

JAMEEL JAFFER  
DEPUTY LEGAL DIRECTOR



July 8, 2014

**BY ECF**

Hon. Colleen McMahon  
United States District Judge  
Daniel P. Moynihan United States Courthouse  
500 Pearl Street, Room 1640  
New York, NY 10007

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OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

Re: *N.Y. Times Co. v. DOJ* (11 Civ. 9336) & *ACLU v. DOJ* (12 Civ. 794)

Dear Judge McMahon:

With the consent of the Plaintiffs in the *New York Times* action, we write to oppose the government's request to file a motion for summary judgment to address "all issues relating to the OLC memoranda" subject to the Court's June 30 order, Defs.' Ltr. 2, for the reasons below. With respect to the government's request for an extension of time to process and release those records to Plaintiffs, Plaintiffs consent to the government's proposed deadline of August 15, 2014.

First, the government's request to engage in an all-encompassing summary-judgment briefing directly conflicts with the Second Circuit's plain instructions to this Court on partial remand. In paragraph (3) of the "Conclusion" to the Second Circuit's June 23, 2014 opinion, the Second Circuit ordered this Court to conduct an "*in camera* inspection and determination of waiver of privileges and appropriate redaction" of the "other legal memoranda prepared by OLC . . . at issue here" in accordance with the Second Circuit's holdings with respect to waiver. *N.Y. Times Co. v. DOJ*, Nos. 13-422 & 13-445, 2014 WL 2838861, at \*20 (2d Cir. June 23, 2014); *see* Order, Nos. 13-422 & 13-445 (2d Cir. June 26, 2014) (ECF No. 231) ("CA2 June 26 Order") (giving effect to paragraph (3) of its opinion); *see also* Order, Nos. 11 Civ. 9336 & 12 Civ. 794 (S.D.N.Y. June 30, 2014) (ECF No. 67).

The Second Circuit has already analyzed the scope of the government's waiver and applied that analysis to the three legal memos that were before it. *See N.Y. Times Co.*, 2014 WL 2838861 at \*17 (finding partial waiver with respect to the OLC-DOD Memorandum and finding no waiver with respect to two "DOD legal memoranda" also submitted for the court's *in camera* inspection). And the Second Circuit has instructed this Court to

conduct the same kind of *in camera* application of the waiver holding to the remaining OLC memoranda. *See id.* (“The other OLC legal memoranda have not been submitted to this Court for in camera inspection, and we are therefore unable to adjudicate the waiver issue as to these memoranda, nor determine, if waiver has occurred, what portions of these documents must be redacted. It is possible that waiver of any claimed privileges applies to the legal reasoning in these documents for the same reasons applicable to the OLC–DOD Memorandum. On remand, these memoranda must be produced to the District Court for in camera examination and determination of waiver and appropriate redaction, in light of our rulings with respect to disclosure and redaction of the legal reasoning in the OLC–DOD Memorandum.”).<sup>1</sup> The government’s request is little more than a bid to bypass the Second Circuit’s clear instructions to this Court to finish what the Second Circuit started and, in the process, to add undue delay.<sup>2</sup>

Second, the government appears to misunderstand the legal significance of the Second Circuit’s waiver analysis. As the Second Circuit itself observed, a waiver under FOIA strips withheld documents of *all* FOIA privileges—not just those asserted under Exemption 5. *See id.*, at \*10 (“Loss of Exemption 5”); *id.*, at \*16 (“Loss of Exemption 1”); *id.*, at \*17 (“*Whatever protection* the legal analysis might once have had has been lost by virtue of public statements of public officials at the highest levels and official disclosure of the DOJ White Paper.” (emphasis added)). Accordingly, any argument the government may have about the “applicability of FOIA’s exemptions to each of the documents at issue” on partial remand, Defs.’ Ltr. 2, is premature. Once this Court conducts its *in camera* review for waiver and orders the release of waived portions of the additional OLC memoranda, it is possible that Plaintiffs will challenge the withholding of information that the

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<sup>1</sup> The Second Circuit’s instructions concerning the additional OLC memoranda stand in contrast to its instructions concerning its eventual remand of the documents remaining at issue on the government’s still-classified *Vaughn* index. *See N.Y. Times Co.*, 2014 WL 2838861, at \*19 (“We will therefore direct that, upon remand, DOD and CIA will provide the District Court with classified *Vaughn* indices listing documents responsive to the Plaintiffs’ requests. From these indices, the District Court, with the guidance provided by this opinion, should have little difficulty, *after examining whatever further affidavits DOD and CIA care to submit to claim protection of specific listings*, to determine which listings on these indices may be disclosed.” (emphasis added)).

<sup>2</sup> Notably, the government did not raise any objections to the clear instructions of paragraph (3) in its extensive motion for rehearing before the Court of Appeals. *See* CA2 June 26 Order at 1 (explaining that “the Government has not sought further review of the requirement in paragraph (3)”).

