UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AMNESTY INTERNATIONAL USA, CENTER FOR CONSTITUTIONAL RIGHTS, INC. and WASHINGTON SQUARE LEGAL SERVICES, INC., Plaintiffs, v. CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF JUSTICE, DEPARTMENT OF STATE, AND THEIR COMPONENTS, Defendants.	**ECF CASE** 07 CV 5435 (LAP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT BY THE DEPARTMENT OF JUSTICE AND THE CENTRAL INTELLIGENCE AGENCY

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STATUTES, RULES, AND REGULATIONS

Plaintiffs Amnesty International USA ("AI"), the Center for Constitutional Rights, Inc. ("CCR"), and Washington Square Legal Services, Inc. ("WSLS") (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their cross-motion for partial summary judgment and in opposition to the Motion for Partial Summary Judgment by the Department of Justice and the Central Intelligence Agency (the "CIA/OIPR Brief") in this action under the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

From the CIA and OIPR's moving papers, one would never guess that disclosure, not secrecy, is the dominant objective of the FOIA.[1] *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001). At every step in response to Plaintiffs' FOIA requests, both agencies obfuscate, withhold without adequate justification, ignore relevant official and public disclosures, refuse to release segregable information, and provide little to no information about search processes.

Specifically, both the CIA and the OIPR have refused to acknowledge or deny the existence of records responsive to the majority of Plaintiffs' requests presently at issue, spinning speculative and overstated harm that they claim would result from the mere acknowledgement of responsive records. The agencies fail to address official acknowledgments and uncontroverted public disclosures that undermine the national security concerns the agencies submit are the bases of the exemptions to the FOIA that they invoke for their non-response. The agencies *Glomar* responses are unwarranted.

[1] OIPR refers to the Office of Intelligence and Policy Review, which has been subsumed within the new National Security Division of the DOJ. Declaration of Mark A. Bradley, dated November 14, 2008 ("Bradley Decl."), ¶ 1.

Where agencies have conducted searches for responsive records, the searches are flawed in scope and method. Contrary to prevailing authorities, the agencies pursue the narrowest possible interpretation of the requests. In addition, they neglect to search for key search terms, fail to task key offices with searches, and do not pursue key agency personnel when those personnel are the most reliable source of information. Often, in fact, they seem to follow the precept that the best search is no search at all, and the declarations documenting searches generally fail to provide the requisite level of detail. The CIA and OIPR searches do not merit summary judgment in their favor.

In the one instance in which the CIA conducted a search and uncovered responsive documents, *i.e.*, 49 cables documenting the waterboarding of Khalid Sheikh Mohammed ("KSM"), the CIA continues to do as little as possible to describe the records, justify any withholdings, or disclose reasonably segregable non-exempt information. Eviscerating the adversarial process, the CIA even fails to provide an adequate *Vaughn* submission to support its withholding of these documents in full, resting on a single declaration that provides insufficient detail to distinguish between the records. Finally, and most egregiously, the CIA fails to segregate and release non-exempt portions of these records—despite having segregated and released similar types of documents concerning similar types of information in another FOIA suit—including facts that are admitted to have been officially acknowledged by top Administration and CIA officials.

For these reasons, among others, the agencies fail to meet their FOIA obligations. Summary judgment should be denied to the agencies and granted in favor of the Plaintiffs.

BACKGROUND

I. OIPR

Plaintiffs served three FOIA requests on the OIPR seeking records relating to unregistered, CIA, and ghost detainees, and the government's rendition, secret detention, and coercive interrogation program ("Plaintiffs' FOIA Requests").[2] The December 21, 2004 FOIA Request ("CCR Request") and the April 25, 2006 First Amnesty Request sought records concerning, *inter alia*, rendition and secret detention of individuals in the "War on Terror." The Second Amnesty Request, also filed on April 25, 2006, sought, *inter alia*, internal government memoranda of understanding pertaining to the rendition, secret detention, and coercive interrogation program, and documentation and communication regarding certain reports.

The OIPR claims to have maintained three categories of records—operations records, policy records, and litigation records. Bradley Decl. ¶ 8. With respect to operations records, the OIPR has invoked a *Glomar* response to Plaintiffs' FOIA Requests, stating that it can neither confirm nor deny whether responsive records exist.[3] Bradley Decl. ¶ 17. For its policy and litigation records, the OIPR did not find any records responsive to the First Amnesty Request or the CCR Request, as detailed further in Section III.C. Bradley Decl. ¶¶ 8-14. With respect to the Second Amnesty Request, and as detailed further in Section III.C, the OIPR did not conduct a search. Bradley Decl. ¶ 16.

[2] The April 25, 2006 FOIA Requests are attached as Exhibits A-B to the Declaration of Gitanjali S. Gutierrez, dated December 22, 2008 ("Gutierrez Decl.").

[3] In *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), the court permitted the CIA to refuse to confirm or deny its ties to the *Glomar Explorer*, a submarine owned by Howard Hughes suspected of use in CIA Cold War activities.

II. CIA

On December 28, 2007, Plaintiff WSLS served a supplementary FOIA request on the CIA ("Supplementary CIA FOIA Request").[4] The Supplementary CIA FOIA Request sought, in pertinent part,[5] certain categories of documents, including,

> Category 1: The spring 2004 report by the Office of the Inspector General ("OIG") on the CIA's compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The existence of this document was publicly revealed in October 2007 by the *New York Times* ("Category 1 Request"). Second Hilton Decl. Ex. A at 2.
>
> Category 2: The list of "erroneous renditions" compiled by the OIG. Such a list was described by several intelligence officials in a December 2005 article in the *Washington Post* ("Category 2 Request"). *Id*.
>
> Categories 5-10: The cables between the Deputy Director of Operations at the CIA (or other agency official(s)) at the CIA and the operative(s) in the field discussing or approving the use of various interrogation techniques on detainees Abu Zabaydah ("AZ") and Khalid Sheikh Mohammed ("KSM"), including the use of a "slap," "attention shake," and "sleep deprivation." The existence of such cables was acknowledged by former CIA employee John Kiriakou during an ABC news program on Dec. 10, 2007 ("KSM/AZ Requests"). *Id*. at 3-4.
>
> Category 12: The cables between the Deputy Director of Operations at the CIA (or other agency official(s)) and the operative(s) in the field discussing and/or approving the use of waterboarding on KSM. The existence of such cables was acknowledged by former CIA employee John Kiriakou during an ABC news program on Dec. 10, 2007 ("Category 12 Request"). *Id*. at 4.
>
> Category 14: The September 13, 2007 notification (described in a letter from Chuck Rosenberg [U.S. Attorney] to Judges [Karen J.] Williams and [Leonie] Brinkema, dated October 25, 2007) from the attorney for the CIA informing the United States Attorney for the Eastern District of Virginia that the CIA had obtained a video tape of an interrogation of one or more detainees ("Category 14 Request"). *Id*.

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[4] The Supplementary CIA FOIA Request is attached as Exhibit K to Gutierrez Decl.

[5] For purposes of this litigation, Plaintiffs withdraw their requests for disclosure of the communications sought in Categories 3 and 4, but without prejudice to reasserting them at a later date. Thus, Plaintiffs do not address any of the government's arguments concerning these requests. Categories 11 and 13 pertain to materials subject to the stay in this action and are accordingly not at issue here. Order of September 24, 2008.

> Categories 15-17: CIA communications with the U.S. Embassy in Sana'a, Yemen, and between the U.S. Government and the Government of Yemen, relating to Mohamed Farag Ahmed Bashmilah and Salah Nasser Salim Ali. The Government of Yemen has acknowledged the existence of these communications ("Bashmilah/Ali Requests"). *Id*. at 4-5.

In response to these requests, the CIA has provided a *Glomar* response for Categories 5-10 and 15-17; has located no responsive records with regard to Categories 2 and 14; and has located 49 cables responsive to Category 12. With regard to Category 1, the CIA attests that the record(s) sought is a May 7, 2004, CIA OIG Special Review report regarding counterterrorism detention and interrogation activities whose partial release is currently being litigated in *American Civil Liberties Union v. DOD*, No. 04 Civ. 4151 (AKH) ("*ACLU*"), and according to a previous agreement between the parties is outside the confines of this litigation.[6] CIA/OIPR Brief at 8; Second Declaration of Wendy M. Hilton, Associate Information Review Officer, National Clandestine Service, CIA ("Second Hilton Decl.") ¶ 12; Docket No. 67, April 21, 2008 Stipulation ¶ 1 (as ordered, June 9, 2008).

[6] The parties have agreed that the CIA's withholding of records that have been or are currently being litigated in ACLU will not be litigated in the instant action. Docket No. 67, April 21, 2008 Stipulation ¶ 1 (as ordered, June 9, 2008). The government asserts that it has produced a document in ACLU that is responsive to Category 1, but notes it disagrees with Plaintiffs' characterization of the document, Second Hilton Decl. ¶ 12, without explaining the basis for its disagreement, or why despite the disagreement, the government is sure that the document produced to the ACLU is the same as the one Plaintiffs here request. Accordingly, if the government does not adequately remedy this failing through the submission of a supplementary declaration, the Court should order a continuance of the motion with respect to Category 1 and afford Plaintiffs an opportunity to depose Hilton pursuant to Federal Rules of Civil Procedure 56(f) to assess the basis of her determination and potentially settle this issue.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

As stated previously by this Court, a "'defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA'" before it is entitled to summary judgment. *Amnesty Int'l USA v. CIA*, No. 07 Civ. 5435 (LAP), 2008 U.S. Dist. LEXIS 47882, at *24 (S.D.N.Y. June 19, 2008) (citation omitted). A declaration submitted to justify a withholding must be sufficient to permit the court to undertake a *de novo* review of an agency's withholding decisions. 5 U.S.C. § 552(a)(4)(B).[7] Where the government's proffered justifications for withholding are insufficient to sustain its burden of proof, summary judgment for plaintiffs may be appropriate. *See, e.g., Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861, 870 (D.C. Cir. 1980) (affirming district court's order granting plaintiff's request for disclosure); *Natural Resources Defense Council v. Nat'l Marine Fisheries Serv.*, 409 F. Supp. 2d 379, 385 (S.D.N.Y. 2006) (granting in part plaintiff's motion for summary judgment).

[7] Contrary to the government's suggestion that this Court "must" accord agency declarations substantial deference because of national security concerns, declarations are only entitled to this deference if sufficiently detailed. *See* CIA/OIPR Brief at 13, 29. In *Doherty v. DOJ*, 775 F.2d 49, 53 (2d Cir. 1985), which the government cites, *see* CIA/OIPR Brief at 13, the court held that the agency affidavits met the requisite particularity before accepting the withholding. *See Greenberg v. U.S. Dep't of Treasury*, 10 F. Supp. 2d 3, 14 (D.D.C. 1998) ("[A]ffidavits are only entitled to this extra weight" if they "describe the documents withheld and the justification for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed."); *see also* Memorandum of Law in Further Support of Plaintiffs' Cross Motion for Partial Summary Judgment, dated October 7, 2008 ("Plaintiffs' October Brief") at 1-2.

II. OIPR AND THE CIA IMPROPERLY INVOKED A *GLOMAR* RESPONSE

The "Second Circuit has never opined on the *Glomar* Response." *Wilner v. NSA*, No. 07 Civ. 3883 (DLC), 2008 U.S. Dist. LEXIS 48750, at *7 n.2 (S.D.N.Y. June 25, 2008).[8] Assuming *arguendo* that a *Glomar* response may in some cases be properly invoked in this Circuit, such a response is an exceedingly narrow exception to the FOIA's disclosure obligations. Accordingly, a *Glomar* response does not "relieve [an] agency of its burden of proof, nor does it relieve the District Court of its congressionally mandated obligation to make a *de novo* determination of the propriety of the agency's claim." *Riquelme v. CIA*, 453 F. Supp. 2d 103, 112 (D.D.C. 2006) (referring to *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976)). To invoke *Glomar*, an agency must "tether" its refusal to admit or deny possession of responsive records to a FOIA exemption, and explain why acknowledgment or denial of possession of responsive records would in itself cause harm. *Wilner*, 2008 U.S. Dist. LEXIS 48750, at *24.[9] When an agency invokes a *Glomar* response a district court should discharge its *de novo* review obligation by first creating "as complete a public record as is possible." *Phillippi*, 546 F.2d, at 1015.

The OIPR and the CIA invoke Exemption 1 to justify their respective *Glomar* responses.[10] *See* CIA/OIPR Brief at 12-13.[11] Both agencies rely on Executive Order 12958,[12]

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[8] *Wilner* is on appeal. *Wilner v. NSA*, No. 08-4726 (2d Cir. filed Dec. 11, 2008).

[9] In determining "whether the existence of agency records *vel non* fits a FOIA exemption, courts apply the general exemption review standards established in non-*Glomar* cases." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990).

[10] Exemption 1 permits an agency to withhold "matters" from FOIA disclosure if such matters are "(A) specifically authorized under criteria established by an Executive order ["E.O."] to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

[11] As discussed *infra* § II.B.2., the CIA additionally relies on Exemption 3.

which provides, in pertinent part, that information may be classified if (i) it falls within a § 1.4 category of the Executive Order and (ii) the "original classification authority determines that the unauthorized disclosure of the information could reasonably be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage." E.O. 12958 §§ 1.1(a)(1)-(4). The OIPR and the CIA rely on § 1.4(c) which permits classification of "intelligence activities . . . intelligence sources or methods," as well as § 3.6(a), which countenances a *Glomar* response for classified materials.[13] CIA/OIPR Brief at 13.

