UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, v. NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, and DEPARTMENT OF STATE, Defendants.	13 Civ. 9198 (AT)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

PREET BHARARA
United States Attorney for the
Southern District of New York
86 Chambers Street, 3rd floor
New York, New York 10007
Tel.: (212) 637-2739/2679
Fax: (212) 637-2717
E-mail: David.Jones6@usdoj.gov
Jean-David.Barnea@usdoj.gov
Attorney for Defendants

DAVID S. JONES
JEAN-DAVID BARNEA
Assistant United States Attorneys

– Of Counsel –

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PRELIMINARY STATEMENT

Defendants the National Security Agency, Central Intelligence Agency, Department of Defense, Department of Justice, and Department of State, by their attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submit this reply memorandum of law in further support of their motion for partial summary judgment ("Gov't Br.") in this case arising under the Freedom of Information Act, 5 U.S.C. § 552.[1] The memorandum also opposes Plaintiffs' cross-motion for partial summary judgment ("ACLU Br.").

The Court should grant partial summary judgment for the Government and deny ACLU's cross-motion because, notwithstanding ACLU's criticisms, the defendant agencies have amply justified the searches they conducted and the exemptions they assert. ACLU misstates applicable law, particularly with respect to the "working law" concept on which it heavily relies, and its arguments should be rejected. Specifically, ACLU seemingly contends that any DOJ or agency counsel's provision of legal advice that opines as to what governmental conduct is legally permissible constitutes working law and so defeats any otherwise-applicable privilege. This is emphatically not the law. Indeed, the Second Circuit has rejected this exact contention, including in a major decision just last year, which ACLU chooses (despite being a litigant in that case) not to acknowledge. This case law alone defeats ACLU's working law arguments.

Nor has ACLU overcome the Government's specific showings that it properly invoked applicable FOIA exemptions, most of which arise either from privileges that unsurprisingly attach to confidential legal analyses of government lawyers that have not been publicly released, or from the classified nature of information that permeates the responsive records, as one would

[1] This memorandum uses abbreviations, short names for declarations, and other terms defined in the Government's opening brief.

expect of discussions of some of the Nation's most sensitive and important international intelligence activities.

The Court also should reject the ACLU's other arguments, in particular, its criticisms of the searches conducted by most defendant agencies, and ACLU's contention that the recent public release of information in a report not at issue in this case somehow requires reprocessing of records at issue here notwithstanding that the report's release post-dated the agencies' searches, processing, and releases to ACLU in this case. Courts recognize that agencies need not continuously repeat processing and analysis of records whenever additional information is disclosed through other means, and this practice should be followed here.

While the Government's moving papers alone were sufficient, the Government accompanies and further supports this memorandum with supplemental declarations by agency officials to further demonstrate the sufficiency of each agency's search, and the applicability of the exemptions that the agencies have asserted.[2] Particularly considering these submissions, there is no need for the Court to grant ACLU's request for extensive and burdensome *in camera* review of various records. The Government's declarations are entitled to a presumption of good faith and regularity, and are due substantial deference to the extent they assert national security exemptions; the declarations are sufficient to support partial summary judgment as requested by the Government here. Courts recognize that *in camera* review, while permissible, is not favored and is not necessary when agency declarations sufficiently support the agency's position, as is true here. And case law instructs courts not to engage in *in camera* review when the request for

[2] These are the Supplemental Declaration of Antoinette B. Shiner of the CIA ("Supp. CIA Decl."); the Supplemental Declaration of David M. Hardy of the FBI ("Supp. FBI Decl."); the Supplemental Declaration of Alesia Y. Williams of the DIA ("Supp. DIA Decl."); the Supplemental Declaration of David J. Sherman ("Supp. NSA Decl."); the Supplemental Declaration of John Bradford Wiegmann of NSD ("Supp. NSD Decl."); and the Supplemental Declaration of Eric Stein of State ("Supp. State Decl.").

such review constitutes, in reality, an attempt to evade the judicial recognition that Government declarations alone are ordinarily sufficient to resolve FOIA cases.

Finally, while the purpose of this memorandum is to demonstrate the adequacy of the Government's searches and the soundness of its assertions of FOIA exemptions, we cannot leave unchallenged ACLU's assertion that the Government has "refus[ed] to disclose basic information about the legal boundaries of its surveillance under Executive Order (EO) 12333." ACLU Br. at 1. Contrary to the ACLU's characterization, the Government has released significant information about its activities in this area, both previously and in response to ACLU's FOIA request, while appropriately taking necessary precautions to preserve highly sensitive secrets that are essential to the nation's intelligence operations, and to the national security. EO 12333 itself reflects the consensus of successive Presidents over a span of decades that these activities are critical to the Nation; these activities are conducted pursuant to robust Congressional oversight and are subject to intensive public debate; and the government is attempting to provide as much information as is possible consistent with the need to safeguard classified information whose release would cause national security harms. Even just in this case, for example, CIA produced 46 documents in part and two in full, including substantial portions of the CIA's regulation governing the type of activities about which ACLU inquires, Agency Regulation 2-2, *see* CIA Decl. Ex. A, OLC released significant portions of its only responsive non-privileged document, *see* OLC Decl. ¶ 26, Ex. 11, and the NSA likewise produced or made available significant information responsive to ACLU's request, *see* NSA Decl. ¶ 16, Ex. 11 (memorializing posting of responsive records on intelligence community website and provision of records to ACLU).

For these reasons and those stated in the Government's moving papers, the Court should grant the Government's motion for partial summary judgment, and deny ACLU's cross-motion.

ARGUMENT

I. THE GOVERNMENT'S ASSERTIONS OF EXEMPTION 5 SHOULD BE UPHELD

A. ACLU Misstates the Working Law Doctrine, and That Doctrine Does Not Require Release of Any Record at Issue

ACLU's primary response to the agencies' invocation of various privileges is that the "working law" doctrine applies, and overcomes any privilege that might otherwise attach to a large number of records at issue. *See* ACLU Br. at 16-26. ACLU misstates the "working law" doctrine, and surprisingly fails even to cite (much less distinguish) recent controlling Second Circuit authority that squarely rejected contentions similar to those ACLU raises here, in particular rejecting claims that OLC opinions constitute working law. Moreover, the working law doctrine would not eliminate the classified status of any document, *see N.Y. Times Co. v. DOJ*, 806 F.3d 682, 687 (2d Cir. 2015) ("[w]hether or not 'working law,' the documents are classified and thus protected under Exemption 1"), *petition for reh'g en banc denied*, and many of the documents at issue here are also classified and subject to Exemptions 1 and 3. *See infra* Point III. None of the documents as to which the Government invokes Exemption 5 constitutes "working law" that must be disclosed.

1. OLC Opinions Generally, and the OLC Documents at Issue Here, Are Not "Working Law"

The Second Circuit, in a recent decision in another national security FOIA case brought by ACLU and others, squarely rejected "the general argument that the legal reasoning in OLC opinions is 'working law,' . . . not entitled to be withheld under FOIA Exemption 5." *N.Y. Times*, 806 F.3d at 687; *cf.* ACLU Br. at 25 ("The fact that OLC's advice is typically authoritative and binding on its recipients makes it all the more probable that the withheld OLC memoranda contain working law"). Despite having been a party to that case, despite having

advanced these arguments to the Second Circuit and having them rejected, and despite seeking rehearing en banc and having that request rejected as well only three weeks prior to the filing of its brief here, ACLU does not attempt to distinguish or even acknowledge the existence of this contrary, controlling precedent, choosing instead to ignore its existence and merely repeat the same arguments to this Court. Contrary to ACLU's contentions, a document constitutes "working law" only if it is "properly characterized as an 'opinion or interpretation which embodies the agency's effective law and policy." *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 195 (2d Cir. 2012) (alterations omitted) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)).

OLC legal advice is not "working law" for the simple reason that it is an advisory input into an agency's deliberation regarding a potential policy decision, but is not itself the agency policy decision, and consequently cannot establish the agency's effective law and policy unless the relevant agency decision-maker expressly adopts the OLC advice as part of the agency's final decision. *See N.Y. Times*, 806 F.3d at 687; OLC Decl. ¶ 2; *see also id.* ¶ 33 ("[N]one of the withheld documents or redacted portions of produced documents have ever been publicly adopted or incorporated by reference by any policymaker as a basis for policy decision"). Consequently, the only appellate courts to have considered the question — the Second Circuit and the D.C. Circuit — have properly concluded that OLC advice cannot, as a general matter, be "working law." *See N.Y. Times*, 806 F.3d at 687; *Brennan Ctr.*, 697 F.3d at 203; *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 10 (D.C. Cir. 2014). ACLU notably fails to address, much less distinguish, this precedent.

The Second Circuit's conclusion that OLC legal advice is generally not "working law" is wholly consistent with the body of case law regarding the concept of "working law." To be

"working law," a record must have "'operative effect.'" *Brennan Ctr.*, 697 F.3d at 197-98 (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)). Legal advice that "describes the legal parameters of what an agency is permitted to do, [but that] does not state or determine [an agency's] policy," is not working law. *Elec. Frontier Found.*, 739 F.3d at 10 (emphasis omitted); *accord N.Y. Times*, 806 F.3d at 687.

The basic concept of "working law" derives from FOIA's affirmative requirement that agencies must disclose "rules governing relationships with private parties and . . . demands on private conduct." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989) (quotation marks omitted); *accord Brennan Ctr.*, 697 F.3d at 201-02. "Working law" refers to "those policies or rules, and the interpretations thereof, that either create or determine the extent of the substantive rights and liabilities of a person." *Afshar v. Dep't of State*, 702 F.2d 1125, 1141 (D.C. Cir. 1983) (quotation marks omitted). Since the Supreme Court's initial discussion of the working law exception in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), the doctrine has been clarified and elaborated in a line of cases decided by the D.C. Circuit, which "has become something of a specialist in the working law exception." *Brennan Ctr.*, 697 F.3d at 200. Surveying these cases in *Brennan Center*, the Second Circuit identified examples of working law, including "'memoranda from regional counsel to auditors working in [an agency's] field offices,'" *id.* (quoting *Coastal States Gas v. Dep't of Energy*, 617 F.2d 854, 858 (D.C. Cir. 1980)), "'formal or informal policy on how [an agency] carries out its responsibilities . . . [that is] referred to as precedent, and not part of an ongoing deliberative process," *id.* at 201 (quoting *Public Citizen v. OMB*, 598 F.3d 865, 875 (D.C. Cir. 2010)), and records that "'explain[ed] and appl[ied] established policy'" in terms that reflect the agency's adopted positions and represent

"'[the agency's] final *legal* position,'" *id.* (emphasis in original) (quoting *Tax Analysts v. IRS*, 294 F.3d 71, 81 (D.C. Cir. 2002)).

The OLC memoranda at issue do not fall into any of these categories: they were not guidance from senior officials to agency staff for use in conducting audits of private parties or any analogous governmental activity, *cf. Coastal States*, 617 F.2d at 869; formal or informal agency policies for carrying out day-to-day decisions outside of any ongoing deliberative process, *cf. Public Citizen*, 598 F.3d at 875; or post-decisional records that "explain and apply established polic[ies]" reflecting the agency's adopted legal position, *cf. Tax Analysts*, 294 F.3d at 81. Rather, the OLC opinions are confidential, pre-decisional legal advice to senior Executive Branch policy-making officials that had no legal effect on the rights and obligations of private parties. *See* OLC Decl. ¶¶ 17, 19, 27, 28 (OLC memoranda at issue are pre-decisional, deliberative documents that formed part of a governmental deliberative process, and are attorney-client privileged because they reflect confidential communications of legal advice and/or confidential communications made for the purpose of seeking and providing that advice). As explained in the OLC's declaration, "OLC does not purport to make policy decisions, and in fact lacks authority to make such decisions." *Id.* ¶ 2. Further, "OLC's legal advice and analysis may inform the decisionmaking of Executive Branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted." *Id.*; *see Brennan Ctr.*, 697 F.3d at 203 (accepting substantially identical representations by OLC declarant in rejecting argument that OLC legal advice is working law). Thus, these OLC memoranda simply do not constitute any agency's "working law."

