IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT CIA'S MOTION FOR SUMMARY JUDGMENT

Defendant United States Central Intelligence Agency ("the CIA") hereby moves for summary judgment pursuant to Fed. R. Civ. P. 56(b) and Local Rule 7(h)(2) for the reasons stated in the attached memorandum.

Dated: August 9, 2013

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CIA'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In light of recent official disclosures about targeted lethal operations, and in accordance with the opinion of the D.C. Circuit, the CIA has now acknowledged that it has a general intelligence interest in this topic and possesses records responsive to the ACLU request.

3. "[T]he selection of human targets for drone strikes and any limits on who may be targeted by a drone strike;"

4. "[C]ivilian casualties in drone strikes;"

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

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

7. The "number of drone strikes the have been executed for the purpose of killing human targets, the location of each such strike, and the agency of the government or branch of the military that undertook each such strike;"

8. The "number, identity, status, and affiliation of individuals killed in drone strikes;"

9. "[W]ho may pilot UAVs, who may cause weapons to be fired from UAVs, or who may otherwise be involved in the operation of UAVs for the purpose of executing targeted killings;" and

10. The "training, supervision, oversight, or discipline of UAV operators and others involved in the decision to execute a targeted killing using a drone."

See Declaration of Mary Ellen Cole ("Cole Decl.") Exhibit A (the "CIA Request") (filed October 1, 2010 as Doc. No. 15). Most of these categories include several sub-categories seeking specific information about drone strikes.

By letter dated March 9, 2010, the CIA issued a response to Plaintiffs' request, stating that "[t]he fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure

Glomar response.[3] Plaintiffs administratively appealed the March 9 determination, s*ee* Cole Decl. ¶ 8, Exhibit B, and while the appeal was pending, filed an Amended Complaint in this matter on June 1, 2010, adding the CIA as a co-defendant to their previously-filed lawsuit against DOD, State, and DOJ.

This Court upheld the CIA's Glomar determination, holding that the existence or non-exist non

Decl."), at ¶2. On April 30, 2012, John Brennan, who was then Assistant to the President for

The D.C. Circuit reversed the decision of the District Court, holding that, given the statement by the President and other high-level government officials, the CIA's Glomar response was no longer appropriate. On appeal, the ACLU had argued primarily that the CIA had previously officially disclosed that it not only has an interest in drone strikes, but also conducts drone strike operations. The D.C. Circuit refused to adopt the ACLU's position; rather, the Court noted that Plaintiffs' FOIA request was not limited to drones purportedly operated by the CIA but instead sought records related to drones operated by the CIA or the Armed Forces. In light of these statements, the D.C. Circuit found that the CIA "proffered no reason to believe that disclosing whether it has any documents at all about drone strikes [would] reveal whether the Agency itself – as opposed to some other U.S. entity such as the Defense Department – operates drones." *ACLU v. CIA*, 710 F.3d 422, 428 (D.C. Cir. 2013). The Court determined that although certain official statements "do not acknowledge that the CIA itself operates drones, they leave no doubt that some U.S. agency does," *id.* at 429; the Court found it was "neither logical nor plausible for the CIA to maintain that it would reveal anything not already in the public domain to say that the Agency 'at least has an intelligence interest' in such strikes," *id.* at 430.

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

stated

Official CIA disclosure of such details would reveal sensitive national security information concerning intelligence activities, intelligence sources and methods, and the foreign activities of the United States. It would provide important insights into the CIA's activities to terrorist organizations, foreign intelligence services, or other hostile groups, and could affect the foreign relations of the United States. *See* Lutz Decl. ¶¶43-47. The CIA has properly asserted a "no number, no list" response, which should be accorded substantial deference in light of the Agency's considerable national security expertise. The CIA is entitled to a grant of summary judgment in its favor.

