IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:10-cv-00436-RMC
CENTRAL INTELLIGENCE ANGECY,	)	
Defendant.	)	

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

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INTRODUCTION

Defendant Central Intelligence Agency ("CIA") submits this memorandum in opposition to Plaintiffs' cross-motion for summary judgment and in further support of its motion for summary judgment. In response to the narrowed Freedom of Information Act ("FOIA") request negotiated between the parties, the CIA released a redacted version of a classified Department of Justice White Paper ("DOJ White Paper") and withheld in full twelve legal memoranda and thousands of classified intelligence products. As demonstrated in the Government's motion and the Second Declaration of Ms. Martha M. Lutz, the CIA properly withheld the classified and privileged information based on FOIA Exemptions 1, 3, and 5. The CIA's determination that the information is currently and properly classified, as explained in Ms. Lutz's declaration, is entitled to substantial deference, especially given the CIA's expertise in the realm of national security issues and how they relate to foreign policy. Plaintiffs do not challenge the adequacy of the CIA's search for materials responsive to their narrowed request, choosing instead to dispute the sufficiency of the agency's supporting declarations, as well as speculate that the Government has officially acknowledged the withheld information. But in truth, the Government's declarations establish that the CIA has not officially acknowledged and cannot release any of the withheld materials without damaging national security and chilling the flow of candid advice necessary for effective government decision-making. Therefore, the Court should grant summary judgment in Defendant's favor.

ARGUMENT

I. The Court Should Grant Defendant Summary Judgment Because It Properly Withheld Information under FOIA Exemptions 1, 3, and 5

The memorandum in support of Defendant's motion for summary judgment establishes that the Government properly withheld responsive materials under FOIA Exemptions 1, 3, and 5.

See Def.'s Mem. in Supp. of Mot. for Summ. J. ("Def.'s Mem.") at 16–23. Ms. Lutz, the Chief of the CIA's Litigation Support Unit, explains that all of the withheld information remains properly classified or otherwise privileged and, therefore, exempt from disclosure. Second Declaration of Martha M. Lutz ("Second Lutz Decl."), ECF No. 67-2, ¶¶ 1, 4, 18; *see* 5 U.S.C. §§ 552(b)(1), (3), (5). As addressed more fully below, Defendant properly invoked the applicable FOIA exemptions, and Plaintiffs' arguments to the contrary lack any discernible merit.[1] *See Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007).

A. The CIA Properly Withheld Information under FOIA Exemption 1

As the Government's motion discusses in depth, all of the withheld information is protected by Exemption 1.[2] *See* Def.'s Mem. at 16–20; 5 U.S.C. § 552(b)(1). Ms. Lutz's declaration confirms that the withheld documents fall squarely within two categories of classified information, and the disclosure of the materials would cause damage to the national security of the United States. *See* Second Lutz Decl. ¶¶ 14, 23–25; *see* Exec. Order 13,526 §§ 1.1(a)(3), (4). Accordingly, the Court should give "substantial weight" to the CIA's considered determination that the information remains currently and properly classified and shielded from release. *See Students Against Genocide v. Dep't of State*, 257 F.3d 828, 837 (D.C. Cir. 2001) (concluding that because courts lack expertise in national security matters, they must give "substantial weight to agency statements") (internal quotations and citations omitted); *Shapiro v. U.S. Dep't of Justice*, --- F. Supp. 2d ---- , 2014 WL 953270, *9 (D.D.C. March 12, 2014) (Collyer, J.) ("In reviewing

[1] Plaintiffs do not challenge the adequacy of the CIA's search for materials responsive to their narrowed FOIA request. *See generally* Pl.'s Opp'n to Def.'s Mot. for Summ. J. and Cross-Mot. for Summ. J. at 17–32.

[2] The Government lodged *ex parte* and *in camera* an additional declaration providing details about the withheld material that cannot be placed on the public record. *See* Notice of Classified Lodging, ECF No. 68.

classification determinations under Exemption 1, the D.C. Circuit has repeatedly stressed that 'substantial weight' must be accorded agency affidavits concerning the classified status of the records at issue.").