ACLU submits no evidence to the contrary. While ACLU argues, for example, that OLC 10, a legal memorandum by OLC attorney Jack Goldsmith that OLC has withheld in part, was

relied upon in the Government's reauthorization of a program known as STELLAR WIND (*see* ACLU Br. at 18-19, also extending similar arguments to OLC 3, 4, and 8), that contention is irrelevant to the working law inquiry, or, at least, insufficient to cause the doctrine to apply. *See, e.g.*, *Afshar*, 702 F.2d at 1141 (working law refers to "those policies or rules, and the interpretations thereof, that either create or determine the extent of the substantive rights and liabilities of a person"). The mere fact that OLC opined on what is or is not legally permitted does not render its work product non-privileged "working law"; to argue that it does confuses documents that set forth opinions regarding the legal bounds within which government officials may act with documents that reflect an agency policy that commits officials to a particular course of action. Similarly, the mere fact that an agency may have acted in a manner that it was advised is lawful, and purportedly thereby "relies" on pre-decisional legal advice, does not somehow render that pre-decisional legal advice "working law."[3]

Indeed, the Second Circuit recently rejected this very argument by ACLU in the *N.Y. Times* case mentioned above:

> [T]hese OLC documents are not "working law." At most, they provide, in their specific contexts, legal advice as to what a department or agency "is permitted to do," but OLC "did not have the authority to establish the 'working law' of the

[3] Confidential, pre-decisional legal advice can lose the protection of the deliberative process privilege if both the conclusion and the reasoning of the advice are expressly adopted by a relevant agency decisionmaker. But the ACLU has failed to raise, and thus waived, any argument that the documents at issue here have been adopted, and, in any event, has pointed to no evidence to support a contention that the conclusions, much less the reasoning, of the OLC opinions at issue here were expressly adopted by any Executive Branch official with policymaking authority. And even if an OLC opinion had been expressly adopted, the court would separately have to consider whether the traditional standards for waiver of attorney-client privilege had also been met. *See Fed. Open Market Cmte. v. Merrill*, 443 U.S. 340, 360 n.23 (1979) ("It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges.").

> [agency]," and its advice "is not the law of an agency unless the agency adopts it."

806 F.3d at 687 (internal citations and alterations omitted) (quoting *Elec. Frontier Found.*, 739 F.3d at 10).[4] As this analysis reflects, contrary to ACLU's suggestion, the mere fact that an OLC memorandum contains legal advice about the parameters within which the law permits an agency to act does not somehow transform that document into working law. ACLU's decision to turn a blind eye to this recent and controlling precedent, arising in a case that it lost this year, strongly suggests ACLU cannot distinguish or overcome this point.

ACLU's arguments as to OLC memoranda that were withheld in full suffer from the same analytical deficiency. *See* ACLU Br. at 24-25 (asserting "good reason to believe" that working law appears in OLC 1, 2, 3, 4, 5, 6, and 7, and also referencing OLC 8, 9, and 10; inferring that these or similar analyses were relied upon in final governmental determinations). Again, this argument disregards the clear holdings by the Second and D.C. Circuits, not acknowledged or addressed by ACLU, that OLC memos generally do not constitute working law. *See N.Y. Times*, 806 F.3d at 687; *Elec. Frontier Found.*, 739 F.3d at 10. And it ignores the unequivocal sworn explanation in OLC's declaration that each of these documents is pre-decisional, deliberative, and attorney-client privileged, *see, e.g.*, OLC Decl. ¶¶ 17, 19, 27, 28, which is entitled to a presumption of good faith.

As OLC's declaration emphasizes and contrary to ACLU's contentions, the office's role in the governmental decisionmaking process, often providing "advice and analysis with respect

[4] ACLU sought rehearing of the panel's decision on this very point, and rehearing was denied less than three months ago. *See N.Y. Times Co. v. DOJ*, Nos. 14-4432-cv, 14-4764-cv (2d Cir.), Dkt. No. 141, at 1 (ACLU rehearing petition dated Jan. 7, 2016, seeking rehearing of panel affirmance of Exemption 5 assertion as to OLC opinions, and contending that, "given the OLC's unique role within the executive branch, the question of when OLC opinions constitute 'working law' is a question of exceptional importance"), Dkt. No. 146 (order dated Mar. 31, 2016, denying rehearing).

to very difficult and unsettled issues of law" and often involving "complex and sensitive activities of the Executive Branch," makes it "essential that OLC legal advice provided in the context of internal deliberations" not be inhibited by fear of public disclosure. OLC Decl. ¶ 4; *see also id.* ¶¶ 5-6 (describing "critical" need to protect privilege "to ensure such full and frank communication between governmental attorneys and their clients, and thereby promote . . . broader public interests in the government's observance of law"). Courts including the Second Circuit have long recognized the validity and importance of this position as to government privileges. *See, e.g.*, *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (attorney-client privilege promotes "'broader public interests in the observance of law and administration of justice'" (quoting *Upjohn v. United States*, 449 U.S. 383, 389 (1981)), and in the government context the attorney-client privilege protects "most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance").

ACLU's contentions, if adopted, would eviscerate the privilege over any government lawyer's confidential advice about what governmental conduct is permissible, and so would undermine the long-established protection afforded to pre-decisional governmental deliberations and, in particular, the crucial ability of government decision-makers to seek and obtain confidential legal advice in connection with their policymaking activities. *See Cnty. of Erie*, 473 F.3d at 418; *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999) (noting Exemption 5 purpose of promoting candor in the internal provision of advice; the "efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to operate in a fishbowl" (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973) (internal quotation and citation omitted))).

Indeed, if ACLU were correct and government officials were not able to seek and receive confidential legal advice prior to setting policy, that would have significant constitutional implications. Courts have consistently recognized that, for a President to effectively execute his duties, he must be able to obtain confidential and candid advice. *See, e.g., United States v. Nixon*, 418 U.S. 683, 705-06 (1974) (discussing the President's need for confidentiality "in the exercise of Art. II powers" and noting that "the importance of this confidentiality is too plain to require further discussion"); *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) ("The ability to discuss matters confidentially is surely an important condition to the exercise of executive power. Without it, the President's performance of any of his duties — textually explicit or implicit in Article II's grant of executive power — would be made more difficult."). The ACLU's theory, that no legal advice within the Executive Branch may be kept confidential if its recipient "relies" on it, would not only prevent the President himself from receiving such advice — thus generally interfering with the execution of his Article II duties — but also interfere directly with the President's discharge of his constitutional obligation to take care that agencies faithfully execute the laws, including by ensuring that those agencies may receive confidential legal advice directly, to inform both their decisionmaking processes and their ability to faithfully execute the law.[5]

[5] As noted above, the concept of "working law" derives from the affirmative disclosure provisions of the FOIA, appearing at 5 U.S.C. § 552(a)(2). In similar circumstances, the Supreme Court has construed statutes in a manner that avoided such constitutional problems. *See Public Citizen v. DOJ*, 491 U.S. 440, 465-68 (1989) (construing Federal Advisory Committee Act (FACA) so as to avoid encroaching on President's Article II authority) (citing, *inter alia*, *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *see also id.* at 488-89 (Kennedy, J., concurring) (concluding that FACA was unconstitutional as applied, because "[t]he mere fact that FACA would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act").

2. Legal Advice by Other Agency Counsel Likewise Is Not "Working Law"

The same considerations defeat ACLU's arguments that certain legal advice prepared by attorneys at agencies other than OLC are "working law" and therefore unprotected by Exemption 5. The very first such document addressed in ACLU's brief — NSA 28 — is, as ACLU's brief acknowledges, a "legal review in order to set out the limits . . . on allowing personnel from other agencies access to NSA databases." ACLU Br. at 19-20; *id.* at 20 (commenting that redacted passages "appear to reflect the NSA's view of 'what the law is'"). But an agency is entitled to protect legal advice and pre-decisional deliberative materials leading to a final policy decision, as opposed to final agency rules or policies themselves, which may or may not coincide with the exact legal limits set forth in the legal advice whose release is sought here. *See supra* at 8-10; *N.Y. Times*, 806 F.3d at 687; *Elec. Frontier Found.*, 739 F.3d at 10. And ACLU fails to acknowledge that NSA 28 is among numerous fully or partially withheld "privileged communications between Agency attorneys and Agency clients," which "were made in order to provide legal advice to Agency clients on a variety of operational issues," and which "were made in confidence, and have not since been used to publically justify NSA actions or expressly adopted as NSA policy." NSA Decl. ¶ 53.[6] NSA has further explained that NSA 28 is a "legal opinion drafted by the NSA OGC [Office of General Counsel] at the request of its client, the NSA's Signals Intelligence Directorate ('SID')," providing legal advice on topics NSA describes and setting forth recommendations, but NSA 28 "does not authoritatively state or determine NSA's policy." Supp. NSA Decl. ¶¶ 14-15. Further, NSA's Office of General Counsel "is not

[6] The ACLU's assertion that DIA V-4 is working law, *see* ACLU Br. at 20, is moot, because DIA has determined that, although its privilege assertion is valid as explained in its initial declaration and in a supplemental declaration being filed with this memorandum, it is waiving Exemption 5 as to the withheld portions of this document, and is instead relying solely on Exemptions 1 and 3. *See* Supp. DIA Decl. ¶¶ 5-8.

authorized to make decisions about SID policy nor can the OGC legal opinion be considered an authoritative statement of SID policy." *Id.* ¶ 16. NSA details the organizational role and limited authority of the NSA OGC, which is to "provide[] legal advice"; the OGC "has no authority to issue final decisions or authoritative statements on NSA policy." *Id.* These facts preclude any possible conclusion that NSA 28 or other NSA OGC opinions constitute working law.

Similarly, while ACLU objects to the withholding of NSD legal memoranda that concern requests for approvals or analyses of the legality of certain governmental programs or activities, *see* ACLU Br. at 21-22 (discussing NSD 4, 12, 13, 14), ACLU's objections are premised on assumptions that are directly contradicted by NSD's declarant. NSD has explained that these documents all contain attorney-client privileged advice by government attorneys to clients, *see* NSD Decl. ¶¶ 14-15, and also material that is protected by the deliberative process privilege because they are pre-decisional and deliberative communications that "related to and preceded a final decision regarding one or more NSA programs or other intelligence activities." *Id.* ¶ 18; *see generally id.* ¶¶ 16-18. Further, none of the privileged material in these documents has "been expressly adopted or incorporated by reference by any Government decision-maker." *Id.* ¶ 18. Nor is the NSD's declarant aware of any statement "expressly adopting" these documents as to which privilege is asserted "as agency policy," *id.*, and ACLU has identified nothing so adopting these legal advice documents as final agency policy. NSD's supplemental declaration provides additional details concerning NSD 4, explaining that the declarant is unaware of any government release or acknowledgment of NSD 4, and that NSD 4 sets forth legal advice, but does not constitute agency procedures or policy, nor working law. *See* Supp. NSD Decl. ¶ 10.

Accordingly, the working law doctrine does not override the privileges that attach to these NSD documents. And, while ACLU infers that NSD 4 is "undoubtedly identical" to a

memorandum that it asserts has been published and relates to now-approved and acknowledged procedures, ACLU Br. at 22-23 & n.9, the government has never released or acknowledged document NSD 4, *see* Supp. NSD Decl. ¶ 10; *see also generally* NSA Classified Decl. Even assuming without conceding that ACLU were correct that the document contains analysis that was considered during the process of adopting a final policy or procedure, that would not render pre-decisional legal advice used in deliberations as to whether to adopt certain procedures subject to release as working law. *See supra* Point I.A.1. The core analysis of *N.Y. Times* and *Electronic Frontier Foundation* directly rebuts this ACLU contention.

The ACLU's argument regarding NSA 11 and NSA 12, meanwhile, again relies on ACLU's legally incorrect formulation of the working law doctrine. *See* ACLU Br. at 23 ("If the activities and programs discussed in these documents were ultimately approved, then the underlying legal analysis in NSA 11 and 12 constitutes the agency's binding working law."). These documents, which are also withheld pursuant to Exemptions 1 and 3, *see* NSA Decl. ¶ 38 and Classified NSA Declaration, contain legal memoranda providing advice with respect to NSA programs or other intelligence activities, and are pre-decisional deliberative documents that "related to and preceded a final decision regarding one or more NSA programs or other intelligence activities." NSD Decl. ¶¶ 15-18. Further, these documents "have not been expressly adopted or incorporated by reference by any Government decision-maker," nor, to the knowledge of the NSD's declarant, have these documents been publicly referred to or expressly adopted by any Government official. *Id.* ¶ 18. Thus, they are not working law because they merely reflect "advice" that "is not the law of an agency unless the agency adopts it." *N.Y. Times*, 806 F.3d at 687 (internal citations and alterations omitted) (quoting *Elec. Frontier Found.*, 739 F.3d at 10).

That is true whether or not the relevant policy-maker elected to take actions that NSD's counsel opined would be lawful. *See id.* As with the OLC memoranda discussed above, to hold otherwise would effectively strip privilege protections from any legal advice that government decision-makers considered before taking action. This result would be extraordinarily harmful, and, as the case law recognizes, would undermine informed and lawful decision-making by discouraging the full and frank airing of information and opinions as part of the policy-making and governmental decision-making process. *See, e.g.*, *Cnty. of Erie*, 473 F.3d at 418; *Grand Cent. P'ship*, 166 F.3d at 481; *EPA v. Mink*, 410 U.S. at 87.