I. THE APPLICABLE FOIA AND SUMMARY JUDGMENT STANDARDS

FOIA's "basic purpose" reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal citation omitted). "Congress recognized, however, that public disclosure is not always in the public interest[.]" *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). Accordingly, in passing FOIA, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy.'" *John Doe Agency*, 493 U.S. at 152 (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). As this Circuit has recognized, "FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential."

jurisdiction to compel an agency to disclose improperly withheld agency records," *i.e.*, records that do "not fall within an exemption." *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996); *see also* 5 U.S.C. § 552(a)(4)(B) (providing the district court with jurisdiction only "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'"). While narrowly construed, FOIA's statutory exemptions "are intended to have meaningful reach and application," *John Doe Agency*, 493 U.S. at 152; *see also Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

Summary judgment is the procedural vehicle by which most FOIA actions are resolved. *See Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007). The government bears the burden of proving that the withheld information falls within the exemptions it invokes. *See* 5 U.S.C. § 552(a)(4)(B); *King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987). In a FOIA case, a court may grant summary judgment to the government entirely on the basis of information set forth in an agency's affidavits or declarations that provide "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Such declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal quotation marks omitted).

In reviewing the applicability of FOIA Exemptions 1 and 3, it is important to note that the information sought by Plaintiffs directly "implicat[es] national security, a uniquely executive purview." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926-27. While courts review *de novo* an agency's withholding of information pursuant to a FOIA request, "de novo review in FOIA cases is not everywhere alike." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Although *de novo* review provides for "an objective, independent judicial determination," courts nonetheless defer to an agency's determination in the national security context, acknowledging that "the executive ha[s] unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record." *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (internal quotation marks omitted). Courts have specifically recognized the "propriety of deference to the executive in the context of FOIA claims which implicate national security." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927-28.

For these reasons, courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927; *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) ("Today we reaffirm our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security."). Consequently, "in the national security context, the reviewing court must give 'substantial weight'" to agency declarations. *Am. Civil Liberties Union v. DOJ*, 265 F. Supp. 2d 20, 27 (D.D.C. 2003) (quoting *King*, 830 F.2d at 217); *see Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (holding that the district court erred in "perform[ing] its own calculus as to whether or not harm t

counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security). Accordingly, FOIA "bars the courts from prying loose from the government even the smallest bit of information that is properly classified or would disclose intelligence sources or methods." *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

The following discussion and accompanying declarations, including the CIA's classified declaration, establish that, pursuant to these standards of review, the CIA's no number, no list response is appropriate in this case, and the CIA is therefore entitled to summary judgment in its favor.

II. THE CIA PROPERLY PROVIDED A "NO NUMBER, NO LIST" RESPONSE PURSUANT TO EXEMPTIONS 1 AND 3

A. The No Number, No List Response

A no number, no list response is employed where the "details that would appear in a Vaughn index" are protected by a FOIA exemption. *Bassiouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004). Although the "*Glomar* doctrine is well settled as a proper response to a FOIA request" *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009); *see also Moore v. CIA*, 666 F.3d 1330, 1333 (D.C. Cir. 2011); *Phillippi v. CIA*, 546 F.2d 1009, 1012 (D.C. Cir. 1976), the D.C. Circuit has not finally ruled upon the propriety of a no number, no list response. However, the Seventh and other district courts have upheld such a response. *Bassiouni*, 392 F.3d at 246; *Jarvik v. CIA*, 741 F. Supp. 2d 106, 111-113 (D.D.C. 2010); *NY Times v. DOJ*, 915 F. Supp. 2d 508, 550 (S.D.N.Y. 2013), appeal pending. And in this case, the Court of Appeals approved the possibility of a no number, list response when justified by a "particularly persuasive affidavit;" the Court left the question in the first instance to the district court. *See* 710 F.3d at 433-34.

The "no number, no list" response permits the agency to acknowledge the existence of responsive records but to withhold the additional details about those documents that normally set forth in the Vaughn index because information about the volume or nature of the responsive records is itself exempt from disclosure. *See Bassiouni*, 392 F.3d at 246-247 (upholding such a response); *Jarvik v. CIA*, 741 F. Supp. 2d 106, 111-113 (D.D.C. 2010) (same); *NY Times v. DOJ*, 915 F. Supp. 2d 508, 550 (S.D.N.Y. 2013) (same), appeal pending; *see also Hayden v. NSA*, 608 F.2d 1381, 1384 (D.C. Cir. 1979) (recognizing that an agency need not provide the number of responsive records or an index describing them if that information is itself exempt from disclosure).

it is classified. "FOIA Exemptions 1 and 3 are independent; agencies may invoke the exemptions independently and courts may uphold agency action under one exemption without considering the applicability of the other." *Larson*, 565 F.3d at 862-63 (citing *Gardels*, 689 F.2d at 1106-07).

