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.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CENTRAL INTELLIGENCE AGENCY'S MOTION FOR SUMMARY JUDGMENT

JOYCE R. BRANDA
Acting Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

AMY POWELL
STEPHEN M. ELLIOTT
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W., Room 7318
Washington, D.C. 20530
Tel: (202) 305-8177
Email: stephen.elliott@usdoj.gov

Counsel for Defendants

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INTRODUCTION

The Government on remand has carefully reviewed individual documents responsive to a narrowed request for materials negotiated between the Government and Plaintiffs. Although certain legal analysis and intelligence products have been located, the Government continues to safeguard properly classified and privileged details pertaining to this information, the disclosure of which could reasonably be expected to damage national security and to chill the flow of candid advice necessary for effective government decisionnmaking.

Pursuant to the Freedom of Information Act ("FOIA"), Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, "ACLU" or "Plaintiffs") have sought a variety of records from Defendant Central Intelligence Agency ("CIA" or "the Agency") related to "the use of unmanned aerial vehicles ('UAVs')—commonly referred to as 'drones' . . . —by the CIA and the Armed Forces for the purposes of killing targeted individuals." The D.C. Circuit Court of Appeals held that the CIA could not sustain its initial Glomar response in light of certain statements made by high-level government officials about U.S. Government drone operations. The D.C. Circuit determined that, although these statements did not acknowledge that the CIA itself operated drones, it was "neither logical nor plausible for the CIA to maintain that it would reveal anything not already in the public domain to say that the Agency 'at least has an intelligence interest in such strikes." *Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 430 (D.C. Cir. 2013). Accordingly, the D.C. Circuit reversed and remanded the case to this Court for further proceedings, noting that the degree of detail that the Agency was required to disclose remained "open for the district court's determination on remand." *Id*. at 434.

In order to narrow the issues in dispute, and to facilitate briefing of the issues of most interest to the Plaintiffs, the parties agreed to the terms of a narrowed request. Pursuant to the

parties' agreement, the CIA agreed to search for: (1) certain final legal memoranda about U.S. Government drone strikes; and (2) certain charts or compilations of information about U.S. Government drone strikes that include, for example, targeting information and damage assessments.

The CIA conducted a thorough search reasonably calculated to locate all records responsive to the negotiated parameters outlined above. As demonstrated by the Second Declaration of Martha M. Lutz, the CIA withheld all of the responsive information in full based on FOIA Exemptions 1, 3, and 5, except for single document, a redacted version of which was released to the ACLU in a parallel case pending in the Southern District of New York. The CIA's determination in this regard—which is largely based on the Agency's expertise in the national security realm—is entitled to substantial deference. Because the CIA conducted an adequate search and, as demonstrated by its declaration, withheld information that logically falls within applicable exemptions, the CIA is entitled to judgment as a matter of law.

BACKGROUND

I. Administrative Background and District Court Decision

This action arises from several FOIA requests Plaintiffs made to the CIA, the Department of Defense ("DOD"), the Department of State ("State"), and the Department of Justice ("DOJ") on January 13, 2010. *See* Declaration of Mary Ellen Cole ("Cole Decl."), ECF No. 15, ¶ 7 & Ex. A. The ACLU alleges that drones are operated "by the CIA and the Armed Forces for the purpose of killing targeted individuals," and asserts that "reports" suggest that "non-military personnel including CIA agents are making targeting decisions, piloting drones, and firing missiles." Cole

Decl. Ex. A, at 2–4. The initial FOIA request sought records broadly pertaining to the following ten categories of information, each of which concerns "drone strikes":[1]

1. The "legal basis in domestic, foreign and international law" for such drone strikes, including who may be targeted with this weapon system, where and why;

3. "[T]he 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;"

5. The "assessment or evaluation of individual drone strikes after the fact;"

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

7. The "number of drone strikes the 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;" and

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 Cole Decl., Ex. A at 6–8. Most of these categories include several sub-categories seeking specific information about drone strikes.[2] *Id.*

By letter dated March 9, 2010, the CIA issued a response to Plaintiffs' requests, stating that "[t]he fact of the existence or nonexistence of requested records is currently and properly

[1] The ACLU's request uses the term "drone strike" to mean "targeted killing" with a drone. Accordingly, this Memorandum will use the term "drone strikes" for convenience. *See* Cole Decl. ¶ 7, Exhibit A at 5.

[2] During the first round of summary judgment briefing, Plaintiffs abandoned categories 1(b) and 2 of their original request.

classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended." Cole Decl. ¶ 8 & Ex. B. This response is commonly known as a *Glomar* response.[3] Plaintiffs administratively appealed the March 9 determination, s*ee* Cole Decl. ¶ 9 & Ex. C, and while the appeal was pending, filed an Amended Complaint on June 1, 2010, adding the CIA as a co-defendant to their previously-filed lawsuit against DOD, State, and DOJ. *See* Amended Compl., ECF No. 11.

This Court granted the CIA's first motion for summary judgment on September 9, 2011. *See Am. Civil Liberties Union v. Dep't of Justice*, 808 F. Supp. 2d 280 (D.D.C. 2011). In doing so, the Court upheld the CIA's Glomar determination, holding that the existence or non-existence of responsive records was currently and properly classified and exempt pursuant to statute because to reveal the existence or non-existence of records would reveal whether or not the CIA had a role or intelligence interest in drone strikes. *Id.* at 286–93, 298–301. The Court agreed that to disclose such information could reveal intelligence activities and intelligence sources and methods, as well as functions of the CIA, all of which are exempt from disclosure under FOIA Exemptions 1 and 3. *Id.* This Court rejected ACLU's contention that the CIA had previously officially acknowledged such involvement or interest. *Id*. at 293–98.

