UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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American Civil Liberties Union and The American Civil Liberties Union Foundation

Plaintiff,

-v-

U.S. Department of Justice, including its component the Office of Legal Counsel, U.S. Department of Defense, including its component U.S. Special Operations Command, and Central Intelligence Agency

Defendant.

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12-CV-00794-CM

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO REMAINING OFFICE OF LEGAL COUNSEL DOCUMENTS

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INTRODUCTION

Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (together the "ACLU") submit this reply memorandum in further support of their motion for summary judgment with regard to certain records withheld by the Department of Justice's Office of Legal Counsel ("OLC").

ARGUMENT

I. The OLC misunderstands the implications of its previous disclosures.

To defend its withholdings, OLC states that any waiver due to official acknowledgement is limited to "[i] final legal analysis [ii] pertaining to a potential operation against Anwar al-Aulaqi, [iii] where that legal analysis is the same as or closely related to legal analysis contained in a draft DOJ white paper released in February 2013." Dist. Ct. Dkt. 105, at 1. The agency is incorrect.

First, an agency's official disclosure of information waives the agency's right to withhold deliberative records, not just final records. *See, e.g., N. Y. Times v. Dep't of Justice*, 756 F.3d 100, 114 (2d Cir. 2014) (noting that deliberative process privilege may be waived by official disclosure); *Brennan Ctr. for Justice v. Dep't of Justice*, 697 F.3d 184, 208 (2d. Cir. 2012) (same). If the government has "officially acknowledged" certain information, it has waived its right to withhold that information (or similar information) under the Freedom of Information Act ("FOIA").[1]

Second, the "official acknowledgement" doctrine extends to disclosures of factual information, not just disclosures of legal analysis. The government suggests that the Second

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[1] Although the ACLU has excluded from its request drafts of documents for which final versions are also listed in the OLC's *Vaughn* index, the documents before this Court on remand may include records labeled as drafts (or otherwise not "final") but for which no final version is listed in the index.

Circuit has rejected the argument that the government has officially acknowledged information relating to the factual basis for the strikes that killed Anwar al-Aulaqi ("Factual-Basis Information"), but, as Plaintiffs have explained, this misunderstands the Second Circuit's analysis. Dist. Ct. Dkt. 96, at 4. The Second Circuit's analysis was focused almost entirely on the extent to which *legal analysis* had been officially acknowledged. The Court did not consider the extent to which the government had acknowledged Factual-Basis Information (except as to two specific facts—the identity of the country in which al-Aulaqi was killed, and the fact of the CIA's operational role in the strike that killed him). And it certainly did not consider the extent to which the government had waived its right to withhold Factual-Basis Information in records other than the OLC-DOD Memorandum. To the contrary, the Second Circuit indicated that it expected this Court to conduct that analysis in the first instance. *N.Y. Times*, 756 F.3d at 121 n.20 ("[a]fter the Government submits its classified *Vaughn* indices on remand, the District Court may, as appropriate, order the release of any documents that are not properly withheld.").[2]

Third, the waiver here is not limited to records relating to the strike that killed al-Aulaqi. Dist. Ct. Dkt. 105, at 1. The Second Circuit focused on a single record that related to the al-Aulaqi killing, but it did not hold—or even suggest—that the government's waiver was limited to records of this kind. The relevant question here is not whether a particular record relates specifically to the killing of al-Aulaqi but whether the agency is withholding responsive information that is "the same or similar" to information that the agency has already disclosed.[3]

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[2] This Court has concluded that the Second Circuit rejected the argument that the government has waived its right to withhold Factual-Basis Information in the OLC legal memoranda. Dist. Ct. Dkt. 111. The ACLU intends to ask the Second Circuit to review that decision.

[3] Plaintiffs' Freedom of Information Act request seeks, among other things, "all records . . . pertaining to the legal basis . . . upon which U.S. citizens can be subjected to targeted

Dist. Ct. Dkt. 92, at 6-8; Dist. Ct. Dkt. 105, at 1 (conceding that official acknowledgement waives agency's right to withhold "same or closely related" information).