Plaintiffs raise the dubious claim that the Court should decline to afford the "substantial weight" owed to Ms. Lutz's Second Declaration. *See* Pl.'s Opp'n to Def.'s Mot. for Summ. J. and Cross-Mot. for Summ. J. ("Pl.'s Opp'n") at 17–19. First, Plaintiffs argue that deference would be inappropriate because the D.C. Circuit Court of Appeals, citing statements by high-level government officials, determined that it was not plausible for the CIA to neither confirm nor deny an undefined intelligence interest in drone strikes—a so-called *Glomar* response. *Id.* at 17–18. Plaintiffs overlook, however, that the CIA moved the D.C. Circuit to remand this case so the District Court could determine the effect intervening public disclosures may have had on its *Glomar* response, which exemplified the Government's efforts to be candid and forthcoming with the Court. *See* Case No. 10-436, ECF No. 41. Moreover, Plaintiffs have not explained how the D.C. Circuit's decision has any bearing on the accuracy and truthfulness of Ms. Lutz's second declaration, since the D.C. Circuit found no bad faith or wrongdoing by the CIA. *See Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 430 (D.C. Cir. 2013). Second, Plaintiffs contend that the Court should not defer to the conclusions reached by Ms. Lutz because the CIA's credibility has been impugned by the Senate Select Committee on Intelligence ("SSCI") Report on Detention and Interrogation. *See* Pl.'s Opp'n at 18–19. But Plaintiffs have neither pointed to any evidence in the record to contradict Ms. Lutz's affirmations nor established that the CIA acted in bad faith in this litigation.[3] *See Hayden v. National Sec. Agency/Central Sec.*

[3] The Plaintiffs state that the SSCI report "discusses *ACLU v. DOD*, 389 F. Supp. 2d 547, 563–565 (S.D.N.Y. 2005)," even though the cited pages nowhere refer to that case. Pl.'s Opp'n at 18.

Service, 608 F.2d 1381, 1387 (D.C. Cir. 1979) ("The sufficiency of the affidavits is not undermined by a mere allegation of agency misrepresentation or bad faith, nor by past agency misconduct in other unrelated cases."). At bottom, "'substantial weight' must be accorded agency affidavits concerning the classified status of the records at issue," especially when, as here, Plaintiffs attempt to buttress their arguments with nothing more than unsupported allegations. *Shapiro*, 2014 WL 953270, at *9.

Plaintiffs unpersuasively argue that the Court should deny the Government's motion because the intelligence products cannot be withheld in full under FOIA Exception 1. *See* Pl.'s Opp'n at 29–31. Plaintiffs assert that the intelligence information contained in the products, which they refer to as "strike metadata," does not constitute intelligence sources or methods, and thus, the information cannot be withheld as classified and should be segregated and released if practicable.[4] *Id.*; *see* Exec. Order 13,526 §§ 1.1(a)(3), 1.4(c). The Supreme Court has rejected the narrow reading proposed by Plaintiffs, holding that "intelligence sources and methods" should be interpreted broadly to encompass any sources and methods related to foreign intelligence, including an "infinite variety of diverse sources." *CIA v. Sims*, 471 U.S. 159, 169–73 (1985); *see Wolf*, 473 F.3d at 375 ("[T]he Supreme Court has recognized the broad sweep of 'intelligence sources' warranting protection in the interest of national security."). With the Supreme Court's broad interpretation as a baseline, Ms. Lutz explains that disclosing the intelligence products "would tend to show how the information was gathered, the weight

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Plaintiffs' speculation in that regard is unsupported, and their reliance on the SSCI Report's narrative misplaced.

[4] Plaintiffs attempt to minimize the sensitivity of the intelligence products by characterizing the information contained within as "strike metadata," which is a misnomer. The intelligence products contain "various details about U.S. Government drone strikes," Second Lutz Decl. ¶ 9, and therefore, the information pertains to intelligence activities, sources, and methods and is properly classified and exempt from release. *See id.* at ¶ 25.

assigned to certain sources, and the types of information tracked by CIA analysts." Second Lutz Decl. ¶ 25. Ms. Lutz also confirms that disclosing any information contained within the intelligence products "would not only compromise the specific intelligence sources and intelligence methods used, but would also reveal the methodology behind the assessments and the priorities of the Agency." *Id.* Lastly, Ms. Lutz states that the intelligence products "reflect the information available to the CIA at a certain point in time, which could show the breadth, capabilities, and limitations of the Agency's intelligence collection." *Id.* And should there be any doubt that the intelligence products are currently and properly classified and exempt from disclosure in full, the Government respectfully refers the Court to Ms. Lutz's classified submission.[5] *See* Notice of Classified Lodging, ECF No. 68.

