UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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American Civil Liberties Union and The American Civil Liberties Union Foundation

Plaintiff,

-v-

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

Defendant.

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12-CV-00794-CM

MEMORANDUM IN SUPPORT OF PLAINTIFFS THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (together the "ACLU") submit this memorandum in support of their cross-motion for summary judgment for disclosure of certain records withheld by the Department of Justice's Office of Legal Counsel ("OLC").[1] To justify its withholding of these records, the government invokes FOIA Exemptions 1, 3, and 5. As explained below, however, the government has "officially acknowledged" some of the information it is withholding, and to the extent it has done so, the government's reliance on the exemptions is unlawful. Even if the government had not officially acknowledged any of the withheld information, the government's reliance on Exemptions 1 and 3 is unlawful insofar as the withheld information consists of legal analysis. Legal analysis is not an intelligence source or method, and it cannot lawfully be classified. Moreover, the government's invocation of Exemption 5 to shield legal analysis should be rejected because the government's public declarations do not provide a factual basis for the application of any of the relevant privileges.

For these reasons and the further reasons discussed below, Plaintiffs respectfully ask the Court to review the withheld OLC records *in camera* to determine (i) which portions of the records must be released because they consist of information that has been officially acknowledged; and (ii) which portions of the records must be released because they consist of legal analysis.

[1] This motion relates to all records listed on the Office of Legal Counsel's October 3, 2014 redacted *Vaughn* index, Dist. Ct. Dkt. 81-2, with the exception of the legal memoranda that this Court addressed in its Decision on Remand dated September 30, 2014. A redacted version of that opinion was filed on the public docket on October 31, 2014. Dist. Ct. Dkt. 90.

PROCEDURAL HISTORY

The ACLU first submitted the FOIA request underlying this suit in 2011, in an effort to help the public better assess the wisdom and lawfulness of the government's use of unmanned armed vehicles ("drones") to carry out "targeted killings" of U.S. citizens.[2] OLC initially issued a "Glomar" response, refusing to confirm or deny the existence of responsive records. After exhausting administrative appeals, the ACLU filed suit on February 1, 2012. OLC subsequently modified its response, acknowledging that it was withholding classified records but asserting that FOIA Exemptions 1 and 3, 5 U.S.C. § 552(b)(1), (3), excused it from having to enumerate the records or describe them—a so-called "no number no list response."[3] First Declaration of John E. Bies ("First Bies Decl.") ¶ 38, Dist. Ct. Dkt. 29. After considering the parties' cross-motions for summary judgment, this Court entered judgment for the defendants. *New York Times v. Dep't of Justice*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013).

On appeal, the Second Circuit affirmed in part, reversed in part, and remanded. *New York Times v. U.S. Dep't of Justice*, 756 F.3d 100 (2d Cir. 2014). Concurrently with the issuance of its revised opinion, the Second Circuit published a redacted version of a July 2010 OLC opinion ("July 2010 OLC-DOD Memorandum"), portions of which that Court held "no longer merit[ed] secrecy" because the government had officially acknowledged the relevant facts or analysis. *Id.* at 117. The Court ordered that "other legal memoranda prepared by OLC . . . be submitted to the

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[2] The ACLU submitted its FOIA request to three agencies: the Department of Justice ("DOJ") (including DOJ's component agencies, Office of Information Policy ("OIP") and OLC), the Department of Defense ("DOD"), and the Central Intelligence Agency ("CIA"). This Court has established a separate briefing schedule to resolve issues relating to withholdings by DOD and CIA. Dist. Ct. Dkt. 78.

[3] OLC did provide brief descriptions of two withheld records, including the memorandum later published in redacted form by the Second Circuit. First Bies Decl. ¶ 30, 38, 45. OLC also provided a *Vaughn* index listing sixty non-classified responsive emails. First Bies Decl. ¶ 37, Ex. I. The ACLU does not seek disclosure of these emails. Pl's Mem. in Support/Opp'n at 48 n.44. Dist Ct. Dkt. 35.

District Court for *in camera* inspection and determination of waiver of privileges and appropriate redaction." *Id.*, 756 F.3d at 124. In addition, the Court ordered the government to produce a redacted version of the OLC's classified *Vaughn* index—which had earlier been submitted to this Court *ex parte*—for adjudication of the government's claimed withholdings. *Id.*, 756 F.3d at 124.