These same considerations also defeat ACLU's objections to the withholding of privileged analyses from "dozens of internal memoranda from [agencies'] general counsel's offices." ACLU Br. at 23. ACLU protests the CIA's withholding of "over 70 memoranda from 'attorneys in the CIA's Office of General Counsel'" to CIA components providing "legal advice in response to a request for legal guidance," ACLU Br. at 24 (quoting CIA Decl. ¶ 23), but such memoranda are archetypal attorney-client communications, in addition to being deliberative, even assuming ACLU is correctly inferring that the memoranda state CIA's or its lawyers' understanding of the law applicable to CIA activities. These legal memoranda by CIA attorneys "are not controlling interpretations of policy on which the Agency relies in discharging its mission." Supp. CIA Decl. ¶ 3. Rather, they represent legal advice provided when "[c]lient-offices sought advice from Agency attorneys in confidence, on discrete national security issues, to gain an understanding of the legal implications associated with taking certain courses of action," and the resulting advice "served as one consideration, among others, weighed by Agency personnel in deciding whether to undertake a particular intelligence activity." *Id.*; *see also id.* ¶ 4 (describing in greater detail process leading to provision of a particular privileged

document challenged by ACLU, CIA 65, and further describing the non-binding, advisory nature of that document); CIA Decl. ¶ 23 (CIA attorneys did not set policy or dictate any particular agency course of conduct; rather, the "attorney's role . . . is to provide legal counsel in connection with specific proposals," "[t]hese communications reflect an interim stage associated with a given deliberation," and the advice provided "does not constitute the Agency's final decision to undertake a particular operation or action."). CIA's legal memoranda thus are not working law. *See, e.g., N.Y. Times*, 806 F.3d at 687; *Elec. Frontier Found.*, 739 F.3d at 10.

Finally, ACLU erroneously asserts that two documents that the Government has shown are subject to the presidential communications privilege, NSA 12 and NSD 18, constitute working law and so have forfeited the protection of Exemption 5. *See* ACLU Br. at 15 n.4. This contention should be rejected for two reasons. First, working law analysis is categorically inapplicable to the presidential communications privilege, which protects even final and post-decisional communications, not merely pre-decisional or advisory communications. *See In re Sealed Case*, 121 F.3d 729, 745-46 (D.C. Cir. 1997). The presidential communications privilege protects "communications directly involving and documents actually viewed by the President, as well as documents solicited and received by the President or his immediate White House advisers with broad and significant responsibility for investigating and formulating the advice to be given the President." *Loving v. DoD*, 550 F.3d 32, 37 (D.C. Cir. 2008) (quotation marks, brackets, and ellipses omitted). The need to protect a confidential presidential communication would remain even if that communication contained a final policy decision — unlike the deliberative process privilege, which, because it applies only to pre-decisional and deliberative documents, can be overcome by a showing that the communication has been adopted and given binding effect as the government's working law. *See Merrill*, 443 U.S. at 360 n.23 ("It should be

obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges.").

In any event, the Court need not decide whether the working law doctrine could ever apply to materials protected by the presidential communications privilege, because here the material withheld pursuant to Exemption 5 consists of "advice and recommendations" from the Attorney General to the President, *see* OIP Decl. ¶¶ 8-9, not a binding final legal determination or ultimate governmental decision. Indeed, the Government has specifically shown that both documents are pre-decisional communications of advice that were provided as part of governmental deliberations and thus are also subject to the deliberative process privilege. *Id.* ¶¶ 11, 13-16. They accordingly cannot be working law. *See N.Y. Times*, 806 F.3d at 687.

B. The Government Amply Justified the Assertion of Exemption 5 and the Deliberative Process, Attorney-Client, and Presidential Communication Privileges

The Court should also reject ACLU's assertion that the Government has failed to demonstrate that all materials withheld pursuant to Exemption 5 are privileged. *See* ACLU Br. at 26-32. The Government's initial memorandum and supporting declarations amply explained and justified the basis for each privilege assertion, and, to further assist the Court, the Government is providing additional information in supplemental declarations that accompany this memorandum.

1. Deliberative Process Privilege

ACLU does not contest that the governing standard requires simply that, to be protected by the deliberative process privilege, an intra-agency or inter-agency document must be both "'predecisional' and 'deliberative.'" *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002). Nor can

there be dispute that the Government need not "identify a specific decision" to establish a document's predecisional nature. *Sears*, 421 U.S. at 151 n.18; *accord Tigue*, 312 F.3d at 80.

ACLU overstates, however, the specificity or degree of detail with which the Government must discuss each document as to which the deliberative process privilege is asserted, by drawing from a handful of cases that found a particular governmental showing insufficient to assert the existence of an inflexible general rule of how the Government must demonstrate that the privilege applies in every case. *See* ACLU Br. at 27 (citing *Sen. of P.R. v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987); *Nat'l Day Laborer Org. Network v. ICE*, 811 F. Supp. 2d 713, 743 (S.D.N.Y. 2011); *Auto Club of N.Y. v. Port of N.Y. & N.J.*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013)). Even the one appellate case ACLU cites recognizes that acceptable proof in FOIA cases can vary considerably, and that "general guidelines are of limited utility in this area." *Sen. of P.R.*, 823 F.2d at 586; *see also, e.g.*, *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006) ("we focus on the functions of the *Vaughn* index, not the length of the document descriptions" . . . and "[a]ny measure will adequately aid a court if it 'provide[s] a relatively detailed justification, specifically identif[ies] the reasons why a particular exemption is relevant and correlate[s] those claims with the particular part of a withheld document to which they apply") (quoting *Mead Data Cent., Inc. v U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)). Thus, notwithstanding ACLU's arguments, agencies' submissions are sufficient where they provide "reasonably detailed explanations why any withheld documents fall within an exemption," *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994), and, "especially where" — as here — "the agency has disclosed and withheld a large number of documents, categorization and repetition provide efficient vehicles by which a court can review withholdings that implicate the same exemption for similar reasons." *Judicial Watch*, 449 F.3d at 147.

Nor must all withholdings be justified in a public declaration if doing so would disclose the sensitive information sought to be protected. *See, e.g.*, *N.Y. Times Co. v. DOJ*, 758 F.3d 436, 440 (2d Cir. 2014) (requiring government to disclose entries on classified index, "unless those materials themselves reveal sensitive information"); *see also Hayden v. NSA*, 608 F.2d 1383, 1384-85 (D.C. Cir. 1979). This is an important consideration in this case, in which many privileged documents at issue are also classified, and detailed descriptions of the deliberations or communications at issue would reveal privileged and/or classified information. *See, e.g.*, Supp. CIA Decl. ¶ 5 (because CIA's privileged documents at issue concern "sensitive intelligence collection methods," disclosure "of the facts, analysis and even citations to legal authorities in this context would tend to reveal . . . the underlying classified material associated with those programs and techniques"); Supp. NSA Decl. ¶ 4 (the "mere subject matter of these memoranda and opinions pertains to classified NSA operations and activities that have not been publicly acknowledged," and "release of even the basic factual or legal background in these memoranda could reasonably be expected to cause harm to the national security or an interest protected by statute"; "even the title and subject matter of these classified documents would tend to reveal classified and protected information").

Indeed, one of the cases that ACLU cites is not even a FOIA case, but rather addresses a discovery dispute regarding the sufficiency of a privilege log under Federal Rule of Civil Procedure 26 and Local Civil Rule 26.2; even so, the court there recognized the permissibility of using a "categorical" log rather than making detailed document-by-document entries in every case. *See Auto Club*, 297 F.R.D. at 59-60. ACLU also relies heavily on the D.C. Circuit's decision in *Senate of the Commonwealth of Puerto Rico*, which found an agency explanation overly "conclusory," 823 F.2d at 585, and which described the agency's obligation as to explain

"'what deliberative process is involved, and the role played by the documents in issue in the course of that process.'" *Id.* at 585-86 (quoting *Coastal States*, 617 F.2d at 868). But even that decision did not require a specific format of submission, *id.* at 586, and, at any rate, nothing in the decision can possibly override the later-issued explicit Second Circuit holding that an agency asserting the deliberative process privilege need not identify the specific decision that the deliberation preceded. *Tigue*, 312 F.3d at 80. And both the Second and the D.C. Circuits have recognized that agencies do not need to reveal privileged or otherwise protected details in order to justify their withholdings under FOIA exemptions. *See N.Y. Times*, 758 F.3d at 440; *Hayden*, 608 F.2d at 1384-85.

Here, as explained below, the agencies' declarations, even if not identifying by name particular authors or recipients, do provide significant information about each record, in general explaining the type of employee who authored a given record (*e.g.*, DOJ attorney or agency attorney), who received it (typically a client agency decision-making official), and what each document's purpose was. The agencies' initial showings sufficiently justify their privilege assertions, and, in some instances, the agencies are providing supplemental declarations to further demonstrate the applicability of the privileges they assert.

a. Central Intelligence Agency

As noted, the CIA withheld two types of documents — all also classified and so also protected by Exemptions 1 and 3 — on deliberative process grounds. The first category was "legal advice conveyed by attorneys in the CIA's Office of General Counsel to Agency employees and by Department of Justice attorneys to CIA officials." CIA Decl. ¶ 23. Each such document provided advice regarding specific proposals, was "one part of" agency decision-making, and "does not constitute the Agency's final decision to undertake a particular operation

or action." *Id.* These memoranda thus are paradigmatic examples of deliberative advice documents subject to both the attorney-client and deliberative process privileges.

ACLU nevertheless puzzlingly objects that CIA and other agencies "failed to include basic information about who authored the withheld documents, who ultimately received copies, and what role these individuals played in each agency's" deliberations. ACLU Br. at 28. This argument fails for numerous reasons. First, ACLU's argument disregards that the CIA has asserted Exemption 3 as to each document at issue, and has explained that the CIA Act "protects from disclosure information that would reveal," among other things, the "names" and "official titles" of "personnel employed by the CIA." CIA Decl. ¶ 21; *see N.Y. Times*, 758 F.3d at 440 (*Vaughn* index need not include materials that "themselves reveal sensitive information"); *Hayden*, 608 F.2d at 1384-85. These considerations limited the CIA's ability to provide more information about the classified documents whose description ACLU faults. *See* ACLU Br. at 28; Supp. CIA Decl. ¶ 5 (explaining that more details about the privileged and classified memoranda at issue cannot be publicly provided without disclosing classified and privileged information that is being protected).

ACLU also disregards both the detailed showing that CIA has made, and that as a matter of law the "materials provided by the agency may take any form so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege." *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 128 (D.C. Cir. 1987). The Second Circuit recently observed that a "so-called 'classical' *Vaughn* index . . . is one that lists titles and descriptions of documents with cites to claimed FOIA exemptions for each document listed" — conspicuously not mentioning names of authors or recipients as core requirements. *N.Y. Times*, 758 F.3d at 439 (citing *Keys v. DOJ*, 830 F.2d 337, 349 (D.C. Cir. 1987), and *Judicial Watch v. DOJ*, 365 F.3d

1108, 1128-36 (D.C. Cir. 2004)). Indeed, the descriptions provided here are no less informative than the information provided in other national security-related FOIA cases brought by ACLU, in which names of authors or recipients of documents were not disclosed as part of the government's evidentiary showing justifying its claimed exemptions. *See, e.g.*, *ACLU v. DOJ*, 12 Civ. 794 (CM) (S.D.N.Y.), Dkt. Nos. 81-2 to 81-4 (index of responsive OLC records with redactions consistent with Second Circuit's rulings), Dkt. No. 100-2 (CIA index), Dkt. No. 101-1 (DOD index), Dkt. No. 128 (order sustaining the vast majority of the government's withholdings), *appeal pending*, Nos. 15-2956, 15-3122(XAP) (2d Cir.); *ACLU v. DOJ*, 15 Civ. 1954 (CM) (S.D.N.Y.), Dkt. No. 38-1 (OLC index), Dkt. No. 40-8 (State index), Dkt. No. 42-1 (CIA index), Dkt. No. 43-5 (OIP index), Dkt. No. 44-1 (NSD index), Dkt. No. 64, at 16-17 (DOD index), Dkt. No. 46, at 20, 27-28 (government memorandum of law asserting protection of names of intelligence community personnel under Exemption 3 and the CIA Act and National Security Act, and protection of names of lower-level government employees under Exemption 6), Dkt. No. 52, at 6 n.10 (ACLU memorandum of law not challenging withholding of names of government personnel under Exemptions 3 or 6).