1. The CIA's No Number, No List Response is Proper Under the CIA Act

It is well-established that the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 3035

United States Intelligence Activities, Exec. Order No. 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981), amended most recently by Exec. Order No. 13470, 75 Fed. Reg. 45325 (July 30, 2008); *see also* 50 U.S.C. § 3036(d)(1), 3036(f) (formerly at §403-4a(d)(1), §403-4a(f)) (authorizing functions of the CIA).

The Lutz Declaration explains that providing further detail about the CIA's responsive records would require the CIA to disclose information about its core functions. Lutz Decl. ¶¶24, 32-39. The CIA has therefore determined that providing the number or nature of the responsive records would require the CIA to disclose information about its functions, an outcome the CIA Act expressly prohibits. *Id*. Providing additional details regarding the nature or volume of requested records would disclose statutorily-protected information regarding CIA functions, including (1) the nature of the CIA's role in drone strike operations, and (2) intelligence activities, sources and methods. Indeed, this Court previously agreed that the request sought to reveal functions of the CIA, explaining that "whether the CIA cooperates with, is interested in, or actually directs drone strikes pertains to (possible) functions of CIA personnel," and that "Plaintiffs' FOIA request—sent to multiple agencies—is clearly designed, at least in part, to determine which agencies, and its personnel, are involved in drone strikes and in what capacities." 808 F. Supp. 2d at 288-89. Plaintiffs did not appeal the applicability of these exemptions, only the issue of waiver. Although the Court of Appeals subsequently held that the CIA could acknowledge possessing an "intelligence interest" in drone strikes given the statements made by high-level government officials, the functions revealed by providing the volume and details of responsive records goes well beyond an "intelligence interest" and remains protected. *See* Lutz Decl. ¶¶28-29; *infra* Part III.

example, the first category of the FOIA Request seeking all records "pertaining to the legal basis in domestic, foreign and international law" upon which drones may be used "to execute targeted killings." As the Lutz Declaration explains, "[i]f the CIA had been granted the extraordinary authority to engage in drone strikes, one would logically expect that the legality of such operations would be carefully and extensively documented" inside and outside the Agency. Lutz Decl. ¶33. "Conversely, if the CIA possessed only a handful of documents . . . , that would tend

2. The CIA's No Number, No List Response is Proper Under the NSA

The National Security Act of 1947, as amended, 50 U.S.C. § 3002 *et seq*. (formerly § 401 *et. seq*) (the "NSA") also satisfies the criteria for withholding of information pursuant to Exemption 3. *See, e.g.*, *Sims*, 471 U.S. at 167-68 (finding that the NSA "qualifies as a withholding statute under Exemption 3"); *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) ("Section 403 [of the NSA] is an Exemption 3 statute."). The NSA provides that the "Director of National Intelligence ("DNI") shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1) (formerly codified at 50 U.S.C. § 403-1); Cole Decl. ¶ 40.[7] In *CIA v. Sims*, the Supreme Court, recognizing the "wide-ranging authority" provided by the NSA to protect intelligence sources and methods, held that it was "the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." 471 U.S. at 180. The Court observed that Congress did not limit the scope of "intelligence sources and methods" in any way. *Id*. at 183. Rather, it "simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, inf

The only question for the court is whether the agency has demonstrated that responding to the request "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." *Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980); *see, e.g.*, *Wolf*, 473 F.3d at 377-78 (relying on the NSA in holding that CIA's affidavits "establish that disclosure of information regarding whether or not CIA records of a foreign national exist would be unauthorized under Exemption 3 because it would be reasonably harmful to intelligence sources and methods"); *Riquelme*, 453 F. Supp. 2d at 111-12 (affirming CIA's Glomar response pursuant to the NSA and CIA Act regarding certain alleged CIA activities in Paraguay and, *inter alia*, information relating to a foreign national because the fact of the existence or nonexistence of such records "are pertinent to the Agency's intelligence sources and methods"). Such broad discretion is proper under the Exemption 3 analysis because even "superficially innocuous information" might reveal valuable intelligence sources and methods. *Sims*, 471 U.S. at 178; *see also Fitzgibbon*, 911 F.2d at 762 ("the fact that the District Court at one point concluded that certain contacts between CIA and foreign officials were 'nonsensitive' does not help [plaintiff] because apparently innocuous information can be protected and withheld").

