UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, *Plaintiffs,* v. CENTRAL INTELLIGENCE AGENCY, *Defendant*.	No. 1:10-CV-00436 (RMC) Judge Rosemary M. Collyer

PLAINTIFFS' OPPOSITION TO DEFENDANT CIA'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation hereby oppose Defendant CIA's motion for summary judgment and cross-move for summary judgment pursuant to Federal Rule of Civil Procedure 56(a).

December 19, 2014

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO CIA'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This litigation concerns a Freedom of Information Act ("FOIA") request filed by Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively the "ACLU") for records concerning the government's use of armed aerial vehicles—"drones"—to carry out targeted killings. The CIA initially stated that it could not confirm or deny the existence of records responsive to the ACLU's request, but the D.C. Circuit found that this response was "neither logical nor plausible," and it declined to give its "imprimatur to a fiction of deniability that no reasonable person would regard as plausible." *ACLU v. CIA*, 710 F.3d 422, 431 (D.C. Cir. 2013) (*Drones FOIA II*). The agency has now acknowledged the existence of certain responsive records but it has withheld all of them in full—in effect the agency has adjusted its position only marginally from the position it took at the outset of this case.[1] In particular, the agency is withholding twelve legal memoranda as well as "thousands" of other records that include statistical information indicating, among other things, how many drone strikes have been carried out and how many individuals have been killed in connection with those strikes.

The CIA has not justified the withholding of these records because the agency has "officially acknowledged" some of the information it is withholding. Even with respect to information that has *not* been officially acknowledged, the CIA's reliance on Exemptions 1 and 3 is unlawful insofar as the withheld information consists of legal analysis or of statistical and factual information not inextricably intertwined with properly withheld intelligence activities, sources, or methods. In addition, the CIA's invocation of Exemption 5 to shield the legal

[1] The CIA did disclose portions of one classified White Paper (the "May 2011 White Paper"), which has already been released to Plaintiffs in the Southern District of New York litigation.

memoranda should be rejected because the agency's public declarations do not provide a sufficient basis for the application of the relevant privileges.

For these reasons and the further reasons discussed below, Plaintiffs respectfully ask the Court to (1) review the legal memoranda *in camera* to determine (a) which portions must be released because they consist of information that has been officially acknowledged, and (b) which portions must be released because they consist of legal analysis; and (2) direct the CIA to segregate and disclose statistical information and certain factual information (described in more detail below) that is not properly protected under the exemptions 1 or 3.

PROCEDURAL HISTORY

Plaintiffs filed their request on January 13, 2010, seeking various "records pertaining to the use of . . . 'drones' . . . by the CIA and the Armed Forces." Request at 2.[2] While Plaintiffs'

[2] Plaintiffs sought records pertaining to :

"1. The 'legal basis in domestic, foreign and international law upon which unmanned aerial vehicles' can be used to execute targeted killings, including who may be targeted with this weapon system, where and why;

2. . . .

3. The 'selection of human targets for drone strikes and any limits on who may be targeted by a drone strike;'

4. '[C]ivilian casualties in drone strikes,' including measures to limit civilian casualties;

5. The 'assessment or evaluation of individual drone strikes after the fact,' including how the number and identities of victims are determined;

6. '[G]eographical or territorial limits on the use of UAVs to kill targeted individuals;'

7. The 'number of drone strikes that have been executed for the purpose of killing human targets, the location of each such strike, and the agency of the government or branch of the military that undertook each such strike;'

8. The 'number, identity, status, and affiliation of individuals killed in drone strikes;'

9. '[W]ho may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings,' including records pertaining to the involvement of CIA personnel, government contractors, or other non-military personnel, and;

request was directed at specific agencies, its scope was not limited to any particular agency. Thus, insofar as the request was addressed to the CIA, it sought any and all records in the agency's possession about the matters listed above, not just records relating to the CIA's involvement in those matters.[3]

Three months after Plaintiffs filed their request, the CIA issued a so-called Glomar response, contending that "[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods that is protected from disclosure by section 6 of the CIA Act of 1949, as amended." Letter from Dolores M. Nelson, CIA Information and Privacy Coordinator to Jonathan Manes, ACLU. After exhausting administrative appeals, Plaintiffs filed suit against the CIA on June 1, 2010.

After considering the parties cross-motions for summary judgment, this Court entered judgment for the defendants, upholding the CIA's Glomar response in full. *ACLU v. DOJ*, 808 F.Supp.2d 280, 301 (D.D.C. 2011) (*Drones FOIA I*). The Court determined that disclosing the existence or nonexistence of records could reveal intelligence activities and sources and methods, as well as functions of the CIA, that are protected from disclosure by Exemptions 1 and 3; and that official statements about the drone program had not waived the CIA's "ability to issue a broad Glomar response." *Id.* at 286-301.

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10. The 'training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone.'"

See Am. Civil Liberties Union v. Dep't of Justice, 808 F.Supp.2d 280, 285 (D.D.C. 2011) (*Drones I FOIA*).

[3] Plaintiffs submitted the request to the Departments of Defense, Justice (including Office of Legal Counsel), and State, as well as the CIA. See Request Under the Freedom of Information Act by Jonathan Manes, ACLU at 1, January 13, 2010, https://www.aclu.org/files/assets/2010-1-13-PredatorDroneFOIARequest.pdf. 1. Subsequently, the parties stipulated to dismiss the case as it pertained to the Departments of Defense, Justice, and State. *See* Stipulation Regarding Voluntary Dismissal of Claims Against Certain Parties, *Drones FOIA I*, ECF 38 (D.D.C. Oct 26, 2011).