Moreover, to the extent the government argues that the only question before this Court is whether the withheld records contain information that was also contained in the "DOJ white paper released in February 2013," this, too, is incorrect. Dist. Ct. Dkt. 105, at 1. While the Second Circuit gave special weight to the White Paper, *N.Y. Times*, 756 F.3d at 115 (referring to the White Paper as "the most revealing document"), it did not suggest that the White Paper was the only disclosure that mattered. To the contrary, the Court considered a range of disclosures by a variety of official sources in determining whether and to what extent the government had waived its right to withhold information. *Id.* at 116-120. In assessing the extent to which OLC has waived its right to withhold the records listed on its *Vaughn* index, this Court must look not only to the White Paper but to the full range of disclosures that Plaintiffs have identified. Dist. Ct. Dkt. 92, at 8-14.[4]

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killings, whether using unmanned aerial vehicles . . . or by other means." *N. Y. Times*, 756 3d. at 106 n.6.

[4] The government's argument that statutory exemptions may not "be lost through disclosures by Members of Congress or former officials of the Executive Branch," Dist. Ct. Dkt. 105, at 5 n.2, is only a distraction. Plaintiffs' official-acknowledgment argument relies not on statements of former officials or legislators but on records that have been released by the executive branch or published by the Second Circuit (in the case of the July 2010 OLC-DOD Memorandum), and on information disclosed by individuals who were executive branch officials at the time they made the statements in question. *See* Dis. Ct. Dkt. 92, at 8-13 (discussing, among other sources, the July 2010 OLC-DOD Memorandum, February 2010 OLC Memorandum, May 2011 White Paper, November 2011 White Paper, and statements by the President and the Attorney General). The Second Circuit has already made clear that it considers these disclosures to be "official acknowledgements" that preclude the government from withholding the relevant information under FOIA exemptions. (The government released the redacted February 2010 Memorandum and May 2011 White Paper after the Second Circuit's decision, but plainly these releases constitute "official acknowledgements," and the government does not contend otherwise.)

A. The OLC must segregate legal analysis from properly withheld information.

The OLC appears to concede that legal analysis cannot be withheld in its own right under exemptions 1 and 3, but it contends that any legal analysis withheld here is so "intertwined" with properly protected information that such analysis may also be withheld. Dist. Ct. Dkt. 105, at 6-7.[5] The ACLU does not take issue with the OLC's statement of the law; as the Second Circuit has observed, legal analysis may "*in some circumstances* … be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts." *N.Y. Times*, 756 F.3d at 119 (emphasis added). However, FOIA expressly provides that "[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). And yet there is no evidence here, beyond conclusory statements, that OLC has made any effort to segregate legal analysis from properly withholdable factual information.[6] This failure is particularly problematic because the government's previous disclosures, as well as many speeches that have been delivered by senior officials, demonstrate quite clearly that segregation is possible.[7]

CONCLUSION

For the foregoing reasons, and the reasons set forth in the ACLU's memorandum of law in support of partial summary judgment, the Court should deny the government's motion for summary judgment and review the withheld records *in camera* to determine (i) which portions of

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In any event, the government is incorrect that statements of former officials and legislators cannot constitute official acknowledgements. *N.Y. Times*, 756 F.3d at 115, 118-119 (considering statements made by members of Congress and former CIA Director Leon Panetta).

[5] In the Second Circuit, the government argued that "legal analysis relating to the use of targeted lethal force" could be properly classified and withheld under Exemption 1 because it pertained to an "intelligence source and method." Govt's Mot. Opp., Sec. Cir. Dkt. 95, at 31.

[6] In addition, not all of the withheld factual information is actually withholdable; some of it has been officially acknowledged. *See* discussion of Factual-Basis Information *supra*.

[7] The OLC also contends that it has adequately justified its assertion of the Exemption 5 privileges in its public and classified declarations. Plaintiffs have already addressed these arguments. Dist. Ct. Dkt. 92, at 19-21.

the records must be released because they consist of information that has been officially acknowledged; and (ii) which portions of the records must be released because they consist of legal analysis.

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