And there is no legal authority known to the Government requiring the specification of individual authors' and recipients' names where, as here, the agency's explanation provides sufficient information to establish that the asserted privilege applies, including the nature of the communication, the attorney status when applicable and role played by its author, the purpose of the communication, and the institutional role of the recipients. *See Carney*, 19 F.3d at 812 (agency meets burden if it provides "reasonably detailed explanation[] why any withheld documents fall within" asserted exemption); *see also Judicial Watch*, 449 F.3d at 146 ("[a]ny measure will adequately aid a court if it 'provide[s] a relatively detailed justification, specifically

identif[ies] the reasons why a particular exemption is relevant and correlate[es] those claims with the particular part of a withheld document to which they apply.") (quoting *Mead Data Cent.*, 566 F.2d at 251); *see also Delaney, Migdail & Young*, 826 F.2d at 128 ("The materials provided by the agency may take any form so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege."); *Gallant v. NLRB*, 16 F.3d 168, 172-73 (D.C. Cir. 1994) (same). Here, the CIA has provided a detailed sworn explanation of the nature and contents of these communications. That explanation is entitled to "a presumption of good faith," *see Carney*, 19 F.3d at 812, and constitutes the required "reasonably detailed explanation[] why any withheld documents fall within" Exemption 5. *Id.*

The CIA also asserted Exemption 5 as to pre-decisional, deliberative portions of a small number of classified documents that also are subject to Exemptions 1 and 3, namely, certain informal talking points and outlines used by presenters concerning the requirements of E.O. 12,333 with the intention of "inform[ing] subsequent Agency decision-making regarding the use of specific authorities." *See* CIA Decl. ¶ 24; ACLU Br. at 29. CIA has provided a supplemental declaration providing additional information regarding the nature and function of these communications, and the decisions that the documents preceded, making clear that the withheld information is pre-decisional and deliberative, and qualifies for protection under both the deliberative process and the attorney-client privileges. *See* Supp. CIA Decl. ¶ 12. The documents were "talking points" that were "utilized as a tool for Agency attorneys to provide legal guidance to their clients on specific topics related to E.O. 12333," and are part of a "larger process of providing training" and "confidential legal advice"; moreover, they are "notes and memory aids for presenters, not finished guidance provided to Agency personnel." *Id.* In any event, each of these documents is also classified and barred from release by statute, and so is also

protected by Exemptions 1 and 3. *See* CIA Decl. Ex. A (*Vaughn* index asserting Exemptions 1 and 3 as to CIA 42, 43, 45, and 46); Supp. CIA Decl. ¶ 9 (explaining deliberative, pre-decisional nature of CIA 22, and further explaining that the document is classified and protected by the National Security Act in its entirety).

b. Defense Intelligence Agency

As noted, the DIA has waived its reliance on Exemption 5 as to the sole DIA document at issue in this motion, DIA V-4. DIA instead relies solely on Exemptions 1 and 3 as to the withheld portions of that document. *See supra* at 12 n.6 ; Supp. DIA Decl. ¶¶ 5-7.

c. National Security Agency

NSA asserts deliberative process privilege protection as to just two documents, NSA 11 and NSA 12, both of which are also subject to Exemptions 1 and 3. *See* NSD Decl. ¶¶ 11, 16; *see also* NSA Decl. ¶ 23 ("All information withheld pursuant to Exemption 5 is also exempt from public release based on Exemptions 1 or 3 of the FOIA."). NSA 11 and 12 "contain memoranda from NSD attorneys to other Government attorneys, and they provide advice with respect to one or more NSA programs or other intelligence activities." NSD Decl. ¶ 15. The Classified NSA Declaration provides additional information about these two documents, but even the unclassified submissions amply justify assertion of the deliberative process privilege, as well as the attorney-client privilege.

First, to the extent ACLU objects, as it did with respect to CIA, to NSA's decision to describe its privileged documents without reference to specific names or recipients, ACLU Br. at 28, ACLU again overlooks that NSA has asserted Exemption 3 as to all of these documents, and that the NSA Act, like the CIA Act, generally bars disclosing names of NSA employees. *See* 50 U.S.C. § 3605(a) ("Except as provided in subsection (b) of this section, nothing in this chapter or any other law . . . shall be construed to require the disclosure of the organization or any function

of the National Security Agency, or any information with respect to the activities thereof, *or of the names, titles, salaries, or number of the persons employed by such agency*") (emphasis added).

Moreover, NSA has provided ample information to justify its invocation of the deliberative process privilege and, accordingly, Exemption 5. The two documents in question "related to and preceded a final decision regarding one or more NSA programs or other intelligence activities," and they "reflect ongoing deliberations by government attorneys on DOD procedures and one or more NSA programs," describing "views and recommendations of Department attorneys as part of a process to assist the Government's decision-making prior to an ultimate decision." NSD Decl. ¶ 18; *see also* NSA Decl. Ex. 13 (*Vaughn* index entries providing dates, indicating that title of document is classified, and describing nature and function of the document). NSA's withholdings pursuant to Exemption 5 are amply justified, *see Carney*, 19 F.3d at 812, and the Court should require no more justification, particularly because where, as here, classified information is at issue, the Government need not justify its withholdings in a public declaration if doing so would disclose the sensitive information sought to be protected. *See, e.g.*, *N.Y. Times*, 758 F.3d at 440; *Hayden*, 608 F.2d at 1384-85.

d. DOJ—National Security Division

ACLU challenges NSD's withholding in full of the 19 documents listed in NSD's *Vaughn* index, Exhibit A to its declaration, and the partial withholding of two additional documents set forth as Exhibits B and C to the declaration. ACLU objects generally that all agencies' submissions "lack the detail required," including as to author names, subject matter, and the role each document played in internal deliberations, ACLU Br. at 28, but ACLU identifies no specific alleged deficiencies in NSD's declaration and *Vaughn* index other than criticizing one isolated statement in the declaration that various documents were "prepared by

NSD lawyers for other attorneys to assist those other attorneys in representing the Government, and were sought by a decision-maker for the Government." *Id.* (quoting NSD Decl. ¶ 14). Even this criticism is misplaced, because that paragraph supports NSD's invocation of the attorney-client privilege, not the deliberative process privilege. *See* NSD Decl. ¶ 14. Application of the deliberative process privilege, where applicable, to documents addressed by NSD is discussed in detail in paragraphs 16-18 of the declaration, with each document's date, title or description, and a summary of applicable exemptions listed document by document in the declaration's *Vaughn* index. *See* NSD Decl. Ex. A. Moreover, the NSD has now provided what additional information it can in a supplemental declaration, *see* Supp. NSD Decl. ¶ 10, bearing in mind that almost all of these documents are also subject to Exemptions 1 and 3, and that the Government need not make disclosures that would reveal the sensitive information sought to be protected. *See N.Y. Times*, 758 F.3d at 440; *Hayden*, 608 F.2d at 1384-85. Finally, to the extent ACLU objects specifically to the omission of specific author and recipient names from NSD's declarations, ACLU Br. at 28, this criticism is misplaced, both because NSD has amply demonstrated the applicability of the asserted privileges and individuals' names are not required, *see supra* at 21-23 (citing, *e.g.*, *Carney* and *Judicial Watch*), and because the names of NSD employees are protected by FOIA Exemption 6, which NSD asserted in its production and response to ACLU's request, *see* Supp. NSD Decl. ¶ 13, Ex. A, and which ACLU has not challenged in this case, *see* Gov't Br. at 8 n.3.

ACLU appears not to challenge privileges asserted as to some NSD documents that ACLU omits from its Index of Contested Documents, Manes Decl. Ex. A, and any claims relating to these documents therefore should be deemed abandoned. NSD 2, for example, is subject to the deliberative process privilege because it is a pre-decisional and deliberative draft

set of procedures, which ultimately were not adopted by the Attorney General. *See* DHS Decl. ¶¶ 12-13 (explaining NSD 2 is "merely a draft proposal that was rejected in an inter-agency decision making process that is still ongoing"). NSD 7, 37, 42, 44, and 47 — all of which are classified documents concerning certain compliance incidents — also do not appear on the ACLU's Index of Contested Documents.

2. Attorney-Client Privilege

As with the deliberative process privilege, the ACLU appears to agree with the Government's explanation of the broad purposes and elements of the attorney-client privilege — to promote the public interest in "the observance of law and administration of justice" by encouraging full and frank communication between attorneys and clients, and, in the government context, to protect "most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance." *Cnty. of Erie*, 473 F.3d at 418. The party invoking the privilege must establish a "communication between client and counsel" that was "intended to be and was in fact kept confidential" and was "made for the purpose of obtaining or providing legal advice." *Id.* at 419; Gov't Br. at 55-56; ACLU Br. at 30-31.

ACLU devotes less than two pages of its brief to its discussion of the attorney-client privilege, and largely argues that CIA, NSA, and NSD, by failing to identify attorney authors of legal memoranda and client recipients of those memoranda by name, have failed to provide sufficient facts to permit the Court to assess each agency's privilege assertion. *See* ACLU Br. at 30-32. In addition to amounting to a concession that other documents, including all of those withheld by OLC, fall properly within the scope of the privilege, this contention misses the mark, because it fails to acknowledge the meaningful information that each agency has provided to

establish that the privilege attaches to each of these attorney-authored communications to agency or governmental clients.

Where the CIA invoked the attorney-client privilege, for example, it provided *Vaughn* index entries that each provide reasonably detailed descriptions of the document at issue, and explained the basis of the asserted privilege. For example, the first CIA document for which attorney-client privilege is asserted is described as a classified memorandum from a CIA attorney to a CIA component providing legal guidance on a specific issue, which entailed discussing, among other things, specific intelligence sources, methods and activities. CIA Decl. Ex. A, Entry 13. The "entire document . . . consists of legal advice that was solicited by an Agency component and information provided by the component in furtherance of that advice." *Id.* This functional explanation of the role played by the document's author and recipient, and the purpose and nature of the communication, fully establish the elements of an attorney-client privileged communication, and no more is required.

The same is true of *Vaughn* entries 14 (classified memorandum from CIA attorney to CIA component providing legal advice on a particular issue, with the document consisting of legal advice and information provided in connection with obtaining that advice), 16 (same), and numerous similar entries. In each instance, the CIA has explained functionally, on a document-by-document basis, what type of agency employee fulfilling what type of function (typically an attorney) sent each document to what type of recipient (a client agency component) for what purpose (the provision of confidential legal advice). This amply establishes the elements of the attorney-client privilege, and no more is required, particularly given the classified and privileged nature of each of these highly sensitive documents. *See N.Y. Times*, 758 F.3d at 440; *Hayden*, 608 F.2d at 1384-85; *see generally Carney*, 19 F.3d at 812 (agency meets burden if it provides

"reasonably detailed explanation[] why any withheld documents fall within" asserted exemption); *see also Judicial Watch*, 449 F.3d at 146 ("[a]ny measure will adequately aid a court if it 'provide[s] a relatively detailed justification, specifically identif[ies] the reasons why a particular exemption is relevant and correlate[s] those claims with the particular part of a withheld document to which they apply.") (quoting *Mead Data Cent.*, 566 F.2d at 251).

As discussed above, *see supra* at 21-23, the Court should reject ACLU's insistence that specific names of individual authors and recipients be disclosed, ACLU Br. at 31; the CIA's functional explanation was detailed and thorough, the CIA Act bars release of CIA employees' names, *see* CIA Decl. ¶ 21, and providing specific names of authors and recipients would not be necessary or even helpful to the Court's assessment of the CIA's explanation. More generally, CIA has explained that the classification of the CIA documents at issue leads to the unsurprising result that "disclosure of the facts, analysis and even citations to legal authorities" in these documents would reveal both the nature of legal advice sought, and the "underlying classified material," and CIA has, following careful review, determined that "there is no segregable information that can be released from these memoranda." Supp. CIA Decl. ¶ 5.

ACLU's criticisms of the attorney-client privilege assertions by NSD and NSA fare no better. NSD, for example, carefully explained why the attorney-client privilege protects each document for which the privilege was asserted. *See, e.g.*, NSD Decl. ¶ 14 & Ex. A (explaining that three documents — NSD 17, the vast majority of NSD 4, and an email message in NSD 31 — discuss legal issues pertaining to an NSA program, provide legal advice from NSD lawyers to other attorneys to assist those attorneys in representing the government, and were sought by a government decision-maker to obtain legal advice). Moreover, with regard to NSD 17 and a portion of NSD 4, additional information is provided in the classified NSA declaration, and more

information about NSD 31 is provided in the unclassified NSA declaration. NSA Decl. ¶¶ 45-46 (explaining that the document concerns NSA collection and analysis programs, contains details regarding SIGINT sources and methods, and further explaining that in most instances additional information including document titles cannot be disclosed because the titles themselves are classified because they would reveal information about intelligence sources).