Plaintiffs appealed. After the parties completed substantive briefing in the Court of Appeals, but before oral argument, the CIA moved the Circuit Court to remand the case in light of disclosures the government had made in *N. Y. Times Co. v. Dep't of Justice*, 915 F.Supp.2d 508 (S.D.N.Y. 2013), a FOIA case brought by Plaintiffs that was then pending before the Southern District of New York. *See* Motion to Remand Proceedings, *Drones FOIA II*, No. 11-5320 (D.C. Cir. June 20, 2012). In its motion, the CIA stated that the agency had "determined that it could acknowledge officially, without harming national security, its possession of some responsive records regarding the legal basis for the use of targeted lethal force against U.S. citizens and the process by which citizens can be designated for targeted lethal force," including disclosing that the agency held copies of the March 5, 2012 speech by Attorney General Eric Holder[4] and the April 30, 2012 speech by then-Assistant to the President for Homeland Security and Counterterrorism John Brennan. *Id.* at 2.[5] "The motion went on to hint that the Agency might abandon its Glomar response in favor of something less absolute, if only slightly less." *Drones FOIA II*, 710 F.3d at 431. The D.C. Circuit denied the CIA's motion. No. 11-5320, (D.C. Cir. July 2, 2012).

On appeal, the D.C. Circuit reversed. Writing for a unanimous panel, Chief Justice Garland concluded that "[g]iven the extent of official statements" by executive-branch officials that unmistakably acknowledged the CIA's "intelligence interest" in drone strikes, the agency's Glomar response was "neither logical nor plausible." *Drones FOIA II*, 710 F.3d at 429-30

[4] Eric Holder, Attorney General, Address at Northwestern University School of Law (Mar. 5, 2012), http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law ("Holder Northwestern Speech")

[5] John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Ethics, and Efficacy of the President's Counterterrorism Strategy, Address at the Woodrow Wilson International Center for Scholars (April 30, 2012), http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy ("Brennan Wilson Center Speech")

(quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007). The Court held that comments by the President[6] and then-Assistant to the President for Homeland Security and Counterterrorism John Brennan[7] established that the CIA had at least an intelligence interest in drone strikes. *Id.* at 430. ("[I]t strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes, even if that agency does not operate the drones itself."). Those acknowledgments alone justified the rejection of the CIA's Glomar response–but, as the Court put it, "there is more." *Id.* The Circuit went on to cite further details from Brennan's speech, and then-CIA Director Leon Panetta's remarks regarding drones at the Pacific Council on International Policy,[8] in a comprehensive refutation of the CIA's Glomar response. *Id.* at 430-431. Because the agency's intelligence interest in drone strikes was "clear," the notion that the agency did not have responsive records "beggar[ed] belief." *Id.*[9]

Accordingly, the D.C. Circuit remanded the case with instructions for the "filing of a *Vaughn* index or other description of the kind of documents the Agency possesses, followed by

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[6] *President Obama Hangs out with America*, White House Blog (Jan. 30, 2012), http://www.whitehouse.gov/blog/2012/01/30/president-obama-hangs-out-america; The White House, *Your Interview with the President—2012*, YouTube, at 28:37–29:23 (Jan. 30, 2012), http://www.youtube.com/watch?v=ee Tj5qMGTAI; *see id.* at 26:20–30:18. ("President Obama Hangout")

[7] *See* Brennan Wilson Center Speech.

[8] Leon Panetta, Director, CIA, Remarks at the Pacific Council on International Policy (May 18, 2009), https://www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html

[9] In its brief, the CIA concedes (as it must) that the D.C. Circuit concluded that the agency had officially acknowledged an "interest" in the use of drones to carry out targeted killings. CIA Br. 30. The agency contends, however, that the D.C. Circuit "explicitly rejected the ACLU's argument that the CIA had officially acknowledged conducting strikes." *Id.* This contention is baseless, and indeed it misrepresents quite fundamentally the D.C. Circuit's decision. The D.C. Circuit did not "reject" Plaintiffs' argument; it simply concluded that Plaintiffs' appeal could be resolved on narrower grounds. *Drones FOIA II*, 710 F.3d at 431. The only thing the Circuit Court rejected was the CIA's claim that its Glomar response was lawful.

litigation regarding whether the exemptions apply to those documents." *Drones FOIA II*, 710 F.3d at 432. The Court of Appeals noted that in the Southern District of New York litigation, the CIA had filed a so-called "no number no list" response. The Court expressed skepticism as to the legitimacy of such a response, noting that it "has not previously been considered by this court" and that the government had only proffered such a response in a handful of cases across the country. *Id.* at 433. The Court observed that "[s]uch a response would only be justified in unusual circumstances, and only by a particularly persuasive affidavit." *Id.*

Nonetheless, on remand before this Court the CIA initially proffered a no-number no-list response, acknowledging that it possessed responsive records but maintaining that every fact about the records, "including the number and nature" of the records, "remain[s] currently and properly classified." CIA Summ J. Br. at 7, ECF 49 (D.D.C. August 9, 2013). This Court subsequently granted the CIA's motion to stay proceedings in this case pending the government's determination whether to seek further review of Second Circuit's decision in *N. Y. Times Co. v. Dep't of Justice*, 756 F.3d 100 (2d Cir. 2014). ECF 58 (D.D.C. April 29, 2014).[10]

Thereafter, the CIA withdrew its motion for summary judgment pending in this Court. Status Report, ECF 62 (D.D.C. July 18, 2014). In an effort to narrow the issues to be resolved

