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

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF DEFENDANTS DEPARTMENT OF DEFENSE AND CENTRAL INTELLIGENCE AGENCY FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

BACKGROUND 2

A. Procedural History on Remand 2

B. The Documents and Information Withheld by CIA and DOD 3

ARGUMENT 6

I. The Withheld CIA and DOD Documents and Classified Index Listings Are Exempt from Disclosure Under FOIA Exemption 1 7

A. CIA Documents and Associated Classified Index Listings 8

B. DOD Documents and Associated Classified Index Listings 10

II. The Withheld CIA Documents and Classified Index Listings Are Exempt from Disclosure Under FOIA Exemption 3 12

III. Certain of the Withheld CIA and DOD Documents Are Also Exempt from Disclosure Under FOIA Exemption 5 13

A. Certain of the Withheld CIA and DOD Documents Are Protected by the Deliberative Process Privilege 14

B. Certain of the Withheld CIA and DOD Documents Are Protected by the Attorney-Client Privilege 17

C. Certain of the Withheld CIA Documents Are Protected by the Work Product Privilege 19

D. Certain of the Withheld CIA and DOD Documents are Protected by the Presidential Communications Privilege 20

IV. CIA and DOD Cannot Confirm or Deny Whether They Have Documents Responsive to the Requests for the Factual Basis for the Killing of Samir Khan or Abdulrahman al-Aulaqi 21

V. There Has Been No Waiver of the Applicable Privileges or Exemptions 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

A. Michael's Piano, Inc. v. FTC,
18 F.3d 138 (2d Cir. 1994).....19

ACLU v. DOJ,
681 F.3d 61 (2d Cir. 2012)..... *passim*

Amnesty International USA v. CIA,
728 F. Supp. 2d 479 (S.D.N.Y. 2010).....21

Brinton v. Department of State,
636 F.2d 600 (D.C. Cir. 1980).....14

Carney v. DOJ,
19 F.3d 807 (2d Cir. 1994).....6

CIA v. Sims,
471 U.S. 159 (1985).....12

In re Cnty. of Erie,
473 F.3d 413 (2d Cir. 2007).....18, 19

Ferguson v. FBI,
1995 WL 329307 (S.D.N.Y. June 1, 1995), *aff'd*, 83 F.3d 41 (2d Cir. 1996).....7

Grand Central Partnership v. Cuomo,
166 F.3d 473 (2d Cir. 1999).....14, 15

Halperin v. CIA,
629 F.2d 144 (D.C. Cir. 1980).....7

Hopkins v. HUD,
929 F.2d 81 (2d Cir. 1991).....13, 14, 17

Krikorian v. Department of State,
984 F.2d 461 (D.C. Cir. 1993).....12

Larson v. Department of State,
565 F.3d 857 (D.C. Cir. 2009).....13

National Council of La Raza v. DOJ,
411 F.3d 350 (2d Cir. 2005).....14

NLRB v. Sears, Roebuck & Co.,
421 U.S. 132 (1975) ..... *passim*

New York Times Co. v. Department of Justice,
915 F. Supp. 2d 508 (S.D.N.Y. 2013), *aff'd in part and rev'd in part*,
756 F.3d 100 (2d Cir. 2014) ..... *passim*

Nixon v. Administrator of General Services,
433 U.S. 425 (1997) 20

Renegotiation Board v. Grumman Aircraft Engineering Corp.,
421 U.S. 168 (1975) 13, 14

In re Sealed Case,
121 F.3d 729 (D.C. Cir. 1997) 20, 21

Tigue v. DOJ,
312 F.3d 70 (2d Cir. 2002) 14, 15, 17

United States v. Adlman,
134 F.3d 1194 (2d Cir. 1998) 19

Upjohn v. United States,
449 U.S. 383 (1981) 18

Wilner v. NSA,
592 F.3d 60 (2d Cir. 2009) ..... *passim*

Wilson v. CIA,
586 F.3d 171 (2d Cir. 2009) 27

Wolf v. CIA,
473 F.3d 370 (D.C. Cir. 2007) 7, 8, 25

Statutes and Legislative History:

5 U.S.C. § 552(b)(1) 1, 7

5 U.S.C. § 552(b)(3) 1, 12

5 U.S.C. § 552(b)(5) 1, 13

50 U.S.C. § 3024(i)(1) 12

50 U.S.C. § 3507 13

H.R. Rep. No. 89-1497, at 10 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427 14

Regulations and Rules:

75 Fed. Reg. 707 (Dec. 29, 2009) 7

Fed. R. Civ. P. 26(b)(3) 19

Fed. R. Civ. P. 56(a) 6

Preliminary Statement

This motion addresses the third, and final, set of documents at issue on remand in this case: classified and privileged documents withheld by defendants the Central Intelligence Agency ("CIA") and the Department of Defense ("DOD"). The agencies' classified and public declarations establish that the documents (and associated classified index listings) withheld by CIA and DOD are properly classified and protected from disclosure by statute, and thus exempt from disclosure under FOIA Exemptions 1 and 3, 5 U.S.C. § 552(b)(1), (3). Among other things, the withheld documents contain highly classified factual information about Anwar al-Aulaqi and his associates—the very type of information that the Second Circuit and this Court have held remains classified and exempt from disclosure. The withheld documents also include classified intra- and inter-agency discussions and deliberations regarding draft legal analysis related to contemplated counterterrorism actions. Many of the withheld documents are therefore also protected by the deliberative process, attorney-client and/or presidential communications privileges, and exempt from disclosure under Exemption 5, 5 U.S.C. § 552(b)(5). The declarations explain, moreover, that CIA and DOD cannot confirm or deny whether they have documents responsive to the ACLU's request for certain specific factual information about Samir Khan and Abdulrahman al-Aulaqi, without revealing classified and/or statutorily protected information regarding intelligence sources and methods. The agencies' explanations for their withholdings easily satisfy the "logical or plausible" standard set forth by the Second Circuit, particularly given the substantial deference owed to agency declarations on matters of national security. Finally, none of the applicable privileges or exemptions have been waived under the Second Circuit's ruling. The Court should therefore uphold the withholdings of CIA and DOD, and grant summary judgment in their favor.

