UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

12 Civ. 794 (CM)

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,

Defendants.

.....x

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO REMAINING OFFICE OF LEGAL COUNSEL DOCUMENTS, AND IN OPPOSITION TO THE ACLU'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendants the U.S. Department of Justice ("DOJ"), the Central Intelligence Agency ("CIA") and the Department of Defense ("DOD") respectfully submit this reply memorandum of law in further support of their motion for summary judgment with regard to the remaining documents withheld by DOJ's Office of Legal Counsel ("OLC"), and in opposition to the cross-motion of plaintiffs the ACLU and ACLU Foundation (collectively, the "ACLU") for summary judgment. This Court has already upheld OLC's withholding of legal advice memoranda prepared by OLC that are responsive to the ACLU's FOIA request. *See* Decision on Remand with Respect to Issue (3) ("Decision on Remand"). Contrary to the ACLU's argument, the government's declarations provide ample support for the withholding of the remaining OLC documents as well. We respectfully refer the Court to the government's classified memorandum, and accompanying classified declarations, for a detailed explanation of why there has been no waiver or official acknowledgment as to the specific documents, or categories of documents, withheld by OLC. As explained below, the ACLU's arguments in response to the government's motion for summary judgment are without merit.

A. The Waiver Found by the Second Circuit Is Limited to Final Legal Analysis Concerning a Potential Operation Against Anwar al-Aulaqi

The ACLU vastly overstates the scope of the waiver found by the Second Circuit. That waiver extends only to final legal analysis pertaining to a potential operation against Anwar al-Aulaqi, 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. There is no basis, in the Second Circuit's decision or otherwise, for a finding of waiver or official acknowledgment as to privileged materials generated in the course of preparing such final legal analysis, or as to other classified and privileged materials relating to other legal advice.

The Second Circuit found a waiver as to portions of the "legal analysis" in the July 2010 "OLC-DOD Memorandum," which considered a potential operation against Aulaqi. *New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 113-14 (2d Cir. 2014). Crucial to the Court's waiver analysis was the fact that the United States had officially acknowledged that it had conducted the operation that killed Aulaqi. *See id.* at 111 (quoting statement by Attorney General Holder in May 2013 that "[t]he United States has specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi," and the President's subsequent "acknowledg[ment] that he had authorized the strike that took him out" (internal quotation marks and alteration omitted)); *see also id.* at 117-18 (citing other public statements by the President and Secretary of Defense (and former CIA Director) Leon Panetta concerning Aulaqi); *id.* at 116, 120 (citing draft DOJ white paper, which the Court described as "discussing why the targeting of al-Awlaki would not violate several statutes").

The Second Circuit explicitly noted that "the Government's waiver applies *only* to the portions of the OLC-DOD Memorandum that explain legal reasoning." *Id.* at 117 (emphasis added). The Court found that "no waiver of any operational details in that document has occurred." *Id.* at 113. Even within those portions of the document that explain legal reasoning, moreover, the Court recognized that certain classified and statutorily protected information was entitled to protection. *See id.* at 117. Indeed, the "only . . . facts" that the Second Circuit held had been officially acknowledged were the identity of the country in which al-Aulaqi was killed, and the CIA's undefined "operational role" in the drone strike that killed Aulaqi. *See id.* at 119 (noting that the Court had redacted "the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities," and "[t]he only other facts mentioned in the pure legal analysis portions of the OLC-DOD Memorandum—the identification of the country

where the drone strike occurred and the CIA's role—have both already been disclosed").

Notably, the classified factual information that the Second Circuit held remains properly classified and protected from disclosure under FOIA includes not only "operational details" as the ACLU would define that term, *see* ACLU Mem. at 16 ("e.g., the kinds of drones or munitions that were used, the precise circumstances of the strikes"), but also classified intelligence information relating to the factual basis for targeting Aulaqi. *See New York Times*, 756 F.3d at 115 (explaining that Part I(A) of the OLC-DOD Memorandum, which the Second Circuit redacted in its entirety, "reports intelligence that OLC has received concerning the relationship between Al-Qaeda in the Arabian Peninsula ('AQAP') and al-Qaida, the organization and operation of AQAP, and the role al-Awlaki performs with AQAP"); *id.* at 119 (aware of the possibility that "legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts," "we have redacted . . . the entire section of the OLC-DOD Memorandum that includes any mention of intelligence gathering activities"). This Court upheld the withholding of substantially similar information in the February 2010 Memorandum. *See* Decision on Remand at 4. Thus, the ACLU is wrong when it argues that neither the Second Circuit nor this Court has considered the extent to which "the factual basis" for the targeting of Aulaqi must be disclosed. *See* ACLU Mem. at 16-17; *see also* Defendants' Memorandum of Law in Opposition to ACLU's Motion for Reconsideration, Dkt. No. 104.[1]

