

N.Y.S.D. Case #
11-cv-9336(CM)

14-4432-cv(L) 14-4764-cv(Con)
The New York Times Company v. United States Department of Justice

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term 2014

4 Argued: June 23, 2015

Decided: October 22, 2015

5 Docket No. 14-4432-cv, 14-4764-cv

6
1 THE NEW YORK TIMES COMPANY, CHARLIE SAVAGE,
2 SCOTT SHANE, AMERICAN CIVIL LIBERTIES UNION,
3 AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
4 Plaintiffs-Appellants,

5 v.

6 UNITED STATES DEPARTMENT OF JUSTICE, UNITED
7 STATES DEPARTMENT OF DEFENSE, CENTRAL
8 INTELLIGENCE AGENCY,
9 Defendants-Appellees.

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

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14 Appeal from the October 31, 2014, decision and order of the
15 United States District Court for the Southern District of New
16 York (Colleen McMahon, District Judge), adjudicating, pursuant
17 to a remand from this Court, Freedom of Information Act requests
18 for documents prepared by the Office of Legal Counsel of the
19 United States Department of Justice concerning targeted killings
20 by drone aircraft. The District Court ordered disclosure of all

1 or portions of some documents and denied disclosure of other
2 documents. The appeal also concerns disclosure of redacted
3 portions of the District Court's sealed opinion and disclosure
4 of redacted portions of the transcript of the June 23, 2015, oral
5 argument present by the Government to the Court *ex parte* and *in*
6 *camera*.

7 Judgment AFFIRMED; redacted portions of District Court
8 opinion to remain UNDISCLOSED, except for three paragraphs (as
9 redacted pursuant to Part IV of this opinion) that the District
10 Court wishes to disclose; and redacted portions of transcript of
11 June 23, 2015, oral argument to remain UNDISCLOSED; case
12 REMANDED.

13 David E. McCraw, The New York Times
14 Company, New York, N.Y. (Jeremy A.
15 Kutner, New York, N.Y., on the
16 brief), for Plaintiffs-Appellants
17 The New York Times Company,
18 Charlie Savage, and Scott Shane.

19
20 Jameel Jaffer, American Civil
21 Liberties Union Foundation, New
22 York, N.Y. (Hina Shamsi, Dror
23 Ladin, American Civil Liberties
24 Union Foundation, New York, N.Y.,
25 Eric Ruzicka, Colin Wicker,
26 Michael Weinbeck, Dorsey & Whitney
27 LLP, Minneapolis, Minn., on the
28 brief), for Plaintiffs-Appellants
29 American Civil Liberties Union and
30 American Civil Liberties Union
31 Foundation.

1 Sarah S. Normand, Asst. U.S. Atty.,
2 New York, N.Y. (Preet Bharara,
3 U.S. Atty., New York, NY, Benjamin
4 C. Mizer, Acting Asst. U.S. Atty.
5 General, Matthew M. Collette,
6 Sharon Swingle, Thomas Pulham,
7 Civil Division, U.S. Dep't of
8 Justice, Washington, D.C., on the
9 brief), for Defendants-Appellees.

10
11 (Lawrence S. Lustberg, Joseph A.
12 Pace, Gibbons P.C., Newark NJ, for
13 amici curiae Senators Ron Wyden,
14 Rand Paul, Jeff Merkley, and
15 Martin Heinrich, in support of
16 Plaintiffs-Appellants)

17
18 JON O. NEWMAN, Circuit Judge:

19 This appeal from the October 31, 2014, decision and order of
20 the District Court for the Southern District of New York (Colleen
21 McMahon, District Judge) concerns the second round in a
22 protracted Freedom of Information Act ("FOIA") litigation seeking
23 disclosure of documents related to targeted killings by the use
24 of drone aircraft. On the prior appeal, see *New York Times Co.*
25 *v. U.S. Dep't of Justice*, 756 F.3d 100 (2d Cir. 2014) ("*NYTimes*
26 *I*"), we ordered disclosure of a 2010 document known as the "OLC-
27 DOD Memorandum," a 41-page legal opinion prepared by the Office
28 of Legal Counsel ("OLC") in the Department of Justice for the
29 Department of Defense ("DOD"), advising as to the legality of
30 targeted drone attacks. See *id.* at 112-21. We ruled that prior
31 disclosures by senior officials of the Government, plus the

1 release of what was referred to as "the White Paper," resulted
2 in waiver of all applicable exemptions for protection of the OLC-
3 DOD Memorandum.

4 We also remanded the case to the District Court to review *in*
5 *camera* several other documents prepared by the OLC that the
6 Government had identified as responsive to the pending FOIA
7 requests but had withheld on various grounds. We remanded for
8 "determination of waiver of privileges and appropriate
9 redaction." *Id.* at 124. The District Court ruled, in a partially
10 redacted opinion, that the Government had properly invoked
11 Exemption 1 (documents classified by executive order), Exemption
12 3 (intelligence sources and methods protected by statute), and
13 Exemption 5 (document protected by the deliberative process or
14 attorney-clients privilege), and that most of these documents
15 should not be disclosed.¹ That ruling is challenged on the

¹ As explained in our prior decision, see *NYTimes I*, 756 F.3d at 104, Exemption 1 permits an agency to withhold information that is "'specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy'" if that information has been "'properly classified pursuant to such Executive order.'" *ACLU v. Dep't of Justice*, 681 F.3d 61, 69 (2d Cir. 2012) (quoting U.S.C. § 552(b)(1)). Exemption 3 permits an agency to withhold information that is "specifically exempted from disclosure by statute, see 5 U.S.C. § 552(b)(3)(A)(I), (ii), such as pursuant to 50 U.S.C. § 3024-1(i)(1), which exempts from disclosure "intelligence sources and methods," or 50 U.S.C. § 3507, which exempts the CIA from "any other law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." Exemption 5 authorizes an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C.

1 pending appeal. The appeal also concerns disclosure of the
2 redacted portions of the District Court's opinion, including
3 three paragraphs that the District Court wishes to disclose, and
4 disclosure of redacted portions of the transcript of the June 23,
5 2015, oral argument presented by the Government to this Court *ex*
6 *parte* and *in camera*.

7 Background

8 The background of the litigation was extensively set forth
9 in *NYTimes I*, 756 F.3d at 104-11, and need not be repeated here.
10 We recount only developments since our prior decision.

11 Paragraph (3) of the "Conclusion" of *NYTimes I* provided that
12 "other legal memoranda prepared by OLC and at issue here must be
13 submitted to the District Court for *in camera* inspection and
14 determination of waiver of privileges and appropriate redaction."
15 *Id.* at 124. In conformity with that direction, the District
16 Court examined *in camera* eleven sealed documents, identified as
17 Exhibits A, B, C, E, F, G, H, I, J, K, and L to a sealed
18 affidavit submitted by John E. Bies, Deputy Assistant Attorney
19 General in the OLC. Exhibit D is the OLC-DOD Memorandum, already
20 disclosed.

§ 552(b)(5). Exemption 5 encompasses documents protected by, among other things, the attorney-client and deliberative process privileges. See *National Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005).

1 On October 31, 2014, the District Court filed under seal its
2 opinion adjudicating claims for disclosure of these documents.
3 The District Court's opinion was sealed because, in discussing
4 the reasons for refusing disclosure of most of the documents at
5 issue, the Court necessarily discussed matters entitled to remain
6 secret. The Court submitted its opinion to the Government *ex*
7 *parte* for classification review. The Government requested
8 redaction of several portions of the District Court's opinion.
9 The District Court agreed to all of the redactions proposed by
10 the Government with the exception of three paragraphs on page 9
11 of the Court's opinion.² Judge McMahon continued those
12 paragraphs under seal, however, to abide the outcome of appellate
13 review of her decision to disclose them. We will recount below
14 the District Court's rulings with respect to each of the eleven
15 documents. The District Court certified its rulings for
16 immediate entry of a partial judgment under Rule 54(b) of the
17 Federal Rules of Civil Procedure.