This same explanation defeats ACLU's contentions regarding NSA's attorney-client privileged documents. Not only do NSA's declaration and *Vaughn* index explain that the withheld documents are legal memoranda providing advice about intelligence activities to agency non-attorney and/or attorney clients, but NSA also provides additional information in its *ex parte* classified submission, and it explains that it cannot provide more on the public record without disclosing classified information. *See id.* ¶¶ 45-46, Ex. 13 (*Vaughn* index, providing dates, title to extent not classified, and description of each document, as well as explanation of applicable exemptions). Indeed, NSA's document descriptions are prepared with unmistakable care, balancing the need to avoid harmful disclosures of classified information with its goal of providing a meaningful description that will enable the Court's review of the reasons behind each asserted exemption. For example, the first NSA document as to which privilege is asserted, NSA 7, is described as a six-page memorandum dated November 10, 2010, referred to as "NSA OGC Legal Memorandum (Information Memorandum; AGC(IL)-756-2010)," and that was "written by a senior NSA intelligence law attorney for the Deputy General Counsel analyzing a classified NSA SIGINT activity under EO 12333 and USSI 18," with "non-segregable details of classified NSA activities, including COMINT sources and methods." *Id.* Ex. 13, at 1. Far from deficient, this explanation gives a clear picture of the nature of the document being withheld and

the reasons it is validly subject to the attorney-client privilege. NSA's other *Vaughn* entries are comparably detailed and informative. *See generally Id.* Ex. 13.

ACLU's rigid insistence that names of authors and recipients must also be disclosed should be rejected because the NSA Act, like the CIA Act, bars disclosure of names of most NSA personnel, while NSD personnel's names are protected by Exemption 6, *see supra* at 26, and because no authority inflexibly requires the provision of such information, while its provision here is unnecessary to permit reliable judicial review in light of the extensive information that has been provided.

3. Presidential Communications Privilege

As ACLU concedes, the Government has established the applicability of the presidential communications privilege over two documents, NSA 12 and NSD 18, except to the extent that those two documents purportedly constitute working law in a manner that overcomes the presidential communications privilege. *See* ACLU Br. at 15 n.4. Because ACLU's working law contentions are erroneous, *see supra* Point I.A, and because ACLU does not otherwise challenge the Government's demonstration that the privilege applies, the Court should uphold the Government's assertion of this privilege.

CIA has now identified two additional documents, already withheld in full under Exemptions 1 and 3, to portions of which the presidential communications privilege also applies. *See* Supp. CIA Decl. ¶ 9 & n.3. As CIA explains, portions of CIA 22 are an authorization request by the CIA Director to a White House official, and the White House's communication back to CIA of the President's grant of the authorization in question, whose nature is classified. *Id.* ¶ 9. And CIA 36 is correspondence between the CIA and the National Security Council. *Id.* ¶ 9 n.3. Thus, in addition to being subject to Exemptions 1 and 3 in its entirety, portions of CIA

22 and 36 are also subject to the presidential communications privilege, and therefore protected by Exemption 5.

II. THE GOVERNMENT'S ASSERTIONS OF EXEMPTIONS 1 AND 3 SHOULD BE UPHELD

Unlike its Exemption 5 challenges, ACLU's challenge to the agencies' invocations of Exemptions 1 and 3 is limited. It argues only that the agencies did not properly segregate non-protected information in three categories of documents: legal memoranda, inspector general and compliance reports, and rules and regulations. *See* ACLU Br. at 35-43. But even this limited argument rests on a fundamental misunderstanding of the scope of Exemptions 1 and 3. The agencies' segregability determinations with respect to Exemption 1 and 3 were correct, and in any event, for the reasons explained above, virtually all of these documents are also properly withheld under Exemption 5.

A. The Government Properly Asserted Exemptions 1 and 3 with Respect to Legal Memoranda

With respect to legal memoranda, ACLU claims, incorrectly, that "pure" legal analysis — "*i.e.*, constitutional and statutory interpretation, discussions of precedent, and legal conclusions" — cannot be classified. ACLU Br. at 35 (improperly citing *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 119-20 (2d Cir. 2014), for the proposition that "legal analysis is 'not an intelligence source or method' and . . . [such] analysis can be withheld under Exemption 1 only to the extent it is inextricably intertwined with properly classified facts"). This argument is based on a misunderstanding of both the Executive Order regarding classification and the applicable case law.

Section 1.4 of Executive Order 13,526 provides that information: "shall not be considered for classification unless its unauthorized disclosure can reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this

order, and *it pertains to* one or more of the following: [including] (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology . . .” (emphasis added).

The Executive Order does not require that information must itself *be* an intelligence source or method in order to be classified, but only that the information must *pertain to* an intelligence source or method. As the D.C. Circuit has recently reiterated in examining this very language in the context of an identical argument by ACLU, “pertains is not a very demanding verb.” *ACLU v. DOJ*, No. 15-5217, __ F. App’x __, 2016 WL 1657953, at *2 (D.C. Cir. Apr. 21, 2016) (quoting *Judicial Watch, Inc. v. DoD*, 715 F.3d 937, 941 (D.C. Cir. 2013)). The district court decision upheld by the D.C. Circuit explained that “[f]or something to pertain to something else, it must be related or connected to such a thing.” *ACLU v. CIA*, 109 F. Supp. 3d 220, 236 (D.D.C. 2015), *aff’d sub nom. ACLU v. DOJ*, 2016 WL 1657953 (D.C. Cir. Apr. 21, 2016). When legal memoranda discuss intelligence operations, the district court explained, it is “entirely logical and plausible that the legal analyses in [such] memoranda pertain to intelligence activities, sources, and methods.” *Id.*; *accord ACLU v. DOJ*, 681 F.3d 61, 72 (2d Cir. 2012) (upholding withholding of information that “pertains to an intelligence activity”); *N.Y. Times Co. v. DOJ*, 915 F. Supp. 2d 508, 535 (S.D.N.Y. 2013) (“legal analysis that ‘pertains to’ [specified categories in § 1.4] can indeed be classified”), *aff’d in relevant part*, 756 F.3d at 113 (“We agree with the District Court’s conclusion[] that the OLC-DOD Memorandum was properly classified . . . .”). Moreover, as the Second Circuit has observed, “in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation.” *N.Y. Times*, 756 F.3d at 119.

Similarly, Exemption 3 encompasses any information that “relates to” an intelligence source or method protected by the National Security Act. *ACLU v. DOJ*, 681 F.3d at 76. Thus,

as the Second Circuit has repeatedly recognized, legal analysis can be properly classified under Exemption 1 and protected under Exemption 3. *See N.Y. Times*, 806 F.3d at 687 (OLC memoranda properly withheld under Exemptions 1 and 3).

ACLU's argument fails to distinguish between memoranda that discuss legal aspects of publicly acknowledged government programs and those that discuss legal aspects of undisclosed, classified government programs. OLC 9, a non-privileged submission to the Foreign Intelligence Surveillance Court, discusses warrantless electronic surveillance, an officially acknowledged program. *See* OLC Decl. ¶ 9 & Ex.G; Office of Director of Nat'l Intel., *DNI Announces the Declassification of the Existence of Collection Activities Authorized by President George W. Bush Shortly After the Attacks of September 11, 2001* (Dec. 21, 2013), https://icontherecord.tumblr.com/post/70683717031/dni-announces-the-declassification-of-the (last visited June 7, 2016); *see also* NSA Supp. Decl. ¶ 5 (same for NSA 28). Similarly, the OLC-DOD memorandum at issue in the Second Circuit's *N.Y. Times* decision discussed the legality of the so-called "targeted killing" of Anwar al-Awlaki, an operation that was officially acknowledged, and the legal basis for which was discussed in detail in a subsequently officially acknowledged draft "DOJ White Paper." 756 F.3d at 110. This draft white paper "virtually parallel[d] the OLC-DOD Memorandum in its analysis of the lawfulness of targeted killings," and former Attorney General Holder publicly acknowledged a relationship between the white paper and "underlying OLC advice." *Id.* at 115. In light of the draft white paper's acknowledgment, the circuit court held that the Government had waived the protections of Exemptions 1 and 5 over the legal analysis in the OLC-DOD memorandum. *See id.* at 117.

There has been no such public acknowledgment of the operations discussed in the legal memoranda withheld in full under Exemptions 1 and 3 by CIA, OLC, FBI, and NSA. As NSA's

supplemental declaration explains with respect to the memoranda it withheld in full under Exemptions 1 and 3 (including NSA 7, 9, and 11-21), "the mere subject matter of these memoranda and opinions pertains to classified NSA operations and activities that have not been publicly acknowledged." Supp. NSA Decl. ¶ 4. In such a circumstance, revealing even the content of any "constitutional and statutory interpretation, discussions of precedent, and legal conclusions," ACLU Br. at 35, would tend to disclose the nature of the classified program at issue because "the formulation of the legal analysis itself could enable [ACLU] and the public to discern classified or protected facts about the program or activity being discussed." Supp. NSA Decl. ¶ 4. The same considerations justify NSA's withholding of these legal memoranda under Exemption 3. *Id.* ¶ 7 ("[T]he release of any portion of these memoranda and opinions would enable [ACLU] and the public to discern information about NSA programs, operations, and activities that is both classified and protected from disclosure by [the relevant Exemption 3] statutes.").

CIA's reply declaration similarly explains that "disclosure of the facts, analysis and even citations to legal authorities" in the context of "attorney-client communications about sensitive intelligence collection methods considered by the Agency . . . would tend to reveal not only the nature of the legal advice sought, but also the underlying classified material associated with these programs and techniques." Supp. CIA Decl. ¶ 5.[7] FBI's supplemental declaration also makes clear that the withheld information in its legal memoranda "provides detailed legal analysis, discussion and descriptions of law enforcement techniques, sources and methods used by the FBI

[7] With respect to certain OLC memoranda, in contrast, NSA has stated that it has not yet conducted a segregability review of these documents for purposes of Exemptions 1 and 3 because they were withheld in full under Exemption 5, but would be prepared to do so in the event the Court concluded that any information in these memoranda was not properly withheld under Exemption 5. *See* NSA Decl. ¶ 84 n.15; Supp. NSA Decl. ¶ 5; ACLU Br. at 37 n.13.

to collect intelligence," and states that "[t]he sources and methods discussed in this memo are classified and thus, all discussion about these methods is classified as well." Supp. FBI Decl. ¶ 9 (NSD 9); *accord id.* ¶ 10 (OLC 5 and OLC 6 discuss "classified aspects pertaining to intelligence sources and methods"); *see N.Y. Times*, 756 F.3d at 119 ("in some cases the very fact that legal analysis was given concerning a planned operation would risk disclosure of that operation.").

These determinations are entitled to "substantial weight," and must be upheld so long as they are "logical" or "plausible." *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (internal quotation marks omitted). The Court should thus uphold the withholding under Exemption 1 of the responsive legal memoranda as properly classified.

B. The Government Properly Asserted Exemptions 1 and 3 with Respect to Inspector General and Compliance Reports

Similarly, with respect to inspector general and compliance reports, the agencies' assertions of Exemptions 1 and 3 are justified because of the nature of the programs and operations discussed in those reports. The unredacted portions of NSA's reports to the Intelligence Oversight Board, such as NSA 79, do not disclose the existence of classified, nonpublic operations or programs. *See* Supp. NSA Decl. ¶ 13. In contrast, the withheld NSA, CIA, and NSD reports pertain to nonpublic, classified programs or operations and thus are subject to Exemptions 1 and 3.

With respect to the CIA reports (CIA 8, 10, 12, 30, and 77),[8] the agency's supplemental declaration explains that "[t]he redacted information consists of details related to specific

[8] These documents are "two fiscal year reports provided to congressional oversight committees on activities conducted under E.O. 12333; follow-up responses to questions posed by the Senate Select Committee on Intelligence in connection with a fiscal year report; and two reports authored by CIA's Office of Inspector General . . . on compliance with E.O. 12333." Supp. CIA Decl. ¶ 6.

intelligence gathering activities of the Agency and discussions of underlying intelligence sources and methods used in the course of those operations." Supp. CIA Decl. ¶ 7. Relatedly, the redacted information in CIA 10, under the headings "Targeting Standards" and "The Department of Justice's Role in E.O. Compliance," "discuss specifics of the Agency's intelligence collection — both methods and process — which remain classified." *Id.* ¶ 8. Such information is at the heart of the protections of Exemptions 1 and 3.