Following the Second Circuit's decision, the government released portions of two other

[1] There has likewise been no waiver or official acknowledgment as to the "factual basis" for the killing of Samir Khan or Abdulrahman al-Aulaqi. *See* ACLU Mem. at 16 & n.14. As explained in the government's motion for summary judgment with regard to CIA and DOD documents, which is incorporated herein, *see* Dkt. Nos. 98-103, the government can neither confirm nor deny whether it has documents responsive to this aspect of the ACLU's FOIA request without revealing exempt information. *See* Dkt. No. 99, at 21-23.

documents: (1) a February 2010 OLC legal memorandum pertaining to Anwar al-Aulaqi, the partial withholding of which was sustained in this Court's Decision on Remand, *see* Decision on Remand at 4-12, and (2) a May 2011 classified white paper prepared by the Department of Justice for Congress, which, although it does not refer specifically to Aulaqi, concerns a potential operation against him, *see* Declaration of Martha M. Lutz dated October 2, 2014 ("Lutz Decl."), ¶ 19. The remaining documents, or portions of documents, withheld by OLC fall outside the scope of the waiver found by the Second Circuit.

As explained in the declaration of Deputy Assistant Attorney General John E. Bies, a substantial majority of the documents withheld by the OLC consist of predecisional, deliberative materials prepared in the course of generating the final OLC advice provided in the OLC-DOD Memorandum, the February 2010 OLC memorandum pertaining to Aulaqi, or other legal advice. *See* Second Declaration of John E. Bies dated October 3, 2014 ("Second Bies Decl.") ¶ 12b-f. Such materials include internal Executive Branch documents reflecting predecisional OLC or DOJ advice, internal and confidential Executive Branch documents conveyed to OLC for the purpose of requesting or obtaining confidential legal advice, documents reflecting internal Executive Branch legal deliberations, internal OLC work product generated during the preparation of OLC advice, and classified and/or privileged factual information provided to OLC in connection with a request for legal advice. *See id.* The waiver found by the Second Circuit with regard to the *final* legal advice memorialized in the OLC-DOD Memorandum that is the same as or closely related to the legal analysis contained in the draft DOJ white paper does not extend to such quintessentially deliberative materials. *See Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002) (deliberative process privilege protects "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the

agency" (citation and internal quotation marks omitted)); *Hopkins v. HUD*, 929 F.2d 81, 84-85 (2d Cir. 1991) (privilege encompasses "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" (citation and internal quotation marks omitted)). And to the extent the OLC materials contain advice on matters other than a contemplated operation against Aulaqi, there is no basis to conclude that there has been a waiver based on public statements or release of the draft DOJ white paper. Aulaqi is the only U.S. citizen whom the United States has acknowledged targeting. *See New York Times*, 756 F.3d at 111; *see also id.* at 120 (applying three-part test for official disclosure set forth in *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009)); Decision on Remand at 12 (same).[2]

Many of the documents withheld by OLC also contain classified factual information of the sort that the Second Circuit specifically held remains properly classified and outside the scope of the waiver. *See* Second Bies Decl. ¶¶ 25, 36, 38, 42, 44, 48, 52, 53-55 *New York Times*, 756 F.3d at 113, 119. This Court has already upheld OLC's withholding of such factual information from the February 2010 OLC memorandum pertaining to Aulaqi and the OLC memoranda generally. *See* Decision on Remand at 4 (holding that "[n]o privilege has been waived as to the factual intelligence information or the strategic analysis" in the February 2010 memorandum); *see id.* at

2 As the Second Circuit and this Court have made clear, the three-part test set forth in *Wilson* remains the governing standard for official disclosure. The ACLU's contention that the protections of Exemption 1 may be lost through disclosures by Members of Congress or former officials of the Executive Branch, ACLU Mem. at 7 & n.8, contravenes well-settled precedent. *See Wilson*, 586 F.3d at 189 ("A former employee's public disclosure of classified information cannot be deemed an 'official' act of the Agency.") (citing *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421 (2d Cir. 1989)); *id.* at 186-87 ("the law will not infer official disclosure of information classified by the CIA from . . . release of information by another agency, or even by Congress") (citing *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir .1999); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 628 (S.D.N.Y. 1996), *aff'd*, 128 F.3d 788 (2d Cir. 1997)), *quoted in New York Times*, 756 F.3d at 119 n.18.

11 (noting that "[t]he Court of Appeals ruled only that the privileged had been waived as to legal analysis" and "repeatedly rejected any contention that the protections of FOIA Exemptions 1, 3 and 5 had been waived as to operational details [with two limited exceptions] or other intelligence information"). The Court should reach the same conclusion with regard to the other documents and information withheld by OLC.