On October 26, 2011, the parties stipulated to dismiss the case as it pertained to Defendants DOD, DOJ, and State. *See* Stipulation of Dismissal, ECF No. 38. The ACLU then

[3] *See Moore v. Bush*, 601 F. Supp. 2d 6, 14 n.6 (D.D.C. 2009) ("The '*Glomar*' response is named after the ship involved in *Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976). In that case, the FOIA requester sought information regarding a ship named the 'Hughes Glomar Explorer,' and the CIA refused to confirm or deny whether it had any relationship with the vessel because to do so would compromise national security or would divulge intelligence sources and methods.").

filed a notice of appeal with the D.C. Circuit Court of Appeals on November 9, 2011. *See* Notice of Appeal, ECF No. 39.

II. D.C. Circuit Proceedings

While the ACLU's appeal was pending in this matter, the Executive Branch declassified and disclosed certain additional information about U.S. counterterrorism operations, including about the legal basis for U.S. Government drone strikes. *See* First Declaration of Martha Lutz ("First Lutz Decl."), ECF No. 49, ¶ 11. On March 5, 2012, Attorney General Eric Holder gave a speech about the legal issues pertaining to the use of lethal force against senior operational leaders of al-Qa'ida and associated forces, including when such leaders are U.S. citizens. *See* Declaration of Amy Powell ("Powell Decl."), ECF No. 49, ¶ 2. On April 30, 2012, John Brennan, then the Assistant to the President for Homeland Security and Counterterrorism, gave a speech in which he explained in broad terms the standards and process of review for authorizing strikes against a specific member of al-Qa'ida outside the battlefield of Afghanistan. *Id*. at ¶ 3. Neither speech discussed whether the CIA played a role in such operations. *Id.* at ¶¶ 3, 4 & Exs. A, B. In light of the newly declassified information, the CIA moved the D.C. Circuit Court of Appeals to remand this case so that the district court could determine the effect of these disclosures on the case at bar, which the D.C. Circuit denied. *See* Case No. 10-436, ECF No. 41.

On March 5, 2013, following oral argument, the D.C. Circuit reversed the decision of the District Court, holding that, given the statements by high-level government officials, the CIA's *Glomar* response was no longer appropriate. *See Am. Civil Liberties Union v. CIA*, 710 F.3d 422 (D.C. Cir. 2013). On appeal, the ACLU argued primarily that the CIA had officially disclosed that it not only has an interest in drone strikes, but also conducts drone strike operations. *Id.* at 428. The D.C. Circuit refused to adopt the ACLU's position; rather, the Court noted that

Plaintiffs' FOIA request was not limited to drones purportedly operated by the CIA but instead sought records related to drones purportedly operated by the CIA and the Armed Forces. *Id.* In light of these statements, the D.C. Circuit found that the CIA "proffered no reason to believe that disclosing whether it has any documents at all about drone strikes [would] reveal whether the Agency itself—as opposed to some other U.S. entity such as the Defense Department—operates drones." *Id.* The Court determined that although certain official statements "do not acknowledge that the CIA itself operates drones, they leave no doubt that some U.S. agency does." *Id.* at 429. The Court found it was "neither logical nor plausible for the CIA to maintain that it would reveal anything not already in the public domain to say that the Agency 'at least has an intelligence interest' in such strikes." *Id.* at 430. The D.C. Circuit did not further define the nature of that interest and appears to have explicitly rejected the ACLU's argument that the CIA had officially acknowledged conducting drone strikes, noting that certain statements by President Obama and then-Assistant to the President John Brennan "do not acknowledge that the CIA itself operates drones." *Id*. Instead, the Court found only that the CIA could acknowledge having an "intelligence interest" in strikes conducted by the U.S. Government. *Id*. at 428.

The D.C. Circuit left open the issue as to "[j]ust how detailed a disclosure must be made." *Am. Civil Liberties Union*, 710 F.3d at 432. The Court noted that "there is no fixed rule establishing what a *Vaughn* index must look like, and a district court has considerable latitude to determine its requisite form and detail in a particular case." *Id*. The D.C. Circuit then discussed a variety of acceptable submissions and mechanisms available to the CIA, including a detailed *Vaughn* index, *in camera* review of documents or an index, a "no number, no list" response, a partial "no number, no list" response, or even a partial *Glomar* response. *Id*. at 433–34. The Court of Appeals noted that a pure no number, no list response would require "a particularly

persuasive affidavit" but stated that "all such issues remain open for the district court's determination upon remand." *Id*. at 434.

III. Additional Disclosures

Subsequent to the D.C. Circuit decision, the Executive Branch declassified and disclosed a limited amount of additional information about the lethal use of drones. First Lutz Decl. ¶ 16. President Obama directed the Attorney General to disclose additional information about targeted lethal operations that, until that point, had been properly classified. Powell Decl. ¶ 4 & Ex. C. In a letter to the Chairman of the Senate Judiciary Committee dated May 22, 2013, the Attorney General publicly acknowledged for the first time that the United States specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi, in the conduct of U.S. counterterrorism operations and further identified three other U.S. citizens who were not specifically targeted, yet had been killed in counterterrorism operations since 2009. *Id*. This acknowledgement was followed by President Obama's speech at the National Defense University in which he explained that he had declassified this information in order "to facilitate transparency and debate on the issue, and to dismiss some of the more outlandish claims," while still acknowledging the "necessary secrecy" surrounding such operations. *Id.* at ¶ 5 & Ex. D.

IV. New York Proceedings

In parallel FOIA litigation in the U.S. District Court for the Southern District of New York, the ACLU and the New York Times sought from multiple agencies a variety of records related to the lethal use of drones. *See New York Times Co. v. Dep't of Justice,* Case No. 1:11-cv-9336 (CM), *Am. Civil Liberties Union v. Dep't of Justice*, Case No. 1:12-cv-794 (CM). There, the CIA acknowledged that it possessed copies of the Holder and Brennan speeches, disclosed that it possessed other responsive records and withheld all details about those

records—a "no number, no list" response. *See* First Lutz Decl. ¶ 11; *see generally NY Times v. Dep't of Justice*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013), *reversed by* 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). On January 1, 2013, the district court granted the Government's motion for summary judgment and the ACLU and NY Times appealed. *NY Times*, 915 F. Supp. 2d 508.

