UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2013

Argued: October 1, 2013 Decided: April 21, 2014

Docket Nos. 13-422(L), 13-445(Con)

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THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE, SCOTT SHANE, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY,
Defendants-Appellees.

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Before: NEWMAN, CABRANES, and POOLER, Circuit Judges.

Appeal from the January 24, 2013, judgment of the United States District Court for the Southern District of New York (Colleen McMahon, District Judge), dismissing, on motion for summary judgment, a suit under the Freedom of Information Act seeking documents relating to targeted killings of United States citizens carried out by drone aircraft.

We conclude that (1) a redacted version of the OLC-DOD

Memorandum must be disclosed, (2) a redacted version of the classified Vaughn index (described below) submitted by OLC must be disclosed, (3) [redacted],[1] (4) the Glomar and "no number, no list" responses are insufficiently justified, (5) DOD and CIA must submit Vaughn indiÖöb

Ruzicka, Colin Wicker, Dorsey & Whitney LLP, Minneapolis, MN., on the brief), for Plaintiffs-Appellants American Civil Liberties Union and American Civil Liberties Union Foundation.

Sharon Swingle, U.S. Appellate Staff Atty., Washington, D.C. (Preet Bharara, U.S. Atty., Sarah S. Normand, Asst. U.S. Atty., New York, N.Y., Stuart F. Delery, Acting Asst. U.S. Atty. General, Washington, D.C., on the brief), for Defendants-Appellees.

(Bruce D. Brown, Mark Caramanica, Aaron Mackey, The Reporters Committee for Freedom of Press, Arlington, V.A., for amicus curiae The Reporters Committee for Freedom of Press, in support of Plaintiffs-Appellants.)

(Marc Rotenberg, Alan Butler, Ginger McCall, David Brody, Julia Horwitz, Electronic Privacy Information Center, Washington, D.C., for amicus curiae Electronic Privacy Information Center, in support of Plaintiffs-Appellants.)

JON O. NEWMAN, Circuit Judge:

This appeal of a judgment dismissing challenges to denialchalle

Executive Branch in maintaining secrecy about matters of national security. The issues assume added importance because the information sought concerns targeted killings of United States citizens carried out by drone aircraft. Plaintiffs-Appellants The New York Times Company and New York Times reporters Charlie Savage and Scott Shane (sometimes collectively "N.Y. Times"), and the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively "ACLU") appeal from the January 24, 2013, judgment of the United States District Court for the Southern District of New York (Colleen McMahon, District Judge) dismissing, on motions for summary judgment, their consolidated FOIA suits. See New York Times Co. v. U. S. Dep't of Justice ("Dist. Ct. Op."), 915 F. Supp. 2d 508 (S.D.N.Y. 2013). The suits were brought against the Defendants-Appellees United States Department of Justice ("DOJ"), the United States Department of Defense ("DOD"), and the Central Intelligence Agency ("CIA") (sometimes collectively the "Government").

We emphasize at the outset that the Plaintiffs' lawsuits do not challenge the lawfulness of drone attacks or targeted killings. Instead, they seek information concerning those attacks, notably, documents prepared by DOJ's Office of Legal Counsel ("OLC") setting forth the Government's reasoning as to

the lawfulness of the attacks.

The issues primarily concern the validity of FOIA responses that (a) decline to reveal even the existence of any documents responsive to particular requests (so-called "Glomar responses" (described below)), (b) acknowledge the existence of responsive docum

Background

The FOIA requests at issue in this case focus primarily on the drone attacks [redacted] that killed Anwar al-Awlaki[2] and Samir Khan in September 2011 and al-Awlaki's teenage son, Abdulrahman al-Awlaki, in October 2011. All three victims were United States citizens either by birth or naturalization.

Statutory Framework. FOIA provides, with exceptions not relevant to this n

to” one of the categories of information specified in the Executive order, including “intelligence activities (including covert action),” “intelligence sources or methods,” or “foreign relations or foreign activities of the United States” and (2) if “unauthorized disclosure of the information could reasonably be expected to cause identifiable and describable damage to the national security.” Executive Order No. 13526 § 1.1(a)(3)-(4), 1.4(c)-(d), 75 Fed. Reg. 708, 709 (Dec. 29, 2009).

Exem@‰@Ò’Ò†B•

National Security Act of 1947, 50 U.S.C. § 3024-1(i)(1) (2013), exempts from disclosure “ig

citizen who is deemed to be a terrorist.