B. Legal Analysis Can Be Withheld Under Exemptions 1 and 3 When Its Disclosure Would Reveal Classified or Statutorily Privileged Information

The ACLU's contention that legal analysis cannot be withheld as classified under Exemption 1 or statutorily protected under Exemption 3, *see* ACLU Mem. at 17-19, is also contradicted by the Second Circuit's decision. The Second Circuit explicitly recognized that "in some instances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation." *New York Times*, 756 F.3d at 119. The Circuit further "recognize[d] that in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts." *Id.* Indeed, the Second Circuit agreed with this Court's conclusion that the OLC-DOD Memorandum—which conveyed OLC's legal advice and analysis to the Attorney General—"was properly classified." *Id*. at 113.

These principles apply equally to information protected by Exemptions 1 and 3: the same facts that are classified and protected under Exemption 1 because they pertain to intelligence sources and methods, *see* Executive Order 13526 § 1.4(c), 75 Fed. Reg. 707 (Dec. 29, 2009) ("E.O. 13526"),[3] are also protected from disclosure under section 102A(i)(1) of the National

[3] The ACLU quarrels with the notion that information that "pertains" to intelligence sources and methods, or other categories of classifiable information, can be properly classified. *See* ACLU Mem. at 18. But that language comes directly from the Executive Order, *see* E.O. 13526,

Security Act ("NSA"), as amended, 50 U.S.C. § 3024(i)(1), and Exemption 3. *See* Lutz Decl. ¶ 18 (explaining that section 102A(i)(1) of the NSA and Exemption 3 also apply to the classified information for which Exemption 1 was asserted). In fact, Plaintiffs concede that "the category of information classifiable under section 1.4(c) is co-extensive with the category of 'intelligence sources and methods' in the NSA." ACLU Mem. at 18 (citing *Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981); *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.4 (D.C. Cir. 1976)). Contrary to the ACLU's suggestion, in stating that "legal analysis is not an 'intelligence source or method,'" *New York Times Co. v. Dep't of Justice*, 915 F. Supp. 2d 508, 540 (S.D.N.Y. 2013), this Court did not hold that legal analysis can never be protected under Exemption 3 and the NSA. Like the Second Circuit, this Court recognized that "legal analysis in a particular document" could be "inextricably intertwined with information that is statutorily exempt from disclosure, including information about intelligence sources and methods that is statutorily exempt form disclosure." *Id.* The Court should therefore reject the ACLU's contention that legal analysis is categorically excluded from protection under Exemptions 1 or 3.

C. OLC Has Not Asserted the Work Product Doctrine, and Has Adequately Justified Its Assertion of the Deliberative Process, Attorney-Client and Presidential Communications Privileges

Finally, the ACLU misunderstands the nature of OLC's Exemption 5 withholdings. OLC does not claim that the documents are protected by the work product doctrine. *See* ACLU Mem. at 19-20. Rather, as detailed in the Second Bies Declaration and the government's opening brief, the documents withheld by OLC include (but are not limited to) informal or preliminary work product of OLC attorneys—such as drafts, notes and outlines generated in connection with the

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§ 1.4(c), as the Second Circuit recognized, *see New York Times*, 756 F.3d at 104.

preparation of OLC advice—that is protected by the deliberative process privilege and the attorney-client privilege. Second Bies Decl. ¶¶ 12.e, 49-50; Govt. Mem. at 8-14.[4] Such informal views and preliminary thoughts and reactions of OLC attorneys are plainly protected by the deliberative process privilege. Second Bies Decl. ¶ 49; *see Tigue*, 312 F.3d at 80; *Hopkins*, 929 F.2d at 84-85. Such documents are also protected by the attorney-client privilege, as their disclosure would reveal confidential facts regarding the nature and subject of requests for OLC legal advice, as well as client confidences. Second Bies Decl. ¶ 50; *see In re Cnty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007).

OLC has adequately justified its assertion of the deliberative process and attorney-client privileges, as well as the presidential communications privilege, with respect to the documents at issue. *See Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) ("an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible" (citation and internal quotation marks omitted)). While OLC is unable to provide additional detail on the public record, the government's classified submissions provide ample information to justify OLC's Exemption 5 withholdings.

[4] The category of internal OLC attorney work product includes draft OLC legal analysis or excerpts of draft legal analysis, as well as other more informal internal attorney work product generated during the preparation of OLC advice, such as preliminary outlines of legal analysis or questions to consider and handwritten notes, either standing alone or in the margins of client communications or drafts of advice. Second Bies Decl. ¶ 12e.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the government's opening memorandum of law and *ex parte* submission, the Court should grant summary judgment with respect to the OLC documents.

Dated: November 28, 2014

Respectfully submitted,

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