In addition, Plaintiffs do not contest that the information contained in the intelligence products falls within another protected category of information found in Section 1.4 of Executive Order 13,526. *See generally* Pl.'s Opp'n at 29–31. More specifically, Ms. Lutz explains that the intelligence information pertains to "foreign relations and foreign activities of the United States," as well as intelligence activities, sources, and methods. *See* Second Lutz Decl. ¶¶ 14, 18. Therefore, the Court does not need to reach Plaintiffs' meritless argument in order to grant summary judgment in the Government's favor, even though the information unquestionably pertains to intelligence activities, sources, and methods.

[5] Plaintiffs contend that the CIA "must provide some individual description and justification" for each of the intelligence products withheld in full. *See* Pl.'s Opp'n at 31. The D.C. Circuit has repeatedly acknowledged that document indexes are not required, and agency declarations alone can suffice to justify withholding documentation in its entirety based on Exemption 1. *See, e.g.*, *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007) (explaining that "little proof or explanation is required [in an agency declaration] beyond a plausible assertion that information is properly classified"). And again, Ms. Lutz confirms in her unclassified and classified declarations that none of the information contained within the intelligence products can be released without damaging the national security of the United States. *See* Second Lutz Decl. ¶¶ 9, 25.

Plaintiffs also unconvincingly argue that legal analysis contained in the withheld memoranda can never be protected under FOIA Exemption 1 because it does not constitute an intelligence activity, source, or method within the meaning of Executive Order 13,526. *See* Pl.'s Opp'n at 25–27; *see* Exec. Order 13,526 §§ 1.1(a)(3), 1.4. Plaintiffs miss the point. The Executive Order only requires that the classified material "pertains to" certain categories of information identified in Section 1.4 of the Executive Order. *See* Exec. Order 13,526 § 1.4. Put another way, legal analysis that "pertains to," among other things, intelligence activities, sources, and methods may be properly classified by an original classification authority. *See* Exec. Order 13,526 § 1.4(c). Here, Plaintiffs requested legal memoranda "concerning the U.S. Government's use of armed drones to carry out premeditated killings," and thus, it is entirely logical and plausible that the legal analysis pertains to intelligence activities, sources, and methods, as Ms. Lutz confirms in her declaration. *See* Second Lutz Decl. ¶¶ 6, 14, 18. Accordingly, the Government properly withheld the legal memoranda under FOIA Exemption 1.

Further, Plaintiffs' argument has been flatly rejected by the Second Circuit Court of Appeals in the parallel litigation Plaintiffs initiated in the Southern District of New York. *See New York Times Co. v. Dep't of Justice*, 752 F.3d 123 (2d Cir. 2014), *revised and superseded by* 756 F.3d 100 (2d Cir. 2014), *amended on denial of rehearing by* 758 F.3d 436 (2d Cir. 2014), *supplemented by* 762 F.3d 233 (2d Cir. 2014). The Second Circuit recognized that legal analysis can be properly classified where its disclosure would reveal the likelihood of a planned operation or where the legal analysis is otherwise so intertwined with classified facts that disclosure of the legal analysis would disclose such facts. *New York Times Co.*, 756 F.3d at 119. And the District Court on remand upheld the withholding of responsive memoranda authored by the Office of Legal Counsel under Exemptions 1 and 3, all of which contained legal analysis. *See* Case No.

1:12-cv-794, ECF No. 90 (Oct. 31, 2014) (upholding withholding in full of nine memoranda and partial withholding of one memorandum).