The government provided this Court with ten OLC memoranda for *in camera* review on August 15, 2014, and provided Plaintiffs with a redacted version of its classified *Vaughn* index on September 12, 2014. The government also released redacted versions of two records that had previously been withheld in their entirety. The first was an OLC memorandum dated February 19, 2010 and authored by David Barron ("February 2010 Memorandum"). The second was a White Paper dated May 25, 2011 ("May 2011 White Paper"), titled "Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen." Both records contained legal analysis similar to that contained in the July 2010 OLC-DOD memorandum.

The OLC contended that all but two records identified on its index were properly withheld in full under Exemptions 1, 3, and 5.[4] On September 5, 2014, the Court instructed Plaintiffs to identify the documents whose withholding they intended to challenge. Dist. Ct. Dkt. 75. The Court also ordered the Government to justify, on a document-by-document basis, why any record requested by the ACLU from the OLC *Vaughn* index should be exempt from disclosure. *Id.*

Pursuant to the Court's order, the ACLU informed the government and the Court that it was seeking production of all records listed on the OLC *Vaughn* index with the exception of:

[4] The two exceptions are numbered 8 and 9 on the OLC Vaughn index. Document number 9 is the May 2011 White Paper. Declaration of Martha Lutz ("Lutz Decl.") ¶ 19, Dist. Ct. Dkt. 82. The government's public declarations do not describe document number 8. The government has withheld both documents in their entirety under Exemptions 1 and 3.

- Records identified as drafts of document numbers 4 and 5;[5]
- Records identified as "open source media materials"; and
- Draft legal memoranda whose final versions were also listed on the index.[6]

Dist. Ct. Dkt. No. 78.[7]

On September 30, 2014, the Court issued an order and opinion with respect to the memoranda the Second Circuit directed it to review *in camera*. Decision on Remand, Dist. Ct. Dkt. 52. The opinion upheld OLC's withholding in full of eight legal memoranda but ordered the disclosure of redacted versions of two legal memoranda. *Id.*

On October 3, the government moved for summary judgment with respect to all of the documents on OLC's *Vaughn* index. Dist. Ct. Dkt. 79.

STANDARD OF REVIEW

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed . . . to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The statute contemplates a "strong presumption in favor of disclosure." *Associated Press v. Dep't of Defense*, 554 F.3d 274, 283 (2d Cir. 2009). It requires disclosure of responsive records except to the extent that the records fall within specific statutory exemptions, and these exemptions are given "a narrow compass." *Milner v. Dep't of Navy,* 131 S.Ct. 1259, 1265 (2011). Even where portions of a record fall within one of the statutory exemptions, "[a]ny reasonably segregable portion of a record shall be

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[5] Document number 4 is the February 2010 Memorandum. Document number 5 is the July 2010 OLC-DOD Memorandum.

[6] The ACLU also indicated that it would forgo its claim to certain records if the government represented that the records did not mention Abdulrahman al-Aulaqi, Dist. Ct. Dkt. 76 at 2, but the government declined to make such a representation, *see* Gov't Memo Summ. J., Dist. Ct. Dkt. 80 at 4, n. 2.

[7] A revised redacted OLC *Vaughn* index reflecting only those records challenged by the ACLU is appended to the Second Bies Decl. Dist. Ct. Dkt. 81-2.

provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b); *Inner City Press/Cmty. on the Move v. Board of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.10 (2d Cir. 2006).

At summary judgment, the heavy burden of justifying the withholding of responsive records belongs to the government. *Bloomberg, L.P. v. Bd. Of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010). The court's review of an agency's claimed withholdings is *de novo*, and "all doubts [are] resolved in favor of disclosure." *Id.*; 5 U.S.C. § 552(a)(4)(B). The agency must provide "reasonably detailed explanations why any withheld documents fall within an exemption." *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). "[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not . . . carry the government's burden." *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2000).

The agency's burden—and the court's obligation to review the agency's withholdings *de novo*—applies with equal force to cases invoking national security concerns. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (finding that courts do not "relinquish[] their independent responsibility" to review agency's withholdings de novo in national security context); see *CIA v. Sims*, 471 U.S. 159, 188-89 (1985) ("[T]his sort of judicial role is essential if the balance Congress believed ought to be struck between disclosure and national security is to be struck in practice." (citation omitted)); *ACLU v. Dep't of Defense*, 389 F. Supp. 2d 547, 552 (S.D.N.Y. 2005) (referencing the responsibility of the judge to determine *de novo* withholdings under national security exemption).

