

("ODNI"). I have held this position since April 2006. Prior to my arrival in the ODNI, I held similar positions in the National Counterterrorism Center and its predecessor, the Terrorist Threat Integration Center. In this capacity I am the final decision-making authority for the ODNI Information and Data Management Group, which receives, processes, and responds to requests for ODNI records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

2. In addition, I have TOP SECRET original classification authority delegated to me by the Director of National Intelligence ("DNI") pursuant to Section 1.3 of Executive Order 13526. I am authorized, therefore, to conduct classification reviews and to make original classification and declassification decisions.

3. I make the statements herein on the basis of my personal knowledge as well as on information made available to me in the course of performing my official duties.

A. ODNI Background

4. Congress created the position of the DNI in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a) and 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004) (amending Sections 102 through 104 of Title I of the National Security Act of 1947). Subject to the authority, direction, and control of the President, the DNI serves as the

head of the United States Intelligence Community and as the principal advisor to the President and the National Security Council for intelligence matters related to the national security. 50 U.S.C. §§ 403(b)(1), (2).

5. The responsibilities and authorities of the DNI are set forth in the National Security Act of 1947, as amended. These responsibilities include ensuring that national intelligence is provided to the President, heads of the departments and agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military commanders, and the Senate and House of Representatives and committees thereof, and to such other persons as the DNI determines to be appropriate. 50 U.S.C. § 403-1(a)(1). The DNI is charged with establishing the objectives of; determining the requirements and priorities for; and managing and directing the tasking, collection, analysis, production, and dissemination of national intelligence by elements of the Intelligence Community. 50 U.S.C. §§ 403-1(f)(1)(A)(i) and (ii).

6. In addition, the National Security Act of 1947, as amended, states that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1). Consistent with this responsibility, the DNI is authorized to establish and implement guidelines for the Intelligence Community for the classification

of information under applicable law, Executive Orders, or other Presidential Directives and for access to and dissemination of intelligence. 50 U.S.C. §§ 403-(i)(2)(A), (B).

7. Finally, the National Security Act of 1947, as amended, created an Office of the Director of National Intelligence. The function of this Office is to assist the DNI in carrying out the duties and responsibilities of the Director under the Act and other applicable provision of law, and to carry out such other duties as may be prescribed by the President or by law. 50 U.S.C. §§ 403-3(a), (b).

B. Plaintiffs' FOIA requests

8. I am submitting this declaration in support of the Government's motion for summary judgment in these proceedings. Through the course of my official duties I have become familiar with these civil actions and the underlying FOIA requests. Although ODNI is not a defendant in this case, due to the nature of the information at issue and the fact that the relevant components of DOJ do not have officials who are original classifying authorities, I will be addressing the Department of Justice's (DOJ) handling of the classified records it located in response to the FOIA requests described below to the extent possible in a public unclassified document. The court is respectfully referred to the classified ex parte

declarations also being filed today for a more detailed discussion of these matters.

9. I understand that on or about June 11, 2010, New York Times reporter Scott Shane submitted a FOIA request to DOJ's Office of Legal Counsel (OLC) seeking "[a]ll Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killing, assassination, or killing of people suspected of ties to Al Qaeda or other terrorist groups by employees or contractors of the United States government. This would include legal advice on these topics to the military, the Central Intelligence Agency or other intelligence agencies. It would include the legal status of killing with missiles fired from drone aircraft or any other means." In response OLC acknowledged the existence of one responsive classified legal memorandum pertaining to the Department of Defense but advised that it could not confirm or deny the existence of any additional responsive documents pursuant to FOIA Exemptions 1 and 3 (a "Glomar" response).

10. I am also aware that on or about October 7, 2011, New York Times reporter Charlie Savage submitted a FOIA request to OLC for "[a]ll Office of Legal Counsel memorandums analyzing the circumstances under which it would be lawful for the United State armed forces or intelligence community assets to target for killing a United States citizen who is deemed a terrorist."

OLC interpreted the request as seeking records pertaining to Anwar al-Aulaqi and provided a Glomar response pursuant to FOIA Exemptions 1 and 3.

11. I am aware that on or about October 19, 2011 plaintiff American Civil Liberties Union Foundation (ACLU) submitted a FOIA request to OLC seeking all records "pertaining to the legal basis in domestic, foreign, and international law upon which U.S. citizens can be subjected to targeted killings" and "the process by which U.S. citizens can be designated for targeted killings, including who is authorized to make such determinations and what evidence is needed to support them," as well as a variety of records related to three individuals alleged to have been targeted, Anwar al-Aulaqi, Samir Khan, and Abdulrahman al-Aulaqi. OLC responded to the ACLU with a Glomar response pursuant to FOIA Exemptions 1 and 3. (The administrative processing of the ACLU and New York Times requests is further described in the unclassified declaration of John E. Bies, Deputy Assistant Attorney General, OLC, which also attaches the relevant correspondence.)

12. On or about October 19, 2011 DOJ's Office of Information Policy (OIP) received the same request from the ACLU described above. OIP did not provide a response to this request prior to the filing of this lawsuit but has since completed the processing of this request. (The administrative processing of

this request is further described in the declaration of Douglas R. Hibbard, Deputy Chief of the Initial Request Staff, OIP, DOJ, which also attaches the relevant correspondence.)

13. While OLC previously provided a Glomar response to these requests there have been a number of developments that have resulted in a determination that OLC and OIP can now publicly acknowledge that they possess documents responsive to the ACLU FOIA request. However, as will be explained further below, OLC and OIP cannot provide further information about those records, including the number, nature, or a categorization of the responsive records, without disclosing information protected by FOIA Exemptions 1 and 3.

14. In addition, I have reviewed the content of the documents located by DOJ and have determined that they contain information that is currently and properly classified and/or consists of intelligence sources and methods information and is therefore exempt from disclosure pursuant to FOIA Exemptions 1 and 3.

C. FOIA Exemption 1

15. Exemption 1 of the FOIA protects from release matters that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy and are in fact properly classified pursuant to such Executive Order. 5 U.S.C. 552(b)(1).

The current Executive Order, which establishes such criteria, is Executive Order 13526.

16. Section 1.1 of Executive Order 13526 provides that information may be originally classified under the terms of the order if: 1) an original classification authority is classifying the information; 2) the information is owned by, produced by or for, or is under the control of the U.S. Government; 3) the information falls within one or more of the categories of information listed in section 1.4 of the Executive Order; and 4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, and the original classification authority is able to identify or describe the damage.

17. Section 1.2(a) of Executive Order 13526 provides that information shall be classified at one of three levels. Information shall be classified at the Top Secret level if its unauthorized disclosure reasonably could be expected to cause exceptionally grave damage to the national security. Information shall be classified at the Secret level if its unauthorized disclosure reasonably could be expected to cause serious damage to the national security. Information shall be classified at the Confidential level if its unauthorized

disclosure reasonably could be expected to cause damage to the national security.

18. In addition, information shall not be considered for classification unless it falls within one of the categories described in Section 1.4 of Executive Order 13526. The relevant categories for purposes of this case are Sections 1.4(c) and 1.4(d). Section 1.4(c) allows information to be classified if it pertains to "intelligence activities (including covert action), intelligence sources or methods, or cryptology." Section 1.4(d) allows information to be classified if it pertains to "foreign relations or foreign activities of the United States, including confidential sources."

D. FOIA Exemption 3

19. Exemption 3 of the FOIA provides that FOIA does not apply to matters that are specifically exempted from disclosure by statute, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3).

20. Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-1(i)(1) states that the "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." The sources

and methods provision of the National Security Act has long been held to qualify as an Exemption 3 statute. In contrast to information withheld pursuant to Exemption 1, agencies are not required to identify and describe the damage to national security that reasonably could be expected to result from the unauthorized disclosure of these sources and methods. Agencies are only required to establish that the withheld information constitutes intelligence sources and methods.

E. DOJ's "No Number/No List" response

21. I have reviewed the classified records located by DOJ in response to the ACLU's FOIA request, as well as the other unclassified and classified ex parte declarations being submitted in support of the Government's motion for summary judgment. In light of the U.S. Government's recent official disclosures in the speeches given by the Attorney General on March 5, 2012 and the Assistant to the President for Homeland Security and Counterterrorism on April 30, 2012 the defendants in this case can now publicly confirm the existence of records responsive to ACLU's request without harming national security. However, given the subject matter of the ACLU's request, which includes, among other things, a request for records pertaining to "the legal basis . . . upon which U.S. citizens can be subjected to targeted killings," DOJ cannot provide any details about the records that were located, including the volume, dates

or nature of those records. Although DOJ can confirm generally the existence of records relating to the broad topics addressed in the ACLU's request, including records related to the Attorney General's speech which addressed legal issues pertaining to the potential use of lethal force against U.S. citizens, any further disclosure related to the classified records located by DOJ would harm national security and should be protected pursuant to FOIA Exemptions 1 and 3.

22. To provide detailed information about the volume and nature of the classified documents located by DOJ would reveal classified information about the nature and extent of the U.S. Government's classified counterterrorism activities. DOJ also cannot disclose whether or not the responsive records they located correlate to the specific subparts of the ACLU's request. Providing such details would tend to reveal the very information that is being protected in this case. This information constitutes currently and properly classified information concerning intelligence sources, methods and activities, as well as information related to the foreign activities of the United States. Disclosure of this information reasonably could be expected to result in damage to the national security, up to and including exceptionally grave damage, and is therefore properly protected from disclosure pursuant to FOIA Exemption 1. This information also consists of intelligence

sources and methods that is protected by the National Security Act and therefore exempt from disclosure pursuant to FOIA Exemption 3.

23. As described in the declaration of John Bennett, Director of the National Clandestine Service of the CIA, the CIA is similarly unable to provide further information about the number and nature of the records it located because such information would reveal information about intelligence activities, intelligence methods, and CIA functions. Were the CIA to publicly acknowledge that it possessed a significant number of documents responsive to the ACLU's FOIA request, that would indicate CIA interest in either actual or contemplated operations against U.S. citizens who are senior operational leaders of al-Qaeda, which in turn would reveal CIA involvement in these activities or that the CIA itself has authority to use lethal force against such individuals. On the other hand, if CIA acknowledged that it did not have any documents, that would reveal a lack of interest or authority.

24. Similarly, were DOJ to acknowledge that it located a large volume of classified records responsive to the ACLU request, that would tend to indicate that an entity of the U.S. Government was involved in the lethal targeting activities that are the subject of the request, since if a U.S. Government entity had been granted the authority to carry out lethal

operations against U.S. citizens it would be logical that the legal issues related to such operations would be extensively documented. Again, on the other hand, a small amount of material would indicate that no authority had been granted, or possibly that the issue had not been raised with DOJ and therefore was not being considered. In particular, whether or not OLC has a large number of responsive documents would also indicate whether or not OLC has provided formal written advice regarding the subjects of the request. This, in turn, would tend to reveal whether or not the U.S. government was contemplating certain actions, because OLC generally provides legal opinions only when there is some practical need for the advice. See Memorandum for Attorneys of the Office from David J. Barron, *Re: Best Practices for OLC Legal Advice and Written Opinions*, at 3, available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> ("OLC generally avoids providing a general survey of an area of law or issuing broad, abstract legal opinions. There should [] be a practical need for [a] written opinion."). Information revealing the depth and breadth of the U.S. Government's efforts to counter the threat posed by U.S. citizens who are senior operational leaders of al-Qaeda, as well as public confirmation that the U.S. Government was involved in the circumstances that led to the deaths of Anwar al-Aulaqi, Samir Khan and Abdulrahman al-Aulaqi, would greatly

benefit terrorist organizations and other foreign adversaries both in operationally responding to U.S. counterterrorism activities as well as in recruiting new terrorists into their ranks.

25. The unclassified CIA declaration submitted today details the CIA's concerns with the potential disclosure of the volume and nature of the CIA records that were located in this matter, including the potential harm to intelligence source relationships, intelligence methods, intelligence activities, and the foreign relations and foreign activities of the United States. All of those concerns are equally applicable to the records located by DOJ and I hereby incorporate by reference the Bennett declaration. To publicly disclose the volume of classified records DOJ located in response to the various sections of the ACLU's request would reveal information about the existence and identity of intelligence sources, possibly including liaison services in the region (or lack of such sources). For example, the existence of a significant amount of information related to the "facts supporting a belief that al-Awlaki could not be captured or brought to justice using nonlethal means" would reveal that CIA had been successful in collecting information, while an assertion that there is no information on this topic would reveal the opposite.