As discussed below, extensive public information concerning OIPR and CIA activities that the government seeks to conceal renders summary judgment inappropriate.[14] An agency is not entitled to summary judgment where (i) its declaration provides an insufficient basis for classification, including by failing to account for uncontroverted official and unofficial public disclosures inconsistent with agency assertions of harm, *see Washington Post v. DOD,* 766 F. Supp. 1, 31 (D.D.C. 1991); or (ii) an "official acknowledgment" waives an otherwise valid

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[12] E.O. 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995), as amended by E.O. 13292, 68 Fed. Reg. 15315 (Mar. 25, 2003).

[13] Although the government also describes Executive Order 12958 § 1.4(b) as "foreign government information" and § 1.4(d) as "foreign relations or foreign activities of the United States" (CIA/OIPR Brief at 13), the OIPR and CIA declarations only address harms purported to arise from disclosure concerning § 1.4(c) "intelligence sources or methods." Bradley Decl. ¶ 21; Second Hilton Decl. at ¶¶ 25, 33, 40. Accordingly, to the extent that the government relies on Executive Order 12958 §§ 1.4(b) and (d) in support of this exemption, it does so without support from the respective agency declarations.

[14] Because the *Glomar* doctrine allows the withholding agency to refuse to even acknowledge or deny the existence of records, the opportunity for abuse is ripe. Specifically, the "danger of *Glomar* responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods." *ACLU v. DOD*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005).

exemption claim, *Wolf*, 473 F.3d, at 378; or (iii) triable issues of fact remain regarding whether materials withheld under Exemption 1 were improperly classified to conceal illegality, error, and/or to avoid embarrassment. *Wiener v. FBI*, 943 F.2d 972, 988 (9th Cir. 1991).

A. OIPR

In response to Plaintiffs' FOIA Requests, the OIPR has issued a *Glomar* response with respect to its "operations records" which relate to "proceedings before the [Foreign Intelligence Surveillance Court ("FISC")] under [the Foreign Intelligence Surveillance Act ("FISA")], including applications for authority to conduct electronic surveillance, physical searches, and pen register and trap and trace surveillance." Bradley Decl. ¶ 8.[15]

1. OIPR's Exemption 1 Claims are Unduly Speculative and Fail to Account for Contravening Public Information

The OIPR advances a number of highly speculative theories as to why merely acknowledging or denying the existence of records responsive to Plaintiffs' FOIA Requests will compromise intelligence activities, sources and methods within the meaning of E.O. 12958 § 1.4(c). First, the OIPR hypothesizes that if it acknowledged the *existence* of responsive records it "'would disclose that persons within the scope of the request were pertinent to the approval of one or more specific uses of [the OIPR's] investigatory techniques.'" CIA/OIPR Brief at 14 (quoting Bradley Decl. ¶ 24). Second, the OIPR contends that acknowledgement of the *non-existence* of responsive records would disclose "'that [the] OIPR had *not* prepared an application under FISA relating to particular intelligence interests.'" CIA/OIPR Brief at 15 (quoting Bradley Decl. ¶ 25). Third, the OIPR argues that an acknowledgment as to the existence or non-existence

[15] The Bradley Declaration does not provide sufficient clarity regarding the categories of records in the OIPR operational files extending beyond simply the FISA applications. For some of these categories of records, a *Glomar* response is even more inappropriate, but the inadequacy of the declaration on this point limits the available challenge.

of responsive documents could provide hostile intelligence services with the opportunity to weave together a "mosaic" of intelligence on FISA activities that would allow for more effective counterintelligence. CIA/OIPR Brief at 15-16 (citing Bradley Decl. ¶¶ 24-25); *see also* CIA/OIPR Brief at 17-18 (citing Bradley Decl. ¶ 31). Fourth, the OIPR argues that consistency compels a *Glomar* response because if it denied that responsive records exist here, issuing a *Glomar* response in any other case would effectively confirm that responsive records did exist there. CIA/OIPR Brief at 17-18 (citing Bradley Decl. ¶ 31).

Whatever merit these arguments may have in other contexts, they are wholly unavailing here. Plaintiffs' FOIA Requests do not name any particular individuals but instead seek information regarding unknown persons—"ghost detainees"—held in a network of secret prisons, and in the larger rendition, secret detention, and enhanced interrogation program of which those prisons are a part.[16] Thus, the universe of persons to which these requests pertain is known only to the government, and the OIPR could acknowledge or deny the existence of responsive records without betraying any concrete intelligence. Simply acknowledging responsive records would not compromise the "secrecy" of FISA proceedings. Bradley Decl. ¶ 18.

The government suggests that acknowledging or denying information could compromise intelligence because the identities of sixteen detainees have been "officially acknowledged" and there is "public speculation" as to others. CIA/OIPR Brief at 18; Second Hilton Decl. ¶ 72. It is no secret, however, that persons that the government views as high-level al Qaeda terrorists or

[16] For example, the CCR Request seeks records concerning persons simply referred to as "unregistered, CIA, and 'ghost' Detainees." Gutierrez Decl. Ex. K (Supplementary CIA FOIA Requests) at 3. Similarly, the First Amnesty Request requests concerns "individuals . . . *about whom the United States has not been provided public information* . . . ." *Id*. Ex. A (April 25, 2006 FOIA Request) at 5 n.3 (emphasis added). While this request lists certain countries of interest, it is expressly "not limited to any specific geographic area." *Id*. at 3.

operatives and their associates are either targets of or sources for government surveillance.[17] Following September 11, 2001, the Patriot Act specifically amended FISA to better facilitate use of its tools against international terrorism.[18] DOJ has also officially acknowledged that foreign intelligence surveillance tools aided in the investigation and prevention of terrorist attacks identified by or that involved high-level al Qaeda suspects, including those held in secret CIA detention.[19] Former Attorney General John Ashcroft has stated that the DOJ is "gathering and cultivating detailed intelligence on terrorism in the U.S." including "[o]ver 1,000 applications in 2002 . . . made to the FISA court targeting terrorist, spies and foreign powers who threaten our security" and maintains that counter-terrorism efforts are effective precisely because terrorist suspects are aware of increased surveillance and other strategies.[20]

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[17] *See* Satterthwaite Decl. Ex. A (White House Office of the Press Secretary, *News Release: President Discusses Creation of Military Commissions to Try Suspected Terrorists*, Sept. 6, 2006 (describing persons held in the secret detention program as high value detainees who provided intelligence information concerning terrorist activity within the United States) ("*White House News Release*").

[18] FBI Director Robert S. Mueller stated that the Patriot Act and other developments have helped overhaul intelligence sharing procedures such that agencies could "deploy the full range of investigative tools -- both criminal processes like search warrants and grand jury subpoenas and intelligence authorities like FISA wiretap warrants -- to identify, investigate and neutralize terrorist threats." Gutierrez Decl. Ex. M (Robert S. Mueller, III, Director, FBI Before the National Commission on Terrorist Attacks upon the U.S., April 14, 2004, *available at* http://www.fbi.gov/congress/congress04/mueller041404.htm (last visited Dec. 17, 2008).

[19] *See* Satterthwaite Decl. Ex. A (*White House News Release*) ("Information from the terrorists in [the CIA secret detention program] has helped us to identify individuals that al Qaeda deemed suitable for Western operations, many of whom we had never heard about before. They include terrorists who were set to case targets inside the United States, including financial buildings in major cities on the East Coast."); *see also Al Qaeda Names Match Those Under U.S. Surveillance*, CNN, March 5, 2003 ("About a dozen names discovered at the house where al Qaeda operations chief Khalid Shaikh Mohammed was arrested match names of individuals under surveillance in the United States, U.S. government officials told CNN Tuesday.").

[20] Gutierrez Decl. Ex. E *(The Terrorist Threat: Working Together to Protect America*," Prepared Remarks of Attorney General John Ashcroft, Senate Judiciary Committee Hearing, Mar. 4, 2003. *See also* Testimony of James A. Baker, Counsel for Intelligence Policy, OIPR, House Committee

Thus, official acknowledgments concerning surveillance priorities and sources undercut the government's claim that harm will result from acknowledging or denying responsive OIPR operations records. The government's failure to address these official acknowledgements renders summary judgment inappropriate. *Washington Post*, 766 F. Supp. at 31; *Founding Church of Scientology, Inc. v. NSA*, 610 F.2d 824, 831-832 (D.C. Cir. 1979).

The government also improperly relies on information outside of Plaintiffs' requests to abdicate their FOIA obligations. CIA/OIPR Brief at 18. The language of the Plaintiffs' FOIA Requests controls. *Miller v. Casey*, 730 F.2d 773 (D.C. Cir. 1984). In *ACLU v. DOD*, for instance, the ACLU sought a "memorandum from DOJ to CIA interpreting the Convention Against Torture." 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005). The CIA justified its *Glomar* response by arguing that because press reports described the memorandum as concerning intelligence techniques such as "sleep deprivation," an acknowledgment or denial as to the existence of any such record would compromise intelligence sources and methods. *Id*. Because the press reports were not part of the FOIA request itself, the court rejected the CIA's *Glomar* response. Focusing only on the language of the request, the court held that "acknowledging whether or not the [requested memorandum] exists reveals nothing about the agency's practices or concerns or its 'intelligence sources or methods.'" *Id*. at 566. Similarly, the OIPR cannot here rely on information outside the request to evade FOIA obligations.

The unique nature of Plaintiffs' FOIA Requests also undercuts the OIPR's "mosaic" theory, by which the OIPR alleges that fragments of intelligence disclosed over time might

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on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, Apr. 26, 2005) ("The reforms in [the PATRIOT Act and Intelligence Reform and Terrorism Prevention Act of 2004] affect every single application made by the Department for electronic surveillance or physical search authorized regarding suspect terrorists and have enable the government to become quicker and more flexible in gathering critical intelligence information on suspected terrorists.").

ultimately compromise national security. Acknowledging or denying the existence of records responsive to Plaintiffs' broad, non-particularized requests would not aid hostile intelligence interests in understanding U.S. intelligence priorities.[21]

In addition, the OIPR's consistency arguments are without merit. Bradley Decl. ¶ 29; CIA/OIPR Brief at 16. Because of the unique nature and scope of the Plaintiffs' FOIA Requests, the OIPR could confirm or deny possession of responsive records while continuing a policy of issuing a *Glomar* response to more particularized requests.

Finally, the OIPR's *Glomar* response is unsupported by authority. *See* CIA/OIPR Brief at 18-19. The government cites *Marrera v. DOJ*, 622 F. Supp. 51 (D.D.C. 1985); *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982); *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142 (D.D.C. 2000); and *Bassouni v. CIA*, 392 F.3d 244 (7th Cir. 2004) in support of its position. Each case, however, concerned *Glomar* responses to far narrower FOIA requests concerning specific individuals, institutions and techniques, where an acknowledgement of records could be understood to amount to the revelation of specific, concrete intelligence information.[22] Unlike

[21] Similarly speculative mosaic theories have been rejected elsewhere. In *Gerstein v. DOJ*, No. C-03-04893 RMW, 2005 U.S. Dist. LEXIS 41276, at *2-3 (N.D. Cal. Sept. 30, 2005), a FOIA requestor sought, *inter alia*, a data compilation showing the number of times that particular U.S. Attorney Offices had utilized § 213 of the Patriot Act, which permits courts to issue search and seizure warrants without immediately notifying the warrant's target. Advancing a "mosaic" theory, the government withheld the data because the compilation would reveal jurisdictions utilizing § 213 and permit wrongdoers to target other jurisdictions. The court rejected as "dubious" the government's claim that this information would aid criminals. *Id*. at 41; *cf. Doe v. Gonzales*, 386 F. Supp. 2d 66, 76-77 (D. Conn. 2005) ("record supplied by the defendants suggests that the disclosure of Doe's identity 'may' or 'could' harm investigations related to national security generally. Just such a speculative record has been rejected in the past by the Supreme Court in the context of a claim of national security.").

[22] In *Marrera*, for instance, the FOIA request sought information concerning "whether the plaintiff is a target of surveillance pursuant to the Foreign Intelligence Surveillance Act." *Marrera*, 622 F. Supp. at 52. Similarly, in *Gardels*, the FOIA request sought information regarding the CIA's past and present ties with eleven University of California campuses. *Gardels*, 689 F.2d at 1102. *Schwarz*, a case which the government characterizes as pertaining to

these cases, Plaintiffs' FOIA Requests do not define a clear universe of persons that would permit any hostile interests to identify targets through repeated FOIA requests. Crucially, then, the government offers no concrete intelligence concerns to satisfy its *Glomar* response.

Because the government has failed to establish the harms needed to support a *Glomar* response, summary judgment is inappropriate. *Rosenfeld v. DOJ*, 57 F.3d 803, 807 (9th Cir. 1995) (insufficient to "rely 'on general assertions that disclosure of certain categories of facts . . . may lead to a variety of consequences detrimental to national security'"); *Halpern v. FBI*, 181 F.3d 279, 293 (2d Cir. 1999).

B. CIA

The CIA has issued *Glomar* responses to the KSM/AZ Requests concerning cables to and from CIA operatives regarding use of the enhanced interrogation techniques of "slap," "attention shake," and "sleep deprivation" on KSM and AZ.[23] The CIA has also *Glomared* the Bashmilah/Ali Requests, which pertain to records related to the secret rendition and detention of Bashmilah and Ali.