[10] In the FOIA litigation in the District Court for the Southern District of New York, the ACLU seeks records from multiple agencies containing the factual information and legal analysis for drone strikes on American citizens. At the District Court the CIA proffered a no-number no-list response. The District Court granted summary judgment for the government. *N. Y. Times Co. v. Dep't of Justice*, 915 F.Supp.2d 508 (S.D.N.Y. 2013). On appeal, the Second Circuit reversed in part and remanded, and it ordered the release of a portion of a July 2010 Office of Legal Counsel (OLC) opinion ("July 2010 OLC-DOD Memorandum") after concluding that the government had officially acknowledged, among other things, the CIA's operational role in the strike that killed Anwar al-Aulaqi. *N. Y. Times Co. v. Dep't of Justice*, 756 F.3d 100, 123 (2d. Cir. 2014). In addition, the Second Circuit held that the CIA's no-number no-list response was unjustified and ordered the agency to produce a *Vaughn* index "for in camera inspection and determination of appropriate disclosure and appropriate redaction." *Id.* at 124. The CIA's index and declarations are currently before the district court on cross-motions for summary judgment.

by this Court, the ACLU agreed to withdraw certain aspects of its FOIA request. Specifically, the ACLU agreed to narrow its request to two categories of records encompassing, first, certain legal memoranda, and second, certain statistical and factual information (hereinafter, "strike metadata") relating to individual drone strikes:

(1) "Any and all final legal memoranda (as well as the latest version of draft legal memoranda which were never finalized) concerning the U.S. Government's use of armed drones to carry out premeditated killings."

(2) "[F]our types of records containing charts or compilations about U.S. Government strikes sufficient to show the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known."[11]

Second Declaration of Martha M. Lutz ("Second Lutz Decl.") ¶ 6.

The ACLU also agreed to exclude any Office of Legal Counsel ("OLC") memoranda whose withholding was being considered by the District Court for the Southern District of New York in connection with the ACLU's FOIA litigation pending before that court. *Id.* at ¶ 6 n.2.

In its most recent filing, the CIA for the first time provides a substantive response to Plaintiffs' FOIA request filed four years ago. In response to Plaintiffs' narrowed request, the agency identifies:

(1) Twelve final legal memoranda, withheld in full under Exemptions 1, 3, and/or 5, with the exception of one classified DOJ White Paper, (the "May 2011 White Paper") that has already been released with redactions to Plaintiffs in connection with the

[11] To be clear, Plaintiffs' seek these records only insofar as they contain strike metadata. They do not seek the release of these records in their entirety.

litigation pending before the Southern District of New York. Second Lutz Decl. ¶ 7-8.[12]

(2) "[T]housands of classified intelligence products responsive to the second [category] of the . . . search, which are being which are being withheld in full under Exemptions 1 and 3." CIA Summ. J. Br. at 10. The CIA has not described these records individually—in effect, it has provided a no-number no-list response.

LEGAL FRAMEWORK AND STANDARD OF REVIEW

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed . . . to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "Although Congress enumerated nine exemptions from the disclosure requirement, 'these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.'" *Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002)). "Accordingly, FOIA's exemptions are to be narrowly construed." *Id.* The agency bears the burden of proving that the withheld information falls within the exemption it invokes. 5 U.S.C. § 552(a)(4)(B); *King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C.Cir.1987).

[12] The May 2011White Paper, titled "Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen" was released to the ACLU in redacted form on September 5, 2014. According to the Second Lutz Declaration, the paper "was prepared by DOJ for Congress [and] discusses the legal basis upon which the CIA could use lethal force in Yemen against a U.S. citizen. Although this paper does not mention the U.S. citizen by name—the target of the contemplated operation was Anwar al-Aulaqi." *Id.* ¶ 22. As the CIA explains in its declarations: "Although this document—the DOJ Classified White Paper—has been produced in connection with the other case, the Agency has included this record here because it is not among the OLC memoranda that were remanded to the District Court by the Second Circuit." *Id.* ¶ 7 n.3.

The Court's review of an agency's claimed withholdings is *de novo*, and "all doubts [are] resolved in favor of disclosure." *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010); 5 U.S.C. § 552(a)(4)(B). Even where portions of a record fall within one of the statutory exemptions, "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b); *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 (D.C. Cir. 2003). In addition, "when information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C.Cir.1990)).

In supporting its withholding decisions, the agency must provide "reasonably detailed explanations why any withheld documents fall within an exemption." *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d. Cir. 1994). "Affidavits submitted by a government agency in justification for its exemption claims must therefore strive to correct, however imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation." *King*, 830 F.2d at 218. "[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not . . . carry the government's burden." *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009).

The agency's burden—and the Court's obligation to review the agency's withholdings *de novo*—applies with equal force to cases invoking national security concerns. *See CIA v. Sims*, 471 U.S. 159, 188-89 (1985) ("[T]his sort of judicial role is essential if the balance Congress believed ought to be struck between disclosure and national security is to be struck in practice.") (citation omitted); *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (courts do

not "relinquish[] their independent responsibility" to review agency's withholdings *de novo* in national security context).

Three exemptions are relevant here.

Exemption 1 allows the withholding of records that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Here, the CIA relies on Executive Order 13,526 § 1.4, 75 Fed. Reg. 707 (Dec. 29, 2009), which, in relevant part, permits classification of "intelligence activities (including covert action), intelligence sources or methods," and "foreign relations or foreign activities of the United States." Exec. Order 13,526 §§ 1.4(c), (d). See Second Lutz Decl. ¶ 14, 18. Additionally, information may be classified only if "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." *Id.* § 1.1(a)(4).