ARGUMENT

I. The "official acknowledgement" doctrine precludes OLC from withholding much of the information it now seeks to withhold.

A. The withheld records must be disclosed to the extent the government has otherwise disclosed the same or similar information.

"Voluntary disclosures of all or part of a document may waive an otherwise valid exemption." *New York Times*, 756 F.3d at 114 (citing *Dow Jones & Co., Inc. v. Dep't of Justice*, 880 F.Supp. 145, 150-51 (S.D.N.Y. 1995)). Thus, even if one assumes that all of the information the OLC now seeks to withhold could *once* have been withheld under Exemptions 1, 3, and 5 (an assumption that is incorrect in at least one important respect, *see* Section II, *infra*), OLC cannot lawfully withhold information if it has already disclosed the same or closely related information in other contexts. *New York Times*, 756 F.3d at 114 (discussing application of official-acknowledgement doctrine to Exemption 5); *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (discussing application of official-acknowledgement doctrine to Exemptions 1 and 3).

The government does not take issue with the general proposition that an agency cannot lawfully withhold information that has been officially acknowledged, but it contends that the official-acknowledgement doctrine must be applied rigidly. Gov't Br. 21. It bases its position on *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009), which stated that the doctrine would apply where withheld information "[is] as specific as the information previously released" and "match[es] the information previously disclosed." But that case did not purport to describe exhaustively all of the circumstances in which official-acknowledgement doctrine would apply, and recent decisions of the Second Circuit and D.C. Circuit make clear that the doctrine should *not* be applied overly rigidly. In the instant case, for example, the Second Circuit considered disclosures by legislators and former executive-branch officials as well as disclosures by current executive-branch officials. *Id.* at 118-19, 119 n.18. It found that "[e]ven if [statements by

government officials] assuring the public of the lawfulness of targeted killings are not themselves sufficiently detailed to establish waiver . . . they establish the context in which [other disclosures] . . . should be evaluated." *New York Times*, 756 F.3d at 115. Even as it described *Wilson* as "the law of this Circuit," the Court cautioned that an overly stringent application of it "may not be warranted." *Id.* at n.19 (discussing "questionable provenance" of *Wilson's* "matching" test); *see also ACLU v. CIA*, 710 F.3d 422, 429-30 (D.C. Cir. 2013). And in *Ameziane v. Obama*, 699 F.3d 488, 493 (D.C. Cir. 2012), the D.C. Circuit rejected the proposition that the doctrine applied only to disclosures by the executive branch, finding in that case that the doctrine would apply to a disclosure made by counsel to a prisoner held at Guantanamo Bay.[8]

Common sense also weighs against an overly strict reading of *Wilson's* "matching" test. FOIA's exemptions were meant to accommodate the government's legitimate interest in protecting information that is classified or otherwise sensitive. They were not meant to facilitate propaganda campaigns in the course of which government officials disclose information selectively in order to cast their own decisions in the most favorable light, or to mislead the public about the nature or import of the government's policies. As discussed below, government officials have made copious disclosures meant to persuade the public that the drone program is lawful and effective and that the government's killing of three Americans in Yemen was

[8] Courts have held that even private actors may officially acknowledge "state secrets" if they have been afforded privileged access to information at issue. *See Terkel v. AT & T Corp.*, 441 F. Supp. 2d 899, 913 (N.D. Ill. 2006) (citing *Heptig v. AT & T Corp.*, 439 F.Supp.2d 974, 987-89, 991-94 (N.D. Cal. 2006)).

justified. FOIA now forecloses OLC from withholding information that is the same or closely related to the information already disclosed.[9]

B. Some of the information the OLC seeks to withhold has been disclosed by the government in other contexts.[10]

The government has officially acknowledged at least some of the information it is now withholding. In particular:

1. The government has disclosed basic facts about the drone program.

- The government has acknowledged that it uses drones to carry out targeted killings overseas. *New York Times*, 756 F.3d at 118-120; *see also* Declaration of Colin Wicker ("Wicker Dec.") Exhibit 1.
- The government has acknowledged that both the DOD and the CIA have an *intelligence interest* in the use of drones to carry out targeted killings. The government earlier contended that it had not acknowledged that the CIA, in addition to the DOD, had an intelligence interest in the practice of targeted killings, but the Second Circuit rejected that contention. *New York Times*, 756 F.3d at 118-119; *ACLU v. CIA*, 710 F.3d at 430 (concluding that CIA's intelligence interest in drone strikes has been officially acknowledged).
- The government has acknowledged that both the DOD and the CIA have an *operational role* in conducting targeted killings. The government earlier

[9] Selective disclosure was one of the evils that FOIA was meant to address. *See e.g.*, Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966) ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear."), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles at 59 (1974).

[10] The Court's Rules of Practice instruct litigants to include all relevant facts in a single section. To avoid duplication, Plaintiffs have not included a "Factual Background" section in this brief, but they have consolidated all of the relevant facts in this section.

contended that it had not acknowledged that the CIA had an operational role in targeted killings, but the Second Circuit rejected this argument. *New York Times*, 756 F.3d at 122 ("[T]he statements of Panetta when he was Director of CIA and later Secretary of Defense . . . have already publicly identified CIA as an agency that had an operational role in targeted drone killings").

2. The government has disclosed information about the program's legal basis.

- The government has disclosed its analysis of 18 U.S.C. § 1119. As the Second Circuit concluded, the government has disclosed its analysis of the statute that makes it a crime for "a national of the United States, [to] kill [] or attempt[] to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country." *New York Times*, 756 F.3d at 117 (quoting 18 U.S.C. § 1119). The public versions of the July 2010 OLC-DOD memorandum and the May 2011 White Paper all analyze the import of the statute, including the applicability of the "public authority" doctrine, at considerable length. The same is true of another White Paper, titled "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Leader of Al-Qa'ida or an Associated Force," dated November 8, 2011, and released by the government on February 4, 2013 (Nov. 2011 White Paper). Wicker Dec. Ex. 2. The Second Circuit explained that the "16-page, single-spaced DOJ White Paper virtually parallels the OLC-DOD Memorandum in its analysis of the lawfulness of targeted killings." *New York Times*, 756 F.3d at 116.
- The government has disclosed its analysis of 18 U.S.C. § 956(a), a statute that criminalizes conspiracy to commit murder abroad. *New York Times*, 756 F.3d at

116 ("Even though the DOJ White Paper does not discuss 18 U.S.C. § 956(a), which the OLD-DOD Memorandum considers, the substantial overlap in legal analysis in the two documents fully establishes that the Government may no longer claim that the legal analysis in the Memorandum is a secret"). *See also* Wicker Dec. Ex. 3 at 17-18 (concluding that Section 956(a) does not prohibit the CIA from lethally targeting an American citizen abroad).

- The government has disclosed its analysis of the War Crimes Act, 18 U.S.C. § 2441(a), which makes it a crime for a member of the United States armed forces of a United States national to "commit[] a war crime." The War Crimes Act is analyzed in the July 2010 OLC-DOD memorandum, the Nov. 2011 White Paper, and the May 2011 White Paper. Wicker Dec. Exs. 2 at 16, 3 at 18-19, and 4 at 37.
- The government has disclosed its analysis of Executive Order No. 12333. The Nov. 2011 White Paper and the February Memorandum discuss whether the targeted killing would violate the assassination ban in Executive Order No. 12333. 46 Fed. Reg. 59941 (Dec 4, 1981). Wicker Dec. Ex. 3.
- The government has disclosed its constitutional analysis. *New York Times*, 756 F.3d at 116 (observing that the OLC-DOD Memorandum analyzes explained "why the contemplated killing would not violate the Fourth or Fifth Amendments of the Constitution"). The memoranda and White Papers also discuss the government's constitutional analysis, including the government's definition of "imminence."
- The government has disclosed the existence of other legal opinions addressing the program. Senator Dianne Feinstein, Chairman of the Senate Select Committee on

Intelligence, has acknowledged the existence of additional "OLC opinions" addressing the "legal authority to strike U.S. citizens." Wicker Dec. Ex. 5.