1. CIA's Exemption 1 Arguments Fail to Justify a *Glomar* Response

Like the OIPR, the CIA attempts to supports its *Glomar* response with a host of unavailing arguments. For instance, the CIA argues that an acknowledgement of the existence of responsive records would "reveal that the CIA had in fact participated in [or had an interest in] the intelligence activity" described in the KSM/AZ and Bashmilah/Ali Requests; and,

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an OIPR *Glomar* response to requests relating to "named and unnamed individuals," among others, *see* CIA/OIPR Brief at 19, in fact, pertained to a far narrower OIPR request concerning "Plaintiff herself." *Schwarz*, 131 F. Supp. 2d at 149. Finally, *Bassiouni* concerned a FOIA request to the CIA for all documents that mentioned the plaintiff. *Bassiouni*, 392 F.3d at 245.

[23] This is in contrast to the government's search for and location of 49 cables to and from CIA operatives concerning the use of the waterboard on KSM. *See infra* §IV.A.

alternatively, that a denial would reveal no participation or interest in the activity. CIA/OIPR Brief at 20-21 (citing Second Hilton Decl. ¶ 22). Hilton maintains that in order for a "*Glomar* response to be credible and effective, the CIA must use it with every requester" seeking records regarding matters not yet acknowledged by the CIA. CIA/OIPR Brief at 21 (citing Second Hilton Decl. ¶ 23).[24] According to Hilton, confirming or denying responsive information would reveal "significant information . . . regarding the use of certain interrogation methods" and allow hostile interests to "engage more effectively in counter-interrogation training." CIA/OIPR Brief at 27-28 (citing Second Hilton Decl. ¶ 32).

As to the Bashmilah/Ali Requests, Hilton explains that anything other than a *Glomar* response would require the CIA to "confirm or deny" specific allegations, including "whether the CIA was involved or had an interest in the capture, transfer, and detention" of Bashmilah and Ali. CIA/OIPR Brief at 24. Hilton further asserts that acknowledging or denying responsive records would reveal "information sharing or coordination between the CIA and the Government of Yemen," thereby compromising the CIA's sources and methods, and damaging national security by revealing "'the extent of the CIA's liaison relationships generally and with respect to these individuals.'" *Id.* at 25 (quoting Second Hilton Decl. ¶ 38).

[24] Hilton refers to over 70 paragraphs of the Declaration of Ralph S. DiMaio Information Review Officer National Clandestine Service CIA, dated April 21, 2008 ("First DiMaio Decl.") to describe why certain intelligence sources and methods are exempt from disclosure. Second Hilton Decl. ¶ 25 (citing First DiMaio Decl. ¶¶ 55-127). As argued previously by Plaintiffs—and incorporated herein—the harms articulated in the First DiMaio Declaration are far too non-specific to support an Exemption 1 withholding. *See*, *e.g.*, Plaintiffs' October Brief at 5-6. The First DiMaio Declaration justifications are insufficient. *Rosenfeld v. DOJ*, 57 F.3d 803, 807 (9th Cir. 1995) (insufficient to "rely 'on general assertions that disclosure . . . may lead to a variety of consequences detrimental to national security.'").

a. CIA's National Security Claims are Undercut by Uncontroverted Official Acknowledgments and Public Disclosures

As described below, significant, uncontroverted official acknowledgements and reports undermine the CIA's national security claims.

(i) KSM/AZ Requests

Acknowledging whether the CIA possesses responsive documents will not "reveal significant information regarding . . . CIA's intelligence methods and activities," or permit more effective counterintelligence training because the methods and activities at issue are known. *See* CIA/OIPR Brief at 27-28. Numerous official acknowledgments, records, and reports concerning KSM's and AZ's detention and interrogation; enhanced interrogation techniques, including the "slap," "attention shake," and "sleep deprivation"; and the approval of the use of these techniques in the field by CIA headquarters seriously undermine the CIA's claim that the mere acknowledgement that such cables exist will compromise national security. Specifically:

- The CIA has officially acknowledged that the United States used multiple techniques in the CIA's rendition, secret detention and interrogation program, including what have been referred to as enhanced interrogation techniques.[25]
- The CIA, and the Office of the Director of National Intelligence have officially acknowledged that specific approval was required before any such interrogation technique was utilized with regard to any particular detainee.[26]

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[25] CIA Director General Hayden specified that "special *methods* of questioning" or "enhanced interrogation *techniques*" had been used against "less than a third" of the individuals secretly detained by the CIA. *See* Satterthwaite Decl. Ex. P (Press Release, Statement to Employees by Director of the Central Intelligence Agency, General Michael V. Hayden on the CIA's Terrorist Interrogation Program (Oct. 5, 2007)).

[26] For example, CIA Director General Hayden stated that the ". . . CIA designed specific, appropriate interrogation procedures. Before they were used, they were reviewed and approved by the Department of Justice and by other elements of the Executive Branch." *See* Satterthwaite Decl. Ex. Q, *Statement to Employees by Director of the Central Intelligence Agency*, General Mike Hayden on the Taping of Early Detainee Interrogations (Dec. 6, 2007); Satterthwaite Decl. Ex. B (Announcement, Office of the Director of National Intelligence, Summary of the High

- President Bush and the Office of the Director of National Intelligence have officially acknowledged that both AZ and KSM were part of the CIA's secret detention program and that they were both subject to interrogation using *multiple* techniques as part of that program.[27]

- Vice President Cheney has officially acknowledged that more than one enhanced interrogation technique was utilized during interrogations of KSM.[28]

- The CIA has officially acknowledged that waterboarding is among the enhanced interrogation techniques, and that KSM and AZ have been subjected to the technique.[29]

- Steven Bradbury, Principal Deputy Assistant Attorney General of the [Office of Legal Counsel ("OLC")], has confirmed that the "waterboarding" technique used by the CIA was adapted from the Survival, Evasion, Resistance and Escape ("SERE") training program.[30]

Value Terrorist Detainee Program (undated) ("*DNI Announcement*") ("Specific senior CIA officers . . . must approve—prior to use—each and every one of the lawful interrogation procedures to be used.").

[27] For instance, President Bush has explained that "[w]e knew that [AZ] had more information . . . it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of *procedures* . . . . [AZ] was questioned using these *procedures*, and soon he began to provide information . . . ." *See* Satterthwaite Decl. Ex. A (*White House News Release*) (President Bush furthered explained that, "[o]nce in our custody, KSM was questioned by the CIA using these *procedures*…") (emphasis added); Satterthwaite Decl. Ex. B (*DNI Announcement*); Satterthwaite Decl. Ex. R (Office of the Director of National Intelligence, Biographies of High Value Terrorist Detainees Transferred to the US Naval Base at Guantanamo Bay, Sept. 6, 2006).

[28] *See* Gutierrez Decl. Ex. N (ABC News, *Transcript: Cheney Defends Hard Line Tactics*, ABC News Dec. 15, 2008) (The Vice President was asked by interviewer, Jonathan Karl, whether he authorized the *tactics* used against KSM, to which he responded: "I was aware of the program, certainly, and involved in helping get the process cleared . . . ." The Vice President was also asked whether: "In hindsight, [he thought] any of those *tactics* that were used against Khalid Sheikh Mohammed and others went too far?" Vice President Cheney responded: "I don't."

[29] *See* Satterthwaite Decl. Ex. AA (*Senate Select Committee on Intelligence Holds a Hearing on the Annual Threat Assessment*: *Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 23-26 (2008)) (CIA director confirming that Abu Zubaydah and Khalid Sheikh Mohammed were among those waterboarded.).

[30] The "CIA's use of the waterboarding procedure was adapted from the SERE training program." *Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the Comm. on the Judiciary H.R.*., 110th Cong. 17 (2008) (testimony of Steven Bradbury, Principal Deputy Assistant Attorney General of the OLC).

- Senator Carl Levin has reported that in addition to waterboarding, SERE tactics include slap techniques and sleep deprivation, which are at issue in the requested cables.[31]

- The use by the Department of Defense ("DOD") of techniques modeled on the SERE tactics in its interrogations in Guantanamo, Iraq and Afghanistan has been officially acknowledged and is well-documented.[32]

- The CIA worked with the DOD to develop the enhanced interrogation techniques modeled on the SERE tactics for use in the CIA's interrogation program.[33]

- The CIA's enhanced interrogation techniques include slap, attention shake, and sleep deprivation techniques.[34]

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[31] The "techniques used in SERE resistance training can include things like . . . disrupting their sleep, . . . [and] face and body slaps . . . [and] waterboarding – mock drowning." *The Origins of Aggressive Interrogation Techniques: Hearing Before the S. Armed Services Comm.*, 110th Cong. 2 (2008) (statement of Sen. Carl Levin (Michigan), Chair of the Armed Services Comm.).

[32] *See generally* Gutierrez Decl. Ex. Q (OFFICE OF THE INSPECTOR GEN. OF THE DEP'T OF DEF., REVIEW OF DOD-DIRECTED INVESTIGATIONS OF DETAINEE ABUSE (U) (2006), *available at*, http://www.dodig.osd.mil/fo/Foia/ERR/06-INTEL-10-part%201.pdf); *see also* Gutierrez Decl. Ex. P (*The Origins of Aggressive Interrogation Techniques: Hearing Before the S. Armed Services Comm.*, 110th Cong. 4 (2008) (statement of Sen. Carl Levin (Michigan)), chair of the Armed Services Comm.)) ("SERE resistance training techniques … were turned on their head and sanctioned by Department of Defense officials for use offensively against detainees…during interrogations").

[33] *See* Gutierrez Decl. Ex. P (The Origins of Aggressive Interrogation Techniques: Hearing Before the S. Armed Services Comm., 110th Cong. 4 (2008) (statement of Sen. Carl Levin (Michigan), chair of the Armed Services Comm.)) (describing DOD and CIA meetings at Guantanamo Bay where "aggressive interrogation techniques… for use against detainees" were discussed, including sleep deprivation and use of "wet towel" technique.)

See Gutierrez Decl. Ex. R (Mark Benjamin, *The CIA's Torture Teachers: Psychologists helped the CIA exploit a secret military program to develop brutal interrogation tactics -- likely with the approval of the Bush White* House, Salon.com News, June 21, 2007, *available at* http://www.salon.com/news/feature/2007/06/21/cia_sere/print.html) ("There is growing evidence of high-level coordination between the Central Intelligence Agency and the U.S. military in developing abusive interrogation techniques used on terrorist suspects," including use of "the military's secretive [SERE] program to 'reverse-engineer' techniques…".

[34] On October 2, 2002 CIA lawyer John Fredman and others attended a meeting at GTMO in order to identify "…trained resisters (Al Qaeda training) and methods to overcome resistance," where use of psychological stressors such as sleep deprivation and the "wet towel" technique were discussed. *See* Gutierrez Decl. Ex. P (*The Origins of Aggressive Interrogation Techniques: Hearing Before the S. Armed Services Comm.*, 110th Cong. 4 (2008) (statement of Sen. Carl

- The FOIA requests that the CIA has *Glomared* were based on highly specific public disclosures by a former CIA employee John Kiriakou, who was involved in the capture of AZ, and was one of the first to interrogate him.[35]

Before it is entitled to summary judgment, the CIA must address this contrary record evidence, which at the very least creates an issue of fact as to its grounds to invoke *Glomar*.

The CIA's limited effort to address public disclosures—arguing that the Kiriakou allegations are not "official disclosures," *see* CIA/OIPR Brief at 21 n.7; Second Hilton Decl. ¶¶ 34—is wholly inadequate. In *Washington Post*, a reporter sought information from the DOD about the failed April 1980 rescue of American hostages held in Teheran. 766 F. Supp. 1. The DOD invoked Exemption 1 based on E.O. 12356 (a precursor to E.O. 12958) to withhold certain records. The plaintiff submitted "four volumes of public source materials" that called into question the DOD's claims. DOD refused to consider the materials contending that "information in the public domain need only be considered if it has been officially disclosed and it is identical to the information being withheld." *Id*. at 10, 12. The court disagreed, stating that it was neither

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Levin (Michigan), chair of the Armed Services Comm.)) (attaching Tab 7, Email from Mark Fallon to Sam McCahon *ccing* Brittain Mallow; Blaine Thomas; Scott Johnson; David Smith).

S*ee also* Gutierrez Declaration Ex. S (Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC News, Nov. 18, 2005, *available at* http://abcnews.go.com/WNT/Investigation/story?id=1322866) (reporting that former and current CIA officers and supervisors described harsh interrogation techniques as including: "the attention grab;" "the attention slap;" "the belly slap;" and waterboarding). *See*, Richard Esposito & Brian Ross, Coming in From the Cold: CIA Spy Calls Waterboarding Necessary But Torture, Former Agent Says the Enhanced Technique Was Used on Al Qaeda Chief Abu Zubaydah, ABC News, Dec. 10, 2007, Part 1 of Transcript, available at http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf (former CIA agent John Kiriakou confirming that CIA interrogation techniques include slap, attention shake, and sleep deprivation techniques).

[35] *See* Gutierrez Decl. Ex. K (Supplementary CIA FOIA Request) at ¶¶ 5-10; Satterthwaite Decl. ¶¶ 16(a), 29(b), 31(b). Kiriakou's proximity to the events as a CIA official lends credibility to his account, as do the CIA acknowledgments that pertain to aspects of his account, including the existence of cable traffic between CIA headquarters and the field concerning KSM and the CIA's use of waterboarding on KSM and AZ.

the "law of the case" nor the "law of the Circuit" that "unofficial information in the public domain need not be considered by an agency in determining whether to withhold information under exception 1." *Id*. at 10. In rejecting the DOD's contention, the court affirmed that:

> The presence of [information in the public realm] is . . . relevant to the determination, required by E.O. 12356, that disclosure of the information in question 'reasonably could be expected to cause damage to the national security.' E.O. 12356 § 1.3(b). By providing evidence that the information being withheld is already within the public domain, a FOIA plaintiff brings into question the government's determination that release of such information might reasonably be expected to damage the national security. Such contrary evidence, in turn, requires the Court to investigate the agency's declarations more closely and determine whether the agency has answered the questions raised by the plaintiff's evidence.

