May 29, 2018

BY ECF

Hon. Catherine O'Hagan Wolfe
Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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Re: *ACLU v. DOJ*, No. 17-157
(Argued May 15, 2018)

Dear Ms. Wolfe:

Plaintiffs–Appellees the American Civil Liberties Union and the American Civil Liberties Union Foundation respectfully submit this letter in response to the government's redacted letter dated May 22, 2018, ECF No. 93 ("Gov't Ltr."). The government's letter states that "all redactions in the Decision and Order" concerning certain "public statements by U.S. government officials" "remain necessary, for two reasons." Gov't Ltr. 1–2. While the first reason is entirely redacted from the public version of the letter, the government's second reason for redaction of public statements by government officials is that they are "intertwined with the district court's analysis" and removing redactions "would effectively reveal the district

court's ruling." Gov't Ltr. 2. Plaintiffs write to offer a brief response.

The government appears to seek these redactions because it is concerned that the district court's description of a government official's public statement, and the court's ruling on the effect of that statement, would somehow disclose information protected under the FOIA. In addressing this argument, it is helpful to set out two contexts in which these issues generally arise. In certain official-acknowledgment cases, such as when a court compares a public statement directly to the text of a withheld document, the comparison and analysis may reveal protected information if it is not redacted. However, in other cases—most commonly in the *Glomar* context—courts compare a public statement *not* to a specific document, but rather to a general category of information. *See, e.g.*, *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013). In those cases, courts compare a public statement to information sought in a FOIA request; if a court finds that a government official has publicly disclosed a category of information, it holds that the government cannot lawfully refuse to confirm or deny that it possesses records relating to that information. Because rulings in this second context do not refer to or rely on any protected information in a specific document, neither the ruling nor the analysis needs to be redacted, even pending appeal. *See, e.g.*, *Smith v. CIA*, 246 F. Supp. 3d 28, 33–34 (D.D.C. 2017) (holding

that President Obama had officially acknowledged the existence of records).

Although this case takes an atypical form, the district court's analysis resembles that of a *Glomar* case. *See* SPA 22–25. The opinion contains an over-arching official-acknowledgment section, in which the analysis apparently does not refer to any specific documents or any potentially exempt information contained in those documents. *See* SPA 22–40. The district court discusses public statements and compares them to topics covered by Plaintiffs' FOIA request (framed as proposed "official acknowledgments"), without analyzing whether the facts appear in specific documents (a task the court says it will undertake in the following sections). *See id.*; SPA 40. If this is indeed how the court conducted its analysis of the parties' public arguments, the official-acknowledgment section poses no risk at all of actually disclosing protected information. Redaction of the district court's abstract assessment about the effect of Secretary Kerry's statement is unjustifiable. *See* ACLU Br. 29, ECF No. 47. Just as these rulings and analyses are not redacted in *Glomar* cases, they should not be redacted here.

Critically, this is especially true because neither the subject of the disputed official acknowledgment nor the district court's resolution of it is a secret. The redacted text is in a section explicitly and publicly titled "The government conducts targeted killings in Pakistan, including through the use

of drones"—a category of information that falls within Plaintiffs' FOIA request. SPA 22 (emphasis removed). As Plaintiffs previously explained, the district court addresses "four public statements" in that section. SPA 22 (listing one statement each by Secretary of State John Kerry and Press Secretary Jay Carney and two by CIA Director Leon Panetta); ACLU Br. 9–10. Three of those statements are discussed in public and the only one that is not publicly analyzed is Secretary Kerry's. *See* ACLU Br. 10. Thus, it is not even arguably a secret that the government is seeking to protect the fact that the district court agreed with Plaintiffs that Secretary Kerry's statement constituted an official acknowledgment of some kind. As a result, the district court's particular "emphasis," "paraphras[ing]," and "selective[] quot[ing]" of this public statement, *see* Gov't Ltr. 2, are irrelevant. In short, because Secretary Kerry's statement is not a secret, neither is the district court's interpretation and application of a legal test to that statement. To the extent the opinion's analysis and ruling on SPA 22–29 merely adjudicates a dispute publicly briefed by the parties, redaction is unjustifiable. This is true whether or not the district court later, separately, addresses the effect of Secretary Kerry's statement on the government's withholding claims concerning any specific document, even one viewed *in camera*.

If the government's redactions *do* hide the relevance of the official-

acknowledgment ruling to specific documents later in the opinion, those sections may only remain redacted if this Court rules that the information is exempt under FOIA. In an ordinary *Glomar* case decided against the government in the district court, the government could appeal before *actually* acknowledging the existence of responsive records. Here, if the existence of records responsive to this category of information is hidden beneath redactions later in the opinion—and indeed, the government itself publicly indicated that the district court's ruling may "potentially implicate[]" two documents, *see* Gov't Br. 2, ECF No. 33— the government was entitled to redact those sections pending appeal.

But those sections may only remain permanently redacted if *this Court* rules that the relevant sections of the district court's opinion contain "information properly withheld under an applicable FOIA exemption"—in this case, Exemption 1. *See N.Y. Times Co. v. DOJ*, 806 F.3d 682, 688 (2d Cir. 2015). In effect, this means that to justify continued redaction of these sections, this Court must determine either that the existence of a drone program in Pakistan has not been officially acknowledged—which, as Plaintiffs have respectfully urged, is not logical or plausible, *see* ACLU Br. 28—or that the acknowledged information is not segregable from other properly protected information.

Respectfully,

/s/ Hina Shamsi
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