As for the NSD compliance reports, which were withheld by NSA (NSD 7, 37, 42, 44, and 47), NSA's declarant states that "these documents concern in their entirety specific classified operations or activities of the Agency that have not been publicly acknowledged and do not contain any segregable information." NSA Supp. Decl. ¶ 13. "The compliance matters discussed therein are inextricably intertwined with factual descriptions of NSA functions and activities that are both classified and protected from public disclosure by statute." *Id.* ACLU's comparison of the withholding in full of the NSD reports with the only partial redactions in NSA 79 is inapposite because NSA 79, "in contrast [to the NSD reports], generally describes a number of different compliance-related matters . . . includ[ing] publicly acknowledged NSA functions and activities," which could be segregated from "material that remains classified and/or protected from disclosure by law, to include factual descriptions of specific NSA operations or activities that have not been publicly acknowledged." *Id.*

ACLU also challenges NSA's redaction of the number of certain types of compliance incidents in NSA 79, *see* ACLU Br. at 41-42, but as NSA's reply declaration clarifies, these redactions were not made to "prevent embarrassment" to the agency, Supp. NSA Decl. ¶ 12. Instead, this information was redacted under Exemption 3 because "the withheld numbers all relate to NSA's collection, analysis, and dissemination of signals intelligence for foreign

intelligence purposes and the manner in which NSA conducts compliance and oversight over that SIGINT mission," and thus this information "falls squarely within the scope of [50 U.S.C. § 3605] as it relates to both a core Agency function . . . and the compliance and oversight activities conducted in support thereof." *Id.* ¶ 10. Moreover, this information is also properly classified because "the disclosure of such numbers, in compilation with information that has been previously released," would permit potential surveillees "to determine the scope of NSA's collection activities under particular programs and/or NSA's ability and accuracy in determining the 'foreignness' of the selectors targeted for acquisition." *Id.* ¶ 11. Further, the "withheld numbers would allow an adversary to assess which NSA capabilities the Agency uses most frequently, and in turn to assess which of their communications may or may not be secure." *Id.*

Again, the agencies' determinations in this regard are entitled to "substantial weight." *See Wilner*, 592 F.3d at 73.

C. The Government Properly Asserted Exemptions 1 and 3 with Respect to Rules and Regulations

Finally, the agencies have conducted proper segregability reviews of their rules and regulations, which were largely released with only limited redactions. ACLU challenges only two of these withholdings: the withholding of the substance of CIA 11, a single-page CIA training slide entitled "AR 2-2 Collection Rules," and the partial withholding of information from NSD 94-125 that was supposedly included in a later version of the same document (Manes Decl. Ex. M).

CIA explains that though the title of CIA 11 refers to "rules," it actually "contains details about . . . specific intelligence collection techniques. It is not a recitation of the regulations." Supp. CIA Decl. ¶ 10. It is thus incorrect that CIA improperly withheld applicable rules in this document. As for NSD 94-125, and its supposed inconsistent redaction compared to the

document attached as Exhibit M to the Manes Declaration, NSA is "reviewing ACLU's assertions and hopes to complete its assessment within 30 days." Supp. NSA. Decl. ¶ 16 n.3.

* * *

In sum, the agencies have met their burden of showing that they engaged in a proper segregability analysis with respect to information withheld pursuant to Exemptions 1 and 3.

III. THE GOVERNMENT'S LIMITED INVOCATION OF EXEMPTION 7 SHOULD BE UPHELD

ACLU's challenge to FBI's and CIA's limited invocation of Exemption 7 is based on a misunderstanding of the scope of the exemption and of the meaning of "law enforcement purposes" underlying it. According to ACLU, "law enforcement purposes" and "intelligence purposes" are mutually exclusive concepts such that a document can have at most one of those purposes at a time. *See* ACLU Br. at 43-44.

Courts have acknowledged, however, that there is overlap between law enforcement and intelligence gathering for purposes of Exemption 7. In one case, a district court specifically rejected a FOIA requester's "suggest[ion] that intelligence gathering cannot be considered a law enforcement activity." *Kidder v. FBI*, 517 F. Supp. 2d 17, 27 (D.D.C. 2007). Instead, the court agreed with the FBI that it "is an agency specializ[ing] in law enforcement," that "its claim of a law enforcement purpose is entitled to deference," and that "[i]nvestigating terrorism is 'one of DOJ's chief law enforcement duties at this time.'" *Id.* (quoting *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 926 (D.C. Cir. 2003)) (internal quotation marks omitted). This result is far from unusual. *See Va.-Pilot Media Cos. v. DOJ*, __ F. Supp. 3d __, 2015 WL 7575916, at *6 (E.D. Va. Nov. 25, 2015) (approving FBI's withholding under Exemption 7(E) of records that "were compiled in furtherance of the FBI's law enforcement, national security, and intelligence missions" (internal quotation marks omitted)); *Shapiro v. DOJ*, 78 F. Supp. 3d 508, 520 (D.D.C.

2015) (same with respect to information relating to the "manner in which FBI applies and analyzes information for use in its investigations and intelligence purposes" and the agency's "law enforcement techniques utilized to conduct national security and intelligence investigations"); *Yagman v. DOJ*, No. CV 13-0354 PA EX, 2014 WL 1245305, at *10 (C.D. Cal. Mar. 22, 2014) (same with respect to "non-public investigative techniques and procedures utilized by the FBI to pursue its law enforcement and intelligence gathering missions"), *aff'd sub nom. Yagman v. U.S. Bureau of Prisons*, 605 F. App'x 666 (9th Cir. 2015); *see also Milner v. Dep't of Navy*, 562 U.S. 562, 582-83 (2011) (Alito, J., concurring) (discussing scope of "law enforcement purposes" in Exemption 7 to include preventing criminal activity and terrorist attacks). As a recent decision explained, "national security is within the realm of law enforcement purposes sufficient to justify withholding based on Exemption 7. '[W]e do not interpret law enforcement [for purposes of Exemption 7] as limited to criminal law enforcement . . . ; rather, we read the term as encompassing the enforcement of national security laws as well.'" *ACLU of S. Cal. v. USCIS*, 133 F. Supp. 3d 234, 242 (D.D.C. 2015) (quoting *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859, 862 (D.C. Cir. 1989)).

Moreover, ACLU's argument is also incorrect as a factual matter, as FBI explains in its supplemental declaration. "The FBI's dual function as both a national security and law enforcement agency are not mutually exclusive, but rather, they effectively work in concert. Intelligence collected under EO 12333 has a significant law enforcement purpose." FBI Supp. Decl. ¶ 11. Indeed, the agency has "the lead domestic role in investigating international terrorist threats to the United States, and in conducting counterintelligence activities to meet foreign entities' espionage and intelligence efforts directed against the United States." *Id.* ¶ 12. FBI uses "[i]nformation obtained pursuant to intelligence methods and techniques under EO 12333

. . . to identify new subjects, associates and terrorist cells both domestically and overseas" and to "identify and establish bona fide Confidential Human Sources . . . used in national security investigations." *Id.* ¶ 11. "[H]ow the FBI collects, disseminates and retains intelligence is all part of its law enforcement mission. The FBI routinely works with other state and federal law enforcement agencies to thwart terrorist and criminal activities, providing them with information collected pursuant to authorities under EO 12333." *Id.* ¶ 13.

The FBI's declaration and reply declaration amply demonstrate why the documents withheld under Exemption 7 (FBI 13-15, FBI 30-35, FBI 57-65, NSD 202-207, and CIA 4) relate to law enforcement, properly defined. FBI 13-15 and NSD 202-207, for example, set out rules and guidelines that FBI must follow when it conducts criminal and national security investigations with regard to intelligence collection. *See id.* ¶¶ 15-16. FBI 30-35 and FBI 57-65 similarly set out legal requirements and agency policies for collecting intelligence. *See id.* ¶¶ 17-18. These documents are used "to effectively integrate information collected pursuant intelligence and law enforcement techniques into the FBI's overall law enforcement mission." *Id.* ¶ 17.

With respect to CIA 4, this document contains guidelines concerning intelligence sharing between FBI and CIA. As FBI's declarant explains, "[i]nformation collected by the FBI, regardless of being characterized as 'traditionally criminal' or 'intelligence,' is used by the FBI for its overall law enforcement missions of combating counterintelligence and counterterrorism threats both domestically and overseas." *See id.* ¶ 14.[9]

[9] The same portions of CIA 4, the CIA-FBI memorandum of understanding, that were withheld under Exemption 7(E) were also properly withheld under Exemptions 1 and 3. As CIA's supplemental declaration notes that the redacted material "consists entirely of foreign intelligence and counterintelligence measures governing operational activities of the CIA and

These documents thus all amply satisfy the requirements of Exemption 7(E), that the withheld information must constitute "either (1) techniques and procedures for law enforcement investigations, or (2) guidelines for law enforcement investigations if disclosure of such guidelines could reasonably be expected to risk circumvention of the law." *Bishop v. DHS*, 45 F. Supp. 3d 380, 387 (S.D.N.Y. 2014).

IV. THE COURT SHOULD REJECT ACLU'S ARGUMENTS BASED ON SUPPOSED "OFFICIAL ACKNOWLEDGMENT" OF WITHHELD RECORDS

A. Public Release of Documents Containing Legal Analysis Does Not Invalidate Privileges as to Other Confidential Advisory Documents

ACLU invokes the "official acknowledgment" doctrine to urge release of information that supposedly already has been disclosed to the public. *See* ACLU Br. at 11-14 (citing *N.Y. Times*, 756 F.3d at 114, 119-20). ACLU, however, mischaracterizes applicable law, and no public release or official acknowledgment by the government defeats the exemptions asserted as to the documents ACLU challenges on this basis — namely, OLC 3, 4, and 8, as well as "at least some of the other legal memoranda withheld by CIA, NSA, NSD, and OLC." ACLU Br. at 14.

In the Second Circuit decision on which ACLU relies, which is discussed above, the court found a *waiver* "as to the legal analysis" in a specific memorandum, only after the government released a draft white paper that "virtually parallel[ed]" the memorandum at issue "in its analysis of the lawfulness of targeted killings," *and* the Attorney General "publicly acknowledged the close relationship between the draft DOJ White Paper and previous OLC advice." *N.Y. Times*, 756 F.3d at 116. It does not follow from this ruling that privileged legal analysis — whether relating to the targeting of U.S. persons given the white paper considered in that case, or relating to E.O. 12333 activities here — would necessarily be subject to public

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FBI, reporting requirements, and the passage of information between the two agencies." Supp. CIA Decl. ¶ 11 & n.4.

disclosure even if the nonpublic documents did analyze similar or even identical legal considerations as some publicly-released document. The purpose of the communication, the decisions being evaluated, or the parties involved in the communication all could differ; a myriad of reasons could suffice to defeat claims of waiver. *See N.Y. Times*, 806 F.3d at 686 ("Even if the content of legal reasoning set forth in one context is somewhat similar to such reasoning that is later explained publicly in another context, such similarity does not necessarily result in waiver."). For example, when an attorney prepares a thorough legal research memorandum to advise a client, and then uses a similar or even the same legal analysis in a publicly filed brief, there is no reason that the earlier privileged and advisory attorney-client communication should lose its privileged status. Yet ACLU's argument urges this Court to require public disclosure of any privileged analysis that arguably matches analysis set forth in a later, non-privileged document — such as the released portions of OLC 9 (a court submission) and/or 10. *See* ACLU Br. at 13-14.

Indeed, ACLU appears to conflate two distinct doctrines, official acknowledgment and waiver of privilege. *See, e.g.*, ACLU Br. at 12 (arguing acknowledgment overcomes protections of "Exemptions 1, 3, and/or 5"). Under the doctrine of official disclosure, courts examine whether the Government is precluded from withholding particular facts or information as *classified* if the same fact or information has been the subject of a prior, official and authorized disclosure. *See Wilson v. CIA*, 586 F.3d 171, 196 (2d Cir. 2009); *N.Y. Times*, 756 F.3d at 120 & n.19. By contrast, to determine whether there has been a waiver of privilege, it is necessary to examine the particular document at issue, the nature and context of the communications reflected in the document and the alleged disclosure, and the specific privilege asserted — and here ACLU appears to challenge the privilege-based withholdings of or from OLC 3, 4, and 8. *See* ACLU

Br. at 14. But the attorney-client privilege is not "lost by the mere fact that the information communicated [between attorney and client] is otherwise available to the public." *United States v. Cunningham*, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982). That is because the privilege attaches to *communications*, not information. *Id.*; *accord Upjohn*, 449 U.S. at 395-96; *In re Grand Jury Subpoenas*, 959 F.2d 1158, 1165 (2d Cir. 1992); *see also* 26A Wright & Graham, *Federal Practice & Procedure, Federal Rules of Evidence* § 5729 (updated Apr. 2016) (waiver "requires disclosure of a privileged communication; revealing the information communicated is not a waiver regardless of how much such disclosure may sap the value of the privilege"). Public disclosures of attorney-client privileged information outside the context of litigation do not waive privilege as to other, undisclosed attorney-client communications. *See In re Von Bulow*, 828 F.2d 4, 102-03 (2d Cir. 1987); *accord In re John Doe Corp.*, 350 F.3d 299, 305-06 (2d Cir. 2003); *In re Grand Jury Proceedings*, 219 F.3d 175, 183 (2d Cir. 2000).