JA 300-01.

OLC denied Shane's request. With respect to the portion of his request that pertained to DOD, OLC initially submitted a so-called "no number, no list" response[3] instead of submitting the usual Vaughn index,[4] numbering and identifying by title and description documents that are being withheld and specifying the FOIA exemptions asserted. A no number, no list response acknowledges the existence of documents responsive to the request, but neither numbers nor identifies them by title or description. OLC said that the requested documents pertaining to DOD were being withheld pursuant to FOIA exemptions 1, 3, and 5.

As to documents pertaining to agencies other than DOD, OLC submitted a so-called "Glomar response."[5] This type of response

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[3] The term was apparently coined by CIA, see Bassiouni v. CIA, 392 F.3d 244, 246 (7th Cir. 2004), and the CIA's use of no number, no list responses to FOIA requests has been considered by district courts in the District of Columbia. See National Security Counselors v. CIA, 898 F. Supp. 2d 233, 284-85 (D.D.C. 2012); Jarvik v. CIA, 741 F. Supp. 2d 106, 123 (D.D.C. 2010).

[4] The term derives from Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

[5] The term derives from the Hughes Glomar Explorer, a vessel built to recover a sunken Soviet submarine. See Phillippi v. CIA, 546 F.2d 1009, 1010-12 (D.C. Cir. 1976). A Glomar response was first used in 1992 in a case challenging a Government agency's refusal to confirm or

neither confirms nor denies the existence of documents responsive to the request. See Wilner v. National Security Agency, 592 F.3d 60, 68 (2d Cir. 2009). OLC stated that the Glomar response was given "because the very fact of the existence or nonexistence of such documents is itself classified, protected from disclosure by statute, and privileged" under 5 U.S.C. § 552(b)(1), (3), (5). CIA confirmed that it requested DOJ to submit a Glomar response on its behalf.[6]

OLC also denied Savage's request. Declining to submit either a Vaughn index or even a no number, no list response, OLC submitted a Glomar response, stating that, pursuant to Exemptions 1, 3, and 5, it was neither confirming nor denying the existence of documents described in the request. Unlike its letter denying the Shane request, OLC's response to the Savage request did not identify any responsive documents relating to DOD.

During the course of the litigation, OLC modified its responses to the Shane and Savage requests by identifying the

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deny the existence of certain materials requested under FOIA, see Benavides v. DEA, 968 F.2d 1243, 1245 (D.C. Cir. 1992).

[6] CIA made one exception to its request that OLC submit a Glomar response. Because CIA's involvement in the operation that resulted in the death of Osama bin Laden had been acknowledged and was not classified, the agency asserted that any OLC documents related to the agency's involvement in that operation would not be covered by a Glomar response, but added that there were no such documents.

existence of one document pertaining to DOD, what the District Court and the parties have referred to as the OLC-DOD Memorandum, but claimed that this document was exempt from disclosure under Exemption 5. Because the OLC-DOD Memorandum was classified, it was presumably also withheld under Exemption 1. Exemp

various documents concerning the targeted killings of United States citizens in general and al-Awlaki, his son, and Khan in particular.

Both OLC and CIA initially submitted Glomar responses, refusing to confirm or deny the existence of

modified their original responses in light of statements by senior Executive Branch officials on the legal and policy issues pertaining to United States counterterrorism operations and the potential use of lethal force by the United States Government against senior operational leaders of al-Qaeda who are United States citizens.

OLC provided ACLU with a Vaughn index of sixty unclassified responsive documents, each described as an e-mail chain reflecting internal deliberations concerning the legal basis for the use of lethal force against United States citizens in a foreign country in certain circumstances. OLC withheld these documents pursuant to Exemption 5.

OLC also submitted a no number, no list response as to classified documents, stating that it could not provide the number or description of these documents because that information was protected from disclosure by Exemptions 1 and 3. OLC did describe one of these documents as an "OLC opinion related to DoD operations," Declaration of John E. Bies, Deputy Assistant Attorney General, OLC ¶ 38 ("Bies Decl."), JA 279, which it withheld in its entirety under Exemptions 1 and 3. This is apparently not the OLC-DOD Memorandum, which OLC said was exempt from disclosure under Exemption 5. That this document is not the

OLC-DOD Memorandum is confirmed by OLC's assertion that this document "cannot be further identified or described on the public record." Id. The OLC-DOD Memorandum was withheld under Exemptions 1 and 5.