3. The government has disclosed that it carried out the targeted killing of Anwar al-Aulaqi.

- The government has acknowledged that it placed Anwar al-Aulaqi on a "kill list" in 2010. In March 2010, Leon Panetta, then Director of the CIA, said of al-Aulaqi: "He's clearly someone that we're looking for … [t]here isn't any question that he's one of the individuals that we're focusing on." Wicker Dec. Ex. 6. Panetta asserted that al-Aulaqi inspired "additional attacks on the United States." *Id.* Panetta also said: "Awlaki is a terrorist, and yes, he's a US Citizen, but he is first and foremost a terrorist and we're going to treat him like a terrorist." Wicker Dex. Ex. 7 at 4. Panetta later said that "[w]e don't have an assassination list, but I can tell you this, we have a terrorist list and [al-Aulaqi's] on it." *Id.* In July 2010, the United States Department of Treasury placed al-Aulaqi on a terrorism watch list asserting that he "has proved that he is extraordinarily dangerous, committed to carrying out deadly attacks on Americans and others worldwide." Wicker Dec. Ex. 8.
- The government has acknowledged that it specifically targeted Anwar al-Aulaqi and that it killed two other Americans, Samir Khan and Abdulrahman al-Aulaqi. *New York Times*, 756 F.3d at 118 ("[i]t is no secret that al-Awlaki was killed in Yemen"). On May 22, 2013, Attorney General Eric Holder sent a letter to Congress acknowledging that the United States had "specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi," and that it had also killed Abdulrahman al-Aulaqi and Samir Khan. Attorney General Holder stated that Samir Khan and

Abdulrahman al-Aulaqi "were not specifically targeted by the United States." Wicker Dec. Ex. 9.

- The government has acknowledged that the CIA had an operational role in the killing of Anwar al-Aulaqi. *New York Times*, 756 F.3d at 118 (government acknowledged that CIA "had an operational role in the drone strike that killed al-Awlaki").

4. The government has disclosed information relating to why it targeted Anwar al-Aulaqi.

- The government has disclosed that it believed al-Aulaqi had a leadership role in al-Qaeda in the Arabian Peninsula (AQAP). In February 2011, Director of the United States National Counterterrorism Center Michael Leiter testified before the House Committee on Homeland Security, where he stated that he considered "al-Qaeda in the Arabian Peninsula with al-Awlaki as a leader within that organization probably the most significant risk to the U.S. homeland." Wicker Dec. Ex. 10 at 26. President Obama also called al-Aulaqi "a leader of al Qaeda in the Arabian Peninsula" and "the leader of external operations for al Qaeda." Wicker Dec. Ex. 11.
- The government has disclosed that it believed that al-Aulaqi directed the failed attempt to bomb a Northwest Airlines jetliner on Christmas 2009. These allegations were further detailed in a Sentencing Memorandum filed in the prosecution of Abdulmutallab, in which the government alleged that the defendant was instructed and enabled by al-Aulaqi to carry out the airliner attack. Wicker Dec. Ex. 12 at 13-14. According to the same memorandum, Abdulmutallab met Samir Khan in Yemen. *Id.*

- The government has disclosed that it believed that it could lawfully use lethal force against al-Aulaqi. In March 2012, Attorney General Eric Holder gave a speech at Northwestern University that outlined the considerations the government used in determining whether it could target and kill American citizens. The Attorney General claimed the use of lethal force is justified against an American who "has become an operational leader of al-Qaeda in a foreign land." Wicker Dec. Ex. 13. Then, on May 22, 2013, Attorney General Holder asserted in a letter to the Chairman of the House Judiciary Committee that al-Aulaqi "plainly satisfied all of the conditions I outlined in my speech at Northwestern" to justify the use of lethal force against an American citizen. Wicker Dec. Ex. 9.
- The government has disclosed that it believed that Samir Khan was involved in "jihad." On September 18, 2014, the Federal Bureau of Investigation ("FBI") released a redacted version of Khan's FBI file pursuant to a FOIA request. Wicker Dec. Ex. 14. The file indicates that the FBI began investigating Khan in January 2007, based on "his jihadist rhetoric and FBI source reporting of his intention to travel to a Muslim state to conduct Jihad."[11] The file suggests that the FBI believed that Khan was using his blog and email accounts to "provide advi[c]e, recruit, or facilitate the travel of potential jihadists to the battlefields in Iraq or Afghanistan." The file also indicates that the FBI believed that Khan

[11] The FBI file described in Wicker Dec. Ex. 14 ("Khan FBI File") is available at the website containing the article. The quoted phrase can be found on page 11 of the file.