Id. at 12. Accordingly, the court concluded that an agency could not carry its burden if it failed to respond to such contrary evidence. *Id*.[36] Applying this rule, the *Washington Post* court ordered DOD to further justify its withholding of an intelligence report and code names

[36] The government cites various cases for the proposition that statements of former CIA employees or foreign governments are not "official disclosures." *See* CIA/OIPR Brief at 21. n.7. These cases concern waiver, where an otherwise valid exemption can be waived due to offical acknowledgments. *Halpern v. FBI*, 181 F.3d 279, 294 (2d Cir. 1999); *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421 (2d Cir. 1989). As described in *Washington Post*, public disclosures — "official" or otherwise — can also bear on the analysis of harms advanced by an agency in support of Exemption 1. Even in *Phillippi v. CIA*, which the government cites, the court addressed the significance of conflicting press reports in considering harm that could result from disclosure. 655 F.2d at 1332 n. 22. In addition to *Phillippi*, *Washington Post* cites to a host of other examples where a "specific explanation" was required as to "why formal release of information already in public domain threatens national security," including, *Abbotts v. Nuclear Regulatory Comm'n*, 766 F.2d 604, 608 n. 4 (D.C. Cir. 1985); *Afshar v. Dep't of State*, 702 F.2d 1125, 1131-1132 & n.7 (D.C. Cir. 1983); *Salisbury v. United States*, 690 F.2d 966, 971-72 (D.C. Cir. 1982); *Military Audit Project v. Casey*, 656 F.2d 724, 741 (D.C. Cir. 1981); *Hayden v. NSA*, 608 F.2d 1381, 1388 (D.C. Cir. 1979). These D.C. Circuit cases, moreover, are authoritative. As recently stated, "the Second Circuit has evidenced a willingness to look to the law of other circuits -- particularly the D.C. Circuit -- in the area of FOIA, even when it has not specifically adopted other circuits' law. This is especially the case when the Second Circuit defines the contours of the FOIA exemptions." *Wilner v. NSA*, No. 07 Civ. 3883 (DLC), 2008 U.S. Dist. LEXIS 48750. at *8 (S.D.N.Y. June 25, 2008). Indeed, as discussed below, a similar analysis occurs in *ACLU v. DOD*, 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005), a case which the government also cites approvingly.

information because a source of the report and code names could be discerned from public information. *Id*. at 13-14.

As the CIA has failed to account for public disclosures concerning the use of enhanced interrogation techniques on KSM and AZ summary judgment is appropriate. *Washington Post*, 766 F. Supp. at 31; *Founding Church of Scientology, Inc. v. NSA*, 610 F.2d 824, 831-832 (D.C. Cir. 1979) (requiring further agency justification where withheld documents were "already well publicized" and "[s]uppression of information of that sort would frustrate the pressing policies of the Act without even arguably advancing countervailing considerations").[37]

(ii) Bashmilah/Ali Requests

The CIA's refusal to confirm or deny documents responsive to Bashmilah/Ali Requests is similarly flawed because of public disclosures. The facts that the United States and Yemen communicated regarding Bashmilah and Ali, and that the United States handed files over to Yemen files regarding both men, have been publicly disclosed through various foreign governmental and United Nations sources, the Embassy of the Republic of Yemen in France, the United Nations Working Group on Arbitrary Detention, and the Permanent Mission of the

[37] For similar reasons, the CIA's reliance on *ACLU v. DOD*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005), is misplaced. CIA/OIPR Brief at 28. There, CIA invoked a *Glomar* response to a FOIA request seeking "a DOJ memorandum specifying interrogation methods that the CIA may use against top Al-Qaeda members." *ACLU* at 564. As in *Washington Post*, the court was sharply critical of the CIA's public declarations for failing to address press reports concerning the requested record. *ACLU v. DOD*, 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005). In fact, in *ACLU v. DOD*, it was only after the CIA submitted an *in camera* and *ex parte* declaration that the Court accepted the government's *Glomar* response. *ACLU v. DOD*, 389 F. Supp. 2d 547, 558 (S.D.N.Y. 2005). While Plaintiffs do not here request any similar *in camera* and *ex parte* declarations from the CIA, Plaintiffs request that the CIA "provide as complete a public record as is possible," consistent with *Phillippi v. CIA*, 546 F.2d 1009, 1015 (D.C. Cir. 1976), justifying its Exemption 1-based *Glomar* response in light of official acknowledgments and press reports.

Republic of Yemen to the United Nations.[38] Specifically, the following information is already in the public domain and has been confirmed by the United Nations and the Yemeni and Jordanian governments:

- Bashmilah was detained by Jordanian intelligence services, on or about October 21, 2003. After approximately a week, Bashmilah was delivered to another authority and transferred to an unknown location outside the country.[39]
- Ali was detained by Jordanian officials on September 4, 2005 and transferred to an unknown location outside of the country on September 8, 2005.[40]
- In 2005, the United States informed the Central Organization for Political Security in Yemen that Bashmilah was in U.S. custody.[41]
- Following their detention in U.S. custody, Bashmilah and Ali were returned to Yemen on May 5, 2005.[42]
- The Yemeni government has confirmed that it did not independently arrest or incarcerate Bashmilah or Ali. Instead, U.S. authorities handed the men over to the Yemeni authorities.[43]
- The Yemeni authorities detained Bashmilah and Ali while awaiting files pertaining to them from the United States, in order to verify the allegations made against the detainees by the U.S. government.[44]

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[38] *See* Gutierrez Decl. Ex. U (Bashmilah Decl. Ex. G (Letter from Embassy of the Republic of Yemen in France to Dick Marty, Council of Europe (March 27, 2007)); United Nations Working Group on Arbitrary Detention Opinion 47/2005; Gutierrez Decl. Ex. W (Bashmilah Decl. Ex. V (Letter from the Permanent Mission of the Republic of Yemen to the United Nations Office and Other International Organizations to the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, and the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (December 20, 2005)).

[39] *See* Gutierrez Decl. Exs. X, U.

[40] *See id.* Ex. X.

[41] *See id.* Ex. U.

[42] *Id.*

[43] *See id.* Exs. U, W.

[44] *See id.* Ex. U, W.

- Upon receiving a file from the United States pertaining to Bashmilah on November 10, 2005, the Yemeni government tried Bashmilah for using a false document and sentenced him to time served, including the time served outside of Yemen.[45]

- Upon receiving a file from the United States pertaining to Ali on November 10, 2005, the Yemeni government tried Ali for using false documents and sentenced him to time served, including the time served outside of Yemen.[46]

A wealth of reliable public information establishes that the CIA communicated with Yemeni authorities regarding the transfer and detention of Bashmilah and Ali. The CIA cannot argue simply that it does not constitute an official disclosure. Second Hilton Decl. ¶ 41. The CIA makes the unsupportable claim that revealing a CIA liaison relationship with the Government of Yemen would reveal secret intelligence methods and activities, jeopardizing national security. *See* CIA/OIPR Brief at 24-25; Second Hilton Decl. ¶¶ 36-37, 39; First DiMaio Decl. at ¶¶ 106-109. The CIA wholly disregards the fact that the same government with which it refuses to acknowledge a relationship has publicly disclosed this very same relationship. *See* Gutierrez Decl. Ex. V (Bashmilah Decl. Ex. U (United Nations Working Group on Arbitrary Detention Opinion 47/2005)) (stating that in official communications, the government of Yemeni confirmed that Bashmilah and Ali were handed over to the Yemeni authorities by the United States for detention pending receipt of files from the United States regarding the detainees). These are not speculative disclosures but are reliable, public reports from foreign governmental bodies and the United Nations. No plausible harm will result from acknowledging that these men were CIA intelligence interests or that the CIA had an intelligence relationship with Yemen because that information is publicly known. Unless and until the government addresses this evidence, summary judgment is inappropriate. *Washington Post*, 766 F. Supp. at 31.

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[45] *Id.*; *see also* Gutierrez Decl. Ex. Y (Yemeni Court Decision (February 27, 2006)) at 2, 11).

[46] *See* Gutierrez Decl. Ex. W (Bashmilah Decl. Ex. V); *see also id.* Ex. Y (Yemeni Court Decision (February 27, 2006) at 2, 11).

Cases cited by the government are unavailing. CIA/OIPR Brief at 25-26. None, for example, concern records of communication with a foreign government where the foreign government had acknowledged them. *Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007); *Weberman v. NSA*, 668 F.2d 676 (2d Cir. 1982); *Pipko v. CIA*, 312 F. Supp. 2d 669 (D.N.J. 2003); *Mohamed Ahmed Nayed v. INS*, No. C 07-02798 JW, 1993 U.S. Dist. LEXIS 16962 (D.D.C. Nov. 29, 1993); *Arabian Shield Dev. Co. v. CIA*, No. 3-98-CV-0624-BD, 1999 U.S. Dist. LEXIS 2379 (N.D. Tex. Feb. 26, 1999); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 624 (S.D.N.Y. 1996).[47] Plaintiffs are unaware of—and the government has not cited to—a case where the disclosure at issue concerned a foreign government that had already acknowledged the substance and existence of the communications requested. Moreover, because of acknowledgment by the foreign government itself, the CIA could confirm or deny responsive records without creating any adverse precedent concerning the CIA's ability to maintain confidences. *Cf. Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007). The CIA classification sought here is without precedent.

Finally, while the government cites *Bassiouni v. CIA* at length, the CIA in that case acknowledged that it held responsive documents concerning the target, but otherwise provided a "'no number, no list' response" 392 F.3d 244, 246 (7th Cir. 2004). In *Bassiouni*, the government acknowledged more than it is willing to do here. CIA/OIPR Brief at 25-26.

b. CIA's *Glomar* Response is Waived as to KSM/AZ Requests

Certain of the public disclosures described above also constitute official acknowledgements. When "'information has been officially acknowledged, its disclosure may

[47] Because the Yemeni government has acknowledged the facts above, the diplomatic concerns voiced in certain of these cases are absent. *Cf. Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 625 (S.D.N.Y. 1996) ("The CIA further argues that official confirmation that the CIA . . . conducted espionage in a foreign country could cause a diplomatic confrontation and lead to the disruption of foreign relations."); *Arabian Shield Dev. Co. v. CIA*, No. 3-98-CV-0624-BD, 1999 U.S. Dist. LEXIS 2379, at *8 (N.D. Tex. Feb. 26, 1999) (discussing diplomatic concerns).

be compelled even over an agency's otherwise valid exemption claim.'" *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (internal quotation marks omitted) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). Courts have articulated the following test for "official acknowledgment": the information requested must (1) be as specific as the information previously disclosed; (2) match the information previously disclosed; and (3) be made public through an official and documented disclosure. *Wolf*, 473 F.3d at 378.

Although the CIA discounts statements made by John Kiriakou as unofficial disclosures, as discussed above, there are numerous specific official acknowledgements that support the existence of the KSM/AZ records. *See* Second Hilton Decl. ¶ 34. The government has waived its right to assert a *Glomar* response concerning the cables at issue.[48] *See Wolf*, 473 F.3d at 378 (official acknowledgment waives *Glomar* response as to particular records). Accordingly, the CIA should be ordered to acknowledge or deny whether it possesses responsive documents.

c. CIA Cannot Invoke Exemption 1 to Conceal Improper, Unlawful or Embarrassing Conduct

Section 1.7(a) of Executive Order 12958 prohibits classification, *inter alia*, to "conceal violations of law, inefficiency, or administrative error"; to "prevent embarrassment"; or to "prevent or delay the release of information that does not require protection in the interest of national security." As detailed in Plaintiffs' October Brief, there is ample evidence in the record of the CIA's improper classification of information related to counter-terrorism programs, and Plaintiffs incorporate those arguments herein. Plaintiffs' October Brief at 25-28.

Improper classification concerns are particularly acute in the *Glomar* context. *ACLU v. DOD*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) (framing as the danger of *Glomar* that it

[48] The CIA concedes that statements from CIA and high ranking White House officials can constitute "official acknowledgements." CIA/OIPR Brief at 21-22 n.7.

encourages "an unfortunate tendency . . . to over-classify . . . [and to improperly classify] that which is more embarrassing than revelatory of intelligence sources or methods").

The public record described above concerning AZ and KSM, as well as concerning Bashmilah and Ali, give rise to serious improper classification concerns. Yet, the CIA's declaration does not address these concerns with any specificity, particularly with regard to press accounts of these issues, *ACLU v. DOD*, 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005), and merely recites conclusory, boilerplate language, *see* Second Hilton Decl. ¶ 50. Plaintiffs note that the Durham investigation is examining CIA personnel's motive and intent for destroying interrogation videotapes related to AZ. *See* Supplemental Declaration of John H. Durham, dated Dec. 16, 2008, ¶ 4. Presumably, Durham is investigating whether one motive for destruction was to conceal illegal conduct.