Court finds has *not* been waived. Only at that point will the government’s exemption-related arguments become relevant.<sup>3</sup>

That the Second Circuit intended the waiver analysis to go forward promptly is implicit in the detailed guidance that its opinion provides to this Court concerning how to execute that analysis. *See N.Y. Times Co.*, 2014 WL 2838861, at \*17 (detailing “*in camera* examination and determination of waiver and appropriate redaction” of the additional OLC memoranda). In particular, the Second Circuit held that:

- the government has waived FOIA privileges with respect to the legal “analysis of the lawfulness of targeted killings.” *Id.*, at \*12. On remand, this Court should follow the Second Circuit in looking to the White Paper, as well as the “numerous statements of senior Government officials discussing the lawfulness of targeted killing of suspected terrorists”—and, of course, the OLC–DOD Memorandum itself—for “substantial overlap in the legal analysis” contained in those sources and in the additional OLC memoranda to be submitted to this Court. *Id.*; *see id.*, at \*16 (“We recognize that in some circumstances the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation, but that is not the situation here where drone strikes and targeted killings have been publicly acknowledged at the highest levels of the Government.”);
- the government has officially acknowledged that the Central Intelligence Agency has “an operational role in targeted drone killings,” *id.*, at \*18, and “had an operational role in the drone strike that killed” Anwar al-Aulaqi, *id.*, at \*14; *see id.*, at \*18 n.22; and
- the government has officially acknowledged that the killing of al-Aulaqi took place in Yemen. *See id.*, at \*14.

Importantly, the Second Circuit has also explained that the “three-part test for ‘official disclosure’” in *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009), does not “require absolute identity” between the information previously acknowledged and the information subject to waiver. *N.Y. Times Co.*, 2014 WL 2838861, at \*16; *see id.* (“Indeed, such a requirement would make little sense. A FOIA requester would have little need for undisclosed information if it had to match precisely information previously disclosed.”); *see id.*, at \*16 n.19 (“not[ing]

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<sup>3</sup> Thus, the government’s assertion that “it is both legally appropriate and in the interests of efficiency and judicial economy” to proceed to summary judgment, Defs.’ Ltr. 2, has it exactly backwards: their proposal would require the briefing of privileges and exemptions that may never become issues before this Court.

that a rigid application of [the three-part test in *Wilson*] may not be warranted in view of its questionable provenance”).

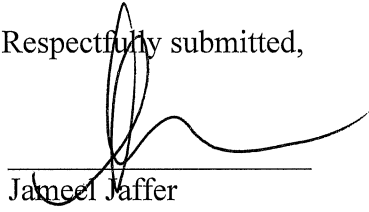
Third, the government’s request that the Court hear the government’s summary-judgment motion (which will involve weeks or months of briefing by the parties) rather than conduct a limited waiver review is inconsistent with the Second Circuit’s recognition of the overwhelming public interest in the legal memoranda at issue in this case. In its opinion on the government’s petition for rehearing, the Second Circuit emphasized—as this Court had done previously—the pressing public interest in the disclosure of the government’s legal justification for its targeted-killing program. *See N.Y. Times Co. v. DOJ*, Nos. 13-422 & 13-445, 2014 WL 2854878, at \*1 (2d Cir. June 23, 2014) (“Because of the four-year delay that has ensued between the filing of the Plaintiffs’ FOIA requests in June 2010 and today, with even a redacted version of the OLC–DOD Memorandum not yet disclosed, we will bifurcate the issues presented by the petition for rehearing.”); *see also N.Y. Times Co. v. DOJ*, 915 F. Supp. 2d 508, 515 (S.D.N.Y. 2013) (“The FOIA requests here in issue implicate serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men.”).

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In the Second Circuit’s order accompanying its partial mandate, the Court explained that it had bifurcated and remanded the case at this time precisely to effectuate the relief in paragraph (3) without delay—despite the fact that future “tasks for the District Court” concerning other aspects of the Second Circuit’s ordered relief remain subject to government’s pending petition for rehearing. *See* CA2 June 26 Order at 1–2. The government complains that the process ordered by the Second Circuit will be inefficient, *see* Defs.’ Ltr. 2, but the opposite is true. Waiver is likely to negate other exemptions and privileges that the government would raise in its proposed summary-judgment motion. Thus, the government’s proposal would only further delay public disclosure of the memoranda as the parties engage in needless briefing of issues that might never be reached by the Court.

In light of the Second Circuit’s clear intention to promptly effectuate the public release of the waived portions of the remaining OLC memoranda at issue in this litigation, Plaintiffs respectfully request that the Court conduct the limited waiver review ordered by the Second Circuit before hearing the government’s motion for summary judgment concerning any information whose withholding has not been waived.

Respectfully submitted,



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