from public disclosure under Exemption 5, as they are protected by the deliberative process and attorney-client privileges and, in one or more cases, the presidential communications privilege. They are also protected from disclosure by Exemptions 1 and 3.

1. The Deliberative Documents Are Exempt From Disclosure 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).

Here, the deliberative materials withheld by OLC fall squarely within the deliberative process and attorney-client privileges, and, in one or more cases, are also covered by the

presidential communications privilege.

a. The Deliberative Documents Are Protected by the Deliberative Process Privilege

In enacting Exemption 5, "[o]ne privilege that Congress specifically had in mind was the 'deliberative process' or 'executive' privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84; *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)). 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).

An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (citations omitted); *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. "Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." *Sears*, 421 U.S. at 151 n.18.

"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. Thus, the privilege "focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Hopkins*, 929 F.2d at 84–85 (quoting

Sears, 421 U.S. at 150).

The deliberative documents withheld by OLC are protected by the deliberative process privilege because they are predecisional and deliberative. Second Bies Decl. ¶ 19; *see also* Declaration of Rear Admiral Sinclair M. Harris ("Harris Decl.") ¶ 18; Declaration of Martha M. Lutz ("Lutz Decl.") ¶ 24 & n.1. They are predecisional in that they were generated prior to Executive Branch policy decisions, or contemplated decisions, regarding future counterterrorism operations. Second Bies Decl. ¶¶ 18-19. They are also deliberative, in that they contain, reflect or reveal discussions, proposals, and the "give and take" exchanges that characterize the government's deliberative processes. *Id*. For example, documents reflecting legal advice or internal Executive Branch legal deliberations constitute advice for use by decisionmakers during interagency deliberations about contemplated policy decisions. *Id.* ¶¶ 33, 45. Requests for legal advice, and information conveyed in the course of requesting or obtaining legal advice, are also part of the Executive Branch's deliberative process. They constitute inputs both to OLC's internal deliberative process for rendering legal advice, and to the broader Executive Branch decisionmaking process. *Id*. ¶ 39. Internal OLC work product is quintessentially deliberative, as it consists of drafts or preliminary thoughts regarding legal advice to be used by decisionmakers regarding future decisions. *Id*. ¶ 49.

The withheld documents containing classified factual material are also deliberative. The fact that these documents are in OLC's possession reflects Executive Branch deliberations regarding what information is relevant to certain Executive Branch policy decisions. *Id*. ¶ 53. Disclosing such documents would reveal privileged and confidential information about the nature

and subject of those deliberations, and that OLC and its Executive Branch clients considered the information contained in the documents potentially relevant to that determination. *Id*.

As Deputy Assistant Attorney General for OLC John E. Bies explains, requiring disclosure of the deliberative documents withheld by OLC

> would undermine the deliberative processes of the government and chill the candid and frank communication necessary for effective governmental decisionmaking. It is essential to OLC's mission and the deliberative processes of the Executive Branch that the development of OLC's considered legal advice not be inhibited by concerns about compelled public disclosure of predecisional matters, including factual information necessary to develop accurate and relevant legal advice, and draft analysis reflecting preliminary thoughts and ideas. Protecting the challenged withholdings from compelled disclosure is critical to ensuring that Executive Branch attorneys will be able to examine relevant facts and analysis, and draft and vet legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters.

Id. ¶ 19; *see also id.* ¶¶ 33, 39, 45. These documents are therefore protected by the deliberative process privilege. *See, e.g.*, *Tigue*, 312 F.3d at 80 ("recommendations, draft documents, proposals, suggestions" protected by deliberative process privilege); *Nat'l Council of La Raza*, 411 F.3d at 356–57 (same for legal advice); *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 10 (D.C. Cir. 2014) (OLC opinion protected by deliberative process privilege).