18 After the Appellants and four United States Senators, as
19 *amici curiae*, filed their briefs, the Government filed a redacted
20 version of its brief and filed an unredacted version *ex parte* and
21 *in camera*. The Government later sought the opportunity to
22 present oral argument to the Court *ex parte* and *in camera*. We

² The Government did not request redaction of the first sentence of the first paragraph.

1 granted that request and heard Government counsel *ex parte* and
2 *in camera* on June 23, 2015, just prior to hearing both sides in
3 open court. On June 25, we entered two sealed orders, both sent
4 to the Government *ex parte*. These orders afforded the Government
5 an opportunity to submit *ex parte* and *in camera* a brief and a
6 supplemental declaration concerning matters that the Court had
7 raised with Government counsel at the June 23 *ex parte* and *in*
8 *camera* hearing. On July 7, the Government filed *ex parte* and *in*
9 *camera* a transcript of the June 23 argument, together with a
10 redacted version of that transcript, which was filed in the
11 normal course ("June 23 redacted tr."). See Dkt. No. 119. On
12 July 17, the Government filed its response to our June 25 orders,
13 submitting, *ex parte* and *in camera*, a brief and a supporting
14 affidavit. On the same day, we asked the Government to submit
15 a letter justifying the transcript redactions. The Government
16 responded with a letter of July 24, 2015, filed *ex parte* and *in*
17 *camera*.

18 Discussion

19 We emphasize at the outset, as we did before, see *NYTimes I*,
20 756 F.3d at 103, that the lawfulness of drone strikes is not at
21 issue. This appeal, like the prior one, primarily concerns
22 whether documents considering such lawfulness must be disclosed.

1 I. The Eleven OLC Documents.

2 *Exhibits A, B, and C.* The District Court ruled that these
3 documents were required to remain secret, but that the legal
4 reasoning contained in Exhibit B had been incorporated into
5 Exhibit K, which was appropriate for disclosure. We agree with
6 the District Court's decision not to disclose Exhibits A, B, and
7 C, which contain intelligence information that was properly
8 exempted.

9 *Exhibit E.*³ This OLC document, as described by the
10 Government, is "the provision of legal advice in 2002 provided
11 to the President's close legal advisor about the [E]xecutive
12 [O]rder 12333."⁴ Executive Order 12333, captioned "United States
13 Intelligence Activities," was signed by President Reagan on Dec.
14 4, 1981. The District Court withheld Exhibit E partly on the
15 ground that most of it discusses topics exempted from FOIA
16 disclosure and not subject to any waiver. We agree with the
17 District Court's ruling in that respect. As to one portion of
18 Exhibit E that discusses a topic referred to in subsequent
19 statements of senior Government officials, the District Court
20 withheld that portion because the discussion "does not
21 correspond" to any legal analysis that has been disclosed.

³ Exhibit D is the OLC-DOD Memorandum, previously disclosed.

⁴ June 23 redacted tr. at 12.

1 At issue is whether the Government waived its right to
2 invoke Exemption 5 as the basis for withholding portions of the
3 legal analysis in Exhibit E by subsequently making public
4 statements on topics related to some of the analysis contained
5 in that document. Our initial concern with disclosure of the
6 portion that is similar to subsequent disclosures is the
7 substantial time interval between the date of Exhibit E and the
8 subsequent arguably similar disclosures. In *NYTimes I*, several
9 relevant statements of Government officials were made before the
10 date of the July 16, 2010, OLC-DOD Memorandum,⁵ and other
11 statements were made less than three years afterwards.⁶ With
12 respect to Exhibit E, there is no statement of a Government
13 official before the date of that exhibit that even arguably
14 supports waiver of protection, and the earliest dates of
15 subsequent statements that even arguably support waiver were made
16 eight years after the date of Exhibit E.⁷

⁵ March 18, 2010, statement of then-CIA director Leon Panetta, see *NYTimes I*, 756 F.3d at 118; March 25, 2010, statement of then-Legal Adviser of the State Department Harold Hongju Koh, see *id.* at 114; June 27, 2010, statement of then-CIA director Leon Panetta, see *id.* at 118.