The government must address with particularity whether suggestions have been made within the CIA to conceal information to avoid disclosure of illegal or embarrassing conduct. To satisfy the substantive requirements of Exemption 1, it is "undeniably the Government's burden" to establish that withheld material falls within an applicable Executive Order and has been properly classified in accordance with that Order—plaintiffs can defeat summary judgment by adducing sufficient evidence to create a disputed issue of material fact as to the propriety of classification. *McDonnell v. United States*, 4 F.3d 1227, 1245 (3d Cir. 1993); *see also Wiener v. FBI*, 943 F.2d 972, 988 (9th Cir. 1991) (reversing summary judgment where triable issues of fact remained regarding whether materials withheld under Exemption 1 were not withheld merely "'to conceal violations of law, inefficiency, or administrative error[, or] to prevent embarrassment to a person, organization, or agency.'") (citing E.O. 12356 § 1.6(a)) . If the government does not adequately address these failings, the Court should order a continuance of

the motion with respect to Exemption 1 and afford Plaintiffs an opportunity to submit interrogatories and conduct depositions pursuant to Federal Rule of Civil Procedure 56(f) to assess whether the CIA has engaged in improper classification.

2. CIA's Exemption 3 Claims are Unsupported

The CIA also invokes Exemption 3 in support of its *Glomar* response. Under the FOIA, "the two threshold criteria needed to [satisfy] exemption 3 . . . are that (1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall within that statute's scope . . . ." *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994). The CIA relies on the National Security Act (the "NSA") as the qualifying statute. If the agency can demonstrate that the "release of the requested information can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods, it is entitled to invoke the statutory protection." *Phillippi*, 546 F.2d at 1015.

a. CIA's Invocation of Exemption 3 is Inconsistent with IRTPA

As argued previously by Plaintiffs, and incorporated herein, the CIA's Exemption 3 argument is flawed because it ignores the restructuring of the nation's intelligence infrastructure through the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638-3872 ("IRTPA"), which amended the NSA in significant respects. *See, e.g.*, Plaintiffs October Brief at 14-20. Because of IRTPA, the CIA no longer has independent authority to assert a withholding of "intelligence sources and methods." IRTPA § 1011(a) (striking NSA §§ 102-104 and inserting amended NSA § 102A(i), 50 U.S.C. § 403-1(i) (2004)). This restructuring led to two shifts pertinent here.

First, a declaration from the Office of the Director of National Intelligence ("DNI") is now required. While a memorandum from the DNI was provided along with the CIA's earlier brief, which Plaintiffs challenged as inadequate, here the DNI has made no submission

whatsoever: the CIA has submitted only a declaration from Hilton, an associate review officer for the CIA's National Clandestine Services ("NCS"), to support classifications here. The Hilton Declaration is procedurally insufficient to support the CIA's Exemption 3 withholding.

Second, IRTPA also included a substantive change in the scope of DNI authority. As argued previously, IRTPA repealed by implication the definition of "sources and methods" established by *Sims* and its progeny. Because the CIA ignores the IRTPA's importance, it wrongly presumes past case law retains the same precedential value.

While Congress did not detail any particular substantive alternative to the scope of sources and methods in *Sims*, heightened scrutiny and reduced deference toward agency declarations in the Exemption 3 context would be consistent with IRTPA goals. Moreover, it may be appropriate in some instances for a special master or national security expert to be appointed to assist the court in evaluating national security claims. For instance, this was the approach adopted in *Washington Post*, where the court appointed a special master to review sensitive national security claims and potential arguments concerning such claims. *Washington Post*, 766 F. Supp. at 4; *see also Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (contemplating appointment of expert to assist in determining potential harm to national security). Where the court and parties are required, as here, to weigh complex national security concerns, such measures may be appropriate.

b. CIA's Exemption 3 Withholding Is Waived As to KSM/AZ Requests

As discussed above, official acknowledgements concerning AZ and KSM and enhanced interrogation techniques waived the CIA's *Glomar* response as to records sought. *See Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (official acknowledgment waives Exemption 1 and 3-

based *Glomar* response as to particular records). The CIA should be ordered to produce the documents sought or further justify their withholding under applicable FOIA exemption(s).

Cases cited by the CIA concerning the protection of "methods" are inapposite because none concerned the magnitude of official acknowledgements here. *See Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990); *Miller v. Casey*, 730 F.2d 773 (D.C. Cir. 1984). In fact, in *Blazy*, also cited by the CIA, the court found that "the plaintiff's polygraphs constitute intelligence methods and therefore cannot be released, although summaries have been provided." *Blazy v. Tenet*, 979 F. Supp. 10, 23 (D.D.C. 1997). The CIA, therefore, acknowledged use of a particular intelligence method (the polygraph) and provided summaries of thereof, even if contents of the actual tests were withheld. This is far more information than the CIA is willing to provide here.

III. THE CIA AND OIPR HAVE CONDUCTED AN INADEQUATE SEARCH FOR RECORDS RESPONSIVE TO PLAINTIFFS' REQUESTS.

In affidavits striking in their lack of detail, both the CIA and OIPR demonstrate their repeated failure to construe Plaintiffs' requests liberally and to conduct an adequate search for records responsive to Plaintiffs' FOIA Requests, and to Categories 2, 14, and 12 of the Supplementary CIA FOIA Request. Because CIA and OIPR fail to establish beyond a material doubt that they have conducted searches reasonably calculated to locate responsive records, summary judgment is not warranted.

A. The Agencies Failed to Satisfy the Standards for An Adequate Search.

As this Court has recognized, on motion for summary judgment, "the defending agency has the burden of showing that its search was adequate." *Amnesty Int'l USA v. CIA*, No. 07 Civ. 5435 (LAP), 2008 U.S. Dist. LEXIS 47882, at *24 (S.D.N.Y. June 19, 2008) (citation omitted); *see also Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). An agency

may rely on affidavits to discharge its burden, provided that the affidavit is "relatively detailed and non-conclusory," and "at a minimum, describe[s] in reasonable detail the scope and method by which the search was conducted and [] describe[s] at least generally the structure of the agency's file system which makes further search difficult." *Amnesty Int'l USA*, 2008 U.S. Dist. LEXIS 47882 at *24 (internal quotation marks and citations omitted); *see also Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (requiring a "reasonably detailed affidavit, setting forth the search terms and type of search performed, and averring that all files likely to contain responsive materials . . . were searched."). Affidavits cannot be "'so general as to raise a serious doubt whether the [agency] conducted a reasonably thorough search of its records.'" *Friends of Blackwater v. U.S. Dep't of Interior*, 391 F. Supp. 2d 115, 120 (D.D.C. 2005) (*quoting Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994)).

"A search will be considered adequate if it was reasonably calculated to uncover all relevant documents." *Amnesty Int'l USA*, 2008 U.S. Dist. LEXIS 47882 at *26 (internal quotation marks and citations omitted). Adequacy of search is a peculiarly fact-sensitive question, and "[r]easonableness must be evaluated in the context of each particular request." *Id.* at *27. If "'the record leaves substantial doubt as to the sufficiency of the search, summary judgment for the agency is not proper.'" *Friends of Blackwater v. U.S. Dep't of the Interior*, 391 F. Supp. 2d 115, 120 (D.D.C. 2005) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)).

B. The CIA Failed To Conduct An Adequate Search for Records Responsive to Categories 2, 14, and 12.

1. The Category 2 Search Was Fundamentally Flawed.

Plaintiffs' Category 2 request sought "[t]he list of 'erroneous renditions' compiled by the CIA's OIG." Gutierrez Decl. Ex. K (Supplementary CIA FOIA Request) at ¶ 2. Hilton asserts

that the CIA officers conducting the search for this record contacted the Deputy Assistant Inspector General for Investigations ("Deputy AIG") within OIG, who at that time was responsible for overseeing all investigations conducted by the OIG and, thus, had "detailed knowledge of the content of OIG investigations files," including those related to the Terrorist Detention and Interrogation ("TDI") Program. CIA/OIPR Brief at 9; Second Hilton Decl. ¶ 16. This unnamed individual stated that "no such [list] document existed." CIA/OIPR Brief at 9-10; Second Hilton Decl. ¶ 16. Based on what appears to be a single conversation, and without ever having conducted a search, the CIA asserts that there are no records responsive to Category 2. Because the Hilton Declaration demonstrates fatal flaws in both the scope and methods of the CIA's search for records responsive to Category 2, summary judgment is improper.

With respect to scope, agencies are under a duty to construe FOIA requests liberally. *Amnesty Int'l USA*, 2008 U.S. Dist. LEXIS 47882 at *38; *see also LaCedra v. Executive Office for U.S. Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003); *Nation Magazine*, 71 F.3d at 890. This Court has noted that "federal agencies should go as far as they reasonably can to ensure that they include what requesters want to have included within the scopes of their FOIA requests." *Amnesty Int'l USA*, 2008 U.S. Dist. LEXIS at *37 (citing authorities). Indeed, agencies may not "read the request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester." *Amnesty Int'l USA*, 2008 U.S. Dist. LEXIS 47882 at *37 (quoting *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985)). The CIA has not discharged this obligation.

First, there is no explanation of the Deputy AIG's interpretation of the term "erroneous rendition" or of what document(s) s/he may have deemed responsive. *See Wilderness Soc'y v. U.S. Bureau of Land Mgmt.*, No. Civ. A. 01CV2210, 2003 WL 255971, at *4 n.11, 12 (D.D.C.

Jan. 15, 2003) (finding search inadequate where declarants did not reveal the manner in which they interpreted the request, whether they interpreted it narrowly, and the universe of potentially responsive documents). Plaintiffs and the Court are left with no way to judge whether the CIA has discharged its duty to interpret the request liberally.

Second, in its apparent interpretation of the scope of Plaintiffs' Category 2 request, the CIA demonstrates a strikingly similar flaw to that of the Department of State in *Hemenway*. In *Hemenway*, the plaintiff had made what the court deemed an ambiguous request—one that could either be interpreted as a request for a single list of individuals complete with citizenship information, or a list *plus* any additional records that would convey the requested citizenship (and other) information. *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985). The court admonished the agency:

> One need not get involved in a semantic debate over the meaning of the word "list" to understand what information the plaintiff wanted. Because the defendants had reasonably clear notice of what the plaintiff sought, the defendants had an obligation to provide any files containing citizenship information that they had, *provided* that the information was not covered by an exemption.

Id. Other cases dealing with requests for "lists" have similarly required agencies to disclose the underlying information. *See Schladetsch v. U.S. Dep't of Housing & Urban Dev.*, No. 99-0175, 2000 WL 33372125, at *2, 3 (D.D.C. Apr. 4, 2000) (where agency had discrete pieces of information sought but not in the requested list form, extracting and compiling the data did not amount to creation of a new record); *See Int'l Diatomite Producers Ass'n v. U.S. Soc. Sec. Admin.*, No. C-92-1634-CAL, 1993 WL 137286, at *2, 3, 6 (N.D. Cal. Apr. 28, 1993) (where requester sought listings that could be derived from information within existing records, agency ordered to create a list or produce the multiple redacted listings themselves).

Third, Plaintiffs' request defined the term "record" broadly, to include "any and all reports, statements, examinations, memoranda, correspondence, designs, maps, photographs, microfilms, computer tapes or disks, audio or videotapes or transcripts thereof, rules, regulations, codes, handbooks, manuals, or guidelines" and, to the extent such records had been destroyed, the request sought records that "are integrally related to, summarize, or are interchangeable" with the destroyed records. Gutierrez Decl. Ex. K (Supplementary CIA FOIA Request) at 1. Consonant with authority, the language of the request, and agencies' general obligation to construe FOIA requests liberally, the CIA was required to provide records concerning erroneous renditions even if no actual "list" existed.[49]

With respect to the adequacy of the agency's search methods for Category 2 records—which, indeed, consisted of no search at all—the CIA's conclusory statement that it has considered the request and that no record exists is simply insufficient. *Nation Magazine*, 71 F.3d at 890 (citing *Weisberg v. DOJ*, 627 F.2d 365, 370 (D.C. Cir. 1980)) (stating that conclusory statements that the agency has reviewed relevant files are insufficient to support summary judgment). "An agency may not satisfy its burden to search for documents with a conclusory statement that it does not maintain such documents." *Robert v. DOJ*, No. 05-CV-2543 (NGG), 2008 U.S. Dist. LEXIS 38103, at *16-17 (E.D.N.Y. May 9, 2008); *see also Defenders of Wildlife v. U.S. Dep't of Agric.*, 311 F. Supp. 2d 44, 55 (D.D.C. 2004) ("[T]he bare assertion that the Deputy Under Secretary saw the FOIA request and . . . stated that he had no responsive documents is inadequate because it does not indicate that he performed any search at all.").

[49] Importantly, the agency does not argue that it possesses no records concerning individuals who have been erroneously rendered—the Hilton Declaration merely says that "no such [list] document exists." Second Hilton Decl. ¶ 8.

The CIA cites to this Court's discussion of *American-Arab Anti-Discrimination Committee v. DHS*, 516 F. Supp. 2d 83 (D.D.C. 2007) (hereinafter "*ADC*"), for the proposition that where an agency official establishes that a search would be futile, the reasonable search required by the FOIA may be no search at all. CIA/OIPR Brief at 33, 36; *Amnesty Int'l USA*, 2008 U.S. Dist. LEXIS 47882 at *34 n.17. However, the Hilton Declaration is so devoid of detail as to the basis for the official's conclusion that no document exists that it fails to demonstrate the type of futility outlined in the government's cited authorities.

The facts of *ADC* are highly distinguishable from the facts at bar. In *ADC*, the court was assessing the sufficiency of the conclusions reached by the declarant himself, based not only on his own knowledge, but on his conversations with other agency officials. In addition, the requested information in *ADC*—whether the agency collected ethnicity and religious information—was basic operational information about the function of the agency's program, such that any official in the declarant's role of Deputy Assistant Secretary for Operations would have instinctively been aware of such information.[50] Even with these details, the *ADC* court deemed the sufficiency of the agency's declaration to be a "close call." *ADC*, at 87-88.