b. The Deliberative Documents Are Also Protected by the 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 deliberative materials withheld by OLC are protected by the attorney-client privilege. As noted, many of the documents contain legal advice or drafts of legal advice that was ultimately communicated in confidence from OLC to Executive Branch clients. Second Bies Decl. ¶ 21; *see also id*. ¶¶ 34, 46, 50. In addition, the existence and content of some of the documents may reflect the privileged fact that a client requested confidential legal advice on a particular subject. *Id.* ¶ 21. Many of the documents at issue also contain factual material that was communicated in confidence by Executive Branch clients to OLC for the purpose of obtaining confidential legal advice. *Id.*; *see also id.* ¶¶ 36, 42, 50, 54. These confidential advice documents and client confidences have not been made public, and have been maintained confidentially within the government. *See id.* ¶¶ 35, 41, 46, 50, 54. They easily fall within the realm of the attorney-client privilege. *See In re Cnty. of Erie*, 473 F.3d at 418; *Nat'l Council of La Raza*, 411 F.3d at 360.

c. One or More Documents Are Also Protected by the 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 privilege covers final and post-decisional materials as well as predecisional and deliberative ones. *Id.*; *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010).

One or more of the challenged OLC withholdings includes material covered by the presidential communications privilege, for reasons explained in the government's *ex parte* submission. Second Bies Decl. ¶ 22.

2. The Deliberative Documents Contain Classified Information That Is Exempt From Disclosure Under Exemption 1

Exemption 1 exempts from public disclosure matters 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 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).

Except as explained in the classified, *ex parte* Lutz and Harris declarations, all of the deliberative materials withheld by OLC contain classified information that meets these criteria and is currently and properly classified under Executive Order 13526. This information is related or similar in kind to the information in the OLC-DOD Memorandum that the Second Circuit has already held to be properly classified. *See New York Times*, 756 F.3d at 113 ("We agree with the District Court's conclusions that the OLC[-]DOD Memorandum was properly classified and that no waiver of any operational details in that document has occurred."); *see also id*. (redacting "the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities").[4] Related or similar information in the other OLC records is likewise properly classified and exempt from disclosure under Exemption 1.

The CIA has reviewed the OLC records in which that agency's equities are at issue, and determined that viewed in context each of those documents contains information—specifically, factual information provided to OLC and analysis incorporating those details—that is currently

[4] Although the ACLU has indicated that it may seek release of additional factual material from the OLC-DOD Memorandum, the ACLU did not seek further review of the Second Circuit's rulings, and it has no basis to revisit those rulings before this Court.

and properly classified pursuant to Executive Order 13526. Lutz Decl. ¶¶ 16, 20. The CIA information withheld in these materials consists of intelligence activities, sources and methods protected by section 1.4(c) of the Executive Order. *See id*. As the CIA explains,

> Although the U.S. Government has officially acknowledged some information about the continuing and imminent threat that Aulaqi posed to the United States, the information contained in these records goes beyond what has been disclosed. These records show the means by which this intelligence about Aulaqi was obtained as well as undisclosed details about Aulaqi's terrorist activities – all of which remain classified. Although Aulaqi is deceased, many of his associates in al-Qa'ida in the Arabian Peninsula ("AQAP") remain at large and continue to plot attacks against the United States and U.S. interests abroad. Additionally, these records also contain CIA intelligence on other subjects, disclosure of which would reveal the sources and methods of that collection. . . . [T]here has been no official acknowledgment of this information.

Id. ¶ 21.

Disclosure of this information reasonably could be expected to cause serious—and in some cases, exceptionally grave—damage to the national security. *Id.* ¶ 22. For example, it would greatly benefit AQAP and other terrorist organizations to know which clandestine sources and methods were used to obtain information about Aulaqi and other subjects, and the specific intelligence that those techniques produced. *Id*. This information could be used by AQAP and other terrorist organizations to uncover current collection activities and take countermeasures to avoid future detection by Intelligence Community agencies. *Id*. In some instances, even indirect references to information obtained by classified sources and methods must be protected. *Id*. Terrorist organizations have the capacity and ability to gather information from myriad public sources, analyze it, and determine the means and methods of intelligence collection from disparate details. *Id*. Accordingly, even seemingly innocuous, indirect references to an intelligence method could have significant adverse effects when coupled with other publicly-available data. *Id*.; *see ACLU*, 681 F.3d at 71 (acknowledging that "even if the redacted information seems

innocuous in the context of what is already known by the public, minor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of a jigsaw puzzle, each detail may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself" (citations, alteration and internal quotation marks omitted)).