BACKGROUND

A. Procedural History on Remand

This Court has ordered the proceedings on remand from the Second Circuit in three stages. The Court first addressed the responsive OLC memoranda other than the July 2010 OLC-DOD Memorandum addressed in the Second Circuit's decision. As directed by the Court, Dkt. No. 67, the government provided ten OLC memoranda, together with a supporting classified memorandum and declarations, for the Court's *in camera* review. In its decision dated September 30, 2014, and filed publicly in redacted form on October 31, 2014 (the "First Remand Decision"), the Court upheld the government's withholding in full of nine OLC memoranda, and its withholding in part of a February 2010 OLC memorandum pertaining to Aulaqi. The Court concluded that the withheld documents and information remain properly classified and exempt from disclosure, and that no waiver had occurred. *See* First Remand Dec. at 3, 11-12, 17.[1]

The Court next directed the ACLU to identify those listings on the redacted OLC index ordered released by the Second Circuit (the "OLC index") for which ACLU sought the underlying documents. The Court further directed the government to provide *in camera* submissions addressing the OLC documents sought by the ACLU. *See* Dkt. No. 75. The government filed a motion for summary judgment with regard to the OLC documents, including the *in camera* submissions directed by the Court, on October 3, 2014. ACLU filed its opposition, and a cross-motion for summary judgment, on November 7, 2014. These motions are scheduled to be fully briefed as of December 19, 2014.

Third, and finally, the Court ordered CIA and DOD to provide indexes for *in camera*

[1] ACLU filed a motion for reconsideration of the First Remand Decision on November 13, 2014, which was denied in part on November 14, 2014. *See* Dkt. Nos. 95-97.

inspection, "together with any affidavits or briefs the agencies wish to file concerning the protectability or disclosability of particular listings on those indices." Dkt. No. 75. By this motion, and the accompanying *ex parte*, *in camera* submissions, the CIA and DOD move for summary judgment with regard to those documents and indexes.

B. The Documents and Information Withheld by CIA and DOD

ACLU's FOIA request sought the following documents from CIA and DOD:

(1) Records created after September 11, 2001, pertaining to "the legal basis in domestic, foreign, and international law upon which U.S. citizens can be subjected to targeted killings, whether using unmanned aerial vehicles ('UAVs' or 'drones') or by other means";

(2) Records created after September 11, 2001, pertaining to "the process by which U.S. citizens can be designated for targeted killings, including who is authorized to make such determinations and what evidence is needed to support them";

(3) "All memoranda, opinions, drafts, correspondence, and other records produced by the OLC after September 11, 2001, pertaining to the legal basis in domestic, foreign, and international law upon which the targeted killing of Anwar al-Awlaki was authorized and upon which he was killed . . .";

(4) "All documents and records pertaining to the factual basis for the targeted killing of Al-Awlaki . . .";

(5) Records "pertaining to the factual basis for the killing of Samir Khan, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his proximity to al-Awlaki at the time the missiles were launched at al-Awlaki's vehicle, whether the United States took measures to avoid Khan's death, and any other facts relevant to the decision to kill Khan or the failure to avoid causing his death"; and

(6) Records "pertaining to the factual basis for the killing of Abdulrahman al-Awlaki, including whether he was intentionally targeted, whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location, whether he was targeted on the basis of his kinship with Anwar al-Awlaki, whether the United States took measures to avoid his death, and any other factors relevant to the decision to kill him or the failure to avoid causing his death."

See New York Times et al. v. US. Dep't of Justice, 756 F.3d 100, 106 n.6 (2d Cir. 2014).

As detailed in the declaration of Martha M. Lutz (the "Second Lutz Decl.") and

accompanying index, CIA identified 144 documents in response to the ACLU's request that were not already identified on the OLC index. Second Lutz Decl. ¶ 4 & n.5 & Exh. A.[2] One of these documents has been released to the ACLU in redacted form (Document 22),[3] one has been released in full (Document 21), and the remaining 142 documents have been withheld in full. *Id.* ¶ 4 & Exh. A. The withheld documents fall into several categories, including (1) intelligence products, (2) classified inter-agency correspondence, (3) classified correspondence with or related to Congress, including documents relating to the Classified DOJ White Paper that has been released to the ACLU in redacted form,[4] and (4) internal CIA discussions and deliberations. *Id.* ¶ 7. Additional detail regarding the documents withheld by CIA is provided in Ms. Lutz's classified declaration. *Id.* ¶ 7. CIA has withheld all of these documents pursuant to Exemptions 1 and 3. Second Lutz Decl. ¶¶ 8-9 & Exh. A. Some of the documents were also withheld under Exemption 5 because they are protected by the deliberative process, attorney-client, work product and/or presidential communications privileges. Second Lutz Decl. ¶¶ 17-21.