26. The ACLU's request also implicates intelligence methods and activities which must be protected in order to prevent terrorist organizations or foreign adversaries from taking countermeasures to avoid those methods. We know that terrorist organizations have the capacity and ability to gather information from a variety of sources and analyze it in order to ascertain the means and methods of foreign intelligence collection efforts aimed at disrupting their activities. Disclosing the amount and character of the classified information DOJ located in response to various sections of the ACLU's request would reveal details about the U.S. Government's counterterrorism efforts and its success or lack of success in gathering intelligence information related to the matters addressed in the ACLU request.

27. The ACLU's request also clearly implicates the foreign relations and foreign activities of the United States. For example, to confirm that DOJ has a significant amount of classified records relating to "the legal basis . . . upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles. . . or by other means" or relating to "the process by which U.S. citizens can be designated for targeted killing" could confirm that an agency of the U.S. Government has requested advice on this topic and is intending to engage in such activities. Such confirmation could

cause harm to U.S. relations with foreign governments with known or suspected U.S. citizen terrorists within their borders. Furthermore, any confirmation regarding whether the U.S. Government was involved in the deaths of the individuals named in the FOIA request could harm U.S. foreign relations by potentially disclosing whether the U.S. is operating clandestinely inside other countries' borders, which could cause those countries to respond in ways that could harm U.S. national interests.

28. Finally, if all of the defendants in this matter -- DOJ, CIA and the Department of Defense -- were to provide the volume, dates, authors and other information about the classified records located which is typically included in agency Vaughn indexes, our adversaries would have significant information about U.S. Government counterterrorism activities in recent years at their fingertips. The indexes could reveal that a particular agency had a significant interest in one of the individuals named in the request at a particular time. This would provide a timeline of counterterrorism and military activities that would be extremely valuable information to terrorists as they work to assess U.S. Government interests and capabilities.

F. The records responsive to the
ACLU and New York Times requests

29. I have reviewed the records located by DOJ, including the one OLC opinion related to the Department of Defense that DOJ has confirmed the existence of, and I have determined that they contain information that is exempt from disclosure pursuant to FOIA Exemptions 1 and 3. Although I am unable to provide detailed information about the records located by DOJ, including the dates, subject and authors, I can state that they contain information that is currently and properly classified pursuant to Executive Order 13526 at the Secret and Top Secret levels. I have also determined that the records contain intelligence sources and methods information that falls squarely within the scope of Section 102A(i)(1) of the National Security Act, as amended, 50 U.S.C. § 403-1(i)(1), which protects intelligence sources and methods from disclosure. Although the statute does not require an agency to identify and describe the harm to national security, the disclosure of the intelligence sources and methods contained in these documents could reasonably be expected to cause serious and exceptionally grave damage to the national security. Disclosure of this information is prohibited by statute; having reviewed the material, I find it to be properly exempt from disclosure pursuant to Exemption 3 of the FOIA. For more detailed justifications for the withholding of

the classified information contained in the documents located by DOJ pursuant to Exemptions 1 and 3 I respectfully refer the court to the classified ex parte declarations submitted herewith.

30. In reviewing DOJ's invocation of FOIA Exemptions 1 and 3 and its Glomar response and for the reasons stated herein and in the attached classified declarations, I have determined that DOJ's withholdings have not been made to conceal violations of law, inefficiency, or administrative error; prevent embarrassment to a person, organization, or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security. See Executive Order 13526, Sec. 1.7.

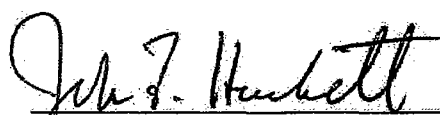
31. Finally, ODNI and other Intelligence Community employee names, phone numbers and email addresses are contained in the unclassified records located by DOJ. These names, phone numbers and email addresses are exempt from release pursuant to FOIA Exemption 6, which protects information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Given the nature of their work ODNI and Intelligence Community employees have a heightened privacy interest that far outweighs the minimal public interest in their

identities and email addresses.

Conclusion

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 20th day of June, 2012.



John F. Hackett
Chief, Information and Data Management Group
Office of the Director of National Intelligence

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, et
al.,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE,

Defendant.

Case No. 11-cv-9336 (CM)

AMERICAN CIVIL LIBERTIES UNION,
et al.,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, et al.,

Defendants.

Case No. 12-cv-794 (CM)

DECLARATION OF JOHN BENNETT
DIRECTOR, NATIONAL CLANDESTINE SERVICE
CENTRAL INTELLIGENCE AGENCY

I. INTRODUCTION

I, JOHN BENNETT, hereby declare and state:

1. I am the Director of the National Clandestine Service ("NCS") of the Central Intelligence Agency ("CIA" or "Agency"). I was appointed to this position in July 2010. I joined the Agency in 1981 and have over twenty-five years of experience as a CIA officer. Over the course of my career, I have held a

variety of leadership positions with the Agency, including Chief of the Special Activities Division and Deputy Chief of the Africa Division. Most of my career with the CIA has been spent in overseas operational positions, including my four tours as the Chief of overseas CIA stations.

2. The NCS is the organization within the CIA responsible for conducting the CIA's foreign intelligence and counterintelligence activities. As Director of the NCS, it is my responsibility to oversee its mission of strengthening the national security and foreign policy objectives of the United States through the clandestine collection of human intelligence, technical collection, and covert action. One of the additional responsibilities that comes with this position is the authority to assess the current, proper classification of CIA information based on the classification criteria of Executive Order 13526. Pursuant to the original TOP SECRET classification authority that has been delegated to me, I am authorized to make original classification and declassification decisions. When called upon to exercise this authority, I ensure that any determinations regarding the classification of CIA information are proper and that the public release of such information does not jeopardize the national security by disclosing classified intelligence activities, methods, or operational targets, or endanger United States government personnel, facilities, or sources.

3. I am submitting this declaration in support of the Government's motion for summary judgment in these consolidated proceedings. Through the exercise of my official duties, I have become familiar with these civil actions and the underlying FOIA requests. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

4. This declaration will explain, to the greatest extent possible on the public record,¹ the basis for the Government's responses to Plaintiffs' FOIA requests pertaining to the CIA and will identify the applicable FOIA exemptions that support these responses in this case. In particular, as an original classification authority for the CIA, I have determined that although the CIA can acknowledge the fact that it possesses records responsive to the American Civil Liberties Union's (ACLU's) FOIA request, it cannot reveal the number or nature of responsive records because such information is currently and properly classified and therefore exempt from release under FOIA exemption (b)(1). As explained below, this response - referred to as a "no number, no list" response² - is required because official CIA acknowledgement of the number and nature of

¹ I am also submitting a classified declaration for the Court's *ex parte*, *in camera* review that contains additional information justifying the CIA's response that cannot be filed on the public record.

² The validity of the "no number, no list" response has been recognized in court cases, including in the Seventh Circuit's decision in *Bassiouni v. Central Intelligence Agency*, 392 F.3d 244 (7th Cir. 2004).

responsive records would reveal information that concerns intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities, the disclosure of which reasonably could be expected to harm the national security of the United States.

5. Additionally, and separately, I have determined that disclosing the number and nature of responsive CIA records would reveal information concerning intelligence sources and methods, as well as core functions of the CIA. The Director of the Central Intelligence Agency is authorized by the National Security Act of 1947, as well as the CIA Act of 1949, to protect intelligence sources and methods, as well as core functions of the CIA, from disclosure. The CIA therefore asserts FOIA exemption (b)(3) as an additional basis for withholding the number and nature of responsive records.

6. Finally, with respect to the New York Times' separate FOIA requests in the consolidated case, the CIA has determined that the existence or non-existence of responsive Office of Legal Counsel ("OLC") opinions pertaining to potential CIA lethal operations against terrorists (including U.S. citizens) is exempt from disclosure under FOIA exemptions (b)(1) and

(b) (3), and therefore the CIA has asked the Department of Justice ("DOJ") to issue a Glomar response³ on its behalf.

7. For the Court's convenience, I have divided the substance of this declaration into five parts. Part II provides an overview of Plaintiffs' FOIA requests, as well as developments that have occurred subsequent to the issuance of these requests. Part III describes the applicable FOIA exemptions. Part IV describes the application of these exemptions to the CIA's response to the ACLU's FOIA request and includes a detailed discussion of the damage to U.S. national security that reasonably could be expected to result if the CIA were to reveal the number and nature of responsive records. Part V provides a similar discussion concerning the New York Times' requests as they pertain to the CIA. Finally, Part VI discusses the absence of prior official public disclosures that would invalidate the CIA's responses to these FOIA requests.

II. PLAINTIFFS' FOIA REQUESTS & SUBSEQUENT DEVELOPMENTS

A. ACLU'S REQUEST

8. In a letter to the CIA's Information and Privacy Coordinator dated 19 October 2011, the ACLU submitted a FOIA request seeking several categories of records pertaining to the

³ The origins of the Glomar response trace back to the D.C. Circuit's decision in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), which affirmed CIA's use of the "neither confirm nor deny" response to a FOIA request for records concerning CIA's reported contacts with the media regarding Howard Hughes' ship, the "Hughes Glomar Explorer."

legality and related processes concerning the U.S. Government's potential use of lethal force against U.S. citizens. It also sought records about the deaths of Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki, Anwar al-Awlaki's son. According to the ACLU's Complaint, it submitted identical FOIA requests to the Department of Defense ("DOD"), including the U.S. Special Operations Command, and the Department of Justice, including the Office of Legal Counsel. A true and correct copy of the ACLU's 19 October 2011 letter is attached as Exhibit A.

9. By letter dated 25 October 2011, the CIA acknowledged receipt of the ACLU's FOIA request. A true and correct copy of the CIA's 25 October 2011 letter is attached as Exhibit B.

10. By letter dated 17 November 2011, the CIA issued a final response to the ACLU's request stating that "[i]n accordance with section 3.6(a) of Executive Order 13526, as amended, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to [the ACLU's] request," citing FOIA exemptions (b)(1) and (b)(3) and "[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended, and Section 102A(i)(1) of the National Security Act of 1947, as amended." The CIA informed the ACLU that it had a right to appeal the finding to the Agency

Release Panel, the body within the CIA that considers FOIA appeals. A true and correct copy of the CIA's 17 October 2011 letter is attached as Exhibit C.

11. By letter dated 6 December 2011, the ACLU appealed the CIA's final response. A true and correct copy of the CIA's 6 December 2011 letter is attached as Exhibit D.

12. By letter dated 16 January 2012, the CIA acknowledged receipt of the ACLU's letter challenging the CIA's Glomar response. The CIA accepted the ACLU's appeal and noted that arrangements would be made for its consideration by the appropriate members of the Agency Release Panel. A true and correct copy of the CIA's 16 January 2012 letter is attached as Exhibit E.

13. While this appeal was pending, the ACLU filed a Complaint in this matter on 1 February 2012. As a result of the filing of the Complaint, and pursuant to its FOIA regulations at 32 C.F.R. § 1900.42(c), the CIA terminated the administrative appeal proceedings on 2 February 2012. A true and correct copy of the CIA's 2 February 2012 termination letter is attached as Exhibit F.

B. NEW YORK TIMES' REQUESTS

14. The CIA is not a defendant in the separate FOIA litigation brought by the New York Times and its reporters against the Department of Justice, which the Court has

consolidated with the ACLU case. However, given the overlapping subject-matter and the nature of the requests, the CIA has an equity in DOJ's response to the New York Times' requests, and therefore those requests will be addressed as well.

15. I understand that on or about 11 June 2010, New York Times reporter Scott Shane issued a FOIA request to DOJ seeking "[a]ll Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killing, assassination, or killing of people suspected of ties to Al Qaeda or other terrorist groups by employees or contractors of the United States government. This would include legal advice on these topics to the military, the Central Intelligence Agency, or other intelligence agencies. It would include the legal status of killing with missiles fired from drone aircraft or any other means." I further understand that in response DOJ acknowledged the existence of a "classified legal memorandum addressing the subject of targeted killing that pertains to the Department of Defense," but it refused to confirm or deny the existence of any additional responsive opinions.

16. I also understand that on or about 7 October 2011, New York Times reporter Charlie Savage issued a FOIA request to DOJ for "[a]ll Office of Legal Counsel memorandums analyzing the circumstances under which it would be lawful for the United States armed forces or intelligence community assets to target

for killing a United States citizen who is deemed a terrorist.” I further understand that DOJ initially issued a Glomar response to this request.