"ha[d] taken Arabic classes, possibly preparing to assist [the Global Islamic Media Front][12] and for overseas travel to conduct Jihad."[13]

C. Given the government's previous disclosures, the OLC has not justified the withholding of legal analysis.

As detailed above, the government has disclosed central aspects of its legal analysis of the targeted killing program, including analysis of statutory, constitutional, and international law; its definition of "imminence"; and the existence of additional OLC memoranda on which it has relied. To the extent that the records at issue on remand also contain this information, the government must disclose them. Importantly, the Second Circuit specifically recognized that waiver may apply even if the withheld legal analysis does not precisely match the legal analysis already released. *See*, *e.g.*, *New York Times*, 756 F.3d at 115 ("[e]ven though the DOJ White Paper does not discuss 18 U.S.C. § 956(a), which the OLC–DOD Memorandum considers, the substantial overlap in the legal analyses in the two documents fully establishes that the government may no longer validly claim that the legal analysis in the Memorandum is a secret."); *id.* at 120 (observing that because the government had already disclosed the legal framework for the program, "additional discussion of 18 U.S.C. § 956(a) in the OLC–DOD Memorandum adds nothing to the risk."). Indeed, the public interest in disclosure may be especially great if the legal rationales the government has offered publicly do not match the legal rationales in the records still withheld.

[12] The FBI file described the Global Islamic Media Front as a "a known terrorist organization associated with Al Qaeda in Iraq, primarily responsible for collecting raw material from Iraq, editing the content, and distributing the finished jihadist videos." Khan FBI File at 248.
[13] Khan FBI File at 189.

D. Given the government's previous disclosures, the OLC has not justified the withholding of information relating to the reasons it killed Anwar al-Aulaqi, Samir Khan, and Abdulrahman al-Aulaqi.

As discussed above, the government has disclosed at least some of the purported facts that led it to conclude that the targeted killing of al-Aulaqi would be appropriate and lawful. To the extent that the withheld records contain these facts or closely related facts, the records must be disclosed.

The OLC argues that the Second Circuit's waiver analysis extends only to legal analysis "where the analysis is the same as or closely related to legal analysis contained in the draft DOJ White Paper." Gov't Br. at 22; Second Bies Decl. ¶ 24-25. This is incorrect. The Second Circuit expressly recognized that the government's authority to withhold otherwise-classified and privileged facts did not extend to facts that had already been disclosed, and indeed it applied this general principle to at least one specific fact—the fact of CIA's involvement in the drone strike that killed Anwar al-Aulaqi in Yemen. *New York Times*, 756 F.3d at 117-118. The government's assertion that the Second Circuit foreclosed waiver for "all privileged and/or classified factual material contained in the challenged withholdings," Second Bies Decl. ¶ 25, misreads the Court's ruling and is inconsistent with well-settled law. The Second Circuit's analysis was necessarily limited to the OLC-DOD Memorandum because that memorandum was the only record before the Court. Even as to that memorandum, the Court did not engage in a wide-ranging analysis of the extent to which the government had waived its right to withhold the factual basis for the targeting of Anwar al-Aulaqi. The Second Circuit's remand, however, requires that the official-acknowledgement doctrine now be applied to all of the records withheld by OLC, and that the doctrine be applied not just with respect to legal analysis but with respect to facts as well. *New York Times*, 756 F.3d at 124.

To the extent that the government's argument is that Plaintiffs have waived their right to seek disclosure of factual information, or that this Court has already rejected Plaintiffs' right to this information, this argument, too, is misguided. Plaintiffs' FOIA request expressly seeks information about the factual basis underlying the government's killings of Anwar al-Aulaqi, Samir Khan, and Abdulrahman al-Aulaqi.[14] In earlier briefs, Plaintiffs specifically pressed their right to this information. See Pls.' Mot. Summ. J. at 4, 6, 19 n.16, Dist. Ct. Dkt. 35 (describing official disclosures of the factual basis of government's interest in Anwar al-Aulaqi and Samir Khan), and Pls'App. Br. at 6, 17, 19-20, Sec. Cir. Dkt. 75 (describing official acknowledgement of reasons for targeted killing of Anwar al-Aulaqi). This Court previously held that Plaintiffs are not entitled to "operational details of the targeted killing," *Dist. Co. Op.*, 915 F.Supp.2d at 536-37, and Plaintiffs do not take issue with this. *See also New York Times*, 756 F.3d at 113 (agreeing that Plaintiffs are not entitled to operational details of targeted killings). But Plaintiffs are seeking not operational details (e.g. the kinds of drones or munitions that were used, the precise circumstances of the strikes), but rather the factual basis upon which the government concluded that the strikes that killed three Americans were lawful. Plaintiffs submit that neither this Court