B. The Court Should Not Require Re-Processing of OLC 4, 8, and 10 in Light of the Recent Disclosure of a Multi-Agency Report

ACLU does not dispute that OLC 4, 8, and 10 have been processed and re-processed numerous times, and that ACLU squarely lost a FOIA lawsuit seeking to compel disclosure of OLC 4, 8, and 10 in which it made arguments similar or identical to those it advances here. *See* OLC Decl. ¶¶ 22-25 (discussing processing history and litigation history of *Elec. Privacy Info. Ctr. v. DOJ*, Nos. 06-096, 06-215 (RCL), 2014 WL 1279280 (D.D.C. Mar. 31, 2014) (affirming withholdings pursuant to Exemptions 1, 3, and 5)). ACLU nevertheless argues that the Court should require yet another round of reprocessing of these sensitive documents, in light of the government's release in September 2015 of a multi-agency report. *See* ACLU Br. at 49-50. The Court should decline this request as futile, pointless, unduly burdensome on limited government resources, and not required by law.

First, as a practical matter, the reprocessing that ACLU appears to seek would have the aim simply of laboriously identifying, isolating, and releasing information that is already known thanks to the release of what ACLU describes as "a 740-page multi-agency report." This task would either accomplish nothing, because it would make known only information that the government has already released in another form, or, worse, it would result in unintentional and erroneous release of other classified or privileged material. The broad public purposes of FOIA would not be furthered by this exercise.

Nor is such an exercise legally required. As just explained, ACLU misconstrues and misapplies the "acknowledgment" doctrine, which concerns *classified* records, but which does not properly apply to privileged communications such as the non-public OLC memoranda that ACLU seeks to have reprocessed. *See supra* Point V.A. There is no legal basis to suggest that the release of information in a multi-agency report could effect a waiver of privilege as to separate attorney-client communications or pre-decisional deliberations, even if those privileged documents discussed the same subject matters as the publicly released report. *Id.*

Moreover, no FOIA requester or plaintiff is entitled to endless reprocessing of the same document, which causes undue burden and risks enmeshing courts and the government in never-ending demands for reprocessing and further judicial review as litigants identify additional information that arguably relates to a search that an agency has already completed. Indeed, not two months ago, the D.C. Circuit rejected an ACLU argument that was substantially the same as the one it makes here. *See ACLU*, 2016 WL 1657953, at *4 ("the question in FOIA cases is typically whether an agency improperly withheld documents *at the time* that it processed a FOIA request") (emphasis added) (citing *Bonner v. Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991)); *see also N.Y. Times*, 756 F.3d at 110 n.8 ("[a]s a general rule, a FOIA decision is

evaluated as of the time it was made and not at the time of a court's review" (citing *Bonner*, 928 F.2d at 1152), although departing from that rule in circumstances of that case, including post-request disclosures that went "to the heart" of the contested issues). Thus, although the D.C. Circuit acknowledged that "there may be some circumstances in which it is appropriate to consider new information that comes to light during litigation," the Court cautioned that "courts must be wary of creating 'an endless cycle of judicially mandated reprocessing' of FOIA requests, lest they undermine the Act's 'premium on the rapid processing of [such] requests.'" *ACLU*, 2016 WL 1657953, at *4 (quoting *Bonner*, 928 F.3d at 1152).

For these reasons, courts generally permit agencies to employ a "cut-off" date — often the date the search is initiated — for purposes of processing a request. *See, e.g.*, *Defenders of Wildlife v. U.S. Dep't of the Interior*, 314 F. Supp. 2d 1, 12 n.10 (D.D.C. 2004) (recognizing that records created after date-of-search "cut-off" date specifically established by agency regulation "are not covered by [plaintiff's] request"); *Public Citizen v. Dep't of State*, 276 F.3d 634, 644 (D.C. Cir. 2002) (favorably discussing "date-of-search cut-off") (emphasis omitted); *Edmonds Inst. v. U.S. Dep't of the Interior*, 383 F. Supp. 2d 105, 110-11 (D.D.C. 2005) (rejecting requester's call for use of date-of-release "cut-off" date as opposed to a date-of-search "cut-off" date); *see also N.Y. Times*, 756 F.3d at 124 (accepting as reasonable cut-off date the date the search was commenced). And here, OLC completed its search by September 22, 2014, when OLC informed the requester in this case of the results of its search. *See* OLC Decl. ¶ 12. The multi-agency report that ACLU now suggests requires re-processing of the OLC documents was not released until September 2015, approximately one year later. *See id.* ¶ 24, ACLU Br. at 14. The Court should not require OLC to embark on laborious re-reviews of sensitive, complex, and lengthy documents in response to the September 2015 report. The question in FOIA cases is

typically whether an agency improperly withheld documents at the time that it processed a FOIA request. *See Bonner*, 928 F.2d at 1152. Here, OLC made a final administrative determination regarding the ACLU's request on September 22, 2014, OLC Decl. ¶ 12, Ex. E, and the question before the court is whether that administrative determination was correct at that time. Although there may be some circumstances in which it is appropriate to consider new information that comes to light during litigation, given the risk of creating "an endless cycle of judicially mandated reprocessing" of FOIA requests, this is not such a case. ACLU would have the Court establish a regime where an agency's search and review obligations are never fixed, its work is never done on any request, and FOIA cases on matters of public importance become never-ending and unmanageable. The Court should decline ACLU's invitation to do so.

V. THE GOVERNMENT MET ITS LEGAL OBLIGATION TO CONDUCT SEARCHES REASONABLY CALCULATED TO LOCATE ALL RESPONSIVE RECORDS

ACLU does not challenge the sufficiency of the searches performed by OLC and NSA. *See* ACLU Br. at 53. The Court should reject the ACLU's challenges to the other agencies' searches, particularly in light of additional information provided through supplemental declarations, and in light of State's identification of one additional source of potentially responsive records, which it is in the process of reviewing. *See infra* at Point V.E. Each agency's obligation is to perform a search that "was reasonably calculated to discover the requested documents," and it is irrelevant whether the agency "actually uncovered every document extant." *Grand Cent. P'ship*, 166 F.3d at 489.

A. Central Intelligence Agency

CIA's search for responsive records is described in its initial declaration, and ACLU's criticisms are misplaced. CIA explained that it "consulted with Agency personnel knowledgeable about" the subject matter of ACLU's request "to identify the relevant databases

and repositories containing such materials," identified as the key document Agency Regulation 2-2 which CIA released in part, CIA Decl. ¶ 9, and used broad search terms including "12333" in some databases while performing targeted searches within CIA's Office of General Counsel for other material. *Id.* ¶ 10. Beyond these intensive efforts, CIA also performed additional database searches within its Office of General Counsel and the front offices of other Agency directorates that were likely to obtain responsive information, "and additionally requested that attorneys staffing those offices [identify] and provide the formal training and reference materials on E.O. 12333 that are currently in use." Moreover, the CIA attested that "[t]hese are the only databases and individuals deemed likely to maintain responsive records." *Id.* Moreover, an on overall basis, CIA has further specifically attested that its searches were "conducted in all locations in which it is reasonably likely that responsive records would reside and used search terms and methods reasonably calculated to locate those documents." *Id.* ¶ 11.

In the face of this strong showing, ACLU quibbles that CIA has not adequately detailed the search terms it used and has not sufficiently described its file systems to allow adjudication of the adequacy of its search. ACLU Br. at 59. These criticisms are unfounded in law, or reason. CIA has explained that it used broad terms including "12333" while also tasking knowledgeable personnel with records searches and performing numerous additional electronic searches, described in CIA's declaration and in the preceding paragraph. CIA further attested both that it looked everywhere responsive records are reasonably likely to exist, and, conversely, that there are no additional locations where additional responsive records are reasonably likely to exist. CIA Decl. ¶¶ 10-11. Indeed, the CIA's search was so comprehensive that it "uncovered a large volume of duplicative documents and non-responsive records," *id.* ¶ 11, which CIA had in turn to exclude. ACLU cites no law to support its demand for a detailed tutorial on CIA record-

keeping systems, and the one case ACLU cites that required in the circumstances of that case a more detailed description of search terms does not establish a blanket rule that would invalidate the reasonable, indeed laudable, efforts of CIA to perform a careful search for responsive records.

B. Defense Intelligence Agency

As DIA's initial submission explained, DIA reasonably determined that all DIA records related to ACLU's request would have originated with DIA's OGC, and DIA tasked knowledgeable personnel in that office to coordinate a search for responsive records. *See* DIA Decl. ¶ 10. ACLU's objections are misplaced.

First, while ACLU expresses concern that DIA omitted categories of information that ACLU sought, such as compliance reports, training materials, and documents authorizing or modifying certain types of procedures, *see* ACLU Br. at 54, DIA has explained that the categories whose omission ACLU protests are not items that the agency likely possesses, because they relate to activities "in which DIA does not engage." *See* Supp. DIA Decl. ¶¶ 13, 17. Specifically, while ACLU sought records "relating to the Agency's authority under EO 12,333 to undertake Electronic Surveillance," DIA "does not undertake Electronic Surveillance and so, in consultation with DIA OGC, we determined that a search for this category of records would not be reasonably likely to produce responsive records." *Id.* ¶ 14. And the fact that DIA does not conduct electronic surveillance likewise makes it unlikely that there could be any fruitful search at DIA for documents officially authorizing or modifying any particular programs, techniques, or types of Electronic Surveillance that implicates U.S. persons. *Id.*

Further, DIA did not rely solely on the fact that it does not engage in the type of activity about which ACLU is inquiring; it also "conducted a broad search in its covered record systems of records interpreting EO 12,333, which did not result in records" responsive to ACLU's

request for information relating to each defendant agency's authority to undertake Electronic Surveillance. *Id.* In response to ACLU's request for records authorizing or modifying use of programs or techniques under EO 12333, and notwithstanding that DIA does not undertake electronic surveillance, DIA "searched any records/regulations/policies interpreting EO 12,333 and any records describing the standards for 'collection,' 'acquisition,' or 'interpretation' of communications." *Id.* ¶ 15. In sum, as to each subcategory of ACLU's request, DIA has explained both that it does not engage in the activity giving rise to ACLU's inquiry, and that it nevertheless conducted a comprehensive search in its records systems, which unsurprisingly did not locate responsive records. *Id.* ¶¶ 14-18. This more than answers ACLU's criticisms of DIA's search.

Second, ACLU criticizes DIA's decision to have its search performed by officials within DIA OGC, ACLU Br. at 54, but DIA's decision was reasonable and appropriate, because the DIA determined that all documents responsive to ACLU's request would have "been generated by or processed through DIA's OGC," and that "a broader search would be unreasonably burdensome and fail to produce responsive records, or duplicative records at best." Supp. DIA Decl. ¶ 19. Moreover, ACLU does not challenge the sufficiency of efforts within the DIA OGC to locate any responsive documents contained in that office — nor could ACLU plausibly argue that DIA OGC's efforts were insufficient, because each member of the OGC office, including all administrative staff, was tasked with searching for responsive records. *See* DIA Decl. ¶ 10.

Finally, the Court should not credit ACLU's argument that the search result of ten responsive documents — all released in full or in part — was "implausibly low" such that the Court should infer a deficiency in DIA's search. *See* ACLU Br. at 54. DIA's supplemental declaration explains that it does not "engage in" the activities about which ACLU inquires, Supp.

DIA Decl. ¶¶ 13-20, which defeats the factual premise of ACLU's criticism. And, as explained above and in the Government's initial motion papers and detailed in DIA's supplemental affidavit, the agency more than made the required "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). And the controlling question as to the adequacy of any agency's search is "not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994) (internal punctuation and citation omitted); *see also Grand Cent. P'ship*, 166 F.3d at 489 ("the factual question . . . is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant"); *N.Y. Times*, 756 F.3d at 124 (search "not inadequate merely because it does not identify all responsive records").

Thus, DIA's search amply meets all applicable requirements.