OIP located one responsive document, a set of talking points prepared for the Attorney General and others related to "hypothetical questions about Anwar al-Aulaqi's death," Declaration of Douglas R. Hibbard, Deputy Chief of the Initial Request Staff, OIP ¶ 8, JA 441, which it released to ACLU. OIP also issued a Vaughn index listing four unclassified records withheld under Exemptions 3, 5, and 6.[8] OIP also submitted a no number, no list response to various classified documents withheld under Exemptions 1 and 3.

DOD's revised response disclosed a speech given by Jeh Johnson, then-DOD General Counsel, at Yale Law School on February 22, 2012. DOD also provided ACLU with a Vaughn index listing ten unclassified records, withheld pursuant to Exemption 5. Seven of those documents were e-mail traffic regarding drafts of the speech given by Johnson at Yale Law School and a speech delivered

[8] Exemption 6, which is not in issue in this appeal, applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (2013).

of John Bennett, Director, National Clandestine Service, CIA, ¶ 27 (quoting ACLU request). In these two categories, CIA submitted a no number, no list response, relying on Exemptions 1 and 3, with the exception that CIA acknowledged that it possessed copies of speeches given by the Attorney General at Northwestern University Law School on March 5, 2012, and by the Assistant to the President for Homeland Security and Counterterrorism on April 30, 2012. See id.

The pending lawsuit and District Court opinions. In December 2011, N.Y. Times filed a lawsuit challenging the denials of the Shane and Savage requests. ACLU filed its suit in February 2012. After the suits were consolidated, both Plaintiffs and the Government filed cross-motions for summary judgment. In January 2013, the District Court denied both Plaintiffs' motions for summary judgment and granted the Defendants' motion in both cases, with one exception, which required DOD to submit a more detailed justification as to why the deliberative process exemption (asserted through

judgment with respect to the two unclassified DOD memos. See New York Times Co. v. U. S. DOJ ("Dist. Ct. Supp. Op."), Nos. 11 Civ. 9336, 12 Civ. 794, 2013 WL 238928 (S.D.N.Y. Jan. 22, 2013).

In its principal opinion, which we discuss in more detail in Parts III and IV, below, the Court first ruled that the Government had conducted an adequate search for responsive documents. See Dist. Ct. Op., 915 F. Supp. 2d at 532-33. The Court then considered separately each of the Government's claims to an exemption.

As to Exemption 1, concerning properly classified documents, the Court first ruled that there was no evidence that any of the documents withheld pursuant to Exemption 1 had not been properly classified. See id. at 535. The Court specifically considered the Plaintiffs' claim that legal analysis could not be classified and rejected the claim. See id.

Turning to the Plaintiffs' claim of waiver, the Court, citing Wilson v. CIA, 586 F.3d 171, 186 (2d Cir. 2009), first ruled that waiver of Exemption 1 had not occurred with respect to classified documents containing operational details of targeted killing missions. See Dist. Ct. Op., 915 F. Supp. 2d at 535-37. The Court then specifically considered whether waiver of Exemption 1 had occurred with respect to the OLC-DOD

Memorandum and rejected the claim. See id. at 538.

As to Exemption 3, which protects records exempted from disclosure by statute, the District Court first noted that section 102A(i)(1) of the National Security Act, now codified at 50 U.S.C. § 3024(i)(1) (2013), is an exempting statute within the meaning of Exemption 3, and that this provision protects from disclosure "intelligence sources and methods." Id. at 539. The Court then reckoned with ACLU's contention that placing individuals on kill lists does not fall within the category of intelligence sources and methods. Agreeing with a decision of a district court in the District of Columbia, ACLU v. Dep't of Justice, 808 F. Supp. 2d 280, 290-92 (D.D.C. 2011) ("Drone Strike Case"), which was later reversed on appeal, see ACLU v. CIA, 710 F.3d 422 (D.C. Cir. 2013), the District Court here rejected ACLU's argument. See Dist. Ct. Op., 915 F. Supp. 2d at 540. The District Court then specifically focused on the issue whether legal analysis could fall within the category of intelligence sources and methods. Acknowledging that it is "entirely logical and plausible" that intelligence sources and methods could be redacted from legal analysis upon in camera inspection, the Court declined to make such inspection or resolve the issue because it concluded that Exemption 5 "plainly applies" to the legal

analysis that is sought here. See id.