The declaration of Rear Admiral Sinclair M. Harris ("Second Harris Decl."), and accompanying index, explains that DOD has withheld 80 documents in response to ACLU's FOIA request. Second Harris Decl. ¶ 4 & Exh. A. These documents include, among other things,

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[2] The CIA's index excludes documents previously identified by OLC as responsive to the ACLU's request, as the propriety of withholding those records is already before the Court, to the extent the ACLU challenged their withholding. Second Lutz Decl. ¶ 4 n.5.

[3] The CIA has released to the ACLU a redacted version of the classified declaration of former CIA Director Leon Panetta, which was submitted in a civil action brought by Anwar al-Aulaqi's father. *See Al-Aulaqi v. Obama*, No. 10-1469 (D.D.C.) (dismissed December 7, 2010). The CIA has also released to the ACLU an unclassified declaration of former Director Panetta submitted in that lawsuit. Both of these declarations were submitted in support of the government's assertion of the state secrets privilege in the civil action. Second Lutz Decl. ¶ 6.

[4] The withholding of portions of the DOJ Classified White Paper (Document No. 9 on the OLC Index) is pending before the Court on the parties' cross-motions for summary judgment regarding the other OLC documents. *See* Dkt. No. 80, at 20.

documents relating to the February 2010 and July 2010 OLC memoranda pertaining to Aulaqi that have been released in redacted form; documents relating to the DOJ Classified White Paper that has been released in redacted form; and documents containing factual information regarding Aulaqi. *Id*. ¶¶ 10-12, 14. DOD has also withheld other documents as described in Admiral Harris's classified declaration. *Id*. ¶ 16. All of the documents withheld by DOD are classified and withheld under Exemption 1, and some of those documents are also protected by Exemption 5 and the deliberative process, attorney-client and/or presidential communications privileges. *Id.* ¶ 4.

Some of the documents withheld by CIA and DOD, moreover, also implicate the equities of DOJ's Office of Legal Counsel. As explained in the Third Declaration of Deputy Assistant Attorney General John E. Bies, such documents include (1) documents containing or reflecting legal advice provided by OLC or DOJ to Executive Branch policymakers, (2) draft legal analysis, (3) requests from Executive Branch officials for legal advice, (4) inter-agency communications reflecting legal deliberations, and (5) intelligence products containing classified factual information provided to OLC in connection with a request for legal advice. Third Bies Decl. ¶ 3. Additional detail concerning these documents is provided in Mr. Bies's classified declaration. *Id.* ¶ 4. All of these documents have been withheld under Exemption 5 because they are protected by the deliberative process and/or attorney-client privileges. *See id.*

With respect to the ACLU's request for records regarding the "factual basis" for the killing of Samir Khan and Abdulrahman al-Aulaqi, beyond confirming that neither of those individuals was intentionally targeted by the United States, CIA and DOD can neither confirm nor deny whether they have responsive records without revealing information that is exempt from disclosure under Exemptions 1 and 3. Second Lutz Decl. ¶¶ 11-12; Harris Decl. ¶ 18.

ARGUMENT

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden" on summary judgment. *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) (footnote omitted). In this case, this Court has already determined that the defendant agencies' respective searches complied with their obligations under FOIA. *See New York Times Co. v. Dep't of Justice*, 915 F. Supp. 2d 508, 533 (S.D.N.Y. 2013) (upholding searches conducted by DOJ's Office of Information Policy (OIP), OLC, CIA and DOD), *aff'd in part and rev'd in part*, 756 F.3d at 123-24 (affirming adequacy of search conducted by OIP, the only search challenged by ACLU on appeal). Thus, the question on this motion for summary judgment is whether CIA and DOD have sufficiently explained, in their classified and unclassified declarations, why the documents and information they have withheld fall within an exemption to FOIA.

The agency's declarations are "accorded a presumption of good faith." *Id*. (quotation marks omitted).[5] Moreover, courts must accord "substantial weight" to agencies' declarations regarding national security. *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009); *accord New York Times*, 756 F.3d at 112; *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). In FOIA cases involving matters of national security, "the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would

[5] Because agency affidavits alone will support a grant of summary judgment in a FOIA case, Local Rule 56.1 statements are unnecessary. *See Ferguson v. FBI*, 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting "the general rule in this Circuit"), *aff'd*, 83 F.3d 41 (2d Cir. 1996).

violate the principle of affording substantial weight to the expert opinion of the agency." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *accord ACLU*, 681 F.3d at 70-71. Rather, "an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner*, 592 F.3d at 73 (citation and internal quotation marks omitted); *accord ACLU*, 681 F.3d at 69; *Wolf*, 473 F.3d at 374-75.

Here, the government's declarations amply establish a "logical or plausible" basis for the CIA's and DOD's withholdings, especially given the substantial deference owed to the agencies' judgments on national security matters. CIA and DOD are therefore entitled to summary judgment.