Exemption 3 allows withholding of information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). Here, the CIA relies upon the National Security Act ("NSA Act"), which "protect[s] intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). *See* Second Lutz Decl. ¶ 26.[13] The CIA also invokes the Central Intelligence Agency Act ("CIA Act"), which protects from disclosure "the organization, functions, names,

[13] Courts have uniformly held that the category of information classifiable under Exemption 1 pursuant to section 1.4(c) of Exec. Order 13,526 is co-extensive with the category of intelligence sources and methods in the National Securities Act, protected from withholding by Exemption 3. *See, e.g., Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981). "When . . . Exemptions 1 and 3 are claimed on the basis of potential disclosure of intelligence sources or methods, the standard of reviewing an agency's decision to withhold information is essentially the same." *Maynard v. CIA*, 986 F.2d 547, 555 (1st Cir. 1993).

official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 3507. *See*, Second Lutz Decl. ¶ 22. However, this section of the CIA Act does not "allow[] the [CIA] to refuse to provide any information at all about anything it does." *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976). Rather, § 3507 "creates a very narrow and explicit exception to the requirements of the FOIA. Only the specific information on the CIA's personnel and internal structure that is listed in the statute will obtain protection from disclosure." *Baker v. CIA*, 580 F.2d 664, 670 (D.C. Cir. 1978).

Exemption 5 protects information that would be shielded in litigation by traditional common-law privileges. 5 U.S.C. § 552(b)(5). The deliberative process privilege protects documents that are "predecisional" and "deliberative." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006).[14] The attorney-client privilege "protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997).[15] The presidential-communications privilege protects "communications in performance of [a President's] responsibilities . . . made in the process of shaping policies and making decisions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977). The CIA invokes these three privileges for the twelve withheld memoranda it withholds, although it does not specify which privilege corresponds to each record. Second Lutz Decl. ¶¶ 28-30.

[14] "[A] document [is] predecisional if 'it was generated before the adoption of an agency policy' and deliberative if 'it reflects the give-and-take of the consultative process.'" *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

[15] Information withheld under the attorney-client privilege must be (1) "confidential communications between an attorney and his client" (2) relating to "a legal matter for which the client has sought professional advice." *Mead Data Cent. v. Dep't of the Air Force*, 556 F.2d 242, 252 (D.C. Cir. 1977).

ARGUMENT

I. The CIA's declarations are not entitled to deference; to the contrary, the Court should subject them to special scrutiny.

The agency asks for deference. It states that courts give deference to the executive in the context of FOIA claims which implicate national security and that they defer to executive affidavits insofar as those affidavits predict harm to the national security. CIA Summ. J. Br. at 14. But the CIA overstates the deference that courts ordinarily accord to the government's affidavits. *Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) ("deference is not equivalent to acquiescence"); *Goldberg v. U.S. Dep't of State*, 818 F.2d at 77 (courts do not "relinquish[] their independent responsibility" to review agency's withholdings *de novo* in national security context). Moreover, this case turns on the extent to which the government's previous disclosures amount to "official acknowledgments" and the meaning of the statutory exemptions protecting intelligence activities, sources, or methods. These are legal questions, not factual ones with respect to which deference might be due. *See also King*, 830 F.2d at 224 (adequacy of *Vaughn* index is a matter of law).

Perhaps more important, the deference ordinarily accorded to the government's declarations should not be accorded here because the record shows—and the D.C. Circuit held—that the government's previous claims for withholding were indefensible. Indeed, the D.C. Circuit concluded not only that the CIA's claims lacked merit but that "no reasonable person would regard [them] as plausible." *Drones FOIA II*, 710 F.3d at 430-31 (stating that CIA's claims "beggar[ed] belief" and were "neither logical nor plausible"). The Second Circuit reached similar conclusions in the other FOIA litigation relating to the drone program. *N. Y.*

Times Co., 756 F.3d at 120 (concluding that it was "no longer either 'logical' or 'plausible' to maintain" that responsive information had not been disclosed"). Against this background, it would be inappropriate for this Court to simply defer to the agency's affidavits. Instead, the Court should subject the agency's affidavits to especially searching review, and it should examine the underlying records itself, as the Second Circuit recently did. *N. Y. Times Co.*, 756 F.3d at 123; *see also Larson*, 565 F.3d at 862 (heightened scrutiny warranted where agency affidavits controverted by evidence in the record or evidence of bad faith).

According deference to the agency's affidavits here would be particularly inappropriate because the recently released Senate Select Committee on Intelligence Report on Detention and Interrogation ("SSCI Report") identifies similarly indefensible claims by the CIA in other national-security related FOIA litigation. *See Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, Senate Select Committee on Intelligence, December 13, 2014.[16] Specifically, the report discusses *ACLU v. DOD*, 389 F.Supp.2d 547, 563-565 (S.D.N.Y. 2005), in which the CIA contended that confirming the existence or non-existence of certain legal documents relating to the agency's interrogation program would cause serious damage to the national security. The report reveals that the CIA prepared a "media campaign" that contemplated "off-the-record disclosures" about the very issues that the CIA was telling the court should remain secret. SSCI Report at 403. Agency personnel apparently recognized the chasm between the agency's off-the-record disclosures about the interrogation program and the representations the agency was making in court. The report points to an internal agency communication in which one agency attorney expressed concern that "'[o]ur Glomar figleaf is getting pretty thin.'" *Id*. at 405. It points to another communication in which "another

[16] Available at http://www.intelligence.senate.gov/study2014.html.

CIA attorney noted . . . 'the [legal] declaration I just wrote about the secrecy of the interrogation program [is] a work of fiction.'" *Id*.

This case calls for especially searching review of the agency's claims, not deference. An agency should not be able to appeal to the general rule of "deference" where some of the most important representations it has made in the litigation have already been shown to be indefensible, implausible, or false. FOIA's exemptions were meant to accommodate the government's legitimate interest in protecting information that is classified or otherwise sensitive. They were not meant to facilitate propaganda campaigns in the course of which government officials disclose information selectively in order to cast their own decisions in the most favorable light, or to mislead the public about the nature or import of the government's policies. Tr. of Oral Argument at 12:19-21 (question of Griffith, J.), *Drones FOIA II*, No. 11-5320 (D.C. Cir. Sept. 20, 2012) (contrasting CIA's claim that secrecy was necessary with the "pattern of strategic and selective leaks at very high levels of the Government"). Indeed, selective disclosure was one of the evils that FOIA was meant to address. *See e.g.* Republican Policy Committee Statement on Freedom of Information Legislation, S. 1160, 112 Cong. Rec. 13020 (1966) ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear."), *reprinted in* Subcomm. on Admin. Practice, S. Comm. on the Judiciary, 93d Cong., Freedom of Information Act Source Book: Legislative Materials, Cases, Articles at 59 (1974).