On appeal, the Second Circuit Court of Appeals ordered the release of a redacted version of a memorandum, holding, among other things, that the CIA's no number no list response was insufficiently justified and that the Government had waived statutory exemptions over certain information, including the fact that CIA had an operational role (of an undefined nature) in the operation against Anwar al-Aulaqi and an operational role (also undefined) in U.S. drone strikes generally. *See NY Times*, 752 F.3d 123. On June 5, 2014, the Government Defendants petitioned for panel rehearing and, alternatively, for rehearing en banc, but also advised the Court that it would not seek further review of certain aspects of the opinion. *NY Times*, 758 F.3d at 437–38. On June 23, 2014, the Second Circuit panel granted the rehearing petition in part, publishing a corrected version of the Second Circuit opinion and a court-redacted version of a memorandum authored by the Office of Legal Counsel ("OLC") about a contemplated operation against Anwar al-Aulaqi. *NY Times*, 758 F.3d 436. All remaining issues have since been remanded to the district court, where proceedings continue.[4] To date, the district court on remand has upheld the withholding in full of all remaining responsive OLC memoranda. *Am.*

[4] After remand, the Government redacted and released one additional OLC memorandum related to a contemplated operation against Anwar al-Aulaqi and one classified DOJ White Paper on the same subject. With respect to all responsive OLC memoranda, the district court has upheld the Government's withholdings in their entirety. The defendants have filed motions for summary judgment with respect to the remaining documents in dispute.

Civil Liberties Union v. Dep't of Justice, Case No. 1:12-cv-794 (CM), Decision on Remand, ECF No. 90.

V. Remand to the D.C. District Court

On remand, the CIA answered the ACLU's requests with a "no number, no list" response and filed a second motion for summary judgment on August 9, 2013. *See* Def.'s Mot., ECF No. 49. But in light of the decision not to seek further review of the Second Circuit decision, the CIA subsequently withdrew its motion for summary judgment and "no number, no list" response on July 18, 2014. *See* Status Report, ECF No. 62. The parties then negotiated the scope of a narrowed request, and the ACLU agreed to limit its requests to: (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'[.]"; and (2) "Four 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." *See* Second Declaration of Martha M. Lutz ("Second Lutz Decl.") ¶ 6. The ACLU agreed to exclude from this case entirely the OLC memoranda being litigated in the New York case. *Id.* at ¶ 7 n.2.

As detailed in the Second Lutz Declaration and discussed in greater depth below, the CIA has completed processing all of the located materials responsive to the negotiated search parameters. Second Lutz Decl. ¶¶ 8–9. The CIA identified twelve documents in response to the ACLU's request for final legal memoranda, not including OLC memoranda that are the subject of the New York litigation. *Id.* at ¶ 8. The CIA concluded that one memorandum, a classified DOJ White Paper, could be released in redacted form, as it has already been provided to the

ACLU in the New York case. *Id.* at ¶¶ 7 n.3, 22. The other responsive legal memoranda are withheld in full under Exemptions 1 and 3 because they contain properly classified information. *Id.* at ¶ 8, 24, 26. The legal memoranda are also protected by Exemption 5, specifically the deliberative process, attorney-client, and/or presidential communications privilege. *Id.* at ¶¶ 8, 27–30. The CIA's search disclosed thousands of classified intelligence products responsive to the second prong of the negotiated search, which are being withheld in full under Exemptions 1 and 3. *Id.* at ¶ 9, 25–26. The classified declaration provided by Ms. Lutz provides additional detail regarding the withheld materials. *Id.*at 8–9.

ARGUMENT

As set forth below and in the attached declaration, the CIA acknowledges possessing records responsive to the Plaintiffs' requests, as narrowed by the parties' agreement. The Second Lutz declaration demonstrates that the CIA made a good faith effort to search the universe of materials reasonably expected to contain the requested information. All of the withheld records remain currently and properly classified, and thus, the materials are exempt from disclosure under FOIA Exemptions 1 and 3. Moreover, some of the responsive documents also contain privileged information exempt from disclosure under Exemption 5. The CIA is therefore entitled to a grant of summary judgment in its favor.

I. STATUTORY STANDARDS

A. The Freedom of Information Act

The "basic purpose" of FOIA reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166–67 (1985).

Accordingly, in passing FOIA, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.'" *John Doe Agency*, 493 U.S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). As the D.C. Circuit has recognized, "FOIA represents a balance struck by Congress between the public's right to know and the [G]overnment's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

When conducting a search for records responsive to a FOIA request, "the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Reasonableness, not perfection, constitutes the Court's guiding principle in determining the adequacy of a FOIA search, *see, e.g.*, *Campbell v. Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998); *Cunningham v. Dep't of Justice*, --- F. Supp. 2d ---- , 2014 WL 1491175, *7 (D.D.C. April 16, 2014) (Collyer, J.), and in the same vein, "[t]here is no requirement that an agency search every record system." *Oglesby*, 920 F.2d at 68. Moreover, a failure to uncover a responsive document does not render the search inadequate; "the issue to be resolved is not whether there might exist any . . . documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (internal citation omitted); *see also Meeropol v. Meese*, 790 F.2d 942, 952–53 (D.C. Cir. 1986) (search is not presumed unreasonable simply because it fails to produce all relevant material). Conducting a "reasonable" search is a process that requires "both systemic and case-specific exercises of

discretion and administrative judgment and expertise" and is "hardly an area in which the courts should attempt to micro-manage the executive branch." *Schrecker v. Dep't of Justice*, 349 F.3d 657, 662 (D.C. Cir. 2003) (quoting *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002)).