⁶ Nov. 8, 2011, White Paper, see *NYTimes I*, 756 F.3d at 110-11 & n.9; February 7, 2013, statement of John O. Brennan, *id.* at 111; statement of then-Attorney General Eric Holder, *id.*

⁷ See footnote 6, *supra*.

1 We do not mean to imply that a Government official's public
2 statement made after preparation of a legal opinion can never
3 result in waiver of protection for that opinion. Our reliance
4 on some statements made soon after the date of the OLC-DOD
5 Memorandum dispels such a broad implication. However, the
6 passage of a significant interval of time between a protected
7 document and a Government official's subsequent statement
8 discussing the same or a similar topic considered in the document
9 inevitably raises a concern that the context in which the
10 official spoke might be significantly different from the context
11 in which the earlier document was prepared. Even if the content
12 of legal reasoning set forth in one context is somewhat similar
13 to such reasoning that is later explained publicly in another
14 context, such similarity does not necessarily result in waiver.
15 Moreover, ignoring both the differences in contexts and the
16 passage of a significant interval of time would risk requiring
17 Government officials to consider numerous arguably similar
18 documents prepared long before and then measure their public
19 words very carefully so as not to inadvertently precipitate a
20 waiver of protection for those earlier documents.

21 In this case, it would be difficult to explain in detail why
22 the context of the legal reasoning in Exhibit E differs from the

1 context of the public explanations given by senior Government
2 officials eight years later without revealing matters that are
3 entitled to protection. We can say, however, that Exhibit E
4 concerns Executive Order 12333, and that Order is not mentioned
5 in any of the public statements we relied on in *NYTimes I* to
6 support waiver of protection for the OLC-DOD Memorandum. We can
7 also say that Exhibit E concerns actions and governing legal
8 standards different from those later publicly discussed. We
9 conclude that these differences suffice to preclude a ruling that
10 waiver has occurred, and we therefore affirm the District Court's
11 decision not to disclose Exhibit E.

12 *Exhibits F, G, H, I, and J.* These OLC documents discuss
13 another document that remains entitled to protection. It would
14 be difficult to redact any arguably disclosable lines of legal
15 analysis from these documents without disclosing the contents of
16 that other document, and for that reason the District Court
17 properly withheld them from disclosure.

18 *Exhibit K.* This document is a redacted version of Exhibit B.
19 The District Court properly ordered it disclosed because the
20 Government waived any privilege in the redacted legal analysis.

21 *Exhibit L.* This document is an email that circulated the
22 White Paper to DOJ personnel, together with the White Paper

1 itself. The White Paper has already been disclosed, and the
2 email contains no legal analysis. The District Court properly
3 withheld it from disclosure.

4 Unable to direct arguments to the specific documents, which
5 they have not seen, the Appellants make the general argument that
6 the legal reasoning in OLC opinions is "working law," *see Brennan*
7 *Center for Justice v. U.S. Dep't of Justice*, 697 F.3d 184 (2d
8 Cir. 2012), not entitled to be withheld under FOIA Exemption 5.
9 Whether or not "working law," the documents are classified and
10 thus protected under Exemption 1, in the absence of statements
11 by public officials that constitute waiver of all FOIA
12 exemptions.