[14] With respect to Anwar al-Aulaqi, Plaintiffs' request seeks disclosure of "[a]ll documents and records pertaining to the *factual basis for the targeted killing* of Al–Awlaki, including:

> A. Facts supporting a belief that al-Awlaki posed an imminent threat to the United States or United States interests;
> B. Facts supporting a belief that al-Awlaki could not be captured or brought to justice using nonlethal means;
> C. Facts indicating that there was a legal justification for killings persons other than al-Awlaki, including other U.S. citizens, while attempting to kill al-Awlaki himself;
> D. Facts supporting the assertion that al-Awlaki was operationally involved in al Qaeda, rather than being involved merely in propaganda activities; and
> E. Any other facts relevant to the decision to authorize and execute the targeted killings of al-Awlaki."

Plaintiffs' request for factual bases information about Samir Khan and Abdulrahman al-Aulaqi is similarly focused on "facts relevant to the decision to kill [them] or the failure to avoid causing [their] death[s]." *New York Times*, 756 F.3d at 106 n.6.

nor the Second Circuit has considered the extent to which such facts must be disclosed, because the procedural posture of the case did not previously require the issue to be resolved.[15]

II. The OLC has not justified the withholding of legal analysis under Exemptions 1, 3, and 5.

As discussed above, the government has waived its authority to withhold legal analysis to the extent the analysis is closely related to the analysis already disclosed. Even if the government has not waived its authority to withhold legal analysis, however, the legal analysis must be disclosed because it is not withholdable under the exemptions the government invokes. Legal analysis is not a source or method, and accordingly it cannot be withheld under exemptions 1 or 3. While in some circumstances legal analysis can be withheld under exemption 5, here OLC has not established a factual basis for the application of that exemption here.

A. OLC has not justified the withholding of legal analysis under Exemptions 1 and 3.

To the extent that documents withheld under Exemptions 1 and 3 contain legal analysis, this information must be disclosed. The targeting killing program and the legal analysis purporting to authorize it are not "intelligence source[s] or method[s]" within the meaning of Executive Order No. 13526 § 1.4 (c), 75 Fed. Reg. 707 (Dec. 29, 2009) (relevant to Exception 1); the CIA Act, 50 U.S.C. § 403g ("CIA Act"); or the National Security Act, 50 U.S.C. § 403-1(i)(1) ("NSA") (relevant to Exception 3). Because neither of the government's withholding authorities protects legal analysis, the only question with respect to these exemptions is whether the legal analysis in the records can be segregated from material that is exempt. *New York Times*, 756 F.3d at 119.

[15] Again, even if some of the information in the withheld records has not been officially acknowledged, FOIA obliges the government to disclose the portions of the records that have been. As the Second Circuit has demonstrated in this case, courts are fully competent to make such segregability determinations in the national security context. *New York Times*, 756 F.3d at 120.

This Court previously held that legal analysis cannot be protected under Exemption 3 because "legal analysis is not an intelligence source or method" under the NSA. *Dist. Co. Op.* 915 F. Supp. 2d at 540 (citing *ACLU v. Dep't of Defense*, 389 F. Supp. 2d at 565 (S.D.N.Y.2005)). However, the Court also concluded that there was "no reason why legal analysis cannot be classified pursuant to E.O. 13526 if it pertains to matters that are themselves properly classified" and protected under Exemption 1. *Id.* at 535. It is not clear to Plaintiffs' whether this Court's reasoning with respect to the withholding of legal reasoning under Exemption 1 survives the Second Circuit's ruling. *New York Times*, 756 F.3d at 124. Because the Second Circuit determined that withholding of legal analysis in the OLC-DOD Memorandum had been waived, it expressly declined to decide whether legal analysis was an intelligence source or method subject to classification. *New York Times*, 756 F.3d at 114 n.13 ("We therefore need not consider the Appellants' claim that the legal analysis in the OLC–DOD Memorandum was not subject to classification").