DOD has also withheld certain information in the OLC deliberative documents pursuant to Exemption 1, including classified factual material related to the OLC-DOD Memorandum, other classified factual information relating to legal advice, and source documents provided by the Intelligence Community that are referred to in the OLC-DOD Memorandum. Harris Decl. ¶¶ 12, 14-15. This information continues to be properly classified under Executive Order 13526. *Id*. The Second Circuit concluded as much with regard to the factual information in the OLC-DOD Memorandum. *See New York Times*, 756 F.3d at 113. The information pertains to intelligence sources and methods, military operational details, or relationships with a foreign government, the disclosure of which could provide valuable information to our enemies, including AQAP, and afford them an opportunity to alter their behavior in ways to avoid detection. Harris Decl. ¶¶ 13, 15. Disclosure of this information would harm national security by permitting adversaries to thwart U.S. intelligence collection and counterterrorism measures. *Id*. The Intelligence Community source documents provide even greater detail regarding the underlying intelligence sources and methods and other classified information. *Id*. ¶ 15. Such documents are plainly within the scope of Exemption 1 under the Second Circuit's ruling. *See New York Times*, 756 F.3d at 113, 119 (upholding withholding of "operational details" and "any mention of intelligence gathering activities").

3. The Deliberative Documents Contain Information That Is Exempt From Disclosure 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, a court determines 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). Thus, a 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." *Krikorian*, 984 F.2d at 465. Significantly, 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 exemption statute at issue here is section 102A(i)(1) of the National Security Act ("NSA"), as amended, 50 U.S.C. § 403-1(i)(1). That statute provides that "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." It is well settled that section 102A(i)(1) of the NSA is an exemption statute under Exemption 3. *Id.* (citing *Larson*, 565 F.3d at 865).

For the reasons discussed above with regard to Exemption 1, the classified information in the deliberative OLC documents constitutes intelligence sources and methods protected from disclosure under section 102A(i)(1) of the NSA and Exemption 3. Lutz Decl. ¶ 23; *see ACLU*, 681 F.3d at 67, 73-76 (upholding withholding of interrogation records, including cables, emails, and notes, and other records under Exemption 3). Although no showing of harm is required under Exemption 3, as explained above, the release of this information could significantly damage the ability of the CIA and other members of the Intelligence Community to collect and analyze foreign intelligence information. Lutz Decl. ¶ 23.

B. Other Classified Documents

Two of the documents, identified as Documents 8 and 9 on the redacted OLC index, are not subject to Exemption 5, but are nevertheless exempt from disclosure in whole or in part under Exemptions 1 and 3. Second Bies Decl. ¶ 14.

As explained in the Lutz declaration, Document 9 is a classified White Paper, dated May 25, 2011, that was prepared by DOJ for Congress and discusses the legal basis upon which the CIA could use lethal force in Yemen against a U.S. citizen. Lutz Decl. ¶ 19; *see also* Second Bies Decl. ¶ 12.g (withheld OLC documents include classified legal analysis prepared for congressional oversight purposes); *see, e.g.*, Redacted OLC Index, No. 9. Although the paper does not mention the U.S. citizen by name, the target of the contemplated operation was Aulaqi. Lutz Decl. ¶ 19. The CIA reviewed Document 9 and determined that certain information could be publicly released, consistent with the earlier disclosures in the OLC-DOD Memorandum. *Id.* The document was released to plaintiffs in redacted form on September 5, 2014. The remaining information withheld from Document 9, however, remains currently and properly classified, as its disclosure could reasonably be expected to harm national security. *Id.*

Document 8 is also classified and exempt from disclosure in its entirety under Exemptions 1 and 3, for the reasons discussed above and in the government's *ex parte* submission. *See supra* at Point I.A.2-3.

II. There Has Been No Waiver of the Applicable Privileges or Exemptions

The Executive Branch has not waived any applicable privileges or exemptions with regard to either the legal advice or the factual material contained in the challenged OLC withholdings. Second Bies Decl. ¶ 23.