II. The official-acknowledgment doctrine precludes the CIA from withholding much of the information it now seeks to withhold.

"When information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Wolf*, 473 F.3d at 378. While the

'official acknowledgement' doctrine applies only to information that has been "made public through an official and documented disclosure," the doctrine applies not only where an agency withholds precisely the same information it has previously disclosed but also where it withholds information closely related to information it has previously disclosed. *N. Y. Times Co.*, 756 F.3d at 120 n.19, 116 (rejecting "rigid application" of official-acknowledgment test and recognizing that waiver may apply to analysis not previously disclosed in any public forum where there is "substantial overlap" with analysis that has been disclosed); *see* Reply Brief for Office of Legal Counsel at 1, *N. Y. Times Co. v. Dep't of Justice*, 12-cv-00794, ECF 105 (S.D.N.Y. November 28, 2014) (conceding that official acknowledgement waives agency's right to withhold "same as or closely related" information).

A. Some of the information the CIA seeks to withhold has been disclosed by the government.

The government has officially acknowledged some of the information likely contained in the records it seeks to withhold. In particular:

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

- The government has acknowledged that it uses drones to carry out targeted killings overseas. *N. Y. Times Co.*, 756 F.3d at 118-120, including in Yemen, Pakistan, and Somalia.[17]

[17] The Second Circuit concluded that the government had officially acknowledged conducting drone strikes in Yemen. *N. Y. Times Co.*, 756 F.3d 117-118. The President has acknowledged that the United States conducts drone strikes in Pakistan, President Obama Hangout (28:38); and Somalia, Craig Whitlock, *U.S. Carries Out Counterterrorism Strike in Somalia*, Wash. Po. (Sept. 1, 2014), http://www.washingtonpost.com/world/national-security/us-carries-out-counter-terrorism-strike-in-somalia/2014/09/01/19067e8c-323b-11e4-8f02-03c644b2d7d0_story.html.

- The government has acknowledged that both the DOD and CIA have an *intelligence interest* in the use of drones to carry out targeted killings. The government earlier contended that it had not acknowledged that the CIA, in addition to the DOD, had an intelligence interest in the practice of targeted killings, but the D.C. Circuit rejected that contention. *Drones FOIA II*, 710 F.3d at 430 (concluding that CIA's intelligence interest in drone strikes has been officially acknowledged). See also *N. Y. Times Co.*, 756 F.3d at 118-119.
- The government has acknowledged that both the DOD and the CIA have an *operational role* in drone strikes. The CIA earlier contended that there had been no official disclosure of its involvement in targeted killings. *See* Declaration of Mary Ellen Cole ¶ 43, Dist. Ct. Dkt. 15-1. The Second Circuit rejected this argument. *N. Y. Times Co.*, 756 F.3d at 122 ("[T]he statements of Panetta when he was Director of CIA and later Secretary of Defense . . . have already publicly identified CIA as an agency that had an operational role in targeted drone killings").[18]
- The government has acknowledged that Anwar al-Aulaqi was targeted, and that U.S. drone strikes have killed two other U.S. citizens in Yemen. *N. Y. Times Co.*, 756 F.3d at 118 ("[i]t is no secret that al-Awlaki was killed in Yemen"). On May 23, 2013, Attorney General Eric Holder sent a letter to Congress acknowledging that the United States had "specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi," and that it had also

[18] Because the D.C. Circuit's conclusion that official disclosure of the CIA's *interest* in the drone strikes made the agency's Glomar response untenable, that Court did not reach the issue of whether the CIA's operational role in such strikes had been disclosed. *Drones FOIA II*, 710 F.3d at 432. However, the Second Circuit concluded that the government had waived withholding of the CIA's operational role in drone strikes. *N. Y. Times Co.*, 756 F.3d at 122. The CIA did not appeal this ruling.

killed Abdulrahman al-Aulaqi, Samir Khan, and Jude Kenan Mohammed, although they "were not specifically targeted by the United States."[19]

- The government has officially disclosed the bases on which the government placed Anwar al-Aulaqi on the "terrorist list" and determined that al-Aulaqi was a legitimate target of lethal force, including facts concerning his purported leadership role in al-Qaeda in the Arabian Peninsula and his purported leadership role in directing the failed Christmas Day bombing.[20]

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

- The government has disclosed its analysis of 18 U.S.C. § 1119. As the Second Circuit concluded, the government has disclosed its analysis of the statute that makes it a crime for "a national of the United States, [to] kill [] or attempt[] to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country." *N. Y. Times Co.*, 756 F.3d at 115-16 (quoting 18 U.S.C. § 1119). The public versions of the July 2010 OLC-DOD memorandum,[21] the November 2011 White

[19] Letter from Eric H. Holder, Jr., Attorney General, to Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary (May 22, 2013) http://www.justice.gov/ag/AG-letter-5-22-13.pdf ("Holder letter")

[20] Press Release, U.S. Dep't of Treasury, Treasury Designates Anwar Al-Aulaqi, Key Leader of Al-Qa'ida in Arabian Peninsula (July 16, 2010). http://www.treasury.gov/press-center/press-releases/Pages/tg779.aspx; Holder letter; Sentencing memorandum in *United States v. Abdulmutallab*, 10-cr-20005 (E.D. Mich.) Dkt. No. 130 at 13-14.

