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,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
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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*

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 *Philippi*, 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 Mazzetti & 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

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/ilUSDe (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/cAbyl7 (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").

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

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/aImV0m; 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/9FhI4B. 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).

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/rIFWd8.

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 Aulaqi*, Wash. Post, Sept. 30, 2011, http://wapo.st/nKjZkJ. The CIA cannot now deny the existence of any records relating to that memorandum.

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

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).

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.

Sincerely,

Nathan Freed Wessler
National Security Fellow
ACLU National Security Project

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Exhibit A

NATIONAL SECURITY
PROJECT

October 19, 2011

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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-Awlaki[2] ("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 Aulaqi Demonstrates Collaboration between CIA and Military*, Wash. Post, Sept. 30, 2011, http://wapo.st/nU0Ia0. 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.

("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/n9NuHP; Laura Kasinoff, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. Times, Oct. 16, 2011, at A12, *available at* http://nyti.ms/pScBwi.

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 Aulaqi*, 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.

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.

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*

("[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

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;

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.

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").

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)(II); 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

; 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]

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.

Strike Reflects U.S. Shift To Drones as Cheaper War Tool, N.Y. Times, Oct. 2, 2011, at A1, *available at* http://nyti.ms/ogznLt; 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 Aulaqi 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.

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/n6l3vK; 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 Aulaqi*, 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.

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

"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. Schmaler's determination, we look forward to your reply within 20 business days, as the statute requires under section 552(a)(6)(A)(I).

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.

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[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.

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

Exhibit B

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:

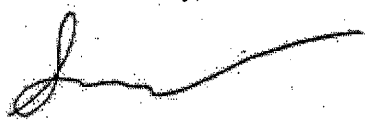
This is further to our 25 October 2011 letter regarding your 19 October 2011 Freedom of Information Act (FOIA) request, submitted on behalf of the American Civil Liberties Union Foundation, received in the office of the Information and Privacy Coordinator on 24 October 2011, for:

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.

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)(l) 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

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