In evaluating the adequacy of a search, an agency must provide "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68). The courts afford agency affidavits "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal quotation and citation omitted); *see Cunningham*, 2014 WL 1491175, *7. Indeed, the plaintiff has the onus to "demonstrate the lack of a good faith search" after an agency puts forth sufficient affidavits. *Cunningham*, 2014 WL 1491175, *7.

FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exemptions. *See* 5 U.S.C. § 552(b). "A district court only has jurisdiction to compel an agency to disclose improperly withheld agency records," *i.e.* records that do "not fall within an exemption." *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996); *see also* 5 U.S.C. § 552(a)(4)(B) (providing the district court with jurisdiction only "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'"). While

narrowly construed, FOIA's statutory exemptions "are intended to have meaningful reach and application." *John Doe Agency*, 493 U.S. at 152; *see also United States Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

The courts resolve most FOIA actions on summary judgment. *See Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007). The government bears the burden of proving that the withheld information falls within the exemptions it invokes. *See* 5 U.S.C. § 552(a)(4)(B); *King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). A court may grant summary judgment to the Government based entirely on an agency's declarations, provided they articulate "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Such declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims[.]" *SafeCard Servs., Inc.*, 926 F.2d at 1200 (internal quotation marks omitted).

B. Special Considerations in National Security Cases

The information sought by Plaintiffs directly "implicat[es] national security, a uniquely executive purview." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926–27. While courts review *de novo* an agency's withholding of information pursuant to a FOIA request, "de novo review in FOIA cases is not everywhere alike." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Although *de novo* review provides for "an objective, independent judicial determination," courts nonetheless defer to an agency's determination in the national security context, acknowledging that "the executive ha[s] unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record." *Ray*

v. Turner, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (internal quotation marks omitted). The courts have specifically recognized the "propriety of deference to the executive in the context of FOIA claims which implicate national security." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927–28.

For these reasons, the courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927; *see Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) ("Today we reaffirm our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security."). Consequently, "in the national security context, the reviewing court must give 'substantial weight'" to agency declarations. *Am. Civil Liberties Union v. Dep't of Justice*, 265 F. Supp. 2d 20, 27 (D.D.C. 2003) (quoting *King*, 830 F.2d at 217); *see Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (holding that the district court erred in "perform[ing] its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"); *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (because "courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security). Accordingly, FOIA "bars the courts from prying loose from the government even the smallest bit of information that is properly classified or would disclose intelligence sources or methods." *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

II. THE CIA CONDUCTED A REASONABLE SEARCH CALCULATED TO DISCOVER RECORDS RESPONSIVE TO PLAINTIFFS' REQUESTS

As described in the Second Lutz Declaration, the CIA conducted a thorough search reasonably calculated to uncover records responsive to Plaintiffs' requests for information, as

narrowed by the parties' agreement. Second Lutz Decl. ¶¶ 8–9. Ms. Lutz serves at the Chief of the Litigation Support Unit for the CIA. *Id.* at ¶ 1. In this role, she is "responsible for the classification review of CIA documents and information that may be the subject of court proceedings or public requests for information under [FOIA]." *Id.* at ¶ 2. As a senior CIA official holding original classification authority, Ms. Lutz has authorization to "assess the current, proper classification of CIA information . . . based on the classification criteria of Executive Order 13526[.]" *Id.* With Ms. Lutz's experience as a backdrop, her declaration establishes that the CIA conducted a reasonable search in good faith, and it has therefore satisfied the statutory requirements for summary judgment.

In an effort to locate materials responsive to the first prong of Plaintiffs' narrowed request, the CIA determined that legal memoranda would most likely be located in the Office of General Counsel ("OGC"). Second Lutz Decl. ¶ 8. Ms. Lutz explains that the CIA reached this conclusion "because the General Counsel serves as the chief legal officer of the CIA, and OGC attorneys assist the General Counsel in providing legal advice to Agency leadership and other personnel in accordance with the performance of their duties." *Id.* Ms. Lutz goes on to note that OGC "engages with DOJ and counterparts at other federal agencies on various legal matters affecting" the CIA, and as a consequence, this professional relationship involves the exchange of legal memoranda. *Id.* The CIA "searched in all areas reasonably likely to maintain responsive records," which included reviews of "all relevant hard copy and electronic files" by personnel knowledgeable about the subject matter. *Id.* When doing so, the CIA personnel tailored their searches to locate all responsive legal memoranda, "including those that did not originate with the Agency." *Id.* The CIA determined that "a search of Agency emails would not likely yield any responsive material because, as a general rule, legal memoranda are not conveyed in the

body of email messages." *Id.* But Ms. Lutz notes that legal memorandum attached to email communications "would have been included in the other searches." *Id.* After completing its searches of OGC, Ms. Lutz states that the CIA identified twelve responsive legal memoranda. *Id.*

With regard to the second prong of Plaintiffs' narrowed request, the CIA represented to Plaintiffs at the outset that it produced "four types of pre-existing intelligence products." Second Lutz Decl. ¶¶ 6, 9. In doing so, the CIA confirmed to Plaintiffs that these intelligence products contained the type of information about U.S. drone strikes that they sought through FOIA, such as the intended targets of the strikes and the assessed number of people killed. *Id.* Ms. Lutz states that the CIA searched the relevant offices, identifying thousands of records responsive to the second part of Plaintiffs' request. *Id.* at ¶ 9. Ms. Lutz refers the Court to her classified declaration for a full description of the CIA's efforts. *Id.*

In short, the CIA conducted a search that was reasonably expected to produce the records responsive to Plaintiffs' narrowed requests for information. *See Oglesby*, 920 F.2d at 68. Since Ms. Lutz's declaration should be afforded a presumption of good faith, the CIA is entitled to summary judgment on the adequacy of its search. *See SafeCard Servs., Inc.*, 926 F.2d at 1200 (D.C. Cir. 1991); *Cunningham*, 2014 WL 1491175, *7.