The District Court then determined that section 6 of the CIA Act, 50 U.S.C. § 403g, now codified at 50 U.S.C. § 3507 (2013), is an exempting statute within the meaning of Exemption 3 and that section 6 protects from disclosure information concerning the "functions" of CIA. See id. at 541. Again, following the district court decision in the Drone Strike Case, before it was reversed, the District Court here ruled that Exemption 3 permitted CIA, in response to ACLU's request, to refuse to reveal the existence of records concerning drone strikes. See id.

As to Exemption 5, covering "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," the District Court noted that this exemption applies to documents withheld "under the deliberative process privilege (a.k.a., the executive privilege) and the attorney-client privilege," citing this Court's decision in Tigue v. U.S. Dep't of Justice, 312 F.3d 70, 76 (2d Cir. 2002). See Dist. Ct. Op., 915 F. Supp. 2d at 541-42. OLC relied on the deliberative process privilege to withhold the classified OLC-DOD Memorandum, which both Plaintiffs sought, and DOD relied on this privilege to withhold the two unclassified documents on its Vaughn index that ACLU requested. These two,

numbered 9 and 10, were described as "Memorandum from Legal Counsel to Chairman of the Joint Chiefs of Staff to the National Security Legal Advisor with legal analysis regarding the effect of U.S. citizenship on targeting enemy belligerents." JA 409.

With respect to the OLC-DOD Memorandum, the District Court, accepting N.Y. Times's concession that this document at one time might have been properly withheld under the deliberative process and/or attorney-client privileges, see id. at 544, rejected the Plaintiffs' contentions that these privileges had been lost because of one or more of the following principles: waiver, adoption, or working law, see id. at 546-50.

As to documents 9 and 10 on DOD's Vaughn index, the Court initially found DOD's justification for invoking Exemption 5 inadequate, see id. at 545, but ruled that a subsequent submission sufficiently supported the application of the deliberative process privilege and hence Exemption 5 to these documents, see Dist. Ct. Supp. Op., 2013 WL 238928, at *1.

Finally, the District Court considered the Glomar and no number, no list responses that were given by DOJ, DOD, and CIA. Apparently accepting the sufficiency of the affidavits submitted by officials of these agencies to justify the responses under Exemptions 1 and 3, the Court turned its attention to the

Plaintiffs' claims that these protections had been waived. Again, following the district court opinion in the Drone Strike Case, before it was reversed, the District Court here concluded that none of the public statements of senior officials waived

After the District Court entered judgment for the Defendants, one document and several statements of Government officials that the Plaintiffs contend support their claims became publicly available. The document is captioned “DOJ White Paper” and titled “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force” (“DOJ White Paper”). As the Government acknowledges, see Br. for Appel

2013; the official disclosure occurred four days later.

The statements are those of John O. Brennan, Attorney General Eric Holder, and President Obama. Brennan, testifying before the Senate Select Committee on Intelligence on February 7, 2013, on his nomination to be director of CIA, said, among other things, "The Office of Legal Counsel advice establishes the legal boundaries within which we can operate." Open Hearing on the Nomination of John O. Brennan to be Director of the Central Intelligence Agency Before the S. Select Comm. on Intelligence, 113 Cong. 57 (Feb. 7, 2013) ("Brennan Hearing"), available at http://www.intelligence.senate.gov/130207/transcript.pdf. Holder sent a letter to Senator Patrick J. Leahy, Chairman of the Senate

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ACLU contends that DOJ did not release the DOJ White Paper in response to its FOIA request, nor list it on its Vaughn index. See Br. for ACLU at 21

Judiciary Committee on May 22, 2013 ("Holder Letter").[11] In that letter Holder stated, "The United States . . . has specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi," Holder Letter at unnumbered second page, and acknowledged that United States counterterrorism operations had killed Samir Khan and Abdulrahman al-Awlaki, who, he states, were not targeted by the United States, see id. He also stated, "[T]he Administration has demonstrated its commitment to discussing with the Congress and the American people the circumstances in which it could lawfully use lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces, and is actively engaged in planning to kill Americans." Id. He also stated, "The decision to target Anwar al-Aulaki was lawful . . . ." Id. at fourth unnumbered page. President Obama delivered an address at the National Defense University on May 23, 2013.[12] In that address, the President listed al-Awlaki's terrorist activities and acknowledged that he had "authorized the strike that took him out."