Here, we have even less. First, the Hilton Declaration is several steps removed from the agency official who states that no responsive documents exist—Hilton recounts the experience of

[50] Similarly, each of the government officers that this Court credited with reasonably describing why a search would be futile made such assertions based on his or her general knowledge of their respective division's operations and programs, not based on those officers' asserted "familiarity" with the detailed contents of countless pages of files, as the Deputy Assistant Inspector General claims here. *Amnesty Int'l USA v. CIA*, No. 07 Civ. 5435 (LAP), 2008 U.S. Dist. LEXIS 47882, at *11-12 (S.D.N.Y. June 19, 2008) (citing Declaration of Shari Suzuki, dated Nov. 30, 2007 ("Suzuki Decl.")) ¶ 23 (explaining the division directors' beliefs "based on their knowledge of the operations of their division"); *id*. at *9 (citing Suzuki Decl. ¶ 10) (the Director of the Training Assistance Division stated that "the division did not maintain any programs related to the issues covered by the FOIA request"); *id*. at *7 (citing Declaration of Catrina M. Pavlik-Keenan, dated Nov. 30, 2007) ¶ 14 (officers did not operate relevant programs and did not engage in apprehension, transfer, detention, or interrogation operations)).

the CIA officers who recount the statements of the Deputy AIG. Second, as described above, the declaration demonstrates no basis for the Deputy AIG's conclusion that no document exists. The Deputy AIG official does not explain, for example, that such information is not collected or that such lists are not compiled or any other reason for his bare assertion. As distinguished from the officials credited in *ADC* and *Amnesty International*, who claimed knowledge of general operational information based on familiarity with the programmatic and operational schemes of their divisions, the Deputy AIG here claims detailed familiarity with the content of all of OIG's investigation files. It strains credulity to suggest that the individual in charge of *all* OIG investigations would have such deep knowledge and recollection of all the countless pages in the OIG investigations files that he would know whether a specific document, or records containing specific information, were contained within them. Pointedly, Hilton does not indicate whether the Deputy AIG was in charge of investigations at the time the publicly reported-on list was compiled. Thus, the declaration fails to sufficiently establish that the requested document or records concerning erroneous renditions do not exist. *See Robert v. DOJ*, No. 05-CV-2543 (NGG), 2008 U.S. Dist. LEXIS 38103, at *16-18 (E.D.N.Y. May 9, 2008) (distinguishing *ADC*, and finding that affiants did not demonstrate sufficient knowledge of practices and procedures or sufficient explanation to credit their argument that agency did not maintain requested documents); *Defenders of Wildlife*, 311 F. Supp. 2d at 55 (official's conclusory denial that he possessed responsive records, without providing any details of his search, did not demonstrate that search was reasonably calculated to uncover all relevant documents).

The failure to search for this document, or to adequately explain the reason for not searching, is particularly egregious given the multiple media reports on the existence of such a document. A December 4, 2005 *Washington Post* article describing the list of "erroneous

renditions" was specifically excerpted and cited in the Supplementary CIA FOIA Request. Gutierrez Decl. Ex. K (Supplementary CIA FOIA Request) at 2; *see id*. Ex. Z (Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, Wash. Post, Dec. 4, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html (last visited Dec. 21, 2008)). A compilation or investigation into erroneous renditions has been described in subsequent reports as well. *See* Gutierrez Decl. Ex. AA (Jane Mayer, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 287-288 (2008)) (referring to a CIA OIG 2004 "Special Review" of CIA activities, including the investigation of seven or eight instances of the mistaken abduction and secret detention of individuals); Gutierrez Decl. Ex. BB (Associated Press, *CIA Watchdog Looks into 'Erroneous Renditions': Inspector General Investigates Cases of People Mistaken as Terror Suspects*, Dec. 27, 2005)) (stating that the CIA Inspector General John Helgerson was "looking into fewer than 10 cases of potentially 'erroneous renditions.'"). The Court should order the government to conduct an adequate search for materials responsive to Category 2 and, if necessary, permit discovery in an effort to resolve material factual disputes raised in the parties' summary judgment motions.

2. The Category 14 Search Was Deficient in Both Scope and Method

Category 14 sought the following: "The Sept. 13, 2007 notification (described in a letter from [U.S. Attorney] Chuck Rosenberg to Judges [Karen J.] Williams and [Leonie] Brinkema, dated October 25, 2007) from the attorney for the CIA informing the United States Attorney for the Eastern District of Virginia that the CIA had obtained a videotape of an interrogation of one or more detainees." Gutierrez Decl. Ex. K (Supplementary CIA FOIA Request) at ¶ 14. To search for responsive documents, CIA officers "consulted with the attorneys in the CIA Office of General Counsel who were familiar with the CIA's involvement" in the criminal prosecution of

United States v. Moussaoui, in connection with which the October 25, 2007 letter described in the Category 14 request was issued. Second Hilton Decl. ¶ 17. According to Hilton, the CIA Office of General Counsel ("OGC") attorneys "stated that no such written notification had been made" and that the notification was made telephonically. *Id*. So concluded the "search"; the CIA asserts that no records are responsive to Category 14. CIA/OIPR Brief at 10; Second Hilton Decl. ¶ 17.

The CIA's search was deficient in both scope and method. With regard to scope, the suggestion that no *written* notification exists does not end the inquiry. Construing the request liberally, as the law requires, the agency should have searched for any records related to the requested notification, including any records memorializing such notification. *Amnesty Int'l USA*, 2008 U.S. Dist. LEXIS 47882, at *38; *see also LaCedra*, 317 F.3d at 348; *Nation Magazine*, 71 F.3d at 890. As stated above, Plaintiffs' Supplementary CIA FOIA Request itself defines the term "records" broadly. Gutierrez Decl. Ex. K (Supplementary CIA FOIA Request) at 1. Therefore, to the extent that there were any records that related to the requested notification—even if the notification itself was not in written form—such records are within the scope of the request.

The search methods were equally deficient. Again, the CIA's declarant is several steps removed from the search: Hilton does not attest that she spoke with the CIA OGC attorneys who stated that the notification was made telephonically, only that unnamed CIA officers did. In addition, this Court and Plaintiffs have no basis to test the veracity of the CIA OGC attorneys comments. The declaration does not specify that any of these attorneys were the ones who actually *made* the notification (and, thus, would have known the form of notification), and gives no basis for the CIA OGC attorneys' to know that notification was made telephonically.

Although the CIA OGC attorneys are described as being familiar with the CIA's involvement in the *Moussaoui* prosecution, no basis for their "familiarity" is described, nor does "familiarity" equate with a level of knowledge necessary to demonstrate an adequate search. Given the specificity of the request, conducting a search reasonably calculated to uncover all relevant documents required the CIA to contact the personnel who made the notification. *See Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327-28 (D.C. Cir. 1999) (finding agency search deficient, in part, because the agency official in charge of a missing record was not contacted; "agency personnel should be contacted if there is a close nexus, as here, between the person and the particular record."); *Hardy v. DOD*, No. CV-99-523-TUC-FRZ, 2001 WL 34354945, at *5 (D. Ariz. Aug. 27, 2001) (concluding that requester had "raised a genuine issue of material fact as to whether the [agency] had made reasonable efforts to obtain the requested information" where it was unclear whether agency had contacted the "presumably few witnesses" responsible for the records at issue). Finally, because the Hilton Declaration does not suggest that the CIA OGC attorneys were the ones who made the notification, they must have learned about the notification through some other means, presumably some written means. Any such written record memorializing a telephonic notification would be responsive.

3. The Category 12 Search was Not Reasonably Calculated to Uncover All Relevant Documents

Category 12 requested cables between the CIA and field operations concerning the waterboarding of KSM. Gutierrez Decl. Ex. K (Supplementary CIA FOIA Request) ¶ 12. The Hilton Declaration states that CIA information management professionals searched for responsive records in an electronic database of cables maintained by the NCS that was designed to aggregate all CIA cables concerning KSM. CIA/OIPR Brief at 10; Second Hilton Decl. ¶ 42. Search terms including, '"waterboard,' 'water,' and 'other variations of the term 'waterboard,'"

and the search returned 49 responsive cables. *Id.* at ¶¶ 42-43. The CIA officers then consulted with "NCS employees" and determined that it was unlikely that other files would contain additional responsive records. Second Hilton Decl. ¶ 42.

Despite the fact that the CIA's search returned *some* responsive documents (the withholding of which Plaintiffs challenge for the reasons given in Section IV), the details in the Hilton Declaration demonstrate that the search was not reasonably calculated to uncover *all* relevant documents. First, as to scope, while the CIA's electronic search terms included variations of the term "waterboard," Hilton does not attest that the CIA also searched for commonly analogous terms, such as "wet towel,"[51] "enhanced interrogation techniques,"[52] "EITs,"[53] and "enhanced interrogation methods."[54] Agencies are required to search for common variants of terms in order to conduct an adequate search. *See Summers v. DOJ*, 934 F. Supp. 458, 461 (D.D.C. 1996) (finding search for J. Edgar Hoover's "'commitment calendars"' inadequate when FBI conducted exhaustive, fruitful search for records containing word "'commitment'" but did not search for "appointment" or "diary"). In addition, there is no

[51] *See* Gutierrez Decl. Ex. P (*The Origins of Aggressive Interrogation Techniques: Hearing Before the S. Armed Services Comm.*, 110th Cong. 4 (2008) (statement of Sen. Carl Levin (Michigan), Chair of the Armed Services Comm.) (*Attaching* Tab 7, Email from Mark Fallon to Sam McCahon ccing Brittain Mallow; Blaine Thomas; Scott Johnson; David Smith attaching Counter Resistance Strategy Meeting Minutes)) (using term "wet towel" to describe waterboarding).

[52] *See* Satterthwaite Decl. Ex. AA (*Senate Select Committee on Intelligence Holds A Hearing on the Annual Threat Assessment: Hearing Before the S. Select Comm. On Intelligence*, 110th Cong. 24 (2008)) (CIA Director Michael Hayden explains that fewer than a third of those in CIA detention had "what we call the enhanced interrogation techniques used against them," including "waterboarding").

[53] *See* Satterthwaite Decl. Ex. BB (Special Review) (referring to use of "standard techniques and EITs").

[54] *See* Satterthwaite Decl. Ex. BB (Other Document #7, Other Document #129 (suggesting that the waterboard is an example of "enhanced interrogation methods")).

evidence that the CIA officers used the prodigious information in the public record, or known to the agency, about the detention and interrogation of KSM to guide its search for responsive documents (*e.g.*, dates of detention, dates of interrogation, places of detention, etc.). Although Plaintiffs' request refers to cables concerning the "waterboarding" of KSM, an adequate search does not end with a search for this term—the CIA was obligated to construe the request liberally, use the information about the subject of the request to guide its search, and to search for common variants. This, the CIA failed to do.

Other aspects of the CIA's search methods were also fatally flawed. Hilton explains that, in addition to the database search, the CIA officers "consult[ed] with NCS employees [and] determined that it was not likely that any other files would contain additional responsive records." This explanation is inadequate. Hilton provides no clue as to the identity of the consulted NCS employees, or the basis of their knowledge for stating that there would likely be no other responsive records. Hilton provides no detail as to the structure of the NCS's files, which might help explain why further search would be difficult or not fruitful.[55] This sort of detail is required in order for an affidavit to establish that an adequate search has been conducted. Moreover, Hilton fails to explain why other CIA offices likely to contain records—the Director's Office; the OIG; the Deputy Director of the NCS; the Counterterrorism Center and the Counterintelligence Center/Analysis Group; the Office of Collection Strategies and Analysis; and the Office of Terrorism Analysis—were not tasked with the search. As such, summary judgment for the CIA is improper.

[55] For instance, the CIA fails to give an assurance that no other files would contain emails or memoranda attaching cables concerning KSM's waterboarding.

C. OIPR Conducted an Inadequate Search for Records Responsive to the Plaintiffs' FOIA Requests and the Second Amnesty Request

Although it provided a *Glomar* response to the Plaintiffs' FOIA Requests and the Second Amnesty Request concerning its operations records, the OIPR did conduct "searches" for documents responsive to Plaintiffs' requests among senior management's files, within its policy records, and within litigation records. Bradley Decl. ¶¶ 8-14, 16. Because these searches were fundamentally inadequate, they do not warrant summary judgment.

According to the Bradley Declaration, the Counsel for Intelligence Policy ("CIP") tasked each member of senior management with searching for records because he believed they would be most likely to either have responsive records or know which subordinates might have them. Bradley Decl. ¶ 9. Each senior manager "personally conducted a search of his or her files," including email, and no responsive records were found. *Id*. ¶¶ 10, 11.