III. THE CIA PROPERLY WITHELD DOCUMENTS PURSUANT TO EXEMPTIONS 1 AND 3

A. The CIA Properly Withheld Records under Exemption 1

FOIA Exemption 1 exempts from disclosure 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). Under Executive Order 13,526, an agency may withhold information that an official with original classification authority has determined to be classified because its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security[.]" Exec. Order 13,526 § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009). And the information must "pertain[] to" one of the categories of information specified in the Executive Order, including "intelligence activities (including covert action), intelligence sources or methods," and "foreign relations or foreign activities of the United States."[5] Exec. Order 13,526 §§ 1.4(c), (d). As noted above, when it comes to matters affecting the national security, the courts accord "substantial weight" to an agency's declarations concerning classified information, *King*, 830 F.2d at 217, and defer to the expertise of agencies involved in national security and foreign relations. *Fitzgibbon*, 911 F.2d at 766; *Frugone*, 169 F.3d at 775; *see 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 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.") (citation omitted).

1. The Withheld Information Falls within the Protected Categories Listed in Section 1.4 of Executive Order 13,526

The CIA has determined that the materials protected from disclosure involve two delineated categories of information set forth in Section 1.4 of Executive Order 13,526. *See*

[5] As also required by Executive Order 13,526, Ms. Lutz declares that she is an original classification authority, and the withheld information is owned or controlled by the U.S. Government. *See* Exec. Order 13,526 § 1.1(a); Second Lutz Decl. ¶¶ 12, 13. Moreover, Ms. Lutz explains that the responsive records have not been classified in order to conceal violations of law, or inefficiency, administrative error; to prevent embarrassment to a person, organization or agency; to restrain competition; or prevent or delay the release of information that does not require protection in the interest of national security. Second Lutz Decl. ¶ 16.

Second Lutz Decl. ¶¶ 14, 18. First, the information encompasses "intelligence activities (including covert action), intelligence sources or methods, or cryptology." Exec. Order 13,526 §1.4(c). Ms. Lutz states that disclosing the intelligence products responsive to the second prong of Plaintiffs' requests "would reveal the sources and methods of underlying intelligence collection." Second Lutz Decl. ¶ 25. Similarly, Ms. Lutz asserts that the legal memoranda, including the redacted portions of the DOJ White Paper, address "classified intelligence activities, sources, and methods." *Id.* at ¶¶ 23–24. Second, the withheld materials pertain to "foreign relations or foreign activities of the United States, including confidential sources." Exec. Order 13,526 § 1.4(d). Ms. Lutz explains that the withheld portions of the DOJ White Paper discuss a contemplated CIA operation in Yemen, Second Lutz Decl. ¶ 23, and details of such an operation in a foreign country necessarily implicates foreign activities within the meaning of the Executive Order. *See Am. Civil Liberties Union*, 808 F. Supp. 2d at 299 ("Because the CIA's operations are conducted almost exclusively outside the United States, they inherently involve foreign activities."). Finally, the intelligence products likewise incorporate information about U.S. government drone strikes, which would also implicate the foreign relations or foreign activities of the United States. Second Lutz Decl. ¶¶ 6, 9, 25. Therefore, the Second Lutz Declaration establishes that the withheld information falls squarely within the boundaries of Section 1.4 of Executive Order 13,526.

2. Ms. Lutz Has Properly Determined that the Unauthorized Disclosure of the Withheld Information Reasonably Could Be Expected to Result in Damage to the National Security

As explained in the Second Lutz Declaration, the CIA has determined that the unauthorized disclosure of the documents at issue reasonably could be expected to cause damage to the national security of the United States. *See* Exec. Order 13,526, § 1.4. First, Ms. Lutz

explains that the withheld portions of the DOJ White Paper "could be exploited by Aulaqi's associates in al-Qa'ida in the Arabian Peninsula and other terrorist organizations to defeat the U.S. Government's counterterrorism efforts." Second Lutz Decl. ¶ 23. By the same token, the DOJ White Paper details a contemplated CIA operation in Yemen, and disclosing the withheld specifics of the operation would harm national security by making public sensitive information about the foreign activities of the United States. *Id.* Second, Ms. Lutz states that releasing any information contained in the withheld-in-full legal memoranda "could reasonably be expected to cause damage to national security," as the documents "reveal classified intelligence activities, sources, and methods." *Id.* at ¶ 24. Third, Ms. Lutz confirms that the intelligence products detailing U.S. Government drone strikes must be withheld in full; disclosing any information from these products "would tend to show how the information was gathered, the weight assigned to certain sources, and the types of information tracked by CIA analysts." *Id.* at ¶ 25. Moreover, 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.* Also potentially undermining national security, Ms. Lutz explains 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.*

For the reasons set forth above, the CIA's public declaration establishes that the withheld information is currently and properly classified and exempt from disclosure. *See* Second Lutz Decl. ¶¶ 23–25. Although the public declaration is sufficient to meet the Agency's burden—especially taking into account the deference afforded the CIA in the national security context—the Court may refer to the CIA's classified declaration for additional support of the

Government's position. *See, e.g.*, *Frugone*, 169 F.3d at 775 ("Mindful that courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns.").