[21] Concurrently with its order, the Second Circuit published a redacted version of an Office of Legal Counsel memorandum signed by then-Acting Assistant Attorney General David Barron, titled "Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaki" dated July 16, 2010 ("July 2010 OLC-DOD Memorandum"). *N. Y. Times Co.*, 756 F.3d at 124.

Paper,[22] and the May 2011 White Paper all analyze the import of the statute, including the applicability of the "public authority" doctrine, at considerable length.[23]

- The government has disclosed its analysis of 18 U.S.C. § 956 (a), a statute that criminalizes conspiracy to commit murder abroad. *N. Y. Times Co.*, 756 F.3d at 116 ("Even though the DOJ White Paper does not discuss 18 U.S.C. § 956 (a), which the OLD-DOD Memorandum considers, the substantial overlap in legal analysis in the two documents fully establishes that the Government may no longer claim that the legal analysis in the Memorandum is a secret").[24]
- The government has disclosed its analysis of the War Crimes Act, 18 U.S.C. § 2441(a), which makes it a crime for a member of the United States armed forces or a United States national to "commit[] a war crime." The War Crimes Act is analyzed in the July 2010 OLC-DOD Memorandum, the May 2011 Paper, and the November 2011White Paper.[25]
- The government has disclosed its analysis of Executive Order 12333. The November 2011 White Paper,[26] and the February 2010 Memorandum[27] discuss whether the targeted killing would violate the assassination ban in Executive Order 12333. 46 Fed. Reg. 59941 (Dec. 4, 1981).

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[22] On February 4, 2013, the DOJ released a White Paper titled "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Leader of Al-Qa'ida or an Associated Force" dated November 8, 2011 ("November 2011White Paper"), that described the government's legal analysis to justify the use of force against a senior al Qaeda leader. See *N. Y. Times Co.*, 756 F.3d at 116.

[23] *See* July 2010 OLC-DOD Memorandum at 14; November 2011 White Paper at 10-15; May 2011 White Paper at 5-17.

[24] *See also* May 2011 White Paper at 17-18 (concluding that Section 956(a) does not prohibit the CIA from lethally targeting an American citizen abroad).

[25] July 2010 OLC-DOD Memo at 37; November 2011 White Paper 16; May 2011 Paper 18-19.

[26] November 2011 White Paper at 15.

[27] David Barron, "Lethal Operation Against Shaykh Anwar Aulaqi," Office of Legal Counsel, (February 19, 2010) ("February 2010 Memorandum").

- The government has said that its endeavors to ensure that "any use of lethal force by the United States [complies] with four fundamental law of war principles" of necessity, distinction, proportionality, and humanity. *See* Holder Northwestern Speech. It has also said that it considers the application of law of war principles prior to each drone strike to "help to ensure . . . that the risk of civilian casualties can be minimized or avoided altogether." *Id. See also* May 2011 White Paper at 14 (drone strikes comply with principles of proportionality and distinction); November 2011 White Paper (same);[28] July 2010 OLC-DOD Memorandum (same);[29] Fact Sheet on US Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (precondition for authorization of lethal force is "near certainty that non-combatants will not be injured or killed").[30]
- The government has disclosed its constitutional analysis. *N. Y. Times Co.*, 756 F.3d at 116 (observing that the July 2010 OLC-DOD Memorandum analyzes "why the contemplated killing would not violate the Fourth or Fifth Amendments of the Constitution"). The memoranda and White Papers also address the government's constitutional analysis, including the government's definition of "imminence," at length.

B. Given the government's previous disclosures, the CIA has not justified its withholding of responsive records.

[28] November 2011 White Paper at 8.

[29] July 2010 OLC-DOD Memorandum at 28-29.

[30] Office of the Press Secretary, White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism ("Presidential Policy Guidance")

As discussed above, the government has disclosed central aspects of its legal analysis of the targeted killing program, including analysis of statutory, constitutional, and international law, and its definition of "imminence." The government has also disclosed certain key facts about the targeted killing program, including its operation in Yemen, Pakistan, and Somalia; the intelligence and operational roles of the CIA and DOD in the program; the fact that it targeted Anwar Al-Aulaqi (as well as facts concerning its justification for the targeting); and the killing of Anwar Al-Aulaqi and three other Americans. To the extent that the records at issue here contain this information, the CIA must disclose them.

III. The CIA has not justified the withholding of the legal memoranda under Exemptions 1, 3, and 5.

A. Legal Analysis is not itself an activity, source, or method protected by Exemptions 1 and 3.

Even to the extent the government has not waived its authority to withhold legal analysis, legal analysis in the memoranda must be disclosed because such analysis is not an intelligence activity, source or method; or a function of the CIA, and accordingly it cannot be withheld under exemptions 1 or 3.[31]

The agency declares that "the legal memoranda, including the redacted portions of the [May 2011] DOJ White Paper, are properly withheld because they address 'classified intelligence activities, sources, and methods." CIA Mem. Summ. J. at 27; Second Lutz Decl. ¶¶ 23-24. The CIA's declarations, however, fail to explain how legal analysis falls within this

[31]Under Exemption 1, the CIA bears the additional burden of establishing that disclosure of information "could reasonably be expected to cause identifiable or describable damage to the national security." Exec. Order 13,526 § 1.4. Because legal analysis does not fall into any of the categories enumerated in section 1.4 of the Executive Order, Plaintiffs do not address this issue.