I. The Withheld CIA and DOD Documents and Classified Index Listings Are Exempt from Disclosure Under FOIA Exemption 1

Exemption 1 exempts from public disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). The current standard for classification is set forth in Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009) ("E.O. 13526"). Section 1.1 of the Executive Order lists four requirements for the classification of national security information: (1) an "original classification authority" must classify the information; (2) the information must be "owned by, produced by or for, or [] under the control of the United States Government;" (3) the information must fall within one or more of eight protected categories of information listed in section 1.4 of the E.O., including *inter alia* (a) military plans, weapons systems or operations, (b) foreign government information, (c) intelligence activities, sources, or methods, and (d) foreign relations of the United States; and (4) an original classification authority must "determine[] that the unauthorized disclosure of the

information reasonably could be expected to result in damage to the national security" and be "able to identify or describe the damage." E.O. 13526 § 1.1(a)(1)-(4).

A. CIA Documents and Associated Classified Index Listings

All of the documents withheld by CIA contain classified information that meets these criteria and is currently and properly classified under Executive Order 13526. Second Lutz Decl. ¶ 8. Similarly, the associated listings on the classified CIA index contain details, such as the dates, individuals involved and descriptions of records, that cannot be disclosed on the public record without revealing information that is currently and properly classified. *Id.* ¶ 7.

The CIA documents include intelligence products containing sensitive reporting on Aulaqi and his associates, which were used to assess the threat that he posed to U.S. persons and interests. Such factual information remains properly classified and exempt from disclosure under the Second Circuit's ruling, *see New York Times*, 756 F.3d at 113, 119 (permitting redaction from OLC-DOD Memorandum of operational details and intelligence information), and this Court's decision upholding the government's withholdings with respect to the remaining OLC memoranda, *see, e.g.*, First Remand Decision at 11.

The classified records withheld by CIA also include inter-agency correspondence consisting of legal analysis, some of which was already processed in connection with this litigation, such as copies of the OLC opinions pertaining to Aulaqi and the DOJ Classified White Paper. Second Lutz Decl. ¶ 6. The withheld inter-agency communications include draft versions of these documents and discussions and comments related to the draft legal analysis. *Id.* Other withheld inter-agency correspondence relates to the civil action brought by Aulaqi's father. *Id.* In addition, the CIA has withheld under Exemption 1 classified communications with, or relating to, Congress, including discussions about the DOJ Classified White Paper, which was

prepared by DOJ for Congress. *Id.* Records in this category include drafts of the DOJ Classified White Paper and predecisional exchanges reflecting the comments and input of different agencies. *Id.* CIA has also withheld records containing classified internal discussions among agency officials regarding all of these matters. *Id.*

As Ms. Lutz explains, the records withheld by CIA under Exemption 1 are "replete with sensitive classified information reflecting intelligence activities, sources and methods—which serve as the principal means by which the CIA accomplishes its mission." *Id.* ¶ 13. Disclosure of the documents and information withheld by CIA reasonably could be expected to cause serious—and in some cases, exceptionally grave—damage to the national security. *Id.* ¶¶ 8, 13. For example, it would greatly benefit al-Qa'ida in the Arabian Peninsula ("AQAP") and other terrorist organizations to know which clandestine sources and methods were used to obtain information about Aulaqi and other subjects, and the specific intelligence that those techniques produced. *Id.* This information could be used by AQAP and other terrorist organizations to uncover current collection activities and take countermeasures to avoid future detection by Intelligence Community agencies. *Id.* In some instances, even indirect references to information obtained by classified sources and methods must be protected. *Id.* Terrorist organizations have the capacity and ability to gather information from myriad public sources, analyze it, and determine the means and methods of intelligence collection from disparate details. *Id.* Accordingly, even seemingly innocuous, indirect references to an intelligence method could have significant adverse effects when coupled with other publicly available data. *Id.*; *accord ACLU*, 681 F.3d at 71.

None of the information withheld by the CIA has been officially acknowledged. *See id.* ¶ 15. Although the United States government has officially acknowledged that Anwar al-Aulaqi

was considered an imminent threat to national security and was targeted in a U.S. government strike in which CIA played an undefined operational role,[5] the information withheld by CIA goes well beyond what has been publicly disclosed. *Id.* Among other things, the withheld records would reveal the methods by which intelligence about Aulaqi was collected and undisclosed details about his terrorist activities. *Id.* Such information could be used by Aulaqi's associates in AQAP and other terrorist organizations to defeat the United States' counterterrorism efforts abroad. *Id.*

The CIA's classified submissions provide additional information describing these documents and demonstrating why they, and the associated index listings, are properly classified and exempt from public disclosure under Exemption 1. *See id.* ¶¶ 7, 20. The CIA has released all reasonably segregable, non-exempt information, *id.* ¶ 20, and the CIA's classified submissions further explain why, with two exceptions, the responsive documents must be withheld in full. Because the CIA's explanations are plainly "logical or plausible," particularly in light of the "substantial weight" owed to agency affidavits regarding national security, the CIA's withholdings under Exemption 1 should be upheld. *Wilner*, 592 F.3d at 73.

B. DOD Documents and Associated Classified Index Listings

Similarly, all of the documents withheld by DOD meet the criteria for classification and are

[5] Contrary to the Court's statement in the First Remand Decision, the Second Circuit did not find that the United States had officially acknowledged "the identity of the agency that took out al-Aulaqi." First Remand Decision at 11. Rather, the Second Circuit found a waiver as to "the identity of the agency, in addition to DOD, that had an operational role in the drone strike that killed al-Awlaki," 756 F.3d at 118, and the CIA's undefined "operational role in targeted drone killings," *id.* at 122. The Court took pains to make clear that "[f]or purposes of the issues on th[e] appeal, it makes no difference whether the drones were maneuvered by CIA or DOD personnel so long as CIA has been disclosed as having some operational role in the drone strikes." *Id.* at 122 n.22. And the OLC-DOD Memorandum released by the Court addressed contemplated operations by CIA and DOD. *See id.* at 125.

exempt from disclosure under Exemption 1. Second Harris Decl. ¶¶ 4, 20. The associated listings in DOD's classified index, which contain classified details such as dates and specific document descriptions, are also classified. *See id.* ¶¶ 16-17.