The Bradley Declaration fails to establish the detail necessary to inquire into the sufficiency of these searches. First, there is no indication of the senior managers' interpretation of the scope of the request, and no basis on which to judge whether the requests were afforded the liberal interpretation that the FOIA requires. *See Wilderness Soc'y*, 2003 WL 255971 at *4 n.11, 12 (search was inadequate where declarants did not reveal the manner in which they interpreted the request, whether they interpreted it narrowly, and the universe of documents that might be deemed responsive). Second, no detail is provided about the mechanics of the senior managers' searches. There is no description of what type of information is contained in the senior managers' files or the file structure. *Amnesty Int'l USA*, 2008 U.S. Dist. LEXIS 47882, at *24 (affidavit must generally describe structure of files). Also, although electronic searches were conducted, no search terms are listed. A failure to list search terms is a fundamental inadequacy. *See Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (stating

that a "reasonably detailed affidavit" sets forth "the search terms and type of search performed, and aver[s] that all files likely to contain responsive materials . . . were searched"); *Maydak v. DOJ*, 362 F. Supp. 2d 316, 326 (D.D.C. 2005) (search deemed inadequate where, *inter alia*, no search terms provided); *Toolasprashad v. Bureau of Prisons*, No. 06-1187, 2006 U.S. Dist. LEXIS 82397, at *4 (D.D.C. Nov. 13, 2006) (same); *Boyd v. U.S. Marshal Serv.*, No. 99-2712 (JR), 2002 U.S. Dist. LEXIS 27734, at *2-3 (D.D.C. Mar. 15, 2002), *aff'd*, 475 F.3d 381 (D.C. Cir. 2007) (same). Coupled with the failure to detail the senior managers' interpretation of the requests, this failure to list search terms affords the Court and Plaintiffs no means of determining whether there was any consistent approach to the searches among the senior managers or, indeed, whether an adequate search was conducted within those locations most likely to have responsive records. Finally, although the CIP tasked the senior managers with the searches in part because they would "know which subordinates would be most likely to have responsive records," the Bradley Declaration does not indicate whether the senior managers contacted any subordinates in conducting their searches or sub-tasked any searches to subordinates most likely to have responsive records. Bradley Decl. ¶ 9.

The Bradley Declaration indicates that no search was conducted of OIPR litigation records in response to the Plaintiffs' FOIA Requests because Plaintiffs did not ask for records pertaining to any particular litigation and because "OIPR FOIA personnel who had substantive knowledge of the contents of the litigation records were not aware of any criminal, civil, or administrative matters pertaining to the subject matter of the [Plaintiffs' FOIA] requests." Bradley Decl. ¶ 14. As discussed with respect to the CIA's response to Category 2 above, the OIPR may not satisfy its burden to search for documents with a conclusory statement that agency personnel have concluded that no responsive documents exist. *Robert v. DOJ*, 2008 U.S. Dist.

LEXIS 38103 at *16-17; *see also Defenders of Wildlife*, 311 F. Supp. 2d at 55. First, the Bradley Declaration is several steps removed from the OIPR FOIA personnel who claim that no responsive records exist. Second, as in *Robert* (and as distinguished from *ADC*), the agency personnel stating that no responsive records exist are FOIA personnel claiming detailed knowledge of the entirety of the content of the OIPR's litigation records, instead of an agency official professing knowledge of general operational facts within bounds of his role. The Bradley Declaration fails to explain how the OIPR FOIA personnel could have such a breadth of substantive knowledge of the entirety of OIPR's litigation records so as to rule out the possibility that such files could contain responsive records. Finally, the OIPR FOIA personnel give no explanation for the basis of their conclusion that no responsive records exist, especially when it is conceivable that the OIPR may have litigation records related to matters such as the *United States v. Moussaoui*, No. 01-cr-00455-LMB-1 (E.D. Va. 2003), or *United States v. Paracha*, No. 03-cr-01197-SHS-1 (S.D.N.Y. 2004), criminal trials. The fact that these criminal matters were not specifically named by Plaintiffs does not excuse the OIPR from conducting the search if the OIPR may have had responsive records that a search would have uncovered, had it been conducted.

With respect to the Second Amnesty Request, Bradley's generalized assertion that no search was conducted because he "was not aware of any OIPR involvement in the preparation of United Nations reports or OIPR involvement in the other matters referenced in the [] [r]equest" does not satisfy the standard of describing in "reasonable detail" the scope and methods of the search to ensure that the search was calculated to uncover all relevant documents. Bradley Decl. ¶ 16. The Second Amnesty Request did not concern only "United Nations reports"—it sought

eight categories of records[56] which are nowhere fully referenced in the Bradley Declaration. Bradley's failure to detail his understanding of these eight categories of records leaves doubt about his attention to and interpretation of the request, and questions whether he afforded it the liberal interpretation that the authorities require. Affidavits that are "so general as to raise a serious doubt whether the [agency] conducted a reasonably thorough search of its records," *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994), do not warrant summary judgment. Bradley's conclusory discussion of the Second Amnesty Request and his failure to search for responsive records renders his declaration insufficient under this measure.

IV. THE CIA HAS FAILED TO JUSTIFY ITS WITHHOLDINGS OF CATEGORY 12 RECORDS

The CIA admits that it possesses 49 cables concerning the waterboarding of KSM. Nevertheless, by failing to provide a *Vaughn* submission, it fails to provide the detail necessary for the Plaintiffs and the Court to assess the propriety of its withholdings. Even without such detail, the CIA's justifications for its withholdings under Exemptions 1, 2, and 3 are riddled with

[56] Specifically, the Second Amnesty Request sought, in summary: (1) memoranda of understanding or other records reflecting an agreement concerning the handling of ghost or unregistered detainees; (2) records reflecting a policy about the reception, detention, or movement of unregistered or ghost detainees; (3) memoranda of understanding or other records reflecting an agreement concerning the transfer of detainees between agencies; (4) records generated in connection with the reporting requirement of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004), Section 1093(c) or records submitted to the Committees on Armed Services of the Senate and House of Representatives in connection with such section; (5) communications regarding the United States' Second Periodic Report to the United Nations Committee Against Torture, submitted on May 6, 2005; (6) communications regarding the United States' Third Periodic Report to the United Nations Human Rights Committee, submitted on November 28, 2005; (7) records reflecting communications regarding the negotiation or drafting of a U.N. working group's September 23, 2005 draft Convention on the Protection of all Persons from Enforced Disappearance; and (8) records reflecting communications with a foreign government regarding the drafting of the draft Convention on the Protection of all Persons from Enforced Disappearance.

flaws. Finally, in perhaps its most egregious demonstration of hubris, the CIA fails to release reasonably segregable non-exempt information. As a result, summary judgment is inappropriate.

A. The CIA Provides No *Vaughn* Index for the 49 Responsive Cables

Inexplicably, the CIA provides no *Vaughn* index to support its withholding of the 49 cables responsive to Category 12, nor does it offer any authority that would relieve it of this burden. To the extent that the Hilton Declaration is intended to serve the purpose of a *Vaughn*, it is patently insufficient under the law as set forth in the Plaintiffs' prior briefs, which are incorporated by reference herein. Opposition to the Central Intelligence Agency's Motion for Summary Judgment and Memorandum of Law in Support of Plaintiffs' Cross Motion for Partial Summary Judgment, dated June 25, 2008 at 5-9; Plaintiffs' October Brief at 1-2. In brief, an agency may justify its withholdings under FOIA by submitting an affidavit that describes the withheld material with adequate specificity and sets forth a proper justification for its exemption claims. *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), *aff'd*, 523 F.2d 1136 (D.C. Cir. 1975); *see also King v. DOJ*, 830 F.2d 210, 218 (D.C. Cir. 1987) (stating that agency affidavits must be full and specific enough to allow requester to contest withholdings and to provide court with adequate foundation to review the withholding); *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 560 (S.D.N.Y. 1989) (stating that *Vaughn* affidavits must be specific enough to permit the court to make a rational decision without viewing the documents themselves). Summary judgment is inappropriate when the agency's affidavits are "conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *See, e.g.*, *King*, 830 F.3d at 218 (internal citations omitted); *Lawyers Comm. for Human Rights*, 721 F. Supp. at 560, 567.

In connection with the prior summary judgment briefing, the CIA submitted a *Vaughn* declaration and index detailing, *inter alia*, the withholding in full of 42 cables.[57] CIA/OIPR Brief at 38, n.11. While the *Vaughn* submission there failed to sufficiently describe the withheld records to permit the Plaintiffs to test the appropriateness of the government's withholdings, the government's paltry showing in this round of briefing displays a new level of hubris. Hardly a model of clarity or detail, the government's *Vaughn* of the 42 cables in the prior round of briefing at least indicates the following information, unique to each document: (1) document date (*e.g.*, "2/22/2006"); (2) unique classification (*e.g.*, "Top Secret"); (3) From/To (*e.g.*, "Field to HQ"); (4) bare, generalized subject (*e.g.*, "Employee Operational Performance"); (5) number of pages (*e.g.*, "4"). In the prior *Vaughn,* the document description explained how much of each cable was comprised of distribution information as opposed to written text. In conjunction with Exhibit J, there was at least some scant categorization of whether disclosure of each cable would tend to reveal intelligence sources (human sources or foreign government information), intelligence methods (cover, field installations, cryptonyms, foreign intelligence relationships, or dissemination control markings), or intelligence activities (intelligence activities or terrorist detention and interrogation program). Let there be no mistake: the information in the prior *Vaughn* was fundamentally insufficient to permit Plaintiffs to challenge the government's withholdings. By comparison, however, the dearth of unique, identifying information in the Hilton Declaration reaches a new low.

The Hilton Declaration attaches no page-by-page index of the 49 cables as did the prior *Vaughn* submission. Instead, the bulk of the identifying information is listed in paragraph 43:

[57] Forty-two of the documents in the government's earlier *Vaughn* are categorized as of the document type "Cable." First DiMaio Doc. Nos. 48-57, 118, 119, 196-225. An additional six records are emails or memoranda attaching cables or draft cables. *Id.* Doc. Nos. 41, 156, 177, 189, 190, 194.

> This search produced 49 classified intelligence cables between CIA Headquarters and the CIA field that are responsive to Category 12 of Plaintiffs' request. Six of the cables are from CIA Headquarters to the field, and vary in length from 1 to 15 pages. The remaining 43 cables are from the field to CIA Headquarters, and vary in length from 2-5 pages. Each cable contains approximately half a page or more of routing and dissemination information at the beginning and end, as well as cable handling and administrative notations. The substance of each cable, as described below, is replete with details about the CIA's TDI Program and consists of information that is properly classified and protected from disclosure as intelligence sources and methods under the National Security Act. All 49 of these documents were withheld in their entirety on the basis of FOIA Exemptions b(1), b(2), and b(3).

Second Hilton Decl. ¶ 43. Nowhere else does the CIA even provide a shadow of the scant information from the prior *Vaughn*—no date, sender or recipient information, no document subject, and no unique pagination. Scattered throughout the Hilton Declaration is the attestation that the 49 cables are each classified at the Top Secret level and each contains sensitive compartmented information ("SCI"), *id*. ¶¶ 46, 49, 51, 59, although Hilton also admits that "certain information contained within the documents may be classified at the SECRET or CONFIDENTIAL level." *Id.* at 28 n.6. Even by the government's own standards, this is plainly insufficient detail. Plaintiffs and the Court are left with no basis to distinguish one cable from the other, or to assess the propriety of the withholdings.[58]

B. The CIA Fails to Justify Its Withholdings Under the Exemptions Claimed

The CIA claims that all 49 intelligence cables responsive to Category 12 are properly withheld in full because such withholdings are justified by Exemptions 1, 2, and 3. CIA/OIPR Brief at 37. Because the CIA fails to sufficiently detail its withholdings by submission of a

[58] The CIA's failure to provide an adequate *Vaughn* submission also greatly undermines its justification for failing to disclose reasonably segregable information, as discussed in Section IV.D, *infra*.

proper *Vaughn* index, neither the Plaintiffs nor the Court are in a position to test the propriety of the CIA's application of these exemptions.

1. The CIA Fails to Justify Its Withholdings Under Exemptions 1 and 3

The CIA contends that all 49 records are classified intelligence cables between CIA headquarters and the CIA field containing detailed information regarding the TDI Program which, if disclosed, would reveal intelligence activities, sources, and methods. CIA/OIPR Brief at 37; Second Hilton Decl. ¶ 54. To justify withholding information based on Exemption 1, the CIA bears the burden of establishing that the information has been properly classified and that the subject matter of the particular withholding would reasonably be expected to cause the specific harm to national security described in the government's submissions.

The government concedes that the following facts have been officially disclosed:

- That the TDI Program exists (Second Hilton Decl. ¶ 56);
- That KSM was detained and questioned outside the United States in a program operated by the CIA (*id.* ¶ 57);
- That KSM was one of the individuals formerly in CIA custody and transferred to the United States Naval Base at Guantanamo Bay, Cuba (*id.* ¶ 56); and
- That the waterboard technique was used during the interrogation of KSM (*id.* ¶ 58).

Hilton asserts, however, that other details concerning the conditions of capture and detention, the interrogation methods used on KSM (including alternative interrogation methods), the questions asked, the intelligence gained from interrogations, the statements KSM made during his interrogation, and other operational details comprise the substance of (and are replete throughout) the 49 responsive documents, and cannot be disclosed without revealing intelligence activities, sources, and methods. *Id.* ¶¶ 57, 58.

Hilton asserts that disclosure of these details could "cause exceptionally grave damage to national security" as such disclosure is "likely to degrade the CIA's ability to effectively

question terrorist detainees," may allow terrorists to resist specific interrogation methods, and undermines the CIA's cooperation with foreign governments. CIA/OIPR Brief at 41-42; Second Hilton Decl. ¶¶ 59, 62. In addition, Hilton claims that the information gained through KSM's interrogation is protected as human intelligence source information and that its disclosure could cause various harms. Second Hilton Decl. ¶¶ 64, 65. Finally, the CIA asserts that the 49 cables contain information that would reveal additional intelligence methods, particularly covert CIA installations abroad, known as field installations (whose disclosure may lead to countermeasures against the CIA). *Id.* ¶¶ 69-71.