category.[32] Plainly, legal analysis is not an "activity," a "source" or a "method" within the ordinary usage of those terms. The terms "activity," "source," and "method" may have broad scope, but they are not limitless. *See, e.g., Weissman v. CIA*, 565 F.2d 692, 694-96 (D.C. Cir. 1977) (CIA's authority to protect "intelligence sources and methods" did not extend to domestic law-enforcement functions); *Phillippi*, 546 F.2d at 1015 n.14 (reference to "functions" does not give the CIA license "to refuse to provide any information at all about anything it does" rather, it exempts the CIA from providing information regarding its "internal structure."). Other courts have recognized that "legal analysis is not an intelligence source or method" protected by Exemption 3, *N. Y. Times Co.*, 915 F. Supp. at 540 (citing *ACLU v. Dep't of Defense*, 389 F.Supp.2d 547, 565 (S.D.N.Y. 2005) ("'memorandum from DOJ to CIA interpreting the Convention Against Torture' does not, by its own terms, implicate 'intelligence sources or methods.'")); or Exemption 1, *Elec. Frontier Found. v. Dep't of Justice*, 892 F.Supp.2d 95, 101 (D.D.C. 2012) (noting that "any portion of the OLC Opinion that contains only legal analysis . . . has been withheld under Exemption 5, not Exemption 1.").[33]

[32] The CIA also contends that the redacted portions of the May 2011 White Paper, which discuss a contemplated CIA operation against Anwar al-Aulaqi in Yemen, "necessarily implicate[] foreign activities within the meaning of the Executive Order." CIA Mem. Summ. J. at 18. *See* Executive Order 13,526 § 1.4 (d) (protecting "foreign relations or foreign activities of the United States, including confidential sources."). If the CIA is contending that it can classified any information (even legal analysis) relating to its foreign activities, the CIA is once again seeking a complete exemption from the FOIA. In any event, the CIA has already disclosed its operational role in drone strikes in Yemen, as noted above, and the government has acknowledged that it conducts drone strikes in Pakistan, Yemen, and Somalia.

[33] Addressing the CIA's Glomar response, this Court held that, "[c]onfirming the existence or nonexistence of pertinent agency records or drone strikes could reasonably be expected to lead to unauthorized disclosure of intelligence sources and/or methods." *Drones FOIA I*, 808 F.Supp.2d at 292. However, the D.C. Circuit's conclusion that the government had officially acknowledged the CIA's intelligence interest in the drone program fundamentally changes the analysis with respect to withholding of legal analysis.

Because neither Exemption 1 nor Exemption 3 protects legal analysis, standing alone, the relevant question with respect these exemptions is whether the legal analysis in the memoranda can be segregated from *other* properly classified information. As demonstrated by the speeches of senior officials, and documents already released by the government or published by the Second Circuit, there is every reason to believe that legal analysis *can* be segregated from protectable intelligence sources or methods. FOIA requires the government to disclose the former even if it must redact the latter. 5 U.S.C. § 552(b). Here, the CIA has not met its burden of providing "a detailed justification for [its] decision that non-exempt material is not segregable." *Mead Data Cent. v. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

Finally, the agency contends that the legal memoranda are also withheld under Exemption 3 pursuant the provisions of the CIA Act which protect from disclosure "functions . . . of the Agency," 50 U.S.C. § 3507; Second Lutz Decl. ¶ 26.[34] To the extent that the CIA invokes this statute as a basis for withholding legal analysis in the memoranda, the agency's construction is overly broad. As the D.C. Circuit has recognized, § 3507 is a "very narrow and explicit exception," *Baker*, 580 F.2d at 670, and does not exempt from disclosure "anything [the CIA] does," *Phillippi*, 546 F.2d at 1015 n.14 (D.C. Cir. 1976).[35] Legal analysis cannot plausibly be characterized as a "function" of the agency.[36]

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[34] Below, this Court concluded that "the fact of the existence or nonexistence of responsive information falls within the ambit of [the CIA Act] because whether the CIA cooperates with, is interested in, or actually directs drone strikes pertains to (possible) functions of CIA personnel." *Drones FOIA I*, 808 F.Supp.2d at 288. Plaintiffs respectfully disagree with this holding. However, as with Exemption 1, see n.33 *supra*, the D.C. Circuit's conclusion that the government had officially acknowledged the CIA's intelligence interest in the drone program fundamentally changes the analysis with respect to withholding of legal analysis specifically (as opposed to all records) as a function of the CIA.

[35] Notably, when the CIA sought a categorical exemption from the FOIA, Congress refused to supply it. *See* Karen A. Winchester & James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. Rich. L. Rev. 231, 256 (1987) (detailing congressional rejection of the

B. The CIA has not justified the withholding of legal memoranda under Exemption 5.

As discussed above, Exemption 5 protects information that would be shielded by traditional common law privileges. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Here, CIA asserts that the withheld legal memoranda are protected under the deliberative-process, attorney-client, and presidential-communications privileges.

However, the CIA has not established that any of the privileges covered by Exemption 5 actually apply to the specific legal memoranda for which they are invoked. In fact, the agency's declarations lack anything approaching the detail the courts have required in other cases. *See, e.g., Senate of Com. of Puerto Rico v. Dep't of Justice*, 823 F.2d 574, 584 (requiring an agency to supply enough information "so that a reviewing court can sensibly determine whether each invocation of deliberative process privilege or work product shield is properly grounded.") This deficiency is compounded by the agency's failure to provide a *Vaughn* index for the twelve legal memoranda it seeks to withhold; with the exception of the May 2011 White Paper, the remaining eleven memoranda are described simply as "responsive records." Second Lutz Decl. ¶ 8. Accordingly, the CIA has failed to provide any meaningful detail about how the documents for which it claims these exemptions were used, who they were shared with, and whether they were directed at a particular case. Without such detail, however, it is impossible to determine whether

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CIA's plea to "exclude totally the CIA . . . from the requirements of FOIA"). And in 1984, when Congress enacted the CIA Information Act to streamline processing of FOIA requests by creating "a *limited exemption* from the [FOIA] for selected CIA records," it underscored the CIA's broad FOIA obligations and explained that its amendment "represent[ed] a reaffirmation by the Congress that the principles of freedom of information are applicable to the CIA." H.R. Rep. No. 276(II) (1984), *reprinted in* 1984 U.S.C.C.A.N. 3778, 3780.