B. The CIA Properly Withheld Records under Exemption 3

Exemption 3 exempts from disclosure records that are "specifically exempted from disclosure by [another] statute" if the relevant statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). The CIA's mandate to withhold information under Exemption 3 is broader than its authority under Exemption 1, as the Agency does not have to demonstrate that the disclosure will harm national security. *See Sims*, 471 U.S. at 167; *Gardels v. CIA*, 689 F.2d 1100, 1106–07 (D.C. Cir. 1982). Instead, "'the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.' It is particularly important to protect intelligence sources and methods from public disclosure." *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007). (quoting *Ass'n of Retired R.R. Workers*, 830 F.2d at 336). In analyzing the propriety of a withholding taken pursuant to Exemption 3, the Court need not examine "the detailed factual contents of specific documents" in which withholdings have been taken. *Id.*

1. The CIA's Withholdings Are Proper under the National Security Act

The CIA invokes Section 102A(i)(1) of the National Security Act of 1947, as amended (now codified at 50 U.S.C. § 3024(i)(1)) ("NSA Act"), which requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure."[6] It is

[6] The courts have recognized that not just the Director of National Intelligence, but also the CIA and other agencies may rely upon the amended NSA to withhold records under FOIA. *See, e.g.*,

well-established that Section 102A qualifies as a withholding statute for the purposes of Exemption 3. *See, e.g.*, *Am. Civil Liberties Union v. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011). In fact, the Supreme Court has recognized the "wide-ranging authority" provided by the NSA Act to protect intelligence sources and methods. *Sims*, 471 U.S. at 159, 169–70, 177, 180. The Second Lutz Declaration demonstrates that the withheld materials relate to intelligence sources and methods, and therefore, the CIA has properly withheld the information under Exemption 3. *See Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980) (explaining that the only question for the court is whether the agency has shown that responding to a FOIA request "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods").

For the reasons discussed above with regard to Exemption 1, as well as in the CIA's classified declaration, all of the classified information withheld by CIA pertains to intelligence sources and methods protected from disclosure under the NSA Act and Exemption 3. Second Lutz Decl. ¶¶ 20, 26; *see, e.g.*, *Shapiro*, 2014 WL 953270, at *11–12 (upholding assertion of Exemption 3 by the Federal Bureau of Investigation based on an agency declaration stating that the withheld information "relate[s] to intelligence sources and methods utilized in the investigations at issue"). The CIA explains that the withheld documents cannot be publicly released because it would "reveal certain sensitive intelligence sources and methods employed by the CIA." Second Lutz Decl. ¶ 26. The government's classified submission further explains

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Larson, 565 F.3d at 862–63, 865; *Talbot v. CIA*, 578 F. Supp. 2d 24, 28–29 n.3 (D.D.C. 2008). Furthermore, the President specifically preserved the CIA's ability to invoke the NSA to protect its intelligence sources and methods. *See, e.g.*, Exec. Order No. 12,333, § 1.6(d) (as revised after the NSA was amended) (reprinted in 50 U.S.C. § 401 note) (requiring that the CIA Director "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the [DNI]"). Here, the CIA has explained that "[u]nder the direction of the DNI . . . and consistent with section 1.6(d) of Executive Order 12,333, the CIA is authorized to protect CIA sources and methods from unauthorized disclosure." 1st Lutz Decl. ¶ 23.

why the information in the documents withheld by the CIA constitutes protected sources and methods within the scope of the NSA, and thus, summary judgment is appropriate.

2. The CIA's Withholdings Are Proper under the CIA Act

The CIA also invokes the Central Intelligence Agency Act of 1949, as amended (now codified at 50 U.S.C. § 3035) ("CIA Act"), which has been widely recognized as an Exemption 3 statute. *See, e.g.*, *Fitzgibbon*, 911 F.2d at 761 (recognizing that courts have determined that the CIA Act is an Exemption 3 statute). Section 6 of the CIA Act exempts the CIA from any law requiring the publication or disclosure of several categories of information relating to the CIA's organization and workforce, including the "functions" of its personnel. *See* 50 U.S.C. § 3507. Accordingly, the CIA Act protects information that would reveal the functions of the CIA, including clandestine intelligence activities and intelligence sources and methods. *See, e.g.*, *Goland v. CIA*, 607 F.2d 339, 351 (D.C. Cir. 1978) (holding that disclosing "functions" of the CIA within the meaning of the CIA Act would release information about intelligence sources and methods); *see also* Second Lutz Decl. ¶ 26. Indeed, Executive Order 12,333, as amended, provides that the CIA shall, among other functions, "[c]ollect . . ., analyze, produce, and disseminate foreign intelligence and counterintelligence," "[c]onduct covert action activities approved by the President," and "[c]onduct foreign intelligence liaison relationships." *See* United States Intelligence Activities, Exec. Order 12,333, 46 Fed. Reg. 59941 (Dec. 4, 1981), amended most recently by Exec. Order 13,470, 75 Fed. Reg. 45325 (July 30, 2008); *see also* 50 U.S.C. §§ 3036(d)(1), 3036(f) (formerly at § 403-4a(d)(1), § 403-4a(f)) (authorizing functions of the CIA).[7]

[7] *But see Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 174–85 (D.D.C. 2013) (holding that "the statute limits protection from disclosure only to the functions and organization pertaining to

The Second Lutz Declaration confirms that the CIA correctly withheld the information pursuant to the CIA Act and Exemption 3. Second Lutz Decl. ¶¶ 21, 26. Ms. Lutz explains that disclosing the withheld materials "would require the CIA to disclose details about its core functions, including, but not limited to, the function of protecting intelligence sources and methods." *Id.* ¶ 26. And Ms. Lutz warns that—as further elaborated in her classified submission—"release of this information could cause exceptionally grave damage to national security." *Id*. The Agency also invokes the CIA Act to protect "names of Agency personnel mentioned in these records." *Id.*; *see James Madison Project v. CIA*, 607 F. Supp. 2d 109, 126 (D.D.C. 2009) (recognizing that the CIA Act "plainly protects . . . employee names, titles . . . telephone numbers, fax numbers, e-mail addresses, and street addresses"). Thus, the CIA properly withheld these materials under Exception 3.