C. SUBSEQUENT DEVELOPMENTS

17. Several developments have occurred subsequent to the issuance of Plaintiffs’ FOIA requests and the filing of these lawsuits that have caused the CIA to reconsider its response, as described further below. Those events include several speeches by senior U.S. officials that address significant legal and policy issues pertaining to U.S. counterterrorism operations and the potential use of lethal force by the U.S. government against senior operational leaders of al-Qa’ida or associated forces who have U.S. citizenship. In light of these recent speeches and the official disclosures contained therein, the CIA decided to conduct a reasonable search for records responsive to the ACLU’s request. Based on that search, it has determined that it can now publicly acknowledge that it possesses records responsive to the ACLU’s FOIA request. As described below, however, the CIA cannot provide the number, nature, or a categorization of these responsive records without disclosing information that continues to be protected from disclosure by FOIA exemptions (b)(1) and (b)(3).

III. APPLICABLE FOIA EXEMPTIONS

A. FOIA Exemption (b)(1)

18. FOIA exemption (b)(1) provides that FOIA does not require the production of records 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).

19. Section 1.1(a) of Executive Order 13526 provides that information may be originally classified under the terms of this order only if all of the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of Executive Order 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage.

20. Consistent with Executive Order 13526, and as described below, I have determined that the number and nature of responsive CIA records - as well as whether or not these records

are responsive to specific aspects of the ACLU's FOIA request - are currently and properly classified facts that concern "intelligence activities (including covert action) [and] intelligence sources or methods" and the "foreign relations or foreign activities of the United States" under Section 1.4 of the Executive Order. With respect to the New York Times' FOIA requests, the CIA has determined that the existence or non-existence of responsive OLC opinions pertaining to potential CIA lethal operations against terrorists (including U.S. citizens) constitutes classified information that falls within these same categories, and therefore the CIA has asked DOJ to issue a Glomar response on its behalf - a response that is specifically authorized by Section 3.6(a) of the Executive Order.⁴ These facts constitute information that is owned by and under the control of the U.S. Government, the unauthorized disclosure of which reasonably could be expected to harm U.S. national security.

21. Section 1.2(a) of Executive Order 13526 provides that information shall be classified at one of three levels if the unauthorized disclosure of the information reasonably could be expected to cause damage to the national security and the

⁴ That provision states that "[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors."

original classification authority is able to identify or describe the damage. Information shall be classified TOP SECRET if its unauthorized disclosure reasonably could be expected to result in *exceptionally grave damage* to the national security; SECRET if its unauthorized disclosure reasonably could be expected to result in *serious damage* to the national security; and CONFIDENTIAL if its unauthorized disclosure reasonably could be expected to result in *damage* to the national security. As described in detail below, I have determined that publicly revealing the information being protected by the CIA's responses to these FOIA requests reasonably could be expected to cause damage to U.S. national security, up to and including exceptionally grave damage.

22. In accordance with section 1.7 of the Executive Order, I hereby certify that these determinations have not been made to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security.

B. FOIA Exemption (b) (3)

23. FOIA exemption (b) (3) provides that FOIA does not apply to matters that are: specifically exempted from disclosure by statute (other than section 552b of this title), provided that

such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld 5 U.S.C. § 552(b)(3).

24. Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-1(i)(1) (the "National Security Act"), provides that the Director of National Intelligence ("DNI") "shall protect intelligence sources and methods from unauthorized disclosure." Accordingly, the National Security Act constitutes a federal statute that "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3). Under the direction of the DNI pursuant to Section 102A, and consistent with Section 1.6(d) of Executive Order 12333, the CIA is authorized to protect CIA sources and methods from unauthorized disclosure.⁵ As described in detail below, acknowledging the number and nature of CIA records responsive to the ACLU request, as well as the existence or non-existence of OLC opinions responsive to the New York Times requests (to the

⁵ Section 1.6(d) of Executive Order 12333, as amended, 3 C.F.R. 200 (1981), reprinted in 50 U.S.C.A. § 401 note at 25 (West Supp. 2009), and as amended by Executive Order 13470, 73 Fed. Reg. 45,323 (July 30, 2008) requires the Director of the Central Intelligence Agency to "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the [DNI]."

extent they pertain to CIA operations) would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect.

25. Additionally, and separately, Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403g (the "CIA Act"), provides that the CIA shall be exempted from the provisions of "any other law" (in this case, FOIA) which requires the publication or disclosure of, *inter alia*, the "functions" of the CIA. Accordingly, under Section 6, the CIA is exempt from disclosing information relating to its core functions - which plainly include clandestine intelligence activities, intelligence sources and methods and foreign liaison relationships. The CIA Act therefore constitutes a federal statute that "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). As explained in detail below, acknowledging the number and nature of CIA records responsive to the ACLU request, as well as the existence or non-existence of OLC opinions responsive to the New York Times requests (to the extent they pertain to CIA operations) would reveal information about the core functions of the CIA, an outcome the CIA Act expressly prohibits.

26. In contrast to Executive Order 13526, the statutes described above do not require the CIA to identify and describe

the damage to the national security that reasonably could be expected to result from the unauthorized disclosure of these sources, methods, or functions. Nonetheless, I refer the Court below to the description of the damage to the national security that reasonably could be expected to result should the CIA be required to respond in a different manner. FOIA exemptions (b)(1) and (b)(3) thus apply independently and co-extensively to Plaintiffs' requests.

IV. THE CIA'S "NO NUMBER, NO LIST" RESPONSE TO THE ACLU REQUEST

27. As noted above, in the light of the U.S. Government's recent official disclosures concerning these matters and the important role the CIA plays on the President's National Security team, the CIA has determined that it can confirm the existence of records responsive to ACLU's request without harming national security. From the outset it should be emphasized that the ACLU's request is quite broad in many respects. As an example, one category of the ACLU's FOIA request seeks records concerning "the legal basis . . . upon which U.S. citizens can be subjected to targeted killing," and another seeks records pertaining to "the process by which U.S. citizens can be designated for targeted killing." The CIA initially refused to confirm or deny the existence of records responsive to these two closely related categories. However, the CIA has since determined that it can acknowledge the

existence of responsive records reflecting a general interest in these broad topics without harming national security. These records include, for example, the speech that the Attorney General gave at Northwestern University Law School on 5 March 2012 in which he discussed a wide variety of issues pertaining to U.S. counterterrorism operations, including legal issues pertaining to the potential use of lethal force against senior operational leaders of al-Qa'ida or associated forces who have U.S. citizenship. The Attorney General explained that under certain circumstances, the use of lethal force against such persons in a foreign country would be lawful when, among other things, "the U.S. government . . . determined, after a thorough and careful review, that the individual pose[d] an imminent threat of violent attack against the United States." These records also include the speech that the Assistant to the President for Homeland Security and Counterterrorism gave on 30 April 2012, in which he addressed similar legal and policy issues related to the U.S. Government's counterterrorism operations. Because the CIA is a critical component of the national security apparatus of the United States and because these speeches covered a wide variety of issues relating to U.S. counterterrorism efforts, it does not harm national security to reveal that copies of the speeches exist in the CIA's files. And because these speeches refer to both the "legal basis" for

the potential use of lethal force against U.S. citizens and a review "process" related thereto, the speeches are responsive to these two categories.

28. Notwithstanding these acknowledgements, however, the CIA cannot further describe or even enumerate on the public record the number, types, dates, or other descriptive information about these responsive records because to do so would reveal classified information about the nature and extent of the CIA's interest in these broad topics. In other words, although the CIA can acknowledge a generalized interest in these matters given the Agency's role in U.S. counterterrorism activities, it cannot respond in a manner that would reveal information about the nature, depth, and breadth of this interest. Nor can the CIA provide a breakdown and categorization that identifies whether or not these responsive records correlate to the specific sub-parts of the ACLU's request concerning the deaths of Anwar al-Awlaki, Samir Khan, and Awlaki's son. Providing the number, dates, and a categorization of responsive record would reveal precisely this information, and therefore a "no number, no list" response is appropriate pursuant to FOIA exemptions (b)(1) and (b)(3).

29. There are several underlying equities protected by the CIA's "no number, no list" response. Among other things, disclosing the number and dates of responsive records would tend

to reveal whether or not the CIA has been granted the authority to directly participate in lethal operations that could potentially target senior operational leaders of al-Qa'ida who have U.S. citizenship (based on the framework discussed in the Attorney General's speech). A response other than a "no number, no list" response would also tend to reveal the significance of the CIA's intelligence interest in and the depth and breadth of the CIA's intelligence collection activities directed against such terrorists. Finally, being required to provide a categorization that confirms whether or not the CIA possesses responsive records specifically about Anwar al-Awlaki, Samir Khan, and Awlaki's son would tend to reveal whether or not the CIA was involved in the events that led to their deaths (e.g., by providing supporting intelligence or technical assistance). All of these facts that would tend to be revealed by disclosing the number, nature, and a categorization of responsive records constitute currently and properly classified information concerning CIA intelligence activities, sources, and methods, as well as the foreign activities of the United States, that is exempt from disclosure pursuant to FOIA exemptions (b)(1) and (b)(3).

30. When the CIA can reveal the existence of records responsive to a FOIA request but cannot describe or even enumerate on the public record the number, dates, or a

categorization of responsive documents, it issues a "no number no list" response. The "no number no list" response allows federal agencies to protect classified or otherwise exempt information pertaining to intelligence activities, sources, or methods by withholding the number of responsive documents in addition to descriptive information, such as the nature of the record, its date, author, and subject matter, as well as the specific part of the request to which the record is responsive. In this case, being required to disclose the volume, nature, and a categorization of responsive records would reveal information about intelligence activities (including foreign activities), intelligence methods, and CIA functions. Revealing these classified facts reasonably could be expected to harm the national security of the United States, and therefore this information must be withheld under FOIA exemption (b)(1). Additionally, and separately, responding in any other manner would reveal intelligence sources, intelligence methods, and core functions of the CIA. The CIA's response is therefore independently supported by FOIA exemption (b)(3).

31. To illustrate, if the CIA publicly acknowledged that it possessed several hundred records responsive to the ACLU's request, that fact would indicate that the CIA had a significant interest in either actual or contemplated operations against senior operational leaders of al-Qa'ida who have U.S.

citizenship, which in turn would tend to reveal that the Agency was actively involved in these activities or that the CIA itself has the authority to directly participate in the use of lethal force against such individuals. At minimum, it would tend to reveal a substantial intelligence interest in the more limited subset of terrorists who might meet the criteria discussed in the Attorney General's speech, as well as the relative success of the CIA's intelligence collection efforts directed against them. Conversely, if the CIA possessed only a handful of documents responsive to the ACLU's request, that would indicate that the CIA had only a minimal interest, which in turn would tend to reveal that the Agency was not actively involved in these actual or contemplated activities, that it did not have the authority to carry them out, and/or that it had been able to collect only a small amount of intelligence about this more limited number of individuals. Under either scenario, the number of responsive records that the CIA possesses is itself a classified fact that must be protected from disclosure, thereby necessitating the CIA's "no number, no list" response.

32. This concern would be magnified if the CIA were required to also reveal the nature, dates, and other descriptive information about the records that are responsive to this request - the information typically required in a *Vaughn* index. For instance, when juxtaposed with the number of responsive

documents, disclosure of the dates of these records would provide a timeline of the existence and nature of the CIA's involvement, authority, and/or intelligence interest and collection activities (or lack thereof) between 11 September 2001 and the present - the timeframe of the ACLU's request.

33. For similar reasons, the CIA cannot reveal whether or not any of these records are specific types of records, such as OLC opinions or other formal legal analyses, as that too would tend to reveal whether the CIA was operationally involved in these activities or had the authority to carry them out itself. If the CIA had been granted the extraordinary authority to be directly involved in targeted lethal operations against U.S. citizens, one would logically expect that the legal issues related thereto be carefully and extensively documented by the Department of Justice and the CIA's Office of General Counsel. On the other hand, if the CIA did not possess this authority, then one would logically expect these issues to receive significantly less, if any, documentation by Department of Justice and CIA attorneys.

34. Similarly, the CIA also cannot provide a categorization of its responsive records that reveals whether or not the Agency possesses documents specifically responsive to the portion of the FOIA request seeking documents about the factual and legal basis for the alleged targeted killing of

Anwar al-Awlaki, Samir Khan, and Awlaki's son. Hypothetically, if the CIA were to respond by admitting that it possessed these specific records, that response would tend to reveal (among other things) that the CIA was involved, in some manner, in the events that led to their deaths (e.g., by providing supporting intelligence or technical assistance). Such a hypothetical response would reveal specific intelligence activities, sources, methods, and functions of the CIA, as well as specific foreign activities of the United States, all of which are protected from disclosure by Executive Order 13526, the National Security Act, and the CIA Act.

35. On the other hand, if the CIA were to respond by admitting that it did not possess any responsive records about these specific events, it would indicate that the CIA had no involvement in the circumstances leading to their deaths. Such a response would reveal damaging information about potential "gaps" or weaknesses in the CIA's authorities, operational capabilities, intelligence interests, and resources that is protected from disclosure by Executive Order 13526 and statute.