[36] To the extent that the CIA Act is invoked to "protect the name of Agency personnel mentioned" in the records, Second Lutz Decl. ¶¶ 21, 26, Plaintiffs do not object to the redaction of this information from responsive records.

the documents are in fact attorney-client communications, whether the attorney-client privilege has been waived, whether the documents are pre-decisional (rather than final), or whether once-pre-decisional documents have been adopted as policy or treated as the agency's "working law," or whether documents reflect communication with presidential advisors. *See, e.g. Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (deliberative process and attorney-client privileges are "narrowly construed and [are] limited to those situations in which [their] purposes will be served.").

As with the other FOIA exemptions, it is the agency's burden to establish that a privilege protected by Exemption 5 applies, not the Plaintiffs' burden to establish they do not. Here, the government's public declarations do not provide a foundation for the invocation of the privilege.

IV. The CIA has not justified the withholding of information in the intelligence products under Exemptions 1 and 3.

The CIA also invokes Exemptions 1 and 3 for its withholding in full of "thousands of classified intelligence products" containing information regarding "the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed if known." Second Lutz Decl. ¶ 6.[37] As the agency apparently recognizes, this strike metadata is not, standing alone, an intelligence

[37] As with the CIA's withholding of legal memoranda, the CIA's withholding claims for information in the "thousands of classified intelligence products" relies on both Exemptions 1 and 3. Second Lutz Decl. ¶ 26. For the reasons discussed *supra*, the strike metadata in the intelligence products is not protected under Exemption 3 as a "function" of the CIA. See, *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976). To the extent that the CIA invokes the CIA Act to "protect the name of Agency personnel mentioned" in the records, Second Lutz Decl. ¶ 26, Plaintiffs do not object to the redaction of this information from the responsive records.

source or method protected by Exemptions 1 or 3. Rather, the agency bases its withholdings on the proposition that disclosing the strike metadata in the intelligence products "would *reveal* the sources and methods of underlying intelligence collection." Second Lutz Decl. ¶ 25 (emphasis added). In other words, the CIA appears to argue that the strike metadata is so inextricably intertwined with other information protected by the exemptions that it cannot be reasonably segregated. *Id.* But, beyond this conclusory assertion, the agency has failed to provide "a detailed justification for [its] decision that non-exempt material is not segregable." *Mead Data Cent. v. Dep't of the Air Force*, 566 F.2d at 261.

Again to be clear, Plaintiffs' seek disclosure of the responsive records only insofar as they contain strike metadata responsive to the narrowed request, and do not seek disclosure of the activities, sources or methods used to gather this information. However, because the strike metadata is not, on its own, an intelligence activity, source or method, this information must be released unless the agency can demonstrate that it is so intertwined with sources or methods that it cannot be released without revealing those sources and methods. In other words, Plaintiffs acknowledge that it is conceivable that with respect to a particular drone strike, disclosing strike metadata could effectively disclose an intelligence source or method, but such a determination would have to be made on a case by case basis. For example, if one of the responsive records identified by the CIA relates (hypothetically) to a drone strike in Yemen in 2010 that killed its target as well as five civilians, there is no reason to assume that releasing the name of the target, the names of the other victims, and the location and date of the strike would implicate sources or methods—particularly given that the CIA has already acknowledged an intelligence interest and operational role in drone strikes; the government has acknowledged that it has carried out drone strikes in Yemen, Somalia, and Pakistan; and the President himself has acknowledged that

drones strikes have resulted in civilian casualties. One can, of course, imagine situations in which this information would be so intertwined with intelligence sources and methods that it would "show how the information was gathered, the weight assigned to certain sources . . . [and] reveal the methodology behind the assessments and the priorities of the Agency." Second Lutz Decl. ¶ 25. But such a situation would be extraordinary, and would not apply to every drone strike, especially given the CIA's ability to segregate and redact such identifying information from the responsive records.

Here, the agency's conclusory declarations do not meet its burden of demonstrating that none of the strike metadata in the "thousands" of responsive records may be segregated and disclosed. Indeed, the agency's construction of these exemptions would give the CIA a virtually categorical exemption from FOIA, under which *any* statistic or fact relating to the agency's activities—even to its *acknowledged* activities—would be automatically protected by Exemptions 1 and 3. This is not the law. *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) ("disclosure, not secrecy, is the dominant objective of the Act.")

This Court should reject the CIA's attempt to extend the scope of the Exemptions here, and direct the agency to segregate and disclose strike metadata. To the extent the agency claims that some of the records (or information in some of the records) are exempt from withholding in their entirety, it must provide some individual description and justification to allow Plaintiffs–and the Court–to test the propriety of its claim. *King*, 830 F.2d at 224 (agency's obligation to provide "as much information as possible without thwarting the [claimed] exemption's purpose.").

CONCLUSION

For the reasons stated above, the CIA has not justified its withholdings of the records at issue on remand. Accordingly, this Court should deny summary judgment to the CIA and grant summary judgment to the Plaintiffs. Specifically, Plaintiffs respectfully ask the Court to (1) review the legal memoranda *in camera* to determine which portions must be released because they consist of information that has been officially acknowledged or is otherwise not withholdable under the Exemptions; (2) direct the CIA to segregate and disclose strike metadata.

Dated: December 19, 2014

Respectfully submitted,

/s/ Jameel Jaffer

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