Among other classified documents, DOD has withheld under Exemption 1 classified communications and discussions within DOD, and between DOD and other Executive Branch agencies, regarding intelligence sources and methods and possible military operations. *See id.* ¶¶ 10-11. DOD has also withheld drafts of the Classified DOJ White Paper, as well as classified communications and notes concerning those drafts. *See id.* ¶ 12. In addition, DOD has withheld substantial factual information regarding Aulaqi. *Id.* ¶ 14. This information is similar to the intelligence information and operational details in the OLC-DOD Memorandum that, as the Second Circuit held, remain properly classified and exempt from disclosure. *Id.*; *see New York Times*, 739 F.3d at 113, 119. Public disclosure of such sensitive intelligence sources and methods would harm national security by permitting adversaries to thwart U.S. intelligence collection and counterterrorism measures. *See* Second Harris Decl. ¶ 14. The classified information in these documents has not been officially acknowledged, and there is no reasonably segregable, non-exempt information. *See id.* ¶ 22.

Additional information concerning the classified documents withheld by DOD, and the bases for their withholding, is provided in Admiral Harris's classified declaration. *See id.* ¶ 16. Together, the classified and unclassified declarations easily satisfy DOD's burden to provide a "logical or plausible" basis for withholding these documents under Exemption 1. *Wilner*, 592 F.3d at 73.

II. The Withheld CIA Documents and Classified Index Listings Are Exempt from Disclosure Under FOIA Exemption 3

Under Exemption 3, matters "specifically exempted from disclosure" by certain statutes need not be disclosed. 5 U.S.C. § 552(b)(3). In examining an Exemption 3 claim, a court determines whether the claimed statute is an exemption statute under FOIA and whether the withheld material satisfies the criteria for the exemption statute. *CIA v. Sims*, 471 U.S. 159, 167 (1985); *Wilner*, 592 F.3d at 72.

As the Second Circuit has explained, "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Wilner*, 592 F.3d at 72 (internal quotation marks omitted); *see also Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993). Thus, a court should "not closely scrutinize the contents of a withheld document; instead, [it should] determine only whether there is a relevant statute and whether the document falls within that statute." *Krikorian*, 984 F.2d at 465. Significantly, to support its claim that information may be withheld pursuant to Exemption 3, the government need not show that there would be harm to national security from disclosure, only that the withheld information logically or plausibly falls within the purview of the exemption statute. *Wilner*, 592 F.3d at 73.

Two exemption statutes are at issue here. First, section 102A(i)(1) of the National Security Act ("NSA"), as amended, 50 U.S.C. § 3024(i)(1), provides that "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure."[6]

[6] While the text of the statute refers to the "Director of National Intelligence," the government has long taken the position that any member of the Intelligence Community may assert the NSA to protect intelligence sources and methods, and courts have regularly upheld other

Section 102A(i)(1) of the NSA is an exemption statute under Exemption 3. *ACLU*, 681 F.3d at 72-73. For the reasons discussed above with regard to Exemption 1, and 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 and Exemption 3. Second Lutz Decl. ¶ 9; *see, e.g.*, *ACLU*, 681 F.3d at 67, 73-76 (upholding withholding of interrogation records, including cables, emails, and notes, and other records under Exemption 3 and the NSA). Among other things, release of the sensitive intelligence reporting at issue here would directly reveal the sources and methods of that collection. Second Lutz Decl. ¶ 9.

Second, CIA has invoked section 6 of the Central Intelligence Agency Act of 1969, as amended, 50 U.S.C. § 3507 (the "CIA Act"), in conjunction with Exemption 3, to protect the names of CIA personnel mentioned throughout the records. Section 6 of the CIA Act protects from disclosure information that would reveal, among other things, the names, official titles, salaries, or numbers of personnel employed by CIA. *Cf. ACLU*, 681 F.3d at 72-73 (applying section 6 of CIA Act as an exemption statute under Exemption 3).

III. Certain of the Withheld CIA and DOD Documents Are Also Exempt from Disclosure Under FOIA Exemption 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991); *accord Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal

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agencies' assertions of that statute in support of Exemption 3 withholdings. *See, e.g.*, *Larson v. Dep't of State*, 565 F.3d 857, 868-69 (D.C. Cir. 2009) (National Security Agency).

discovery rules (*e.g.*, attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5." *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (citation omitted).

A. Certain of the Withheld CIA and DOD Documents Are Protected by the Deliberative Process Privilege

In enacting Exemption 5, "[o]ne privilege that Congress specifically had in mind was the 'deliberative process' or 'executive' privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84; *accord* H.R. Rep. No. 89-1497, at 10 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427 ("a full and frank exchange of opinions would be impossible if all internal communications were made public," and "advice . . . and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl'"). Legal advice, no less than other types of 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); *accord Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356–57 (2d Cir. 2005).