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or about personnel . . . , not to all information that relates to such functions and organization"); *Sack v. CIA*, --- F. Supp. 2d ---- , 2014 WL 3375568 (D.D.C. July 10, 2014) (Sullivan, J.) (same); *Sack v. CIA*, --- F.Supp.2d ---- , 2014 WL 2769103 (D.D.C. June 17, 2014) (Cooper, J.) (same); *Whitaker v. CIA*, --- F.Supp.2d ---- , 2014 WL 914603 (D.D.C. March 10, 2014) (Kollar-Kotelly, J.) (same). Some of the redacted information here falls within even the narrow definition of protected information defined in those cases. *See* Second Lutz Decl. ¶ 21. In any event, the CIA respectfully disagrees with those cases. The CIA's interpretation is consistent with the title and text of Section 6 of the CIA Act. The CIA Act, 50 U.S.C. 3507, is titled "Protection of Nature of Agency's Functions," and the text of the provision states explicitly that it was enacted to secure the "foreign intelligence activities of the United States" and to further implement Section 403-1(i) of the National Security Act in "protecting intelligence sources and methods from unauthorized disclosure." *See also Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976) ("the wording of the section strongly suggests that the authority it confers is specifically directed at any statutes that would otherwise require the Agency to divulge information about its internal structure."); *Larson*, 565 F. 3d at 865 n.2 (noting "the applicability of [the CIA Act] to withhold internal CIA organizational data"). Regardless, given the clear applicability of both Exemption 1 and the National Security Act to the withheld information, it is not necessary for the Court to reach the applicability of the CIA Act in this matter.

IV. THE CIA CORRECTLY WITHHELD DOCUMENTS PURSUANT TO EXEMPTION 5

The CIA has withheld materials pursuant to Exemption 5, which shields from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Supreme Court has clarified that Exemption 5 exempts "those documents, and only those documents that are normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *see also Klamath Water Users Protective Ass'n*, 532 U.S. at 8. Exemption 5, therefore, protects from disclosure records that would be privileged in civil litigation under doctrines such as the deliberative process privilege, the attorney-client privilege, and the presidential communications privilege.[8] *See, e.g.*, *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984); *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 676 (D.C. Cir. 1981).

A. The CIA Has Properly Withheld Deliberative Materials

The deliberative process privilege aims to "prevent injury to the quality of agency decisions." *Sears, Roebuck & Co.*, 421 U.S. at 151. The courts have recognized that this privilege is an "ancient [one] . . . predicated on the recognition that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl." *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 573 (D.C. Cir. 1990) (internal quotations marks and citation omitted); *accord Klamath Water Users Protective Ass'n*, 532 U.S. at 8–9 (noting that "officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news"). Legal advice, no less than other types of

[8] All of the materials protected by Exemption 5 are also exempt from disclosure under Exemptions 1 and 3. Second Lutz Decl. ¶ 27.

advisory opinions, "fits exactly within the deliberative process rationale for Exemption 5." *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980).

The deliberative process privilege of Exemption 5 extends to those documents that are both "predecisional" and "deliberative." *See, e.g., Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006); *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011). "[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.*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). The government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record. *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18. Rather, the agency satisfies the predecisional component by identifying "the decisionmaking process to which [the withheld documents] contributed[.]" *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991). "Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18.

The CIA properly withheld a substantial number of documents in accordance with the deliberative process privilege and Exception 5. *See* Second Lutz Decl. ¶ 28. More specifically, the CIA withheld predecisional and deliberative documents, including drafts. *Id.* These materials reveal an interim stage in intra-agency and inter-agency discussions, "which preceded a final decision of the CIA or other agency or component of the Executive Branch." *Id.* The withheld materials reflect the "give and take" exchanges of the Government's deliberative

process, and "[d]isclosure of this information would inhibit the frank communications and the free exchange of ideas that the privilege is designed to protect." *Id.*; *see Sears, Roebuck & Co.*, 421 U.S. at 150–51 ("T]hose who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process.") (internal quotations omitted). As a consequence, the CIA has properly withheld these deliberative materials under Exception 5.

B. The CIA Has Properly Withheld Materials Protected by the Attorney-Client Privilege

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) (citing *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984)). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." *Id*. To invoke the attorney-client privilege, a party must demonstrate that the document it seeks to withhold: (1) involves "confidential communications between an attorney and his client"; and (2) relates to "a legal matter for which the client has sought professional advice." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).

The CIA has properly asserted attorney-client privilege over the legal memoranda similarly exempt from disclosure as deliberative. Second Lutz Decl. ¶ 29. The attorney-client privilege protects communications between the CIA and the Department of Justice "in connection with a request for the provision of legal advice as well as information provided by Agency personnel in furtherance of that advice." *Id.* Ms. Lutz notes that the CIA maintained the confidentiality of the attorney-client communications. *Id.* And public disclosure of the withheld attorney-client communications would seriously disrupt open communication between the CIA

and its attorneys, and deprive government decisionmakers of the full and candid advice of their counsel. *Id.* Accordingly, these communications are properly withheld under Exemption 5.

C. The CIA Has Properly Withheld Materials Protected by the Presidential Communications Privilege

The presidential communications privilege is "closely affiliated" with the deliberative process privilege. *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). However, unlike the deliberative process privilege, which applies to decisionmaking of executive officials generally, the presidential communications privilege applies specifically to "communications that directly involve the President," including "communications made by presidential advisers in the course of preparing advice for the President [.]" *Id.* at 752. In particular, it applies "to communications in performance of a President's responsibilities, . . . and made in the process of shaping policies and making decisions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1997) (citation and internal quotation marks omitted).