The Second Circuit found that a limited waiver had occurred with respect to certain portions of the legal analysis in the OLC-DOD Memorandum, based principally on the release in February 2013 of a draft unclassified Department of Justice White Paper containing some legal analysis similar to that in the OLC-DOD Memorandum, and on public statements acknowledging the identity of the relevant target of the operation (Anwar al-Aulaqi) and the existence of relevant OLC advice. *New York Times*, 756 F.3d at 114-21. The waiver found by the Second Circuit could only apply to legal analysis embodied in a final OLC legal advice document, such as an OLC opinion, where the analysis is the same as or closely related to legal analysis contained in the draft DOJ White Paper, and where the target at issue has been officially acknowledged by the U.S. Government. *See id.* at 120 (applying three-part test for official disclosure, that the information at issue be "as specific as the information previously released in the DOJ White Paper," "match[] the information previously disclosed," and have been "made public through an official and documented disclosure" (quoting *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (internal quotation marks omitted))); *see generally Public Citizen v. Dep't of State*, 11 F.3d 198, 201-04

(D.C. Cir. 1993) (discussing test for waiver of Exemption 1 protection). This standard is not met with respect to any of the OLC documents that the ACLU now seeks.

First, as noted above, the Second Circuit acknowledged that its finding of waiver did not extend to classified factual information in the OLC-DOD Memorandum. The panel explicitly held that this factual information remains exempt from disclosure, and permitted the redaction, in its entirety, of the section of the memorandum containing factual material. *See New York Times*, 756 F.3d at 113, 119. In addition to being classified, this same factual information consists of confidential information provided by OLC's Executive Branch clients for the purpose of obtaining legal advice, and therefore constitutes privileged client communications. Second Bies Decl. ¶¶ 36, 40, 50, 54; *In re Cnty. of Erie*, 473 F.3d at 419. Applying these principles, all privileged and/or classified factual material contained in the challenged withholdings, and all documents consisting entirely of privileged and/or classified factual material, remain exempt from disclosure. Second Bies Decl. ¶¶ 25, 36, 38, 44, 48, 52, 55.

Second, the waiver found by the Second Circuit does not extend to other confidential and classified legal advice provided by OLC that is not the same as or closely related to the legal analysis in the draft DOJ White Paper and pertaining to the same target; confidential and classified communications from clients made in the course of requesting or obtaining OLC legal advice; other confidential and classified deliberative materials, such as the interagency exchange of legal views and arguments; or OLC work product such as drafts, notes or outlines containing legal thoughts, ideas, theories, and preliminary analysis. *Id*. ¶¶ 26-28, 37, 43, 47, 51. Nor have applicable privileges or exemptions been waived with respect to references to the date, title, or recipient of analysis contained in other nonpublic OLC opinions and memoranda cited in any of

the challenged withholdings. *Id*. ¶¶ 29-30. OLC's withholdings therefore do not fall within the scope of the waiver found by the Second Circuit.

III. The Government Has Released All Reasonably Segregable, Non-Exempt Information in the OLC Documents

The Court's September 5 Order also directed the government to explain, as to each document, "what would have to be redacted from a document were either the Government or the court to conclude that disclosure was otherwise appropriate." The government has carefully reviewed each of the OLC records and released all reasonably segregable, non-exempt information. *See* Second Bies Decl. ¶ 56; Harris Decl. ¶¶ 12, 15, 18; Lutz Decl. ¶¶ 19, 24. Because the government has determined that it cannot release any further material without revealing exempt information, we cannot at this time identify specific redactions that would be appropriate "were either the Government or the court to conclude that disclosure was otherwise appropriate."

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment with respect to the OLC documents.

Dated: October 3, 2014

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

PREET BHARARA
United States Attorney for the
Southern District of New York

By: */s/ Elizabeth J. Shapiro*
ELIZABETH J. SHAPIRO
AMY POWELL
20 Massachusetts Ave., NW
Washington, D.C. 20530.
Telephone: (202) 514-5302
Facsimile: (202) 616-8470
Elizabeth.Shapiro@usdoj.gov

By: */s/ Sarah S. Normand*
SARAH S. NORMAND
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Telephone: (212) 637-2709
Facsimile: (212) 637-2730
Sarah.Normand@usdoj.gov