To the extent Plaintiffs speculate that legal analysis or intelligence information they refer to as "strike metadata" can be segregated from the classified information, *see* Pl.'s Opp'n at 27, 30–31, Ms. Lutz has categorically refuted such an assertion. Second Lutz Decl. ¶ 31; *see Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) ("Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material."). The CIA conducted a page-by-page and line-by-line review of the materials responsive to Plaintiffs' requests, as narrowed by the parties' agreement. Second Lutz Decl. ¶ 31. Following this review, the CIA determined that it has already released the reasonably segregable, non-exempt information from the DOJ White Paper, and the withheld information remains properly classified and unsuitable for release. *Id.* at ¶ 22. Ms. Lutz went on to explain that "there is no reasonably segregable, non-exempt portions of documents that can be released without potentially compromising classified information, intelligence sources and methods, and/or material protected by privilege." *Id.* at ¶ 31. The CIA, therefore, met its burden of establishing that none of the withheld information can be segregated and disclosed. *See Juarez v. Dep't of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008) (explaining that a court "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated").

B. The CIA Properly Withheld Information under FOIA Exemption 3

The Government's motion demonstrates that Exemption 3 shields from disclosure all of the withheld materials, as two additional statutes protect the information from release. *See* Def.'s Mem. at 20–23; 5 U.S.C. § 552(b)(3). Ms. Lutz's declaration confirms that all of the

classified information withheld by the CIA implicates intelligence sources and methods protected from disclosure under the National Security Act of 1947 ("NSA"). Second Lutz Decl. ¶ 26. Moreover, Ms. Lutz's declaration explains that the Central Intelligence Act of 1949 ("CIA Act") protects from release materials that, like the information withheld here, would reveal core functions of the CIA, including, but not limited to, "the function of protecting intelligence sources and methods," as well as names of CIA personnel. *Id*.

Plaintiffs unpersuasively challenge the Government's assertion of Exemption 3 by contending that legal analysis cannot be considered an intelligence source or method under the NSA. *See* Pl.'s Opp'n at 26. Plaintiffs have not explained why legal analysis addressing intelligence sources or methods does not fall within the ambit of Exemption 3, observing only that the Southern District of New York asserted that "legal analysis is not an intelligence source or method[.]" *Id.* (quoting *New York Times Co. v. Dep't of Justice*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013), *rev'd*, 752 F.3d 123). Plaintiffs, however, fail to acknowledge that the District Court also held that legal analysis may be withheld when it is "inextricably intertwined with information that is statutorily exempt from disclosure, including information about intelligence sources and methods[.]" *New York Times Co.*, 915 F. Supp. 2d at 540. Even assuming, for the sake of argument, legal analysis cannot, by itself, constitute intelligence sources or methods, Ms. Lutz explicitly concluded that "there is no reasonably segregable, non-exempt portions of documents that can be released[.]" Second Lutz Decl. ¶ 31.

Plaintiffs' remaining arguments regarding the Government's assertion of Exemption 3 similarly lack merit. *See* Pl.'s Opp'n at 25–27, 29–31. Plaintiffs first assert, like they did with the legal memoranda, that the withheld intelligence products cannot be considered "intelligence sources or methods" under the NSA for purposes of Exemption 3. *Id.* at 29–30. For all of the

same reasons Plaintiffs' narrow interpretation fails in regard to Exemption 1, it similarly lacks merit for purposes of Exemption 3. *See supra* pp. 5–6. Next, Plaintiffs make the conclusory statement that "[l]egal analysis cannot plausibly be characterized as a 'function' of the agency," and therefore, such analysis cannot be protected under the CIA Act and Exemption 3. Pl.'s Opp'n at 27. But the Government's declarations make clear that "all of the records at issue would reveal the specific functions of Agency personnel," which includes "the function of protecting intelligence sources and methods." Second Lutz Decl. ¶¶ 21, 26.

C. The CIA Properly Withheld Information under FOIA Exemption 5

The Government's motion demonstrates that the CIA logically withheld the legal memoranda pursuant to Exemption 5, *see* Def.'s Mem. 24–28, which protects "those documents . . . normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *see* 5 U.S.C. § 552(b)(5). More specifically, Ms. Lutz's declarations explain that the Government properly asserted the deliberative process privilege, the attorney-client privilege, and the presidential communications privilege. *See* Second Lutz. Decl. ¶¶ 28–30.