36. Information revealing the depth and breadth of the CIA's interest in the U.S. Government's efforts to counter the threat posed by senior operational leaders of al-Qa'ida who have U.S. citizenship, as well as public confirmation of whether or not the CIA was involved in the circumstances that led to the

deaths of Anwar al-Awlaki, Samir Khan, and Awlaki's son, constitutes information concerning CIA intelligence activities, methods, and functions, as well as the foreign activities of the United States. It would greatly benefit hostile groups, including terrorist organizations such as al-Qa'ida, to know with certainty the specific intelligence activities in which the CIA is (or is not) directly involved. It would also benefit them to know the depth, breadth, and chronology of the CIA's intelligence collection efforts against senior operational leaders of al-Qai'da who have U.S. citizenship. To reveal such information would provide valuable insight into the CIA's authorities, capabilities, and intelligence interests that our enemies could use to reduce the effectiveness of the CIA's intelligence operations.

37. As illustrated by the example of Anwar al-Awlaki, it is no secret that terrorist organizations such as al-Qa'ida have made it a priority to recruit U.S. citizens into their leadership, based on the assumption that the cloak of U.S. citizenship will make these individuals less susceptible to being targeted by U.S. military and intelligence operations. Although it has been acknowledged in the Attorney General's speech and elsewhere that, as a legal matter, a terrorist's status as a citizen does not make him or her immune from being targeted by the U.S. military, there has been no acknowledgement

with respect to whether or not the CIA (with its unique and distinct roles, capabilities, and authorities as compared to the U.S. military) has been granted similar authority to be directly involved in or carry out such operations. Nor has there been any official acknowledgement concerning whether or not the CIA was involved in the circumstances leading to the deaths of Awlaki, Samir Khan, and Awlaki's son. Revealing these facts would provide valuable insight to al-Qa'ida and other hostile groups as they continue to recruit U.S. citizens into their ranks and use them to plot attacks against the United States. For these reasons and others, the CIA has determined that it must issue a "no number, no list" response to the ACLU's request.

* * *

38. By way of background, the CIA is charged with carrying out a number of important functions on behalf of the United States, which include, among other activities, collecting and analyzing foreign intelligence and counterintelligence (particularly intelligence provided by human sources, called human intelligence or HUMINT), as well as conducting other activities at the direction of the President, including covert action. A defining characteristic of the CIA's intelligence activities is that they are typically carried out clandestinely, and therefore they must remain secret in order to be effective.

In the context of FOIA, this means that the CIA must carefully evaluate whether its response to a particular FOIA request could jeopardize the clandestine nature of its intelligence activities or otherwise reveal previously undisclosed information about its sources, capabilities, authorities, interests, strengths, weaknesses, resources, and other factors important to hostile intelligence services and terrorist groups.

39. In this case, although the CIA has determined that it can publicly acknowledge that it possesses records responsive to the ACLU's FOIA request, further disclosure of the number, nature, and a categorization of responsive records reasonably could be expected to damage to U.S. national security. In particular, disclosure of this information would tend to expose or otherwise damages one or more of the following: (a) intelligence sources, (b) intelligence methods, (c) intelligence activities, and (d) the foreign relations and foreign activities of the United States.

A. Intelligence Sources

40. One of the core functions of the CIA is to collect foreign intelligence from around the world for the President and other United States Government officials to use in formulating policy decisions. To accomplish this function, the CIA must rely on information from knowledgeable sources that the CIA can obtain only under an arrangement of absolute secrecy.

Intelligence sources will rarely furnish information unless they are confident that they are protected from retribution or embarrassment by the absolute secrecy surrounding the source-CIA relationship. In other words, intelligence sources must be certain that the CIA can and will do everything in its power to prevent the public disclosure of their association with the CIA. Intelligence sources include clandestine human intelligence sources and foreign intelligence services.

41. The CIA relies on clandestine human sources - often called "assets" - to collect foreign intelligence, and it does so with the promise that the CIA will keep their identities and their relationships with the CIA secret. This is because the revelation of this secret relationship could harm the individual and inhibit the CIA's ability to collect foreign intelligence from that individual and others in the future. When a foreign national abroad cooperates with the CIA, for example, it is often without the knowledge of his or her government or organization, and the consequences of the disclosure of this relationship can be swift and far-ranging, from economic reprisals to harassment, imprisonment, or death. In addition, such disclosure may place in jeopardy the lives of every individual with whom the foreign national has had contact, including his or her family and associates.

42. In many cases, the very nature of the information that the source communicates necessarily tends to reveal the identity of the human source because of the limited number of individuals with access to the information. In other words, revealing the information provided by the source is tantamount to identifying the source itself. Furthermore, disclosing information that would or could identify a human source could seriously damage the CIA's credibility with all other current intelligence sources and thereby undermine the CIA's ability to recruit future sources. As stated previously, most individuals will not cooperate with the CIA unless they have confidence that their identities will remain secret. The CIA therefore has a primary interest in keeping these identities secret, not only to protect the sources, but also to demonstrate to other sources and future sources that these sources can trust the CIA to preserve the secrecy of the relationship.

43. On the other hand, it is equally damaging to reveal that the CIA does not possess intelligence regarding a particular topic, which in turn reveals that the CIA has been unsuccessful in recruiting a human source to provide intelligence regarding that topic. If terrorist organizations and other hostile entities were to learn that the CIA is essentially "blind" in a particular part of the world or otherwise has limited ability to collect human intelligence

regarding a particular topic, they would use this information to their advantage (e.g., by enhancing their operational efforts in that part of the world, knowing that the CIA's ability to monitor those operations is limited). This reasonably could be expected to harm U.S. national security.

44. Another type of CIA source is a "liaison relationship." A liaison relationship is a cooperative and secret relationship between the CIA and an entity of a foreign government. Most CIA liaison relationships involve a foreign country's intelligence or security service. A liaison relationship is a working and information-sharing agreement. Liaison relationships between the CIA and other foreign intelligence services or government entities are initiated and continued only on the basis of a mutual trust and understanding that the existence and details of such liaison arrangements will be kept in the utmost secrecy. A liaison relationship constitutes both an intelligence source and an intelligence method. The CIA's liaison relationships are critical and extremely sensitive. Accordingly, officially acknowledging foreign liaison information - or even the existence of a particular liaison relationship - can undermine a foreign government's trust in the CIA's ability to protect their sensitive intelligence information.

45. Additionally, in many foreign countries, cooperation with the CIA is not a popular concept. If a foreign liaison service's cooperation with the CIA were to be officially confirmed by the CIA, then that service and government could face a popular backlash that reasonably could be expected to reduce or eliminate the information-sharing relationship with the CIA. This, in turn, reasonably could be expected to damage U.S. national security.

46. As described above with respect to human sources, it is equally damaging to reveal information about the existence and nature of CIA intelligence regarding a particular topic, which in turn would tend to confirm the absence of a liaison relationship (and thus the absence of a CIA intelligence-collection capability) in a particular location.

47. Several aspects of the ACLU's FOIA request implicate intelligence sources directly. For example, one category asks the CIA to disclose whether and to what degree it possesses intelligence regarding the imminence of Awlaki's threat to U.S. national security (No. 4(A)); intelligence regarding Awlaki's location at a particular time and place (No. 4 generally), as well as the security conditions under which he was living and the individuals with whom he was associating at a particular time and place, i.e., hypothetical facts related to Awlaki's feasibility of capture (No. 4(B)). Additionally, other

categories would require the CIA to disclose whether and to what degree it possesses intelligence regarding Samir Khan and Abulrahman al-Awlaki, including whether the CIA was aware of their location at a particular time and place (Nos. 5 and 6).

48. As described above, however, if the CIA were to confirm the existence, volume, and nature of documents responsive to these specific categories of the ACLU's request, it could potentially reveal information about the existence and identity of particular intelligence sources. This, in turn, would provide terrorist groups and other adversarial organizations with valuable information regarding the degree to which the CIA possessed intelligence regarding these individuals and their environs, as well as information that could be used to identify the sources of that intelligence, if it exists. Conversely, if the CIA were to acknowledge that it possessed no records responsive to these specific categories, it would tend to reveal the absence of such sources, thereby providing terrorist organizations and other adversaries with information regarding about potential weaknesses in the CIA's intelligence collection efforts. In either scenario, disclosure of the existence or nonexistence of intelligence sources relating to these events reasonably could be expected to harm national security.

B. Intelligence Methods

49. The ACLU's request also implicates CIA intelligence methods. Intelligence methods are the means by which an intelligence agency accomplishes its objectives. Intelligence methods must be protected in situations where a certain capability or technique or the application thereof is unknown to others, such as a foreign intelligence service or terrorist organization, which could take countermeasures. Secret information collection techniques are valuable from an intelligence-gathering perspective only so long as they remain unknown and unsuspected. Once the nature of an intelligence method or the fact of its use in a certain situation is discovered, its usefulness in that situation is neutralized and the CIA's ability to apply that method in other situations is significantly degraded.

50. The CIA must do more than prevent explicit references to intelligence methods; it must also prevent indirect references that would tend to reveal the existence (or non-existence) of such methods. One vehicle for gathering information about the CIA capabilities is by reviewing officially released information. We know that terrorist organizations and other hostile groups have the capacity and ability to gather information from myriad sources, analyze it, and deduce means and methods from disparate details in order to

defeat the CIA's collection efforts. Thus, even seemingly innocuous, indirect references to an intelligence method could have significant adverse effects when juxtaposed with other publicly available data.

51. Intelligence methods include the use of human assets and liaison relationships, described above. Intelligence methods also include the CIA's selection of targets for intelligence collection or operational activities. When a foreign intelligence service or adversary nation learns that a particular foreign national or group has been targeted for intelligence collection by the CIA, it will seek to glean from the CIA's interest what information the CIA has received, why the CIA is focused on that type of information, and how the CIA will seek to use that information for further intelligence collection efforts and clandestine intelligence activities. If terrorist groups such as al-Qa'ida, foreign intelligence services, or other hostile entities were to discover what the CIA has or has not learned about certain individuals or groups, this information could be used against the CIA to thwart future intelligence operations, jeopardize ongoing human sources, and otherwise derail the CIA's intelligence collection efforts. Finally, intelligence methods include specific CIA technical capabilities and the financial resources to effectively implement those capabilities.

52. In this case, the ACLU FOIA request implicates intelligence methods in several ways. As noted above, the use of intelligence sources (or lack thereof) also constitutes an intelligence method, and therefore this request implicates both sources and methods to the same degree. In addition, whether or not the CIA was involved circumstances that led to the deaths of Awlaki and/or the other referenced individuals (e.g., by providing supporting intelligence or technical assistance) is another fact that pertains to CIA intelligence-gathering methods and activities. More generally, disclosing the degree to which the CIA is interested in in the U.S. Government's efforts to counter the threat posed by certain senior-level terrorists who have U.S. citizenship would tend to reveal the level of the CIA's intelligence interest in this group of individuals and the relative success (or lack thereof) of the CIA's intelligence collection efforts directed against them - information that squarely implicates intelligence-gathering methods and operational activities.

53. Finally, the ACLU alleges that Awlaki and Khan were killed "by a missile or missiles fired from one or more unmanned aerial vehicles (UAVs)." If Awlaki and Khan were in fact killed via a missile fired from an unmanned aerial vehicle as alleged, then the acknowledgment of a CIA connection to their deaths would tend to reveal the CIA's involvement in the use of this

advanced technological platform (of lack of involvement, if the response revealed no CIA connection).⁶

54. In any of these scenarios, the CIA's official confirmation or denial that it does or does not possess responsive records reasonably could be expected to harm the national security by revealing CIA intelligence methods. It would greatly benefit hostile groups, including terrorist organizations such as al-Qa'ida, to know with certainty which intelligence methods the CIA has at its disposal. To reveal such information would provide valuable insight into the CIA's capabilities, interests, and resources that our enemies could use to reduce the effectiveness of CIA's intelligence operations.

C. Intelligence Activities

55. Clandestine intelligence activities lie at the heart of the CIA's mission. Intelligence activities refer to the actual implementation of intelligence sources and methods in the operational context. Accordingly, the discussion above of the harm to national security stemming from the disclosure of "sources and methods" applies with equal force to the disclosure of "intelligence activities." As defined in Section 6.1 of E.O.

⁶ Thus, by admitting that it possesses records responsive to the ACLU FOIA request generally, the CIA is not confirming or denying that it possesses records specifically about the actual use of UAVs in targeted lethal operations - so-called "drone strikes."