In any event, Plaintiffs respectfully submit that this Court's earlier conclusion was incorrect. Courts have uniformly held that the category of information classifiable under section 1.4(c) is co-extensive with the category of "intelligence sources and methods" in the NSA. *See, e.g.*, *Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981); *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976). A contrary conclusion would dramatically expand the scope of government's withholdings authority. If legal analysis could be protected simply because it "pertain[ed]" to classified information, it is not clear why the government could not withhold every record relating in some way to national security. Moreover, the classification of legal analysis that "pertains" to any properly classified subject would quickly create a body of

secret law, a harm that FOIA was intended to prevent, *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 153-54 (1975).

If this Court's earlier ruling with respect to the withholding of legal analysis under Exemption 1 is the law of the case notwithstanding the Second Circuit's ruling, Plaintiffs respectfully reserve the right to seek further review of this Court's earlier ruling in the Second Circuit.

B. OLC has not justified the withholding of legal analysis under Exemption 5.

Exemption 5 protects information that would be shielded in litigation by traditional common-law privileges. *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005). Here, OLC claims that all but two of the records listed on its redacted *Vaughn* are protected by Exemption 5—for example by the attorney-client privilege, which protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance," *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007); or by the deliberative-process privilege, which protects records that are both "predecisional" and "deliberative." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (1999).[16]

The OLC has not established that any of the privileges covered by Exemption 5 actually apply. In fact the agency's public declarations lack anything approaching the detail that courts have required in other cases. For example, the government invokes the "attorney work product" privilege, Gov't Mot. Summ. J. at 8, Second Bies Decl. ¶ 12e, but its brief provides no argument regarding this doctrine and its public declarations are wholly conclusory. The work-product privilege is "limited to documents prepared in contemplation of litigation," *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980), and does not apply to policy-level

[16] "A document is predecisional when it is prepared in order to assist an agency decision maker in arriving at his decision." *Grand Cent.P'ship, Inc.*, 166 F.3d at 582. "A document is deliberative when it is actually . . . related to the process by which policies are formulated." *Id.*

analysis. It is the deliberative process privilege, not the work-product doctrine, that is implicated where the record "bear[s] on the formulation or exercise of policy-oriented judgment." *Tigue v. Dep't of Justice*, 312 F.3d 70, 80 (2d Cir. 2002). OLC does not assert, and has not shown, that any of the records at issue were prepared in contemplation of litigation.

The record is even more meager with respect to the OLC's invocation of the presidential communications privilege. The agency invokes that privilege for "one or more documents" but fails to identify the documents by index number or description. Gov't Mot. Summ. J at 14-15; Second Bies Decl. ¶ 22.

With respect to the attorney-client and deliberative-process privileges, the agency has failed to provide any meaningful detail about how the relevant documents were used, who they were shared with, and whether they were directed at a particular case. Without such detail, however, it is impossible to determine whether the documents are in fact attorney-client communications, whether the attorney-client privilege has been waived, whether the documents are pre-decisional (rather than final), or whether once-pre-decisional documents have been adopted as policy or treated as the agency's "working law." *Brennan Ctr. for Justice v. U.S. Dep't of Justice*, 697 F.3d 184, 195 (2d Cir. 2012) (citing *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. at 153, 161). A predecisional or otherwise privileged record loses its protection when it has been relied on as working law, or expressly adopted within the agency. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d at 866 ("[E]ven if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency's position on an issue or is used by the agency in dealings with the public").

Importantly, it is the agency's burden to establish that FOIA exemptions apply—not Plaintiffs' burden to establish that they do not. Here, the agency's declarations simply do not provide a foundation for application of Exemption 5.[17]

CONCLUSION

For these reasons, the Court should deny the government's motion for summary judgment and review the withheld records in camera to determine (i) which portions of the records must be released because they consist of information that has been officially acknowledged; and (ii) which portions of the records must be released because they consist of legal analysis.

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[17] To the extent the government's classified declarations provide for a fuller basis for the application of these privileges, Plaintiffs respectfully ask that the Court order the government to describe that basis more fully in public declarations.