An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (citations omitted); *accord Tigue*, 312 F.3d at 76–77; *Hopkins*, 929 F.2d at 84. A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd.*, 421 U.S. at 184 (*quoted in Tigue*, 312 F.3d at 77; *Grand Cent. P'ship*, 166 F.3d at 482; *Hopkins*, 929 F.2d at 84). While a document is predecisional if it "precedes, in temporal sequence, the 'decision' to which it relates," *Grand Cent. P'ship*, 166 F.3d at 482, the government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record. *NLRB v. Sears, Roebuck*

& Co., 421 U.S. 132, 151 n.18 (1975); *accord Tigue*, 312 F.3d at 80. Rather, so long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is predecisional. *Tigue*, 312 F.3d at 80. "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*, 421 U.S. at 151 n.18. "A document is "deliberative' when it is actually . . . related to the process by which policies are formulated." *Grand Cent. P'ship*, 166 F.3d at 482 (internal quotation marks omitted; alteration in original).

A substantial number of the CIA and DOD documents are protected by the deliberative process privilege. For example, the CIA has withheld predecisional and deliberative inter-agency communications, discussions and comments relating to draft legal analysis; communications among CIA and DOJ attorneys relating to the civil suit filed by Aulaqi's father; and communications with and about Congress, including inter-agency discussions related to the preparation of the Classified White Paper prepared by DOJ for Congress, as well as predecisional and deliberative internal CIA discussions on these topics. Second Lutz Decl. ¶¶ 6, 18. All of this material reveals an interim stage in intra- and inter-agency discussions, which preceded a final decision by CIA or another Executive Branch agency or component. *Id.* ¶ 18. Disclosure of this information would inhibit the frank communications and free exchange of ideas that the privilege is designed to protect. *Id.*

Similarly, DOD has withheld predecisional and deliberative documents under Exemption 5. Among other things, DOD has asserted the deliberative process privilege to protect handwritten notes on the two OLC memoranda relating to Aulaqi that were made by DOD attorneys preparing to brief senior DOD leadership regarding legal analysis to inform possible

military action, as well as a draft communication from DOD's General Counsel to the Secretary of Defense attaching those OLC memoranda. Second Harris Decl. ¶ 10. DOD has also withheld intra- and inter-agency email communications and notes regarding the two OLC memoranda, addressing draft legal analysis and factual questions posed during the preparation of those memoranda. *Id.* ¶ 11. In addition, the withheld documents include drafts of the Classified DOJ White Paper and communications and notes regarding those drafts. *Id.* ¶ 12. All of these materials are predecisional and deliberative, and their public disclosure would have a chilling effect on DOD's operational planning discussions and impede military decisionmaking. *Id.* ¶¶ 10-12.

Additionally, the documents withheld by CIA and DOD include privileged predecisional and deliberative materials pertaining to OLC. These materials consist of:

(a) documents containing or reflecting confidential, predecisional legal advice provided by OLC or the Department of Justice to Executive Branch policymakers;

(b) draft legal analysis, including draft white papers and draft OLC attorney work product generated during the preparation of OLC advice, such as sections of draft OLC memoranda circulated for review and comments;

(c) requests from Executive Branch officials for legal advice, including confidential and classified factual information potentially relevant to the requests;

(d) inter-agency Executive Branch communications reflecting legal deliberations regarding the appropriate legal analysis of potential actions or legal determinations, including communications seeking and providing factual information determined to be potentially relevant to that analysis, as well as comments and legal deliberations regarding draft legal advice and analysis, including views provided to OLC by other agencies regarding the appropriate legal analysis, many of which include classified factual information conveyed as part of those legal deliberations; and

(e) intelligence products containing classified factual information regarding terrorist organizations and individuals involved with such organizations provided to OLC in connection with a request for legal advice.

Third Bies Decl. ¶ 3. All of these materials are protected by the deliberative process privilege, in

whole or in part, because they are predecisional, in that they contain, reflect, or reveal discussions or proposals, and they reflect the "give and take" exchanges that characterize the government's deliberative processes. *Id.* ¶ 7; *see also id.* ¶¶ 11-15. Compelled disclosure of these documents would undermine the deliberative processes of the government and chill the candid and frank communications necessary for effective governmental decisionmaking. *Id.* ¶ 7. As Deputy Assistant Attorney General Bies explains,

> It is essential to OLC's mission and the deliberative processes of the Executive Branch that the development of OLC's considered legal advice not be inhibited by concerns about the compelled public disclosure of predecisional matters, including factual information necessary to develop accurate and relevant legal advice, and draft analyses reflecting preliminary thoughts and ideas. Protecting the withheld documents from compelled disclosure is central to ensuring that Executive Branch attorneys will be able to examine relevant facts and analysis, and draft and vet legal arguments and theories thoroughly, candidly, effectively, and in writing, and to ensuring that Executive Branch officials will seek legal advice from OLC and the Department of Justice on sensitive matters.

Id.; *see also id.* ¶ 19.

All of these documents fall squarely within the scope of the deliberative process privilege, and were therefore properly withheld under Exemption 5. *See Tigue*, 312 F.3d at 80 (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"); *Hopkins*, 929 F.2d at 84–85 (privilege "focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated'" (quoting *Sears*, 421 U.S. at 150)).