13526, "intelligence activities" means all activities that elements of the Intelligence Community are authorized to conduct pursuant to law or Executive Order 12333, as amended. Section 1.4(c) of Executive Order 13526 also provides that these intelligence activities can include "covert action" in addition to more traditional intelligence-gathering activities. An acknowledgment of information regarding specific intelligence activities can reveal the CIA's specific intelligence capabilities, authorities, interests, and resources. Terrorist organizations, foreign intelligence services, and other hostile groups use this information to thwart CIA activities and attack the United States and its interests. These parties search continually for information regarding the activities of the CIA and are able to gather information from myriad sources, analyze this information, and devise ways to defeat the CIA activities from seemingly disparate pieces of information.

56. In this case, and as described above, responding to the ACLU's FOIA request in a manner other than a "no number, no list" reasonably could be expected to damage the national security by disclosing whether or not the CIA was involved, in some manner, in the circumstances that led to the deaths of Awlaki, Samir Khan, or Awlaki's son (e.g., by providing supporting intelligence or technical assistance). Officially

confirming the existence or nonexistence of these intelligence activities reasonably could be expected to harm U.S. national security, as such confirmation would provide valuable insight into the CIA's authorities, capabilities, and resources that our enemies could use to reduce the effectiveness of CIA's intelligence operations.

D. Foreign Relations and Foreign Activities of the United States

57. A response other than a "no number, no list" response also would reveal information concerning U.S. foreign relations and foreign activities, the disclosure of which reasonably can be expected to harm the national security. As an initial matter, because CIA's operations are conducted overseas or otherwise concern foreign intelligence matters, they generally are U.S. "foreign" activities by definition. In this case, that means that information concerning the CIA's involvement in the deaths of Anwar al-Awlaki, Samir Khan, Abdulrahman al-Awlaki, if such information existed, would concern a potential foreign activity that would fall within section 1.4(d) of Executive Order 13526.

58. In carrying out its legally authorized intelligence activities, the CIA engages in activities which, if officially confirmed, reasonably could be expected to cause damage to U.S. relations with affected or interested nations. Although it is

generally known that the CIA conducts clandestine intelligence operations, identifying an interest in a particular matter or publicly disclosing a particular intelligence activity could cause the affected or interested foreign government to respond in ways that would damage U.S. national interests. An official acknowledgement that the CIA possesses the requested information could be construed by a foreign government, whether friend or foe, to mean that the CIA has operated within that country's borders or has undertaken certain intelligence operations against its residents. Such a perception could adversely affect U.S. foreign relations with that nation.

59. In this case, providing a categorization of the CIA's responsive records reasonably could be expected to cause damage to the national security by negatively impacting U.S. foreign relations. Any response by the CIA that could be seen as a confirmation of its alleged involvement in the deaths of Anwar al-Awlaki, Samir Khan, or Abdulrahman al-Awlaki, for example, could raise questions with other countries and their populaces about whether the CIA is operating clandestinely inside their borders, which in turn could cause those countries to respond in ways that would damage U.S. national interests. Additionally, the CIA typically cannot confirm or deny whether it has had any involvement in any particular foreign activity of the United States; to do so would provide terrorist organizations and

adversarial nations with information about the CIA's intelligence activities and capabilities (or lack thereof, as the case may be), in a particular location or region, thereby diminishing the effectiveness of those activities in the future.

* * *

60. As discussed in Part III above, the CIA's "no number, no list" response is supported not only by FOIA exemption (b)(1), but also FOIA exemption (b)(3) (and in particular, the National Security Act of 1947 and the CIA Act of 1949). Neither of those statutes requires a showing of damage; rather, they merely require the withheld information to be an intelligence source, intelligence method, or relate to a function of the CIA. Immediately above I have described at length the specific intelligence sources, methods, and functions of the CIA implicated by the ACLU's FOIA request. Accordingly, the CIA's "no number, no list" response is independently supported by FOIA exemption (b)(3), even if the Court believes that a different response would not harm U.S. national security.

V. GLOMAR RESPONSE TO NEW YORK TIMES REQUESTS

61. Although the CIA is not a defendant in the consolidated case brought by the New York Times and its reporters against DOJ, these requests implicate CIA equities for the same reasons identified above, and therefore the CIA has asked DOJ to issue a Glomar response on its behalf. Both of the

New York Times requests seek OLC opinions examining the legality of targeted lethal operations. The Savage request seeks such OLC opinions as they pertain to the targeting of "a United States citizens who is deemed a terrorist," whereas the Shane request seeks such opinions concerning the targeting of "people suspected of ties to Al Qaeda or other terrorist groups." In addition, both requests make clear that they are seeking such opinions as they relate to potential CIA operations, not just those of the U.S. military; the Shane request specifically identifies "the Central Intelligence Agency" in its request, while the Savage request refers to operations by "intelligence community assets," which would include the CIA. With one extremely limited exception described below, the CIA has asked DOJ to issue a Glomar response to these two requests to the extent they seek OLC opinions about CIA operations. As contrasted to a "no number, no list" response, this means that DOJ did not search for and include opinions covered by this Glomar response (if they existed) when it processed the requests for the New York Times litigation, nor can it confirm or deny the existence or nonexistence of such opinions in its response..

62. With one limited exception, the fact of the existence or nonexistence of OLC opinions concerning targeted lethal operations conducted by the CIA against terrorists, including those who are U.S. citizens, is classified information that is

protected from disclosure by Executive Order 13526, the National Security Act, and the CIA Act. OLC opinions are a very unique type of document within the U.S. Government, and acknowledging the mere existence of an OLC opinion can reveal a great deal of information about the interests, priorities, and capabilities of the agencies that are the subjects of those opinions - information that is not revealed by acknowledging the existence of a non-descript record about the same topic. In this case, if it were revealed that responsive OLC opinions pertaining to CIA operations existed, it would tend to reveal that the CIA had the authority to directly participate in targeted lethal operations against terrorists generally, and that this authority may extend more specifically to terrorists who are U.S. citizens. Conversely, if OLC opinions did not exist on these subjects, it would tend to reveal that the CIA did not have these authorities. In either case, confirming the existence or nonexistence of these authorities would reveal information pertaining to CIA intelligence activities, methods, and functions, as well as the foreign activities of the United States.

63. The harm to national security that reasonably could be expected to result from disclosure of whether or not the CIA has the authority to be directly involved in lethal operations specifically against U.S. citizens who are terrorists was

described above. That rationale applies equally to the Savage request, and therefore I refer the Court to that discussion.

64. The Shane request is broader in that it seeks OLC opinions about the use of lethal force against not just U.S. citizens but terrorists generally - namely, "people suspected of ties to Al Qaeda or other terrorist groups." As with the Savage request, the CIA has asked DOJ to issue a Glomar response to this request to the extent it pertains to CIA operations, with one limited exception. As the Court is well aware, on 1 May 2011, the United States conducted an operation that resulted in the death of Usama Bin Laden ("UBL"), the leader of al-Qa'ida. It has been officially acknowledged that the CIA participated in and oversaw this historic operation. Thus, whether or not there are any OLC opinions that specifically address the CIA's involvement in the operation that resulted in UBL's death is not classified, and the existence of such opinions is not covered by DOJ's Glomar response (in fact, I understand that there are no such opinions). What cannot be revealed, however, is whether or not there are any additional OLC opinions addressing the CIA's use of lethal force against terrorists outside the specific context of the UBL operation. To do so would tend to reveal whether or not the CIA has been granted the authority to directly participate in lethal operations against members of al-Qa'ida (or other terrorist groups) beyond UBL. This fact

remains classified, and therefore it is appropriate for DOJ to refuse to confirm or deny the existence of any OLC opinions that would reveal this fact under FOIA exemptions (b)(1) and (b)(3).

65. With respect to both requests, it would greatly benefit terrorist organizations such as al-Qa'ida to know with certainty the intelligence activities in which the CIA has or has not been specifically authorized to participate. To reveal such information would provide valuable insight into the CIA's authorities, capabilities, and interests that our enemies could use to reduce the effectiveness of the CIA's intelligence operations. This is particularly true with regard to whether or not the CIA's intelligence activities against members of al-Qa'ida and other terrorist groups (other than the UBL operation) may involve the use of lethal force. Hypothetically, if it was revealed that the CIA possesses this authority, it would alert terrorists to the possibility that they could be targeted by such activities, which may allow them to take countermeasures to avoid this possibility. It would also reveal that the CIA had been granted authorities against certain terrorists that go beyond traditional intelligence-gathering activities, which could lead to suspicion that the CIA was involved in other "non-traditional" activities in addition to the use of lethal force - such as, hypothetically, covert influence. This in turn could lead to the belief by other governments and their populaces,

rightly or wrongly, that the CIA was responsible for certain activities carried out within their countries, which could harm the foreign affairs of the United States and also reduce the effectiveness of future CIA operations. On the other hand, if it was officially confirmed that the CIA did not have this authority, it would allow terrorists to operate more freely and openly, knowing that they could not be targeted by the CIA. For these reasons, it is appropriate for DOJ to Glomar both of the New York Times requests to the extent they pertain to CIA operations.⁷

VI. THE ABSENCE OF AUTHORIZED OFFICIAL DISCLOSURES

66. In its administrative appeal, the ACLU references a number of purported statements of current and former U.S. Government officials, news reports, and other publicly available information to support its argument that the CIA has officially disclosed the underlying facts being protected by its response to the FOIA request. I am also aware of more recent non-authoritative news reports on similar subjects, which the ACLU has cited in other pending litigation against the CIA. Separately, I am aware that various U.S. Government officials (including the Attorney General) have spoken publicly about the U.S. Government's legal analysis and related procedural

⁷ For the same reasons, in the course of responding to the aspects of the ACLU request that seek legal analysis, DOJ likewise cannot reveal whether or not there are any responsive OLC opinions pertaining to CIA operations.

considerations applicable to the potential targeting of U.S. citizens for lethal force.

67. Contrary to the ACLU's suggestion, however, no authorized CIA or Executive Branch official has officially and publicly confirmed (or denied) whether the CIA had any involvement whatsoever in the deaths of Anwar al-Awlaki, Samir Khan, or Abdulrahman al-Awlaki. Nor has any such official officially and publicly confirmed or denied that the CIA possesses documents responsive to these specific aspects of the ACLU's FOIA request. Many of the referenced news reports, for example, largely amount to media speculation and conjecture by individuals who do not have the ability to make official and documented disclosures on behalf of the CIA. Indeed, many of the statements cited by the ACLU are either unsourced or come from former government officials or anonymous individuals. In addition to being unofficial, one also cannot assume that such anonymous, unsourced, or otherwise non-authoritative reports are accurate. Regardless, these statements do not constitute official disclosures on behalf of the CIA. If the CIA were precluded from issuing a Glomar response to FOIA requests as a result of such non-authoritative statements, then the U.S. Government's ability to protect classified information would be eviscerated, thereby causing significant and far reaching damage to the U.S. national security.

68. The same is true with respect to the broader categories of the ACLU request about targeting U.S. citizens generally, as well as the New York Times requests. I am unaware of any official disclosures that would invalidate the CIA's responses to these requests. In the case of the ACLU request, I am unaware of any official disclosure that reveals the level of interest the CIA has in the legality and related procedural considerations applicable to the targeting of U.S. citizens for lethal force or the underlying fact being protected by the CIA's response - whether or not the CIA itself has the authority to be directly involved in such activities. Nor am I aware of any official disclosures as to the existence or non-existence of OLC opinions on this topic, as sought by the New York Times requests.


VII. CONCLUSION

69. In this case, the number, nature, and categorization of CIA records responsive to the ACLU request, and the existence or nonexistence of OLC opinions responsive to the New York Times requests (to the extent they pertain to CIA operations), are properly classified facts and are so intricately intertwined with intelligence activities, intelligence sources and methods, and U.S. foreign relations and foreign activities that these facts must remain classified. Accordingly, I have determined the only appropriate response is for the CIA to withhold this

information under FOIA exemptions (b)(1). Additionally, and separately, responding in any other manner would reveal intelligence sources and methods and core functions of the CIA. This response is therefore independently supported by FOIA exemption (b)(3).

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of June, 2012.