Discussion

[11] The Holder Letter is available at http://www.justice.gov/ag/AG-letter-5-22-13.pdf.

[12] The President's address is available via a link at http://wh.gov/hrTq.

I. FOIA St

When the claimed exemptions involve classified documents in the

required “to renew its search for responsive documents.” Br. for ACLU at 61.

III. The OLC-DOD Memorandum

The OLC-DOD Memorandum, as described by OLC, is an “OLC opinion pertaining to the Department of Defense marked classified . . .[t]hat . . . contains confidential legal advice to the Attorney General, for his use in interagency deliberations, regarding a potential military operation in a foreign country.” Bies Decl. ¶ 30.

OLC withheld the OLC-DOD Memorandum as protected from disclosure by Exemption 5 “because it is protected by the deliberative process and attorney-client privileges.” Id. DOD withheld the document under Exemptions 1 and 5 “because the content of the document contains information about military operations, intelligence sources and methods, foreign government information, foreign relations, and foreign activities.” Neller Decl. ¶ 17. General Neller stated that the classified information in the OLC-DOD Memorandum “is not reasonably segregable.” Id.

In upholding the application of Exemption 1 to the OLC-DOD Memorandum, the District Court first ruled that the affidavits supplied by senior Government officials demonstrated that

classification had been properly made. See Dist. Ct. Op., 915 F. Supp. 2d at 535. The Court then ruled that legal analysis may be classified, citing three district court opinions.[13] See id. After pointing out that Exemption 1 applies to documents properly classified pursuant to an Executive Order and that Executive Order No. 13526 "applies to any information that 'pertains to' military plans or intelligence activities (including covert action), sources or methods," id., the Court stated, "I see no reason why legal analysis cannot be classified pursuant to E.O. 13526 if it pertains to matters that are themselves classified," id.

In considering the application of Exemption 5 to the OLC-DOD Memorandum, the District Court noted the Government's claim that both the deliberative process and attorney-client privileges protected the document, and observed that N.Y. Times did not disagree that the document might at one time have been withheld under both privileges. See id. at 544.

After determining that Exemptions 1 and 5 applied to the

[13] New York Times Co. v. U.S. Dep't of Justice, 872 F. Supp. 2d 309, 312-13, 317-18 (S.D.N.Y. 2012), ACLU v. Office of the Director of National Intelligence, No. 10 Civ. 4419, 2011 WL 5563520, at *8 (S.D.N.Y. Nov. 15, 2011), and Center for International Environmental Law v. Office of the U.S. Trade Representative, 505 F. Supp. 2d 150, 154 (D.D.C. 2007).

relied upon and repeated in public the arguments made specifically in the OLC-DOD Memo," id. at 549 (emphasis in original) (internal quotation marks omitted), and that "it is sheer speculation that this particular OLC memorandum . . . contains the legal analysis that justifies the Executive Branch's conclusion that it is legal in certain circumstances to target suspected terrorists, including United States citizens, for killing away from a 'hot' field of battle," id. The Court saw no need to consider the plaintiffs' claim of waiver in the context of the attorney-client privilege because the deliberative process privilege protected the OLC-DOD Memorandum under Exemption 5. See id.

We agree with the District Court's conclusions that the OLC-DOD Memos cÐ specu

E.P.A., 879 F.2d 698, 700 (9th Cir. 1989)), vacated in part on other grounds, 907 F. Supp. 79 (S.D.N.Y. 1995), and the attorney-client and deliberative privileges, in the context of Exemption 5, may be lost by disclosure, see Brennan Center for Justice v. U.S. Dep't of Justice, 697 F.3d 184, 208 (2d Cir. 2012).

(a) Loss of Exemption 5. Exemption 5 "'properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be.'" Id. at 196 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975)). At

characterized as "an extensive public relations campaign to convince the public that [the Administration's] conclusions [about the lawfulness of the killing of al-Awlaki] are correct." Dist. Ct. Op., 915 F. Supp. 2d at 524. In a March 25, 2010, speech at the annual meeting of the American Society of International Law in Washington, D.C., then-Legal Adviser of the State Department Harold Hongju Koh said, "U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war." JA 113, 124. In a February 22, 2012, speech at the Yale Law School, Jeh Johnson, then-General Counsel of DOD, "summarize[d] . . . some of the basic legal principles that form the basis for the U.S. military's counterterrorism efforts against Al Qaeda and its associated forces," JA 399, and referring explicitly to "targeted killing," said, "In an armed conflict, lethal force against known, individual members of the enemy is a long-standing and long-legal practice," JA 402.