As discussed above, the Lutz Declaration explains that providing the number or nature of the responsive records can reasonably be expected to lead to unauthorized disclosure of CIA intelligence sources and methods. *See generally* Part II.B.1, *supra*. This Court previously held that the existence or non-existence of responsive records pertained to "intelligence sources and methods," as that authority is broadly construed under the NSA. *See* 808 F. Supp. 2d at 289-93. The same principles establish that disclosure of the

1. An Original Classification Authority Has Classified the Information

Martha Lutz, the Chief of the Litigation Support Unit, has affirmed that she holds original classification authority under a delegation of authority pursuant to section 1.3(c) of E.O. 13526. Lutz Decl. ¶3. She found that "the volume or nature" of the CIA's responsive documents "is currently and properly classified." *Id*. ¶7. Thus, the information withheld satisfies the Executive

operational deployment of its sources and methods." Lutz Decl. ¶41. As Lutz explains, "such involvement could be based on not only the CIA's foreign intelligence gathering functions, but also its ability to conduct covert action and other activities as directed by the President." *Id.*; *see also* 50 U.S.C.

Decl. ¶45. In turn, the belief t

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

The Lutz Declaration confirms that the CIA has not officially acknowledged the volume or nature of responsive CIA records related to drone strikes, the relevant legal inquiry. *See Wolf*, 473 F.3d at 379; *see also NY Times v. DOJ*, 915 F. Supp. 2d at 552. Nor has it officially acknowledged any of the protected underlying information implicated by Plaintiffs' request, such as the nature of the CIA's involvement in drone strikes. Lutz Decl. ¶ 48.

In the appeal of this matter, the D.C. Circuit concluded that a number of st Td ( )Tjd ( )13(ol)-a nc

Accordingly, the D.C. Circuit has explicitly rejected the ACLU's argument that there is any acknowledged CIA operational role in drone strikes based on the statements discussed in the D.C. Circuit opinion. Further, none of the statements cited thus far by Plaintiffs constitute official acknowledgment of CIA's alleged role in drone strikes. *See* Lutz Decl. ¶¶11-16 (reviewing official disclosures regarding the use of targeted lethal force); ¶¶28-29 (explaining the significant difference between an intelligence interest versus the alleged operational role); ¶48 (confirming that there has been no authorized disclosure of the CIA's role). This is consistent with the finding of the court in the Southern District of New York, which upheld the CIA's no number, no list response to the FOIA request at issue in that case. *NY Times v. DOJ*, 915 F. Supp. 2d at 552 ("Plaintiffs have provided the Court with every public pronouncement by a senior Executive Branch official that touches on the intelligence community's involvement in the Government's targeted killing program. In none of these statements is there a reference to any particular records pertaining to the program, let alone the number or nature of those records.").

Generally, the other statements Plaintiffs have cited as "acknowledgements" are, in fact, either unsourced, come from former government officials, or are attributed to anonymous individuals. As the Second Circuit explained, "anything short of [an official] disclosure necessarily preserves some increment of doubt regarding the reliability of the publicly available information." *Wilson v. CIA*, 586 F.3d 171, 195 (2d Cir. 2009). Morever, "the law will not infer official disclosure . . . from . . . widespread public discussion of a classified matter," and such publicity or statements are insufficient to undermine the CIA's predictions of harm from official confirmation or denial. *See id*. at 195; *see also Wolf,* 473 F.3d at 378 ("An agency's official acknowledgment of information by prior disclosure, however, cannot be based on mere public

constitute official acknowledgements on behalf of the CIA. *See Phillippi*, 655 F.2d at 1331; *Military Audit Project*, 656 F.2d at 745; *Afshar*, 702 F.2d at 1130-31.

CONCLUSION

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

Dated: August 9, 2013

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