John Bennett
Director, National Clandestine Service
Central Intelligence Agency

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Exhibit A

JA247

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NATIONAL SECURITY
PROJECT



October 19, 2011

Information Officer
Office of Freedom of Information and Security Review
Directorate for Executive Services and Communications
FOIA/Privacy Branch
1155 Defense Pentagon, Room 2C757
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**Re: REQUEST UNDER FREEDOM OF INFORMATION ACT/
 Expedited Processing Requested**

To Whom it May Concern:

This letter constitutes a request ("Request") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, the Department of Defense implementing regulations, 32 C.F.R. § 286.1 *et seq.*, the Department of Justice implementing regulations, 28 C.F.R. § 16.1 *et seq.*, the Central Intelligence Agency implementing regulations, 32 C.F.R. § 1900.01 *et seq.*, the President's Memorandum of January 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009) and the Attorney General's Memorandum of March 19, 2009, 74 Fed. Reg. 49,892 (Sept. 29, 2009). The Request is submitted by the American Civil Liberties Union Foundation and the American Civil Liberties Union (collectively, the "ACLU").¹

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This Request seeks records pertaining to the legal authority and factual basis for the targeted killing of Anwar al-Awlaki² ("al-Awlaki") and two other U.S. citizens by the United States Government. According to news reports, al-Awlaki, a United States citizen, was killed in Yemen on or around September 30, 2011, by a missile or missiles fired from one or more unmanned aerial vehicles (UAVs)—commonly referred to as "drones"—operated by the Central Intelligence Agency (CIA) and/or Joint Special Operations Command (JSOC). *See, e.g.*, Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Greg Miller, *Strike on Aulqi Demonstrates Collaboration between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0la0>. Samir Khan

¹ The American Civil Liberties Union is a non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators. The American Civil Liberties Union Foundation is a separate 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, and educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analyses of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

² Al-Awlaki's name is sometimes spelled "al-Aulaqi." This Request seeks records referring to al-Awlaki using any spelling or transliteration of his name.

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("Khan"), also a U.S. citizen, was killed in the same attack. See Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pq0Nke>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>. Press reports indicate that on or around October 14, 2011, a third U.S. citizen, Abdulrahman al-Awlaki,³ was killed in a drone strike in southern Yemen. Abdulrahman al-Awlaki, the son of Anwar al-Awlaki, was 16 years old at the time of his death. See Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks Out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuFP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>.

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We seek information about the legal basis in domestic, foreign, and international law for authorizing the targeted killing of al-Awlaki. Specifically, we request any memoranda produced by the Department of Justice Office of Legal Counsel (OLC) analyzing the legal basis for killing al-Awlaki and authorizing the use of lethal force against him. We request information regarding the rules and standards used to determine when, where, and under what circumstances al-Awlaki could be killed, as well as what measures were required to avoid civilian casualties. We also request information about whether Samir Khan was specifically targeted for killing and what the legal basis was for killing him.

Beginning immediately after al-Awlaki was killed, the media began reporting the existence of a legal memorandum drafted by the OLC that provided legal justification for killing al-Awlaki (hereinafter "OLC memo"). The memorandum was reportedly completed around June 2010 and signed by David Barron. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulaki*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. According to the New York Times, the OLC memo "concluded that Mr. Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans, as well as because Yemeni authorities were unable or unwilling to stop him." Savage, *supra*. We seek release of this memorandum, as well as any other memoranda describing the legal basis for killing al-Awlaki or any other U.S. citizen.

³ Abdulrahman al-Awlaki's first name is sometimes spelled "Abdelrahman" or "Abdul-Rahman" and his family name is sometimes spelled "al-Aulaqi." This Request seeks records referring to Abdulrahman al-Awlaki using any spelling or transliteration of his name.

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Since al-Awlaki was killed, there have been numerous calls for the release of the OLC memo and any other documents explaining the government's asserted legal basis for killing al-Awlaki. See, e.g., Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2011, <http://wapo.st/n6l3vK> ("A bipartisan chorus of political and legal voices is calling on the Obama administration to release a declassified version of the Justice Department memo that provided the legal analysis sanctioning the killing in Yemen last week of Anwar al-Awlaki, a U.S. citizen."); Benjamin Wittes, *More on Releasing the Legal Rationale for the Al-Aulaqi Strike*, Lawfare (Oct. 4, 2011, 3:07 PM), <http://bit.ly/r42x0f>; Jack Goldsmith, *Release the al-Aulaqi OLC Opinion, or Its Reasoning*, Lawfare (Oct. 3, 2011, 7:45 AM), <http://bit.ly/mRUMg0>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4> ("The Justice Department reportedly wrote an advisory memo on the legality of targeting an American citizen with lethal force absent a trial or other due process, but the administration has kept the memo classified. Keeping the legal rationale secret amplifies the voices that argue that Mr. Obama assassinated an American citizen."); Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/oh0G0w>. The public has a vital interest in knowing the legal basis on which U.S. citizens may be designated for extrajudicial killing and then targeted with legal force.

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Reports indicate that the OLC memo "does not independently analyze the quality of the evidence against [al-Awlaki]." Savage, *supra*. We therefore also seek information about the factual basis for authorizing the killing of al-Awlaki. Such information includes the basis for asserting that al-Awlaki was operationally involved in al Qaeda planning, and that he posed an imminent threat of harm to the United States, United States citizens, or others. We also seek information about the legal and factual bases for targeting Khan and Abdulrahman al-Awlaki.

Press reports have revealed that Executive Branch officials engage in a process of assessing the factual basis for determining whether an individual, including U.S. citizens, should be targeted for killing. See Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>; James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010, <http://bit.ly/qZ0Q4q> ("Hidden behind walls of top-secret classification, senior U.S. government officials meet in what is essentially a star chamber to decide which enemies of the state to target for assassination."). However, the government has not revealed the factual basis for targeting al-Awlaki for killing, and press reports suggest that the evidence against him is subject to significant dispute. See Hosenball, *supra*

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("[O]fficials acknowledged that some of the intelligence purporting to show Awlaki's hands-on role in plotting attacks was patchy."). The public also lacks information about the killings of Khan and Abdulrahman al-Awlaki, including whether they were intentionally targeted.

Without information about the legal and factual basis for the targeted killing of al-Awlaki and others, the public is unable to make an informed judgment about the policy of authorizing targeted killings of United States citizens. We make the following requests for information in hopes of filling that void.

I. Requested Records

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1. All records created after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles ("UAVs" or "drones") or by other means.
2. All records created after September 11, 2001, pertaining to the process by which U.S. citizens can be designated for targeted killing, including who is authorized to make such determinations and what evidence is needed to support them.
3. All memoranda, opinions, drafts, correspondence, and other records produced by the OLC after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed, including discussions of:
 - A. The reasons why domestic-law prohibitions on murder, assassination, and excessive use of force did not preclude the targeted killing of al-Awlaki;
 - B. The protections and requirements imposed by the Fifth Amendment Due Process Clause;
 - C. The reasons why international-law prohibitions on extrajudicial killing did not preclude the targeted killing of al-Awlaki;
 - D. The applicability (or non-applicability) of the Treason Clause to the decision whether to target al-Awlaki;
 - E. The legal basis authorizing the CIA, JSOC, or other U.S. Government entities to carry out the targeted killing of al-Awlaki;

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- F. Any requirement for proving that al-Awlaki posed an imminent risk of harm to others, including an explanation of how to define imminence in this context; and
 - G. Any requirement that the U.S. government first attempt to capture al-Awlaki before killing him.
4. All 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 killing 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 killing of al-Awlaki.
5. All documents and records pertaining to the factual basis for the killing of Samir Khan, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death.
6. All documents and records pertaining to the factual basis for the killing of Abdulrahman al-Awlaki, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, and any other factors relevant to the decision to kill him or the failure to avoid causing his death.

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II. Application for Expedited Processing

We request expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c). There is a "compelling need" for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged Federal Government activity. 5 U.S.C. § 552(a)(6)(E)(v); *see also* 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). In addition, the records sought relate to a "breaking news story of general public interest." 32 C.F.R. § 286.4(d)(3)(ii)(A); *see also* 28 C.F.R. § 16.5(d)(1)(iv) (providing for expedited processing in relation to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence").

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The ACLU is "primarily engaged in disseminating information" within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(I); 28 C.F.R. § 16.5(d)(1)(ii); 32 C.F.R. § 286.4(d)(3)(ii); 32 C.F.R. § 1900.34(c)(2). Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. *See ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding that a non-profit public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information" (internal citation omitted)). Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly circulated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU also disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused.

The ACLU website specifically includes features on information obtained through the FOIA. *See, e.g.*, www.aclu.org/torturefoia; <http://www.aclu.org/olcmemos/>; <http://www.aclu.org/national-security/predator-drone-foia>; <http://www.aclu.org/safefree/torture/csrtfoia.html>; <http://www.aclu.org/natsec/foia/search.html>; <http://www.aclu.org/safefree/nsaspying/30022res20060207.html>; www.aclu.org/patriotfoia; www.aclu.org/spyfiles; <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>

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; www.aclu.org/exclusion. For example, the ACLU's "Torture FOIA" webpage, www.aclu.org/torturefoia, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. The webpage also advises that the ACLU in collaboration with Columbia University Press has published a book about the documents obtained through the FOIA. See Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (Columbia Univ. Press 2007). The ACLU also publishes an electronic newsletter, which is distributed to subscribers by e-mail. Finally, the ACLU has produced an in-depth television series on civil liberties, which has included analysis and explanation of information the ACLU has obtained through the FOIA. The ACLU plans to analyze and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the Requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.⁴

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Furthermore, the records sought directly relate to a breaking news story of general public interest that concerns actual or alleged Federal Government activity; specifically, the records sought relate the U.S. Government's targeted killing of Anwar al-Awlaki, allegedly collateral killing of Samir Khan, and potential killing of other U.S. citizens in Yemen and elsewhere using unmanned aerial vehicles or other means. The records sought will help determine what the government's asserted legal basis for the targeted killing of al-Awlaki and others is, whether it complies with domestic and international law, whether the government seeks to avoid collateral killing of U.S. citizens not specifically targeted, and other matters that are essential in order for the public to make an informed judgment about the advisability of this tactic and the lawfulness of the government's conduct. For these reasons, the records sought relate to a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

There have been numerous news reports about targeted killings using drones in Afghanistan, Pakistan, Yemen and elsewhere. More particularly, there has been extensive media coverage of the killing of al-Awlaki and Khan. See, e.g., Tim Mak, *U.S. Calls Kin of American Al Qaeda*, Politico, Oct. 12, 2011, <http://politi.co/pq0Nke>; Scott Shane & Thom Shanker, *Yemen*

⁴ In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters. Further, the ACLU makes archived material available at the American Civil Liberties Union Archives at Princeton University Library.

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Strike Reflects U.S. Shift To Drones as Cheaper War Tool, N.Y. Times, Oct. 2, 2011, at A1, available at <http://nyti.ms/ogznLi>; Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant In A Car In Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J>; Robbie Brown & Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, N.Y. Times, Oct. 1, 2011, at A8, available at <http://nyti.ms/pHZSGH>; Greg Miller, *Strike on Aulagi Demonstrates Collaboration Between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0Ia0>. There has also been widespread reporting of the killing of Abdulrahman al-Awlaki. See, e.g., Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks out Against His Son's Death in Airstrike*, Wash. Post, Oct. 17, 2011, <http://wapo.st/n9NuHP>; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, available at <http://nyti.ms/pScBwi>; Brian Bennett, *U.S. Drone Strikes Kill Al Qaeda Operative in Yemen*, L.A. Times, Oct. 16, 2011, <http://lat.ms/mWffAn>; Hamza Hendawi, *Yemen: U.S. Strike Kills 9 al-Qaeda Militants*, Associated Press, Oct. 15, 2011, <http://abcn.ws/p3HqbA>.

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The Obama Administration's refusal to release the OLC memo or other documents describing the legal basis for killing al-Awlaki has also been the subject of intense media coverage. See, e.g., Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pScBwi>; Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. Times, Oct. 9, 2011, <http://nyti.ms/naggsE>; Editorial, *Administration Should Do More to Defend the Awlaki Strike*, Wash. Post, Oct. 7, 2011, <http://wapo.st/p1SEho>; Peter Finn, *Political, Legal Experts Want Release of Justice Dept. Memo Supporting Killing of Anwar al-Awlaki*, Wash. Post, Oct. 7, 2007, <http://wapo.st/n6I3vK>; Editorial, *Obama's Illegal Assassination?*, Wash. Times, Oct. 3, 2011, <http://bit.ly/q8y3a4>; Editorial, *Anwar Awlaki: Targeted for Death*, L.A. Times, Oct. 2, 2011, <http://lat.ms/oh0G0w>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulagi*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. There is also significant interest in the details of the process by which the government authorized the killing of al-Awlaki. See, e.g., Bruce Ackerman, *Obama's Death Panel*, Foreign Policy, Oct. 7, 2011, <http://bit.ly/qZ0Q4q>; Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>.

Significant and pressing questions about the basis for the targeted killing of al-Awlaki and other U.S. citizens remain unanswered. Therefore, the subject of this Request will remain a matter of widespread and exceptional media interest. The public has an urgent need for information about the subject of this Request.