Plaintiffs raise a cursory argument that Ms. Lutz's declaration does not provide enough information about the assertion of privileges under FOIA Exception 5. *See* Pl.'s Opp'n at 28–29. Plaintiffs, however, fail to address Ms. Lutz's affirmations about the necessity of these privileges, as briefly summarized above and more thoroughly addressed in Defendant's motion. *See* Second Lutz Decl. ¶¶ 27–30. While the Government cannot describe the responsive documents in any more detail on the public record without revealing classified and statutorily privileged information, Defendant respectfully refers the Court to the classified submission for a more robust discussion of the Government's assertion of the applicable privileges. *Id.* at ¶ 30. Lastly, even assuming, for the sake of argument, the Court disagrees with the assertion of

privilege, all of the materials have also been properly withheld under FOIA Exemptions 1 and 3. *Id.* at ¶ 27.

II. The Government Has Not Officially Acknowledged Any of the Withheld Information

The CIA may be compelled to provide information notwithstanding a valid FOIA exemption only when the specific information at issue has already been fully, publicly, and officially disclosed. *See Am. Civil Liberties Union*, 710 F.3d at 426–27; *see also Wolf*, 473 F.3d at 378 ("The insistence on exactitude recognizes 'the Government's vital interest in information relating to national security and foreign affairs.'") (quoting *Public Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993)). In this case, Plaintiffs spend considerable time listing the alleged public acknowledgements by the Government, which they speculate are also included in the withheld materials. *See* Pl.'s Opp'n at 19–25. But the D.C. Circuit explained that it has "repeatedly rejected the argument that the government's decision to disclose some information prevents the government from withholding other information about the same subject." *Am. Civil Liberties Union v. Dep't of Defense*, 628 F.3d 612, 625 (D.C. Cir. 2011). And similarly, the D.C. Circuit has observed that "the fact that information exists in some form in the public domain does not necessarily mean that official disclosure will not cause harm cognizable under a FOIA exemption." *Wolf*, 473 F.3d at 378. With these principles as a backdrop, Defendant's motion, as briefly summarized below, establishes that the Government has not officially acknowledged any of the withheld materials.

The Government has not officially acknowledged any of the information withheld in the DOJ White Paper or the withheld-in-full documents. *See* Def.'s Mem. at 29–31. To begin, the D.C. Circuit, in the appeal of this case, did not conclude that the CIA waived any of the exemptions discussed above and in Defendant's motion. *See Am. Civil Liberties Union*, 710

F.3d at 430. Indeed, the Court only determined that the CIA could acknowledge having an intelligence interest in strikes conducted by the U.S. Government, and that such a disclosure would not reveal whether or not "the Agency itself—as opposed to some other U.S. entity such as the Defense Department—operates drones." *Id.* at 428. Ms. Lutz specifically attests that she conducted a line-by-line, page-by-page review of the responsive materials, including the DOJ White Paper, and she confirms that none of the withheld information has been officially acknowledged by the U.S. Government. *See* Second Lutz Decl. ¶¶ 22–25. In the course of reaching her conclusion, Ms. Lutz also considered the information released in connection with the decision by the Second Circuit in the parallel case brought by Plaintiffs in the Southern District of New York. *Id.* at ¶¶ 7, 24. The Second Circuit found a waiver as to portions of the "legal analysis" in a July 2010 Office of Legal Counsel Memorandum, which considered a potential operation against Anwar al-Aulaqi. *See New York Times Co.*, 756 F.3d at 114–21. Ms. Lutz specifically concluded that disclosure of the information withheld from the classified DOJ White Paper, as well as the withheld-in-full memoranda, would reveal information beyond what was found to be officially acknowledged in the New York litigation. *See* Second Lutz Decl. ¶¶ 23–24. In sum, none of the withheld information has been officially acknowledged, and Plaintiffs' speculation otherwise does not compel disclosure.

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CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court deny Plaintiffs' motion and grant summary judgment in its favor.

Dated: January 9, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2015, I electronically transmitted the foregoing to the clerk of court for the United States District Court for the District of Columbia using the CM/ECF filing system. Participants in the case are registered CM/ECF users and will be served by the CM/ECF filing system.

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