C. DOJ—Federal Bureau of Investigation

ACLU's criticisms of FBI's search appear to derive from a misunderstanding of the limited extent of FBI's involvement with EO 12333 electronic surveillance. As the FBI's original declaration explained, FBI conducted a targeted search of the specific FBI Headquarters Divisions/Units likely to possess responsive records relating to E.O. 12,333, subject to the restrictions set forth in the parties' search stipulation that was entered by the Court. FBI Decl. ¶ 20. FBI FOIA personnel identified the specific FBI components that were likely to contain responsive records not found elsewhere, and sent them what the FBI calls an "Electronic Communication," requesting that each search their respective databases and paper and manual files. *Id.* ¶¶ 21-22. Each of these agencies completed the requested searches, *id.*, and, as a result, FBI identified 65 pages of responsive records, which were processed and released in part with

redactions. *Id.* ¶ 24 & n.14. Both FBI's understanding of its own organization and record systems, and an examination of the documents located through its search, caused FBI to conclude that there were no additional agency locations in which additional responsive documents would be likely to exist. *Id.* ¶¶ 21, 23.

Although FBI's explanation is entitled to a presumption of good faith that ACLU gives no reason to question, the FBI has prepared a supplemental declaration that further explains why the locations it searched were the logical places for it to seek responsive documents, and why no other FBI location was reasonably likely to contain additional responsive records. The FBI "is not authorized to conduct electronic surveillance pursuant to Executive Order 12333 . . . for subjects located in the United States or when a Title III or [Foreign Intelligence Surveillance Court] warrant can be obtained, nor is the FBI authorized to conduct 'signals intelligence.'" Supp. FBI Decl. ¶ 3. Rather, the "FBI's use of EO 12333 to conduct electronic surveillance is limited only to instances where the subject is located outside of any U.S. Court's jurisdiction," and, to obtain authorization to conduct EO 12333 electronic surveillance, "the FBI must seek authorization from the Attorney General," which can be granted only if "the Attorney General has determined in each case that there is probable cause to believe the technique is directed against a foreign power or an agent of a foreign power." *Id.* Thus, FBI's activities in areas covered by ACLU's request are strictly circumscribed and limited.

As the FBI has further explained, the locations it searched "are the locations where responsive documents were reasonably likely to be located." *Id.* ¶ 4. Specifically, because FBI's use of EO 12333 is limited to "foreign powers or agents of a foreign power," FBI concluded that responsive documents, if any, were "most likely" to be "within the National Security Branch," as other divisions responsible for purely criminal violations are unable to rely on EO 12333 to

collect electronic surveillance and, therefore, would not be likely to have any responsive documents. *Id.* Further, as to ACLU's request for training materials and documents, FBI's "Training Division retains all documents, Power Point presentations and policies related to any training that occurs within the FBI," and the FBI's "Corporate Policy Office retains all documents related to any policies drafted and implemented by the FBI." *Id.* "Consequently, any documents related to the FBI's training and/or policies concerning EO 12333 would have been located in these two divisions." *Id.* And, given that FBI identified no other factual basis to look elsewhere, it had no reason to do so. *Id.*

Nor should the Court credit the ACLU's criticisms of FBI for not describing in greater detail how FBI's various components conducted their searches. FBI has now expanded on its explanation of its search methodologies, explaining that its FOIA professionals sent Electronic Communications to four separate FBI components, requesting each to "conduct a search of database systems, as well as paper and manual files, for records responsive to [ACLU's] request." *Id.* ¶ 5. Moreover, each recipient unit was advised to send an email "to each of its employees . . .seeking all relevant records pertaining to this request." *Id.* Further, FBI's tasking communication "did not limit or restrict the search parameters to specific search terms, due to the expertise of these divisions/units, as they would be in a better position to most effectively determine the search methodology and/or terms to be searched." *Id.* ¶ 6. FBI instead reasonably "relied upon its employees' knowledge of the records maintained and stored within each division/unit, to search by whatever means are necessary to locate records potentially responsive to [ACLU's] request." *Id.* Because FBI's activities and records systems vary widely by component, FBI tasks knowledgeable personnel within each component to design and carry out searches of the relevant offices, taking into account the nature of each component's records and

activities. *See id.* ¶ 5. Under FBI's usual procedures, each tasked division is charged with carrying out a search tailored to that division's activities, its recordkeeping systems, and the nature of the request, with each division to search paper and electronic records as appropriate. *See id.* ¶¶ 5-6.

Further, while ACLU complains that the FBI identified what ACLU considers "extraordinarily few responsive documents," ACLU Br. at 58, this complaint is both factually unfounded, and legally irrelevant. FBI's "primary method of electronic surveillance is NOT conducted using any authority under EO 12333," and FBI utilizes EO 12333 authority only in "rare instances" and upon specific Attorney General findings. Supp. FBI Decl. ¶ 7. Thus, contrary to ACLU's suggestion, there is nothing inherently suspicious about the relatively low volume of responsive documents that FBI located. Moreover, the sufficiency of a search is determined by whether it was designed in a manner reasonably calculated to locate all responsive records — *not* according to its results. *See supra* at 51 (citing, *e.g.*, *Nation Magazine*, *Steinberg*, *Grand Cent. P'ship*, *N.Y. Times*).

Accordingly, the FBI's search was "reasonably calculated to discover the requested documents." *Grand Cent. P'ship*, 166 F.3d at 489.

D. DOJ—National Security Division

The ACLU criticizes NSD's selection, in the valid exercise of its discretion, of which attorneys were most appropriate to design and carry out a search for responsive records within NSD. NSD's initial explanation already was sufficient, because it establishes that the search was conducted by carefully chosen NSD attorneys who are familiar with NSD operations, personnel, and areas of responsibility, and who obtained input from additional relevant NSD personnel, all of whom have worked on issues concerning electronic surveillance under E.O. 12,333 described in the request. *See* NSD Decl. ¶ 8. And NSD has detailed the searches of files and databases

that its personnel performed, explaining that no other NSD personnel were likely to have responsive records that these seven attorneys did not also have, *id.*, and that these searches captured all the systems and types of files that were likely to contain responsive records possessed by each attorney, *id.* ¶ 9. Further, NSD explained that it believes there are no additional locations that are likely to contain additional records beyond those located through the searches that NSD personnel performed. *Id.*

This thorough explanation makes ACLU's objections utterly inadequate; in an abundance of caution, however, NSD has supplemented its initial declaration to further identify the positions and degree of seniority held by the personnel who searched NSD's records. *See* Supp. NSD Decl. ¶ 11 (detailing organizational role played by each assigned official tasked with locating responsive records, and those officials' experience and supervisory responsibilities over NSD activities and personnel likely to possess responsive records or to be active in the areas about which ACLU is inquiring). The experience, expertise, and thorough methods employed by each of these attorneys belie any possible contention that NSD did not craft and conduct a search reasonably calculated to identify whatever responsive records it possesses.

E. State Department

ACLU's criticisms of State's explanation of its search are misplaced and appear to be driven by a fundamental misunderstanding of State's authorities under Executive Order 12333, which the ACLU characterizes as the State Department's "surveillance authority." The Executive Order instructs, and thereby authorizes, the State Department as a whole to collect information relevant to United States foreign policy and national security concerns *overtly or through publicly available sources*. *See* E.O. 12333 § 1.8. Even the Bureau of Intelligence and Research ("INR"), which is State's sole element of the intelligence community, is limited under the Executive Order to the collection of information, intelligence, and counterintelligence *overtly*

or through publicly available sources. *Id.* §§ 1.7(i), 3.5(h)(12); *cf. id.* § 1.7(a)-(c), (f)-(h) (specifying the clandestine collection authority of other enumerated elements of the intelligence community). Nowhere does Executive Order 12333 grant State generally or INR specifically the authority to undertake electronic surveillance as defined therein. *Id.* § 3.5(c) ("Electronic surveillance means acquisition of a nonpublic communication by electronic means without the consent of a person who is a party to an electronic communication. . . ."). Consistent with the authority granted to INR under Executive Order 12333, INR's official policies and procedures clearly state its overt or public source collection authority under the Executive Order and underscore that "INR is not authorized to conduct — and does not conduct — signals intelligence activities." *See* Bureau of Intel. & Research, U.S. Dep't of State, *Presidential Policy Directive 28 — Policies and Procedures* at 1 (Jan. 16, 2015), http://www.state.gov/documents/organization/249846.pdf (last visited June 7, 2016). Therefore, the absence of responsive records identified in State's search is not, as the ACLU contends, "implausible." It is exactly the outcome to be expected. The ACLU's objections are misplaced, reflect a misunderstanding of the Executive Order's application to State, and should be rejected for reasons explained here and in the government's initial motion papers.

Even though State logically should not find any documents that are in any way responsive to the ACLU's request for the reasons described above, State has identified one additional set of materials that it has not yet reviewed for responsive documents. *See* Supp. State Decl. ¶ 2. These materials constitute 35 boxes of chronological files of documents from the period September 2001 through December 2008 that have been archived by INR. *Id.* These records are maintained chronologically and are not topically indexed or logged, leaving State no option other than reviewing the entire 35 boxes of records to assess whether anything responsive

appears within them. *Id.* The review will be complicated by the classified nature of much of this archived material and the limited number of sufficiently cleared personnel to conduct a review, but the agency anticipates that an initial responsiveness review of this archived material will be completed by approximately September 30, 2016, *id.* ¶¶ 3-4, and State will inform the ACLU and the Court when this process is complete.

Notwithstanding State's identification of this additional source of material to be searched, the Court should reject the ACLU's criticisms of State's search, which seems premised on the ACLU's skepticism that the Nation's "central agency responsible for foreign affairs" would not have records relating to the ACLU's request for narrowly defined information about electronic surveillance that State is *not* authorized to conduct under EO 12333. *See* ACLU Br. at 55. State conducted multiple searches of the only offices in the agency that are reasonably likely to possess responsive materials, if any: INR and the Office of the Legal Adviser. *See* State Decl. ¶ 9. State described in detail the design and conduct of the searches within these bureaus and attested that these searches covered all offices that are reasonably likely to maintain records responsive to ACLU's request. *Id.* ¶ 27. These searches more than met applicable requirements in terms of the offices searched, and, as noted with respect to other agencies, the sufficiency of a search is determined by whether it was designed in a manner reasonably calculated to locate all responsive records — *not* according to its results. *See supra* at 51 (citing, *e.g.*, *Nation Magazine*, *Steinberg*, *Grand Cent. P'ship*). No more is required. *See, e.g.*, *Grand Cent. P'ship*, 166 F.3d at 489.

VI. THE COURT SHOULD NOT REQUIRE *IN CAMERA* INSPECTION

Finally, ACLU's requests for extensive *in camera* inspection of withheld materials should be denied. *In camera* review is "the exception, not the rule." *Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988), *cited with approval in Halpern v. FBI*, 181 F.3d

279, 295 (2d Cir. 1999). "[W]here the [agency] affidavit is sufficiently detailed to place the documents within the claimed exemptions, and where the government's assertions are not challenged by contrary evidence or a showing of agency bad faith," the Second Circuit has "held that the district court should restrain its discretion to order *in camera* review." *Halpern*, 181 F.3d at 292. As a result, "[c]ases generally disfavor in camera inspections by district court judges as the primary method for resolving FOIA disputes," *ACLU v. DoD*, 389 F. Supp. 2d 547, 567 (S.D.N.Y. 2005), restricting it to those instances "when the issue before the District Court could not be otherwise resolved," *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); *see also Mo. Coal for the Env't v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1210 (8th Cir. 2008) ("*in camera* inspection should be limited" and was not necessary because agency affidavits and *Vaughn* index provided sufficient detail); *Lane v. Dep't of Interior*, 523 F.3d 1128, 1136 (9th Cir. 2008) (*in camera* inspection "should not be resorted to lightly"); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 119 (D.D.C. 2005) ("courts disfavor *in camera* inspection and it is more appropriate in only the exceptional case").

These considerations apply even more strongly in the context of classified and other information that raises national security concerns, particularly because the defendant agencies extensively and carefully explained the reasons for their respective withholdings, providing a more than adequate basis for adjudication. It is settled that courts should not conduct *in camera* review for purposes of conducting a more "probing" judicial review, particularly in cases involving national security information. *Wilner*, 592 F.3d at 75-76; *accord Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (declining FOIA requester's invitation to "cross-examine" the intelligence agency until "satisfied that its assessment of the national security risk is correct"). In evaluating the applicability of a FOIA exemption, "'the court should not conduct

a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions.'" *Wilner*, 592 F.3d at 76 (quoting *Larson*, 565 F.3d at 865). The Second Circuit has repeatedly instructed that it is "bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies." *ACLU*, 681 F.3d at 70-71 (quoting *Wilner*, 592 F.3d at 76).

CONCLUSION

For the foregoing reasons and those set forth in the Government's initial memorandum of law, the Court should grant Defendants' motion for partial summary judgment, and deny Plaintiffs' cross-motion.

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Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York

By: *s/David S. Jones*

DAVID S. JONES
JEAN-DAVID BARNEA
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Tel.: (212) 637-2739/2679
Fax: (212) 637-2717
Email: David.Jones6@usdoj.gov
Jean-David.Barnea@usdoj.gov