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III. Application for Waiver or Limitation of Fees

We request a waiver of search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because it "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 28 C.F.R. § 16.11(k)(1); 32 C.F.R. § 286.28(d); 32 C.F.R. § 1900.13(b)(2).

As discussed above, numerous news accounts reflect the considerable public interest in the records we seek. Given the ongoing and widespread media attention to this issue, the records sought in the instant Request will contribute significantly to public understanding of the operations and activities of the Departments of Defense, Justice, and the Central Intelligence Agency with regard to the targeted killings of Anwar al-Awlaki and other U.S. citizens. *See* 28 C.F.R. § 16.11(k)(1)(i); 32 C.F.R. § 286.28(d)(i); 32 C.F.R. § 1900.13(b)(2). Moreover, disclosure is not in the ACLU's commercial interest. Any information disclosed by the ACLU as a result of this Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation omitted)); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act").

We also request a waiver of search and review fees on the grounds that the ACLU qualifies as a "representative of the news media" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 32 C.F.R. § 286.28(e)(7); 32 C.F.R. § 1900.13(i)(2); 28 C.F.R. § 16.11(d) (search and review fees shall not be charged to "representatives of the news media").

The ACLU meets the statutory and regulatory definitions of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004) (finding non-profit public interest group to be "primarily engaged in disseminating information"). The ACLU is a "representative of the news media" for the same reasons it is

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"primarily engaged in the dissemination of information." *See Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of FOIA); *see supra*, section II.⁵

* * *

Pursuant to applicable statute and regulations, we expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(d)(4); 32 C.F.R. § 286.4(d)(3); 32 C.F.R. § 1900.21(d).

Please be advised that because we are requesting expedited processing under the Department of Justice implementing regulations section 16.5(d)(1)(ii) and section 16.5(d)(1)(iv), we are sending a copy of this letter to DOJ's Office of Public Affairs. Notwithstanding Ms. Schmalzer's determination, we look forward to your reply within 20 business days, as the statute requires under section 552(a)(6)(A)(I).

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If the Request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. We expect the release of all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

⁵ On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU. For example, in August 2011 the Department of Justice granted a fee waiver to the ACLU with respect to a request for information related to the proxy detention of detainees of U.S. naval vessels. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In January 2010, the State Department, Department of Defense, and Department of Justice all granted a fee waiver to the ACLU with regard to a FOIA request submitted in April 2009 for information relating to the Bagram Theater Internment Facility in Afghanistan. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In addition, the Department of Defense did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. The Department of Justice did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in November 2007, December 2005, and December 2004. Three separate agencies—the Federal Bureau of Investigation, the Office of Intelligence Policy and Review, and the Office of Information and Privacy in the Department of Justice—did not charge the ACLU fees associated with a FOIA request submitted by the ACLU in August 2002.

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We also request that you provide an estimated date on which you will complete processing of this request. See 5 U.S.C. § 552(a)(7)(B).

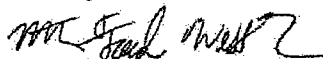
Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Nathan Freed Wessler
National Security Project
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. See 5 U.S.C. § 552(a)(6)(E)(vi).

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,



Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 519-7847
Fax: (212) 549-2654

C05800551

Exhibit B

[Faint, illegible handwritten text]

JA260

Central Intelligence Agency



Washington, D.C. 20505

25 October 2011

Mr. Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street 18th Floor
New York, NY 10004

Reference: F-2012-00140

Dear Mr. Wessler:

On 24 October 2011, the office of the Information and Privacy Coordinator received your 19 October 2011 Freedom of Information Act (FOIA) request. Our officers will review it, and will advise you should they encounter any problems or if they cannot begin the search without additional information.

You have requested expedited processing. We handle all requests in the order we receive them; that is, "first-in, first-out." We make exceptions to this rule only when a requester establishes a compelling need in accordance with the FOIA, 5 U.S.C. § 552, as amended. Your request does not demonstrate a "compelling need" under these criteria and, therefore, we deny your request for expedited processing.

We have assigned your request the reference number above. Please use this number when corresponding so that we can identify it easily.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Viscuso".

Susan Viscuso
Information and Privacy Coordinator

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EXHIBIT C

JA262

C05800551

Central Intelligence Agency



Washington, D.C. 20505

17 November 2011

Mr. Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Reference: F-2012-00140

Dear Mr. Wessler:

This is further to our 25 October 2011 letter regarding your 19 October 2011 Freedom of Information Act (FOIA) request, submitted on behalf of the American Civil Liberties Union Foundation, received in the office of the Information and Privacy Coordinator on 24 October 2011, for:

1. All records created after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles ("UAVs" or "drones") or by other means.
2. All records created after September 11, 2001, pertaining to the process by which U.S. citizens can be designated for targeted killing.
3. All memoranda, opinions, drafts, correspondence, and other records produced by the OLC after September 11, 2001, pertaining to the legal basis in domestic, foreign, and international law upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed.
4. All documents and records pertaining to the factual basis for the targeted killing of al-Awlaki.
5. All documents and records pertaining to the factual basis for the killing of Samir Khan, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death.
6. All documents and records pertaining to the factual basis for the killing of Abdulrahman al-Awlaki, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, and any other factors relevant to the decision to kill him or the failure to avoid causing his death.

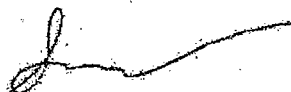
JA263

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We have completed a thorough review of your request and have determined, in accordance with section 3.6(a) of Executive Order 13526, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended, and section 102A(i)(1) of the National Security Act of 1947, as amended. Therefore, your request is denied pursuant to FOIA exemptions (b)(1) and (b)(3). I have enclosed an explanation of these exemptions for your reference and retention. As the CIA Information and Privacy Coordinator, I am the CIA official responsible for this determination. You have the right to appeal this response to the Agency Release Panel, in my care, within 45 days from the date of this letter. Please include the basis of your appeal.

We note that you have already submitted your request to the Department of Justice.

Sincerely,



Susan Viscuso
Information and Privacy Coordinator

Enclosure

JA264

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Explanation of Exemptions

Freedom of Information Act:

- (b)(1) exempts from disclosure information currently and properly classified, pursuant to an Executive Order;
- (b)(3) exempts from disclosure information that another federal statute protects, provided that the other federal statute either requires that the matters be withheld, or establishes particular criteria for withholding or refers to particular types of matters to be withheld. The (b)(3) statutes upon which the CIA relies include, but are not limited to, the CIA Act of 1949;
- (b)(4) exempts from disclosure trade secrets and commercial or financial information that is obtained from a person and that is privileged or confidential;
- (b)(5) exempts from disclosure inter-and intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) exempts from disclosure information from personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy;
- (b)(7) exempts from disclosure information compiled for law enforcement purposes to the extent that the production of the information (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source or, in the case of information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source; (E) would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or (F) could reasonably be expected to endanger any individual's life or physical safety;
- (b)(8) exempts from disclosure information contained in reports or related to examination, operating, or condition reports prepared by, or on behalf of, or for use of an agency responsible for regulating or supervising financial institutions; and
- (b)(9) exempts from disclosure geological and geophysical information and data, including maps, concerning wells.

March 2011

JA265

EXHIBIT D

C05800551

NATIONAL SECURITY
PROJECT



December 6, 2011

Agency Release Panel
c/o Susan Viscuso, Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Re: FOIA Appeal, Reference: F-2012-00140

Dear Ms. Viscuso,

Requesters American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "ACLU") write to appeal the Central Intelligence Agency's ("CIA") refusal to confirm or deny the existence or nonexistence of records requested by Freedom of Information Act ("FOIA") request number F-2012-00140 ("Request"). The Request seeks records pertaining to the legal authority and factual basis for the targeted killings of U.S. citizens, specifically, Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki. *See* Ex. A (FOIA Request dated October 19, 2011). Information and Privacy Coordinator Susan Viscuso's letter refusing to confirm or deny the existence or nonexistence of responsive records ("Response Letter") is dated November 17, 2011. *See* Ex. B (Response Letter). The ACLU respectfully requests reconsideration of this determination and the release of records responsive to the Request.

The ACLU requested release of six distinct categories of information pertaining to the legal authority and factual basis for the targeted killing of three U.S. citizens. The CIA denied the ACLU's FOIA request with a "Glomar" response. The Response Letter stated, in conclusory terms, that "the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request" because "[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by [statute]." Ex. B at 2.

The Glomar response provided here is far too sweeping and categorical. The refusal to confirm or deny the existence of *any* records about the targeted killings in question or the targeted killing program generally goes far beyond the bounds of a permissible Glomar response. Under FOIA, an agency may invoke the Glomar response—refusing to confirm or deny the existence of requested records—only if the very fact of existence or nonexistence of the records is itself properly classified under FOIA exemption (b)(1), properly withheld pursuant to statute under exemption (b)(3), or properly subject to another FOIA exemption. *See*

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NEW YORK, NY 10002-3400
1 212.549.2500
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OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

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Phillippi v. CIA, 546 F.2d 1009, 1012 (D.C. Cir. 1976); Exec. Order No. 13,526, § 3.6(a), 75 Fed. Reg. 707, 719 (Dec. 29, 2009). It is extremely unlikely that merely confirming or denying the existence of records pertaining to targeted killing—a subject of voluminous and sustained media coverage—would reveal a classified fact or intelligence sources or methods.

The Response Letter fails to adequately justify the sweeping and categorical Glomar response. The Response Letter provides only a conclusory explanation of the basis for invoking the Glomar response, and does not explain why acknowledging the existence or nonexistence of *any* responsive records would reveal a classified fact or an intelligence source or method. *See* Ex. B at 2 (“The fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by [statute].”). Further, the Response Letter does not explain how the requested records even *relate* to intelligence sources or methods, and makes no attempt to distinguish between the six distinct categories of information contained in the ACLU’s Request or to explain why confirming or denying *any particular category* of requested records would reveal a classified fact or intelligence source or method. The summary and categorical rationale provided in the Response Letter is not an adequate justification for denying the ACLU’s FOIA request *in toto*. *See Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (remanding with instructions that “the CIA must substantiate its Glomar response with ‘reasonably specific detail’”); *Riquelme v. CIA*, 453 F. Supp. 2d 103, 112 (D.D.C. 2006) (“[A] Glomar response does not . . . relieve [an] agency of its burden of proof.” (citing *Phillippi*, 546 F.2d at 1013)).

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Additionally, the sweeping Glomar response provided in the Response Letter is unsupportable because the government has acknowledged facts at issue in the Request. The government’s targeted killing program and its use of unmanned aerial vehicles (commonly known as “drones”) to carry out the program is by no means a secret. Previous government acknowledgement of information sought in a FOIA request waives an otherwise valid Glomar claim. *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (“[W]hen information has been officially acknowledged, its disclosure may be compelled even over an agency’s otherwise valid exemption claim.” (internal quotation marks omitted) (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990))).

The CIA’s involvement in carrying out targeted killings using drones and other means is well known. *See, e.g.*, Adam Entous, Siobhan Gorman, & Julian E. Barnes, *U.S. Tightens Drone Rules*, Wall St. J., Nov. 4, 2011, <http://on.wsj.com/uh1AEL>; Mark Mazzotti & Eric Schmitt, *C.I.A. Steps Up Drone Attacks on Taliban in Pakistan*, N.Y. Times, Sept. 27, 2010, <http://nyti.ms/aDZ7Y3> (“The C.I.A. has drastically increased its bombing

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campaign in the mountains of Pakistan in recent weeks, American officials said.”); Jane Mayer, *The Predator War*, New Yorker, Oct. 26, 2009, <http://nyr.kr/3BpZyi>. Current and former government officials have explicitly discussed the targeted killing and drone programs and have acknowledged the CIA’s role in them. See, e.g., Josh Gerstein, *Ex-DNI Dennis Blair: Get CIA Out of Long-Term Drone Campaigns*, Politico, Nov. 30, 2011, <http://politi.co/rp90Cm> (quoting former Director of National Intelligence Dennis Blair discussing CIA drone program); *U.S.: Defense Secretary Refers to CIA Drone Use*, L.A. Times, Oct. 7, 2011, <http://lat.ms/roREDq> (quoting former CIA Director and current Secretary of Defense Leon Panetta discussing CIA’s use of predator drones); Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. Times, Aug. 11, 2011, <http://nyti.ms/nsUijW> (“President Obama’s top counterterrorism adviser, John O. Brennan, clearly referring to the classified drone program, said in June that for almost a year, ‘there hasn’t been a single collateral death because of the exceptional proficiency, precision of the capabilities we’ve been able to develop.’”); Spencer Ackerman, *Will Petraeus Rein in the Drone War?*, Wired, June 23, 2011, <http://bit.ly/iUSDe> (quoting Gen. David Petraeus’s comments on use of drones by CIA during CIA directorship confirmation hearing); Tara Mckelvey, *Inside the Killing Machine*, Daily Beast, Feb. 13, 2011, <http://bit.ly/rfU2eG> (quoting former CIA General Counsel John A. Rizzo’s detailed discussion of the CIA’s targeted killing program); Leon E. Panetta, Director’s Remarks at the Pacific Council on International Policy (May 18, 2009), <http://1.usa.gov/15sidh> (quoting CIA Director Leon E. Panetta stating, in response to a question about drone strikes, that “I think it does suffice to say that these operations have been very effective because they have been very precise in terms of the targeting and it involved a minimum of collateral damage” and that drones are “the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership”); Peter Finn & Joby Warrick, *CIA Director Says Attacks in Pakistan have Hobbled Al-Qaida*, Wash. Post, Mar. 17, 2010, <http://wapo.st/cAby17> (quoting CIA Director Leon E. Panetta describing drone strikes in Pakistan as “the most aggressive operation that CIA has been involved in in our history”).