13 Moreover, these OLC documents are not "working law." At
14 most, they provide, in their specific contexts, legal advice as
15 to what a department or agency "is *permitted* to do," *Electronic*
16 *Frontier Foundation v. U.S. Dep't of Justice*, 739 F.3d 1, 10
17 (D.C. Cir. 2014) (emphasis in original), but OLC "did not have
18 the authority to establish the 'working law' of the [agency],"
19 *id.* at 8, and its advice "is not the law of an agency unless the
20 agency adopts it," *id.* The one document ordered disclosed in
21 *Brennan Center* was not deemed "working law," 697 F.3d at 203, and
22 was ordered disclosed only because the agency had "adopted [it]"

1 by reference," *id.* No agency of the Government has adopted by
2 reference any of the documents at issue in this case.

3 To recapitulate, we agree with all of the District Court's
4 rulings with respect to the documents at issue, with the result
5 that only Exhibit K is to be disclosed. As explained above,
6 Exhibit K, which the District Court ordered disclosed, is a
7 redacted version of Exhibit B.

8 II. Disclosure of the Redacted Portions of the District
9 Court's Opinion

10 The Appellants contend that the redacted portions of the
11 District Court's opinion should be disclosed. Judge McMahon
12 herself urges us to permit disclosure of three paragraphs on page
13 9 of her opinion, which she maintained under seal only to assure
14 that those paragraphs remained sealed in the event that a
15 reviewing court disagreed with her decision to make them public.

16 The Appellants are understandably in a difficult position to
17 present their argument for disclosure of the redacted portions
18 of the District Court's opinion because they have not seen them.
19 The Appellants' basic argument is that the First Amendment
20 requires public access to normally public documents, such as
21 court opinions. They rely on *United States v. Erie County*, 763
22

1 F.3d 235 (2d Cir. 2014), and *Lugosch v. Pyramid Co.*, 435 F.3d 110
2 (2d Cir. 2006).

3 *Erie County* concerned compliance reports filed with a court
4 administering a stipulation governing prison conditions. As the
5 Court noted, “[E]very aspect of this litigation is public.” *Erie*
6 *County*, 763 F.3d at 241. By contrast, the pending case concerns
7 classified documents sought pursuant to FOIA requests, and the
8 District Court’s sealed opinion explains why, with limited
9 exception, those documents must remain under seal. *Lugosch*
10 concerned documents supporting and opposing a summary judgment
11 motion in litigation between private parties. Concerns related
12 to classified documents were not involved in either case. “As
13 a general rule,” there is no constitutional right of access “to
14 traditionally nonpublic government information.” *McGehee v.*
15 *Casey*, 718 F.2d 1137, 1147 (D.C. Cir. 1983). Appellants are
16 therefore not entitled to disclosure of those portions of the
17 District Court’s opinion that discuss information properly
18 withheld under an applicable FOIA exemption.

19 The Appellants further contend that even if the District
20 Court was entitled to seal its opinion, the Court failed to make
21 the findings warranting sealing that are required by *Erie County*,
22 763 F.3d at 239, and *Lugosch*, 435 F.3d at 120, both of which

1 restated the findings requirement first announced in *In re New*
2 *York Times*, 828 F.2d 110, 116 (2d Cir. 1987) (“[D]ocuments may
3 be sealed if specific, on the record findings are made
4 demonstrating that closure is essential to preserve higher values
5 and is narrowly tailored to serve that interest.”) (internal
6 quotation marks omitted). But, as *Erie County* explained, the
7 findings requirement for sealing documents arises only after “a
8 First Amendment right of access to judicial documents is found.”
9 763 F.3d at 239. In any event, we require no findings in this
10 case to understand that the District Court sealed its opinion to
11 avoid disclosure of classified information.