In a March 5, 2012, speech at Northwestern University, Attorney General Holder said, "[I]t is entirely lawful – under both United States law and applicable `ÖÙƒ•Ö–60399,$

a March

Process Clause, id., and maintained that killing a senior al Qaeda leader would be lawful ab law

Re: [redacted[15]*]*

It was prepared on the letterhead of OLC and signed by David J. Barron, Acting Assistant Attorney General.

The OLC-DOD Memorandum has several parts. After two introductory paragraphs, Part I(A) reports [redacted]. Parts I(B) and I(C) describe [redacted]. Part II(A) considers [redacted]. Part II(B) explains [redacted]. Part III(A) explains [redacted], and Part III(B) explains [redacted]. Part IV explains [redacted]. Part V explains [redacted]. Part VI explains [redacted].

The 16-page, single-spaced DOJ White Paper [redacted] in its analysis of the lawfulness of targeted killings. [redacted] The DOJ White Paper explains why targeted killings do not violate 18 U.S.C. §§ 1119 or 2441, or the Fourth and Fifth Amendments to the Constitution, and includes an analysis of why section 1119 encompasses the public authority justification. Even though the DOJ White Paper does not discuss 18 U.S.C. § 956(a)[redacted]. After the District Court's decision, Attorney General Holder publicly acknowledged the close relationship between the DOJ White Paper and previous OLC advice on March 6, 2013, when he

[15] We have deleted classification codes from the caption and throughout the document.

said at a hearing of the Senate Committee on the Judiciary that the DOJ White Paper's discussion of imminence of threatened action would be "more clear if it is read in conjunction with the underlying OLC advice."[16] Oversight of the U.S. Department of Justice Before the Senate Committee on the Judiciary, 113th Cong. (Mar. 6, 2013).

After senior Government officials have assured the public that targeted killings are "lawful" and that OLC advice "establishes the legal boundaries within which we can operate," and the Government makes public a detailed analysis [redacted], waiver of secrecy and privilege as to the legal analysis in the Memorandum has occurred.

The recent opinion of the District Court for the Northern District of California, First Amendment Coalition v. U.S. Dep't of Justice, No. 4:12-cv-01013-CW (N.D. Cal. April 11, 2014), denying an FOIA request for the OLC-DOD Memorandum, is readily distinguishable because the Court, being under the impression that "there has been no 'official disclosure' of the White Paper," id., slip op. at 24, did not assess its significance,

[16] The statement was made in a response to a question from Senator Mike Lee. A webcast of the hearing is available via a link at http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e0c4315749c10b084028087a4aa80a73, at 1:51:30.

whereas in our case, the Government has conceded that the White Paper, with its detailed analysis of legal reasoning, has in fact been officially disclosed, see footnote 10, supra.

In resisting disclosure of the OLC-DOD Memorandum, the Government contends that making public the legal reasoning in the document will inhibit agencies throughout the Government from seeking OLC's legal advice. The argument proves too much. If this contention were upheld, waiver of privileges protecting legal advice could never occur. In La Raza, we explained that "[l]ike the deliberative process privilege, the attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's policy." 411 F.3d at 360. Here, the Government has done so by publicly asserting that OLC advice "establishes the legal boundaries within which we can operate"; it "cannot invoke that relied-upon authority and then shield it from public view." Brennan Center, 697 F.3d at 207-08. Agencies seeking OLC legal advice are surely sophisticated enough to know that in these circumstances attorney/client and deliberative process privileges can be waived and the advice publicly disclosed. We need not fear that OLC will lack for clients.

The Government also argues that because the OLC-DOD

Memorandum refers to earlier OLC documents that remain classified, those assessing the legal reasoning in the OLC-DOD Memorandum might find the reasoning deficient without an opportunity to see the previous documents. However, the reasoning in the OLC-DOD Memorandum is rather elaborate, and readers should have no difficulty assessing the reasoning on its own terms. Moreover, the Government had no similar concern when it released the DOJ White Paper, the reasoning of which cannot be properly assessed, on the Government's argument, without seeing the OLC-DOD Memorandum. Finally, the Government always has the option of disclosing redacted versions of previous OLC advice.