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The CIA’s authority to carry out targeted killings against U.S. citizens has also been publicly known for nearly a decade. See, e.g., John J. Lumpkin, *Bush Order: CIA Can Kill Americans in Al Qaeda*, Chi. Trib., Dec. 4, 2002, available at 2002 WLNR 12684412 (“U.S. citizens working for Al Qaeda overseas can legally be targeted and killed by the CIA under President Bush’s rules for the war on terrorism, U.S. officials say.”); Editorial, *Lethal Force Under Law*, N.Y. Times, Oct. 10, 2010, <http://nyti.ms/aahH2n> (“Privately, government officials say no C.I.A. drone strike takes place without the approval of the United States ambassador to the target country, the chief of the C.I.A. station, a deputy at the agency, and the agency’s director.”). More specifically, the CIA’s involvement in the

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killings of Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki has been acknowledged by government officials and widely reported in the press.

It has been publicly known since at least January 2010 that Anwar al-Awlaki was placed on a so-called "kill list." See, e.g., Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, Wash. Post, Jan. 27, 2010, <http://wapo.st/dkg306>; Greg Miller, *U.S. Citizen in CIA's Cross Hairs*, L.A. Times, Jan. 31, 2010, <http://lat.ms/lncdXB>; David S. Cloud, *U.S. Citizen Anwar Awlaki Added to CIA Target List*, L.A. Times, Apr. 6, 2010, <http://lat.ms/almV0m>; Greg Miller, *Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of Those CIA Is Allowed to Kill*, Wash. Post, Apr. 7, 2010, <http://wapo.st/9Fhl4B>. Press coverage of the attack that killed al-Awlaki and Khan cited statements by government officials describing clearly, and in considerable detail, the CIA's involvement in directing and carrying out the attack. See, e.g., Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. Times, Oct. 1, 2011, at A1, available at <http://nyti.ms/rsjp7J> (citing government officials and reporting that "[a]fter several days of surveillance of Mr. Awlaki, armed drones operated by the Central Intelligence Agency took off from a new, secret American base in the Arabian Peninsula, crossed into northern Yemen and unleashed a barrage of Hellfire missiles at a car carrying him and other top operatives from Al Qaeda's branch in Yemen, including another American militant who had run the group's English-language Internet magazine"); Greg Miller, *Strike on Aulaqi Demonstrates Collaboration between CIA and Military*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nU0Ia0> ("Traveling from secret bases on opposite sides of Yemen, armed drones from the CIA and the military's Joint Special Operations Command converged above Anwar al-Aulaqi's position in northern Yemen early Friday and unleashed a flurry of missiles. US officials said the CIA was in control of all the aircraft . . ."). President Obama himself has acknowledged the U.S. government's killing of al-Awlaki: Hours after al-Awlaki and Samir Khan were killed, the President publicly lauded al-Awlaki's death as "another significant milestone in the broader effort to defeat al Qaeda and its affiliates" and then acknowledged the U.S. government's role, stating that "this success is a tribute to our intelligence community." Barack Obama, Remarks by the President at the "Change of Office" Chairman of the Joint Chiefs of Staff Ceremony (Sept. 30, 2011), <http://1.usa.gov/o0mLpT>. Several weeks later, President Obama stated on national television that "[al-Awlaki] was probably the most important al Qaeda threat that was out there after Bin Laden was taken out, and it was important that working with the enemies [sic: Yemenis], we were able to remove him from the field." David Nakamura, *Obama on 'Tonight Show' with Jay Leno: Full Video and Transcript*, Wash. Post, Oct. 26, 2011, <http://wapo.st/u2GTMf> (emphasis added).

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Press reports have also revealed details about the U.S. drone strike that killed Abdulrahman al-Awlaki. See Tom Finn & Noah Browning, *An American Teenager in Yemen: Paying for the Sins of his Father?*, Time, Oct. 27, 2011, <http://ti.me/vj2Eor>; Tim Lister, *Death of U.S. Teenager in Drone Strike Stokes Debate*, CNN.com, Oct. 25, 2011, <http://bit.ly/rDnXsA>; Catherine Herridge, *Obama Administration Pressed for Accountability After Americans Killed in Anti-Terror Airstrikes*, FoxNews.com, Oct. 25, 2011, <http://fxn.ws/r1FWd8>.

The press has also quoted government officials regarding specific categories of information sought by the Request. For example, Category Three of the Request seeks memoranda and other records produced by the Department of Justice Office of Legal Counsel ("OLC") pertaining to the legal basis upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed. Ex. A at 5. Based on descriptions provided by government officials, the press has published detailed accounts of the existence and contents of such a memorandum. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. Times, Oct. 9, 2011, at A1, available at <http://nyti.ms/pYJG3X>; Peter Finn, *Secret U.S. Memo Sanctioned Killing of Aulqi*, Wash. Post, Sept. 30, 2011, <http://wapo.st/nKjZkJ>. The CIA cannot now deny the existence of any records relating to that memorandum.

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Category Two of the Request seeks records "pertaining to the process by which U.S. citizens can be designated for targeted killing." Ex. A at 5. Based on statements by government officials, the press has reported significant details about that process, including the CIA's involvement in it. See Mark Hosenball, *Secret Panel Can Put Americans on "Kill List"*, Reuters, Oct. 5, 2011, <http://reut.rs/odCH8s>; Tara Mckelvey, *Inside the Killing Machine*, Daily Beast, Feb. 13, 2011, <http://bit.ly/rfU2eG>; James Kitfield, *Wanted: Dead*, Nat'l J., Jan. 8, 2010, <http://bit.ly/sVOxk8>.

The sweeping and categorical Glomar response provided in the Response Letter cannot survive in light of these official public disclosures. The above acknowledgements by the U.S. government are specific and relevant to the records requested here. They undermine the CIA's Glomar response and require the Agency to acknowledge whether it holds responsive records and to release those records or justify their withholding pursuant to the FOIA exemptions. See *Wolf*, 473 F.3d at 378.

Even notwithstanding the detailed official acknowledgements about the U.S. government's targeted killing program and the targeting of U.S. citizens under it, the CIA's Glomar response is further undermined by the presence of substantial information about the subject matter of the ACLU's Request in the public domain. In assessing whether information is properly classified and thus properly withheld under Exemption (b)(1), courts take

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into account whether the information is already in the public domain. See, e.g., *Washington Post v. U.S. Dep't of Def.*, 766 F. Supp. 1, 9 (D.D.C. 1991) (“[S]uppression of ‘already well publicized’ information would normally ‘frustrate the pressing policies of [FOIA] without even arguably advancing countervailing considerations’” (quoting *Founding Church of Scientology v. Nat'l Sec. Agency*, 610 F.2d 824, 831–32 (D.C. Cir. 1979))). When extensive information about the subject of a FOIA request is already in the public domain, courts require a “specific explanation . . . of why formal release of information already in the public domain threatens the national security.” *Id.* at 10. Here, it is difficult to fathom how confirming or denying the existence of records that discuss matters already reported extensively in the press and available to the public would in any way threaten national security. The numerous press articles cited above and in the Request demonstrate the depth and breadth of reporting on the subject matter of the Request. Those reports, whether they include official acknowledgements by named government officials or not, invalidate the Glomar response under exemption (b)(1).

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UNION FOUNDATION

More fundamentally, it is a perversion of the Freedom of Information Act for government officials at the CIA and elsewhere to trumpet and describe in detail the perceived successes of the targeted killing program in both official and unattributed statements to the press, but then to summarily refuse to confirm or deny the existence of any records relating to that program when presented with a request under FOIA. The CIA has failed to articulate a cogent rationale for refusing to confirm or deny the existence or nonexistence of records responsive to the Request, and it is difficult to imagine a credible rationale in light of the information already available to the public. Maintaining a Glomar response in this situation runs counter to the letter and spirit of President Obama’s directive that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.” Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, *Freedom of Information Act* (Jan. 21, 2009), <http://1.usa.gov/rA14o1>. See also Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, *Classified Information and Controlled Unclassified Information* (May 27, 2009), <http://1.usa.gov/uuwPUW> (“[The government] must not withhold information for self-serving reasons or simply to avoid embarrassment.”).

For the foregoing reasons, we respectfully request that you reconsider the decision to neither confirm nor deny the existence or nonexistence of any records responsive to the Request and that you release records responsive to the Request. We look forward to your prompt response.

C05800551

Sincerely,



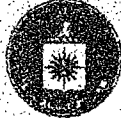
Nathan Freed Wessler
National Security Fellow
ACLU National Security Project

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

EXHIBIT E

C05800552

Central Intelligence Agency



Washington, D.C. 20505

JAN 18 2012

Mr. Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400

Reference: F-2012-00140

Dear Mr. Wessler:

We received your 6 December 2011 letter appealing our 17 November 2011 final response to your Freedom of Information Act (FOIA) request, submitted on behalf of the American Civil Liberties Union Foundation, for "records pertaining to the legal authority and factual basis for the targeted killings of U.S. citizens, specifically, Anwar al-Awlaki, Samir Khan, and Abdulrahman al-Awlaki." Specifically, you appealed our determination to neither confirm nor deny material responsive to your request on the basis of FOIA exemptions (b)(1) and (b)(3).

Your appeal has been accepted and arrangements will be made for its consideration by the appropriate members of the Agency Release Panel. You will be advised of the determinations made.

In order to afford requesters the most equitable treatment possible, we have adopted the policy of handling appeals on a first-received, first-out basis. Despite our best efforts, the large number of appeals that CIA receives has created unavoidable processing delays making it unlikely that we can respond within 20 working days. In view of this, some delay in our reply must be expected, but every reasonable effort will be made to respond as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Viscuso".

Susan Viscuso
Information and Privacy Coordinator

JA275

EXHIBIT F

JA276



Washington, D.C. 20505

2 February 2012

Mr. Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

Reference: F-2012-00140

Dear Mr. Wessler:

This letter further addresses your 6 December 2011 letter in which you appealed our 17 November 2011 final response to your Freedom of Information Act (FOIA) request, submitted on behalf of the American Civil Liberties Union Foundation, for:

1. All records created after September 11, 2001, pertaining to the legal basis in domestic, foreign and international law upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles ("UAVs" or "drones") or by other means.
2. All records created after September 11, 2001, pertaining to the process by which U.S. citizens can be designated for targeted killing.
3. All memoranda, opinions, drafts, correspondence, and other records produced by the OLC after September 11, 2001, pertaining to the legal basis in domestic, foreign, and international law upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed.
4. All documents and records pertaining to the factual basis for the targeted killing of al-Awlaki.
5. All documents and records pertaining to the factual basis for the killing of Samir Khan, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death.
6. All documents and records pertaining to the factual basis for the killing of Abdulrahman al-Awlaki, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, and any other factors relevant to the decision to kill him or the failure to avoid causing his death.

Specifically, you appealed our final response that we can neither confirm nor deny the existence or nonexistence of records responsive to your FOIA request because the fact of the existence or nonexistence of responsive records is currently and properly classified and exempt from release under FOIA exemptions (b)(1) and (b)(3). Prior to a final appellate determination by the CIA's Agency Release Panel (ARP), on 1 February 2012, you filed litigation against the CIA for the records referenced.

JA277

Based on the Agency's FOIA regulations governing exceptions to the right of administrative appeal set forth in part 1900.42(c) of title 32 of the Code of Federal Regulations, the ARP will take no further action regarding your 6 December 2011 administrative appeal, which is now the subject of pending litigation in federal court.

Sincerely,

A handwritten signature in black ink, appearing to read 'Susan Viscuso', with a long horizontal flourish extending to the right.

Susan Viscuso
Executive Secretary
Agency Release Panel

JA278