B. Certain of the Withheld CIA and DOD Documents Are Protected by the Attorney-Client Privilege

"The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance. Its purpose is to

encourage attorneys and their clients to communicate fully and frankly and thereby to promote 'broader public interests in the observance of law and administration of justice.'" *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (quoting *Upjohn v. United States*, 449 U.S. 383, 389 (1981)) (citation omitted). The privilege operates in the government context as it does between private attorneys and their clients, "protect[ing] most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance." *Id.* To invoke the attorney-client privilege, a party must demonstrate that there was: "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *Id.* at 419.

Certain of the documents withheld by CIA and DOD are protected by the attorney-client privilege. CIA has withheld attorney-client communications between CIA and DOJ in connection with requests for legal advice. Second Lutz Decl. ¶ 19. Among other things, DOD has withheld an attorney-client privileged communication between the Secretary of Defense and DOD's General Counsel regarding the two OLC memoranda relating to Aulaqi, as well as attorney-client communications relating to the preparation of the legal advice contained in those OLC memoranda and the legal analysis contained in the Classified DOJ White Paper. Second Harris Decl. ¶¶ 10-12. Certain of the withheld documents also contain or reflect legal advice or drafts of legal advice that was ultimately communicated in confidence from OLC to CIA or DOD, as well as requests for legal advice. Third Bies Decl. ¶ 9; *see also id.* ¶¶ 11-14. The existence of such confidential legal advice documents also reflects the privileged fact that a client requested confidential legal advice on a particular subject. *Id.* ¶ 9. In addition, the attorney-client privileged documents withheld by CIA and DOD include privileged factual material provided to attorneys, including OLC, in connection with requests for legal advice. Second Lutz Decl. ¶ 19;

Second Harris Decl. ¶ 15; Third Bies Decl. ¶¶ 3(e), 9, 15.

The government's declarations establish that these attorney-client communications were intended to be confidential, and their confidentiality has been maintained. Second Lutz Decl. ¶ 19; Second Harris Decl. ¶¶ 10-12; Third Bies Decl. ¶ 16. Public disclosure of the withheld attorney-client communications would seriously disrupt the relationship of trust between attorneys and their client agencies, inhibit open communication between client agencies and their attorneys, and deprive government decisionmakers of the full and candid advice of their counsel. Second Lutz Decl. ¶ 19; Third Bies Decl. ¶¶ 9, 19; *see Cnty. of Erie*, 473 F.3d at 419-22 (recognizing crucial importance of maintaining confidentiality of attorney-client communications in government context to encourage policymakers to seek legal advice to ensure that their decisions are consistent with the law). These communications are exempt under Exemption 5.

C. Certain of the Withheld CIA Documents Are Protected by the Work Product Privilege

Exemption 5 also encompasses the attorney work product privilege. *Sears*, 421 U.S. at 154-55. The work product doctrine protects documents "prepared in anticipation of litigation," as well as "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3); *accord A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 146 (2d Cir. 1994). Without such protection, an entity would have to choose between "scrimp[ing] on candor and completeness" or disclosing its "assessment of its strengths and weakness . . . to litigation adversaries." *United States v. Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998). Under the work product doctrine, the "anticipation of litigation" element is satisfied where, "in light of the nature of the document and the factual situation in the particular

case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id*. at 1202 (emphasis in original).

Here, CIA has asserted the work product privilege to protect documents that were prepared by, or at the direction of, CIA and DOJ attorneys in reasonable anticipation of litigation. Second Lutz Decl. ¶ 20. Specifically, the work product privilege was asserted to withhold communications concerning the civil action brought by the father of Anwar al-Aulaqi, which was pending in a U.S. District Court at the time the documents were created. *Id.* Release of these documents would expose the attorneys' preparation for the litigation to scrutiny, and would give litigants against the government an unfair advantage. *Id*. Such documents fall squarely within the work product doctrine.

D. Certain of the Withheld CIA and DOD Documents Are 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 decisionmaking of the President. *Id.* at 745. 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.*; *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010). The privilege also covers factual material. *In re Sealed Case*, 121 F.3d at 745.

Certain of the documents withheld by CIA and DOD are protected by the presidential communications privilege, *see* Second Lutz Decl. ¶ 21; Second Harris Decl. ¶ 4, for the reasons discussed in the classified *in camera* submissions.

IV. CIA and DOD Cannot Confirm or Deny Whether They Have Documents Responsive to the Requests for the Factual Basis for the Killing of Samir Khan or Abdulrahman al-Aulaqi

With respect to the final two categories of the ACLU's FOIA request, seeking documents concerning the "factual basis for the killing" of Samir Khan and Abdulrahman al-Aulaqi, beyond confirming that neither individual was intentionally targeted by the United States, CIA and DOD can neither confirm nor deny whether they have responsive records. Such an acknowledgment would reveal classified and statutorily protected information that is exempt from disclosure under Exemptions 1 and 3. *Wilner*, 592 F.3d at 68 ("to properly employ the Glomar response to a FOIA request, an agency must tether its refusal to respond to one of the nine FOIA exemptions – in other words, a government agency may . . . refuse to confirm or deny the existence of certain records . . . if the FOIA exemption would itself preclude the acknowledgment of such documents" (citation and internal quotation marks omitted)).

In a letter to the Senate Judiciary Committee dated May 22, 2013, the Attorney General disclosed that Samir Khan and Abdulrahman al-Aulaqi were killed in the course of U.S. counterterrorism operations, but stated that "these individuals were not specifically targeted by the

United States." Second Lutz Decl. ¶ 11; Second Harris Decl. ¶ 18. Beyond this limited acknowledgment, however, the United States has never acknowledged the specific circumstances surrounding those operations, which remain classified. *Id*. Indeed, in a later speech at the National Defense University, President Obama emphasized the "necessary secrecy" of these operations. *Id*.