The loss of protection for the legal analysis in the OLC-DOD Memorandum does not mean, however, that the entire document must be disclosed. FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552b. The Government's waiver applies only to the portions of the OLC-DOD Memorandum that explain legal reasoning. These are Parts II, III, IV, V, and VI of the document, and only these portions will be disclosed. Even within those portions of the document, there are matters that the

Government contends should remain secret for reasons set forth in the Government's classified ex parte submission, which we have reviewed in camera.

One of those reasons concerns [redacted] the Government persuasively argues warrants continued secrecy. [redacted] We will redact all references to that [redacted].

Two arguments concern facts [redacted] that no longer merit secrecy. One is the identity of the country in which al-Awlaki was killed. [redacted[17]]

The other fact [redacted] that the Government contends merits secrecy is the identity of the agency, in addition to DOD, that had an operational role in the drone strike that killed al-Awlaki. Both facts have been redacted from this public opinion. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(b) Loss of Exemption 1. Much of the above discussion

[17] [redacted]

concerning loss of Exemption 5 is applicable to loss of Exemption 1. As the District of Columbia Circuit has noted, "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" Wolf v. CIA, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (quoting Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982)). But Gardels made it clear that the justification must be "logical" and "plausible" "in protecting our intelligence sources and methods from foreign discovery." 689 F.2d at 1105.

The District Court noted the Government's contention that "'[i]t is entirely logical and plausible that the legal opinion contains information pertaining to military plans, intelligence activities, sources and methods, and foreign relations.' (Gov't Memo. in Opp'n/Reply 6)." Dist. Ct. Op., 915 F. Supp. 2d at 540. But the Court then astutely observed, "[T]hat begs the question. In fact, legal analysis is not an 'intelligence source or method.'" Id.

We recognize that in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation, but that is not the situation here where drone strikes and targeted killings have been publicly acknowledged at the highest levels of the

Government. We also recognize that in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts. Aware of that possibility, we have redacted, as explained above, the entire section of the OLC-DOD Memorandum

With the redactions and public disclosures discussed above, it is no longer either "logical" or "plausible" to maintain that disclosure of the legal analysis in the OLC-DOD Memorandum risks disclosing any aspect of "military plans, intelligence activities, sources and methods, and foreign relations." The release of the DOJ White Paper, discussing why the targeted killing of al-Addw9ligall4D•riw g vns,8"se$ riin{

this clear. [redacted] in the OLC-DOD Memorandum adds nothing to the

Documents numbered 9 and 10 are OLC legal memoranda, which were made available to this Court ex parte for in camera inspection. As to these documents, we agree with the District Court that the declaration of Richard C. Gross, Brigadier General, United States Army, JA 863, adequately supports the application of Exemption 5. See Dist. Ct. Supp. Op., 2013 WL 238928, at *1. As General Gross pointed out, these brief documents (two and four pages respectively) are informal and predecisional. One does not even identify the sender or the receiver. They mention legal authorities, but in no way resemble the detailed, polished legal analysis in the disclosed DOJ White Paper. At most, they are "part of a process by which governmental decisions and policies are formulated, [or] the personal opinions of the writer prior to the agency's adoption of a policy." Public Citizen, Inc. v. Office of Management and Budget, 598 F.3d 865, 875 (D.C. Cir. 2010) (alteration in original) (internal quotation marks omitted). See also Judicial Watch, Inc. v. FDA, 449 F.3d 141, 151 (D.C. Cir. 2006) (protecting as deliberative "the give-and-take of omitted). See

[redacted]

V. Glomar and No Number, No List Responses

As set forth above, OLC, DOD, and CIA submitted either Glomar or no number, no list responses to the N.Y. Times and ACLU requests, in addition to Vaughn indices. For clarification, we set forth in the margin a chart showing the revised responses of the three agencies.[21] An agency may withhold information on the number of responsive documents and a description of their contents if those facts are protected from disclosure by a FOIA exemption. See Wilner, 592 F.3d at 67-69; Hayden v. National Security Agency, 608 F.2d 1381, 1384 (D.C. Cir. 1979). However, we agree with the D.C. Circuit that "[s]uch a response would only be justified in unusual circumstances, and only by a particularly persuasive affidavit." ACLU, 710 F.3d at 433.