12 We turn then to the three paragraphs of the District Court’s
13 opinion that Judge McMahon thought need not be withheld. Those
14 paragraphs briefly mention hypothetical situations that might
15 raise issues of waiver of attorney-client privilege with respect
16 to a non-compete clause in an employment contract. In an
17 unredacted order, she stated that the three paragraphs “contain
18 not a whit of classified material (the Government does not
19 suggest otherwise)” and would not “tend to reveal any classified
20 material.” SPA 176.

21 The Government contends that the three paragraphs at issue,
22 although containing no classified information, can be understood

1 to imply a fact that should not be disclosed. That fact is the
2 nationality of a person who has been considered as a possible
3 target of a drone attack. However, the three paragraphs neither
4 say nor imply anything about such a nationality. At most, the
5 paragraphs, by considering various permutations of a law firm's
6 advice concerning one or more different employment contracts,
7 might be understood to imply that drone attacks have been
8 considered for persons other than al-Awlaki, the subject of the
9 OLC-DOD Memorandum. That fact, of course, is widely known, see,
10 e.g., W.J. Hennigan & David S. Cloud, "U.S. airstrikes in Somalia
11 signal a more direct role against Shabab," Los Angeles Times, July
12 23, 2015 (reporting six drone strikes in one week, quoting U.S.
13 military officials),⁸ and has been publicly acknowledged by
14 senior United States military personnel, see, e.g., Lolita C.
15 Baldor, "U.S. Drone Strike In Afghanistan Kills ISIS Recruiter
16 Who Was Once Held In Guantanamo," Huffington Post (Feb. 10, 2015)
17 (reporting statement of Pentagon spokesman Rear Admiral John
18 Kirby).⁹

⁸ Available at <http://www.latimes.com/world/la-fg-us-airstrikes-somalia-20150723-story.html>.

⁹ Available at http://www.huffingtonpost.com/2015/02/10/drone-kills-guantanamo-de_n_6656530.html.

1 The flaw in the Government's argument is that a reader of
2 the District Court's redacted opinion, with the three paragraphs
3 restored, could not identify the name or nationality of the
4 potential target. Indeed, the District Court's opinion redacts
5 the entire discussion of the document that mentions that target's
6 name, and that document remains undisclosed. To guard against
7 even the remote possibility that a reader might conceivably infer
8 the nationality of the potential target from the three paragraphs
9 at issue, we will order redaction of the few words in the first
10 of these paragraphs to which the Government, on classification
11 review, has called to our attention. See Point IV, below.

12 We agree with the District Court that the three paragraphs
13 need not be redacted, other than as ordered in Point IV, below,
14 and that the remainder of the Court's opinion may remain sealed.

15 III. Disclosure of Redacted Portions of the June 23
16 Transcript

17 Because the Appellants have not seen the words that the
18 Government has redacted from the transcript of the June 23 *ex*
19 *parte* and *in camera* hearing, they obviously have had no
20 opportunity to argue for disclosure of these redactions. And
21 they have not seen the Government's *ex parte* and *in camera* letter
22 of July 24 supporting those redactions. Our own ability to

1 explain our rulings with respect to the redactions is also
2 handicapped, but for a different reason: if redacted words touch
3 on matters entitled to remain secret, we can state a conclusion,
4 but little, if anything, else.

5 Initially, we note some concern as to the need for the
6 Government's *ex parte* and *in camera* oral argument. When asked
7 at the closed hearing why such argument was needed at this stage
8 of the litigation but not at the earlier stage, the Government
9 offered two different reasons. First, the Government noted that
10 many of the bases for withholding the documents at issue are
11 classified or statutorily protected. Then we were told the
12 reason was that a large portion of the District Court's opinion
13 was redacted. Neither reason precluded the Government from fully
14 presenting its arguments in briefs and affidavits, submitted *ex*
15 *parte* and *in camera*, as it has done throughout this litigation.
16 Any future request for *ex parte* and *in camera* oral argument will
17 have to be persuasively supported, even if the request is
18 unopposed, as it was in this case.