Although the presidential communications privilege is in this sense more narrow than the deliberative process privilege, the protection afforded by the presidential communications privilege is broader. Documents subject to the presidential communications privilege are shielded in their entirety. *See In re Sealed Case*, 121 F.3d at 745 ("Even though the presidential privilege is based on the need to preserve the President's access to candid advice, none of the cases suggest that it encompasses only the deliberative or advice portions of documents."). The privilege covers final and post-decisional materials as well as predecisional and deliberative ones. *Id.* The privilege also covers factual material. *Id.*

The CIA properly withheld certain documents in accordance with the presidential communications privilege. Second Lutz Decl. ¶ 30. Generally speaking, the withheld materials

"reflect communications between Executive Branch agencies and presidential advisors for the purpose of presidential decision-making." *Id.* The CIA refers the Court to the classified submission for additional details about the withheld materials. *Id.*

V. THE CIA HAS RELEASED ALL REASONABLY SEGREGABLE INFORMATION

Under FOIA, "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Accordingly, "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Cent., Inc.*, 566 F.2d at 260. An agency has no obligation to segregate non-exempt material that is so "inextricably intertwined" with exempt material that "the excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value." *Neufeld v. IRS*, 646 F.2d 661, 666 (D.C. Cir. 1981), *abrogated on other grounds by Church of Scientology of Calif. v. IRS*, 792 F.2d 153 (D.C. Cir. 1986); *see also Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220–21 (D.D.C. 2005) (same). A court "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated." *Juarez v. Dep't of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008) (internal citation omitted). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) (citation omitted).

As explained in Ms. Lutz's declaration, the CIA met its obligation to segregate, if feasible, any non-exempt material. *See* Second Lutz Decl. ¶ 31; *see also Mead Data Cent., Inc.*, 566 F.2d at 260. 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. Further, Ms. Lutz explains 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. For instance, no reasonably segregable portions of the classified intelligence products can be disclosed because "any release would disclose classified intelligence and analysis." *Id.* at ¶ 25. The CIA, therefore, met its burden and is entitled to summary judgment on this issue. *See Johnson*, 310 F.3d at 776–77 (agency showed there was no reasonably segregable non-exempt information where it submitted affidavit showing that agency had conducted line-by-line review of each document withheld in full).

VI. THE CIA HAS NOT OFFICIALLY ACKNOWLEDGED THE PROTECTED INFORMATION

An agency 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; *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). Plaintiffs "bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Wolf*, 473 F.3d at 378 (quoting *Afshar*, 702 F.2d at 1130). The Plaintiffs must show: (1) that the requested information is "as specific as the information previously released;" (2) that the requested information "match[es] the previous information;" and (3) that the information has "already . . . been made public through an official and documented disclosure." *Id*. As the Circuit noted in *Wolf*, "[t]he

insistence on exactitude recognizes 'the Government's vital interest in information relating to national security and foreign affairs.'" *Id*. (quoting *Public Citizen v. Dep't of State*, 11 F.3d 198, 203 (D.C. Cir. 1993)).

In the appeal of this matter, the D.C. Circuit did not conclude that the CIA waived any of the exemptions discussed above. *See Am. Civil Liberties Union*, 710 F.3d at 430. The D.C. Circuit concluded that a number of statements by authorized Executive Branch officials constituted a waiver of the CIA's *Glomar* response and, in light of these statements, found that "it is neither logical nor plausible" for the Agency to maintain that it does not have "at least an 'intelligence interest'" in drone strikes. *Id.* But this finding was narrow in scope; the Court of Appeals determined that, given its interest in the subject matter, the CIA could generally acknowledge possessing records responsive to Plaintiffs' request. *Id.* However, the D.C. Circuit did not further define the nature of that interest and explicitly rejected the ACLU's argument that the CIA had officially acknowledged conducting strikes, noting that certain statements by President Obama and then-Assistant to the President John Brennan "do not acknowledge that the CIA itself operates drones." *Id*. Instead, the Court found only that the CIA could acknowledge having an intelligence interest in strikes conducted by the U.S. Government, and that there was no reason that such a disclosure would 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.

Likewise, the CIA has not waived any of the above exemptions taking into consideration the Second Circuit's decision. *See New York Times Co.*, 756 F.3d at 114–21. The Second Circuit found a waiver as to portions of the "legal analysis" in a July 2010 OLC Memorandum, which considered a potential operation against Anwar al-Aulaqi. *Id.* The Second Circuit explicitly noted that "the Government's waiver applies only to the portions of the OLC

Memorandum that explain legal reasoning," *id.*at 117, and found that "no waiver of any operational details in the document has occurred." *Id.* at 113. In addition, even within those portions of the document that explain legal reasoning, the Court recognized that certain classified and statutorily protected information was entitled to protection. *Id.*at 117. Indeed, the "only . . . facts" that the Second Circuit held had been officially acknowledged were the identity of the country where Anwar al-Aulaqi was killed, and the CIA's undefined "operational role" in the drone strike that killed him. *Id.* at 119.

The CIA confirms that it has not officially acknowledged any of the withheld information. Lutz. Decl. ¶¶ 22, 23, 24, 25, 31. Ms. Lutz explains that she conducted a page-by-page and line-by-line review of the DOJ White Paper, the responsive legal memoranda, and the intelligence products, and she confirms that none of the withheld information has been officially acknowledged. *Id.* Specifically, Ms. Lutz notes that the United States Government has acknowledged certain information about the subject of the DOJ White Paper, Anwar al-Aulaqi, but "the redacted information goes beyond what has been publicly disclosed." *Id.* at ¶ 23. Ms. Lutz also confirms that she considered the disclosures made in the New York litigation and other government disclosures, and she concludes that none of the legal memoranda withheld in the instant case have been officially acknowledged by the United States Government. *Id.* at ¶ 24. In sum, none of the withheld information has been officially acknowledged, and any inferences drawn by the ACLU do not constitute official acknowledgements on behalf of the CIA. *See, e.g.*, *Phillippi v. CIA*, 655 F.2d 1325, 1331 (D.C. Cir. 1981).

CONCLUSION

For the foregoing reasons, Defendant CIA respectfully requests that the Court grant summary judgment in its favor.

Dated: November 25, 2014

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

RONALD C. MACHEN JR.
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/ Stephen M. Elliott
AMY POWELL
STEPHEN M. ELLIOTT
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 305-8177
Email: stephen.elliott@usdoj.gov