The Government's core argument to justify the Glomar and no

[21]

OLC:	DOD:	CIA:
Glomar to NYTimes; no number, no list to ACLU as to classified documents, except		

necessarily mean that either the number or the listing of all documents on those indices must be disclosed. The Appellees argue persuasively that with respect to documents concerning a contemplated military operation, disclosure of the number of such documents must remain secret because a large number might alert the enemy to the need to increase efforts to defend against attacks or to avoid detection and a small number might encourage a lessening of such efforts. Accordingly, all listings after number 271 on OLC's Vaughn index will remain secret. See Wilner, 592 F.3d at 70 (upholding Glomar response as to identification of documents that would reveal "details of [a] program's operations and scope"). The descriptions of listing numbers 1-4, 6, 69, 72, 80-82, 87, 92, 103-04, 244-49, and 256 reveal information entitled to be protected. Listing numbers 10-49, 51-56, 84-86, 94, 101, 106-09, 111-12, 114-15, 251, 255, 257-61, and 266-67 describe email chains (or copies of chains). Because the Plaintiffs informed the District Court that they were not seeking these items, see Dist. Ct. Op., 915 F. Supp. 2d at 545, these listings need not be disclosed.

No reason appears why the number, title, or description of the remaining listed documents needs to be kept secret. Listing number 5 is the OLC-DOD Memorandum; listing numbers 7-9, 50, 250,

262-65, and 269-71 describe documents and attorney notes concerning legal advice; listing numbers 57-68, 70-71, 73-79, 83, 88-91, 93, 95-100, 102, 105, 110, 113, 116-22, and 144-45 are described as including factual information concerning al-Awlaki; listing numbers 123-30 are described as unclassified open source materials; listing numbers 131-43 and 148-237 are described as drafts of the OLC-DOD Memorandum; listing numbers 238-43 are described as drafts of other documents; listing numbers 146-47 are described as drafts of Document 86A, a listing that does not appear on the OLC's Vaughn index; and listing numbers 244, 246, 248, 252-54, 256, and 268 are described as including [redacted].

Some, perhaps all, of the information in many of these documents might be protected as classified intelligence information or predecisional. If the Plaintiffs challenge the applicability of a cited exemption, the District Court, after in camera inspection, will be able to determine which of these documents need to be withheld and which portions of these documents need to be redacted as subject to one or more exemptions that have not been waived. At this stage, we decide only that the number, title, and description of all documents listed on OLC's classified Vaughn index must be disclosed, with the exception of listing numbers 1-4, 6, 69, 72, 80-82, 87, 92,

103-04, 244-49; 10-49, 51-56, 84-86, 94, 101, 106-09, 111-12, 114-15, 251, 255-61, 266-67; and all listings after listing number 271.

Unlike OLC, DOD

it does not identify all responsive records. See Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999). The adequacy of a search is not measured by its results, but rather by its method. See Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). To show that a search is adequate, the agency affidavit "must be relatively detailed and nonconclusory, and submitted in good faith." Grand Central Partnership, 166 F.3d at 489 (internal quotation marks omitted). The affidavit submitted by an OIP official, JA 412-419 ¶¶ 7-34, easily meets these requirements, and the November 3, 2011, cut-off date was reasonable as the date on which the search was commenced. See Edmonds Institute v. U.S. Dep't of Interior, 383 F. Supp. 2d 105, 110-11 (D.D.C. 2005).

Conclusion

For the reasons stated above, we conclude that:

(1) a redacted version of the OLC-DOD Memorandum (attached as Appendix A to this opinion) must be disclosed;

(2) a redacted version of the classified Vaughn index submitted by OLC must be disclosed, including the number, title, and description of all documents, with the exception of listing numbers 1-4, 6, 10-49,

51-56, 69, 72, 80-82, 84-87, 92, 94, 101, 103-04, 106-09, 111-12, 114-15, 244-49, 251, 255-61, 266-67; and all listings after listing number 271;

(3) [redacted];

(4) the Glomar and "no number, no list" responses are insufficiently justified;

(5) DOD and CIA must submit Vaughn indices to the District Court for in camera inspection and determination of appropriate disclosure and appropriate redaction; and

(6) the OIP search was sufficient.

We therefore affirm in part, reverse in part, and remand.[23]

Appendix A

OLC-DOD Memorandum after appropriate redactions and deletion of classification codes

[In this redacted version of the opinion, the entire redacted version of the OLC-DOD Memorandum has been redacted. *See* footnote 1, *supra.*]

[23] Prior to filing, we have made this opinion available to the Government in camera to afford an opportunity to advise whether any classified information, not intended to be disclosed by this opinion, has been inadvertently disclosed.