19 Nearly all of the redactions made by the Government in the
20 June 23 transcript refer to the contents of Exhibit E. Because
21 we have upheld nondisclosure of that Exhibit in this opinion, we
22 will uphold nondisclosure of those redactions.

1 One other redaction in the June 23 transcript has nothing to
2 do with Exhibit E. In response to the panel's request for
3 identification of those in attendance at the closed hearing,
4 eight Government personnel named themselves and their
5 affiliations; one provided only a name. The Government has
6 redacted that name and the name and agency affiliation of one
7 other person.

8 We have substantial reservations about the Government's
9 decision to bring to a closed *ex parte* hearing personnel whose
10 identity and affiliation it will not disclose to opposing
11 counsel, who were excluded from the hearing. Of course, the
12 Government is entitled to keep secret the name of any undercover
13 operative, but there is no claim that the two people whose names
14 have been redacted serve in such capacity, and it would be a rare
15 case where such persons would need to attend an appellate
16 argument. The Government's justification for nondisclosure of
17 the two names is that they are CIA personnel, whose identities
18 are protected by the Central Intelligence Act and Exemption (3)
19 of FOIA, 5 U.S.C. § 552(b)(3).

20 Not having previously established ground rules concerning
21 disclosure of the identities of those attending the closed
22 hearing, we think it would be unfair to disclose the two names

1 that the Government has redacted. However, if the need for a
2 closed *ex parte* hearing should arise in the future, the
3 Government should either not bring personnel whose identities may
4 not be disclosed, or present, prior to the hearing, a substantial
5 justification for including such personnel.

6 IV. Government's Classification Review

7 After affording the Government an opportunity for
8 classification review of our proposed opinion, we received, *ex*
9 *parte* and *in camera*, requests for a correction of a misstatement,
10 redactions from the opinion, and requests to redact some words
11 from the three paragraphs on page 9 of the District Court's
12 opinion that Judge McMahon stated should be disclosed.

13 With respect to our proposed opinion, we have corrected the
14 misstatement and made all of the redactions requested by the
15 Government, except those concerning the three paragraphs at issue
16 on page 9 of the District Court's opinion. With respect to the
17 requested redactions from the District Court's opinion, we rule
18 as follows: in the third line of the first full paragraph on page
19 9 of that opinion, the eight words following the word "opine"
20 will be redacted; in the 6th line of that paragraph, the six
21 words following the word "lawyer" will be redacted; in the
22 seventh line of that paragraph, "an" shall be changed to "a" and

1 the next two words will be redacted. With these redactions, the
2 three paragraphs at issue may be disclosed. We recognize that
3 these redactions render the resulting wording somewhat awkward.
4 We leave it to Judge McMahon on remand, if she chooses, to make
5 further redactions or some rephrasing of her language to smooth
6 out the wording without restoring the words we have deleted.

7 The Government has requested that we either (1) submit our
8 revised opinion for further classification review or (2) maintain
9 our opinion under seal for 30 days to permit the Government an
10 opportunity to seek further appellate review. We will pursue the
11 second alternative and have instructed the Clerk accordingly.

12 Conclusion

13 We conclude that all the OLC documents at issue shall remain
14 undisclosed, except Exhibit K (the redacted version of Exhibit
15 B), which the District Court has authorized to be disclosed; that
16 the redacted portions of the District Court's opinion shall
17 remain undisclosed, except for the three paragraphs on page 9,
18 (as redacted pursuant to Part IV of this opinion), which the
19 District Court wishes disclosed; and that the redactions from the
20 transcript of the June 23 hearing may remain undisclosed.

21 We therefore affirm the judgment, authorize the District
22 Court to disclose the three redacted paragraphs on page 9 of its
23 opinion (as redacted pursuant to Part IV of this opinion), and

1 maintain undisclosed the redacted portions of the District
2 Court's opinion and the June 23, 2015, transcript.

3 AFFIRMED and REMANDED.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

 Catherine O'Hagan Wolfe