For this reason, CIA and DOD can neither confirm nor deny having records pertaining to the "factual basis for the killing" of Samir Khan or Abdulrahman al-Aulaqi. Second Lutz Decl. ¶ 12; Second Harris Decl. ¶ 19. In seeking such records for each individual, the ACLU specifically requested records showing "whether U.S. Government personnel were aware of his presence when they launched a missile or missiles at his location," "whether the United States took measures to avoid his death," and "any other factors relevant to the decision to kill him or the failure to avoid causing his death." The existence or nonexistence of such records could indicate whether or not CIA or DOD had an intelligence interest in, or specific intelligence relating to, either individual. Second Lutz Decl. ¶ 12; Second Harris Decl. ¶ 19. Confirming or denying the existence of such records could also reveal whether CIA did or did not have authority to participate in specific counterterrorism operations or gather intelligence on specific individuals, Second Lutz Decl. ¶ 12, and whether DOD played an operational role in specific counterterrorism operations, Second Harris Decl. ¶ 19. Public disclosure of such information would harm national security by revealing whether CIA or DOD had information regarding specific individuals at specific times, which could provide valuable insight to terrorist organizations and allow them to alter their activities to frustrate U.S. counterterrorism efforts. Second Lutz Decl. ¶ 11; Second Harris Decl. ¶ 19. Disclosing the particular activities for which the CIA has or has not been specifically authorized, or the specific targets of intelligence collection, would also provide valuable insight

into the CIA's authorities, capabilities, priorities and interests, which could be used by adversaries, including al-Qa'ida and AQAP, to inhibit the effectiveness of the CIA's intelligence operations. Second Lutz Declaration ¶ 11. CIA and DOD therefore properly asserted a Glomar response with respect to this aspect of the ACLU's request.

V. There Has Been No Waiver of the Applicable Privileges or Exemptions

The Executive Branch has not waived any applicable privileges or exemptions with regard to the documents or information withheld by CIA and DOD.

First, as noted above, the Second Circuit acknowledged that its finding of waiver did not extend to classified factual information in the OLC-DOD Memorandum, including operational details and intelligence information. The panel explicitly held that this factual information remains exempt from disclosure, and permitted the redaction, in its entirety, of the section of the memorandum containing factual material. *See New York Times*, 756 F.3d at 113, 119. This Court applied the same principle in affirming the government's withholding of the other OLC memoranda. *See, e.g.*, First Remand Decision at 11. Similarly here, the vast majority of the documents and information withheld by CIA and DOD remains properly classified and statutorily protected from disclosure because it contains classified factual information relating to intelligence sources and methods, foreign relations, and military plans that has not been officially acknowledged. *See* Second Lutz Decl. ¶ 15; Second Harris Decl. ¶¶ 10-11, 14, 18-19, 20-21; Third Bies Decl. ¶¶ 10, 13-15.

Second, the waiver found by the Second Circuit does not extend to other confidential and classified legal advice that is not the same as or closely related to the legal analysis in the draft DOJ White Paper and pertaining to the same target. Nor does it extend to deliberative or attorney-client privileged materials created in the preparation of such advice, such as drafts and

intra- and inter-agency comments or notes on drafts, or other privileged deliberations or attorney-client communications. Rather, the Second Circuit found that a limited waiver had occurred with respect to certain portions of the legal analysis in the OLC-DOD Memorandum, based principally on the release in February 2013 of a draft unclassified DOJ White Paper containing some legal analysis similar to that in the OLC-DOD Memorandum, and on public statements acknowledging the identity of the relevant target of the operation (Anwar al-Aulaqi) and the existence of relevant OLC advice, including the fact that the Attorney General had adverted to the OLC advice in explaining the context of the draft DOJ White Paper. *See New York Times*, 756 F.3d at 114-21.

Given the Second Circuit's reliance on these facts, the waiver could only apply to legal analysis embodied in a final OLC legal advice document, such as the OLC-DOD opinion, where the analysis is the same as or closely related to legal analysis contained in the draft DOJ White Paper, and where the target at issue has been officially acknowledged by the U.S. government. *See id.* at 120 (applying three-part test for official disclosure, that the information at issue be "as specific as the information previously released in the DOJ White Paper," "match[] the information previously disclosed," and have been "made public through an official and documented disclosure" (quoting *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (internal quotation marks omitted))); *see also* First Remand Decision at 11, 12, 16-17 (noting that the Second Circuit "ruled only that the privilege had been waived as to legal analysis," and applying *Wilson*'s three-part test to information in other OLC memoranda). Indeed, applying the waiver more broadly to include any predecisional, deliberative document analyzing the same legal issues would effectively swallow Exemption 5.

Many of the documents withheld by CIA and DOD, in addition to being classified, are also deliberative, attorney-client or otherwise privileged materials that remain protected by Exemption 5. Such documents do not fall within the scope of the waiver found by the Second Circuit. *See* Second Lutz Decl. ¶¶ 17-21; Second Harris Decl. ¶¶ 10-12, 15, 21; Third Bies Decl. ¶¶ 10, 13-15.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of defendants CIA and DOD.

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Respectfully submitted,

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