The CIA's arguments are deficient in several respects. First, and most fundamentally, the Hilton Declaration lacks the detail necessary for the government to carry its burden to demonstrate that the subject matter of the particular withholding would reasonably be expected to cause the specific harm to national security described in the government's submissions. Hilton's failure to distinguish between the 49 cables or give any unique identifying information fatally undermines the CIA's claims of harm from their disclosure. The CIA's failure to link particular classification justifications to particular information prohibits Plaintiffs and the Court from testing whether harm claims are over-inclusive. For example, the CIA fails to attest that *all* the 49 cables contain field installation information or to distinguish those that do not (as the CIA did previously with Exhibit J to the First DiMaio Declaration). Thus, the CIA fails to establish that the disclosure of each of the withheld records could reasonably be expected to cause the harm to national security claimed—that foreign governments may take countermeasures against the CIA.

Second, because the CIA has officially acknowledged enumerated facts about KSM—including that he was waterboarded— the CIA has waived the right to withhold this information,

and disclosure of this officially acknowledged information must "be compelled, even over an otherwise valid exemption claim." *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). In addition, although Hilton discusses several facts that were officially acknowledged in a September 6, 2006 speech by President Bush, she fails to account for other facts about KSM that were officially acknowledged in the very same speech. Specifically, President Bush also disclosed that multiple interrogation methods were used on KSM[59] and discussed specific intelligence gained from the use of these techniques on KSM.[60] Accordingly, the CIA has also waived the right to withhold this information. Moreover, the fact that the President has officially acknowledged that multiple procedures were used and has discussed specific intelligence gained from KSM's interrogation undermines Hilton's attestation that specific details about the program have not been released, including "the interrogation methods used," "the intelligence gained from interrogations," and "the statements that [KSM] made during his interrogation." Second Hilton Decl. ¶¶ 57, 58. Thus, the purported harm from the revelation of these officially acknowledged details is accordingly diminished.

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[59] Specifically, President Bush's speech stated that the "CIA used an alternative set of procedures," used "authorized methods," used "specific methods," used "procedures [that] were tough," and that "KSM was questioned by the CIA using these procedures." *See* Satterthwaite Decl. Ex. A (*White House News Release*); *see supra* n.22, 23 (regarding official acknowledgements of multiple interrogation methods by both President Bush and Vice-President Cheney).

[60] Specifically, President Bush explained that the use of the alternate set of procedures on KSM led him to reveal: that another individual he knew was in CIA custody, Majid Khan, allegedly had been told to deliver $50,000 to individuals working for Hambali, whom President Bush identifies as the leader of al Qaeda's Southeast Asian affiliate known as "J-I"; that Hambali's brother was the alleged leader of a "J-I" cell, and Hambali's conduit for communications with al Qaeda; the design of planned attacks on buildings inside the United States, and how operatives were directed to carry them out; and that he met three individuals involved in al Qaeda's efforts to produce anthrax, and identified one as an individual named Yazid, whom KSM knew had been taken into custody. *See* Satterthwaite Decl. Ex. A (*White House News Release*); *see also* Satterthwaite Decl. Ex. B (*DNI Announcement*) (describing, *inter alia*, specific information learned from interrogation of KSM).

Third, in addition to the fact that waterboarding was used by interrogators against KSM, multiple other public disclosures relevant to these KSM cables are in the public realm. Because these significant, uncontroverted public disclosures undermine the CIA's harm claims, the CIA's Exemption 1 assertions are insufficient. Specifically, public disclosures establish the following:

- That the CIA approved waterboarding of KSM;[61]
- That interrogators applied standard and enhanced interrogation techniques on KSM;[62]
- That there was cable traffic between the field and CIA headquarters concerning the waterboarding of KSM;[63] and
- That one of KSM's interrogators in the CIA program was named Deuce Martinez.[64]

As discussed above, because the CIA has failed to account for these uncontroverted public disclosures, summary judgment is unwarranted. *Washington Post v. DOD*, 766 F. Supp. 1, 11 (D.D.C. 1991); *see also Founding Church of Scientology, Inc. v. NSA*, 610 F.2d 824, 831-32 (D.C. Cir. 1979).

Finally, to the extent that the facts demonstrate that information in these 49 cables was classified to "conceal violations of law, inefficiency, or administrative error," such classification was improper and the records were not validly withheld under Exemption 1. E.O. 12958, §

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[61] *See* Satterthwaite Decl. Ex. BB (Interview Report #103 (with Scott Muller)) ("[T]he Agency approved the use of the waterboard on Khalid Shaykh Muhammad (KSM).").

[62] *See* Satterthwaite Decl. Ex. BB (Other Document #7) ("[redaction] CERTIFIED INTERROGATORS [redaction] HAVE EMPLOYED THE FOLLOWING STANDARD AND ENHANCED INTERROGATION METHODS WITH KHALID SHAYKH ((MUHAMMAD)) [redaction] THE WATERBOARD [redaction].");

[63] *See* Satterthwaite Decl. Ex. BB (Other Document # 85) ("In each instance the use of Enhanced Techniques must be approved by Headquarters in advance, [redaction]"); Satterthwaite Decl. Ex. BB, 2004 Special Review ("Cables indicate that Agency interrogators [redaction] applied the waterboard technique to Khalid Shaykh Muhammad.").

[64] *See* Satterthwaite Decl. ¶ 16(c), Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, N.Y. Times, June 22, 2008 (naming Deuce Martinez as one of KSM's interrogators).

1.7(a); Plaintiffs' October Brief at 25-28. Waterboarding has been deemed illegal by American courts. *See, e.g.*, *United States v. Parker*, CR-H-83-66 (S.D. Tex. 1983), *aff'd sub nom. United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984) (sheriff and deputies' application of water torture to prisoners violated criminal and constitutional laws); *see also* Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. of Transnat'l L. 468, 477 (2006-2007) ("In all cases, whether the water treatment was applied by Americans or to Americans, or simply reviewed by American courts, it has uniformly been rejected as illegal, often with severely punitive results for the perpetrators."). The Detainee Treatment Act ("DTA"), 42 U.S.C. § 2000dd, prohibits subjecting any "individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location" to "cruel, inhuman, or degrading treatment or punishment." DTA, 42 U.S.C. § 2000dd(a); *see also* Sattherthwaite Decl. ¶ Ex. DDD, *Statement to Employees by Director of the Central Intelligence Agency, General Michael V. Hayden on Lawful Interrogation*, Feb. 13, 2008 (describing statement of CIA Director General Michael V. Hayden that recently he had given Congressional testimony "that waterboarding is not included in the current program, and in my own view, the view of my lawyers and the Department of Justice, it is not certain that the technique would be considered lawful under the current statute."). The Senate Armed Services Committee has recently concluded that Office of Legal Counsel opinions commissioned by the White House "distorted the meaning and intent of anti-torture laws," including with respect to waterboarding. Gutierrez Decl. Ex. P (Senate Armed Services Committee Report at xxvi-xxvii).[65] Moreover, media reports establish that the CIA Inspector General and individual CIA

[65] The report concluded, *inter alia*, that "The [CIA's] interrogation program included at least one SERE training technique, waterboarding. Senior Administration lawyers, including Alberto Gonzales, Counsel to the President, and David Addington, Counsel to the Vice President, were

agents have expressed concerns about the legal basis of the CIA's secret detention, rendition, and interrogation practices, and that these activities, including waterboarding, involved illegal acts. *See* Satterthwaite Decl. ¶¶ 60.i, j, k. Thus, substantial evidence exists that information in the 49 cables concerning the waterboarding of KSM was improperly classified to conceal illegality. The Hilton Declaration's bare assertion that these documents were classified for a proper purpose does not adequately answer these claims. Second Hilton Decl. ¶ 50.

To justify an Exemption 3 withholding, the CIA must demonstrate that the subject matter of the withheld information falls within one of the withholding statutes, which are claimed as being the NSA and Central Intelligence Agency Act of 1949, 50 U.S.C. § 403g ("the CIA Act"), in this instance. The CIA argues that release of information in the 49 cables would disclose CIA intelligence sources and methods, information gathered from human intelligence sources, and information regarding covert CIA installations, all of which is allegedly "replete" throughout all the documents and falls within the NSA. CIA/OIPR Brief at 39. Hilton asserts that the CIA Act justifies the "withholding of information regarding the organization, functions, and official titles of CIA personnel." CIA/OIPR Brief at 40 n.12.

Hilton's failure to delineate between the 49 cables or give any unique identifying information fails to demonstrate the "logical connection" that the CIA purports. Having submitted a declaration providing starkly insufficient detail to distinguish among the 49 cables, the CIA cannot now credibly argue that it has provided reasonable specificity to demonstrate how any of these individual documents justify the withholdings under Exemption 3. Moreover,

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consulted on the development of legal analysis of CIA interrogation techniques. Legal opinions subsequently issued by the [DOJ OLC] interpreted legal obligations under U.S. anti-torture laws and determined the legality of CIA interrogation techniques. Those OLC opinions distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody . . ." Gutierrez Decl. Ex. P (Senate Armed Services Committee Report at xxvi-xxvii).

for the reasons expressed in Plaintiffs' prior briefs and in Section I.C.1, *supra*, Plaintiffs challenge the government's definition of intelligence sources and methods as being overbroad in light of the IRTPA. Thus, the CIA's determination that disclosure of the cables would reveal information regarding intelligence sources and methods is not entitled to the virtually unassailable level of deference that the government effectively requests.

C. The CIA Fails to Justify Its Withholdings Under Exemption 2

The government also fails to sustain its burden of showing that information included in the 49 responsive documents is properly withheld under Exemption 2. Exemption 2 allows the government to withhold information that is "related solely to internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). However, even if the government can show that the withheld information falls within the statutory parameters of internal rules or practices, the government must still establish that "disclosure may risk circumvention of agency regulations or the material relates to trivial administrative matters of no genuine public interest." *Schwaner v. Dep't of Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990) (internal citations omitted).

Here, the government has simply stated, in conclusory terms, that Exemption 2 applies to cable "routing and dissemination information . . . as well as cable handling and administrative notations" because "[t]he information withheld pursuant to this exemption is 'internal, clerical information,' the release of which holds no public interest." CIA/OIPR Brief at 42-43; Second Hilton Decl. ¶ 81.[66] Such a bald justification is not sufficient to show that Exemption 2 applies. *Morley v. CIA*, 508 F.3d 1108, 1125 (D.C. Cir. 2007) (finding the CIA's *Vaughn* failed to justify withholdings under Exemption 2). In *Morley*, the court found a government justification was

[66] The government claims that the withheld information is all "low 2" information. Second Hilton Decl. ¶ 129.

insufficient where "there is no public interest in the disclosure of such internal procedures and clerical information"—language that is almost identical to the government's language here. *Id.*

The government cannot show that the withheld information is "trivial"; on the contrary, the withheld information is of genuine public interest both to the Plaintiffs and the public at large. The Court of Appeals for the District of Columbia has explicitly stated that not all "administrative handling instructions are *per se*" lacking in genuine public interest. *Founding Church of Scientology*, 721 F.2d at 831. Information that might contain the date, time, location, or sender/recipient information of cables concerning the waterboarding of KSM is of great interest to the Plaintiffs and to the public, particularly in a case such as this. The entire purpose of the FOIA favors the maintenance of a "reasonably low threshold . . . for determining when withheld administrative material relates to significant public interests." *Id.* (citing *Dep't of Air Force v. Rose*, 425 U.S. 352, 367-69 (1976)). The routing and dissemination instructions on cables between federal officials, regarding the waterboarding of a detainee, absolutely meet this threshold. Accordingly, the government must either release this information in full or submit an adequately detailed *Vaughn* submission justifying its withholding.

D. The CIA Cannot Justify Its Failure to Release Reasonably Segregable Non-Exempt Information

Despite numerous official acknowledgements concerning the exact content of the 49 cables, the CIA has refused to segregate and release any such non-exempt information from the records. The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . ." 5 U.S.C. § 552(b). It is the agency's burden to establish the necessity for nondisclosure. *See Hopkins v. Dep't of Housing & Urban Development*, 929 F.2d 81, 85 (2d Cir. 1991) (vacating and remanding to district court where agency had offered no details about specific reports and

had stated conclusorily that factual information was inextricably intertwined with privileged information, and where district court had apparently not considered the segregability question). Segregability of non-exempt information is such a basic premise of the FOIA that courts have an affirmative duty to consider the issue *sua sponte* where it is not raised by the parties, *see Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999), and appellate courts may overturn lower courts who fail to consider the issue. *See, e.g., Hopkins*, 929 F.2d at 85.

To demonstrate that all "reasonably segregable" material has been released, an agency must provide a "detailed justification for its non-segregability." *Perry-Torres v. Dep't of State*, 404 F. Supp. 2d 140, 144 (D.D.C. 2005); *see also Mead Data Central v. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977) ("[U]nless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts.").[67] It is not sufficient for an agency to offer one explanation as to all documents; rather, an agency must offer an explanation for each document withheld. *Perry-Torres v. Dep't of State*, 404 F. Supp. 2d 140, 145 (D.D.C. 2005) (citing *Animal Legal Def. Fund, Inc. v. Dep't of Air Force*, 44 F. Supp. 2d 295, 302 (D.D.C. 1999)). Indeed, the FOIA requires that agencies correlate the theories of exemption to specific textual segments in a document. *Schiller v. NLRB*, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992). This is because "the focus in the FOIA is in information, not documents, and an agency cannot justify withholding an entire document simply

[67] Although the CIA cites *Mead Data Central* to support its segregability argument, the language cited by the government is in a footnote, in a case where the Court of Appeals, in a strongly worded opinion, found sorely lacking the agency's conclusory justifications for its failure to release potentially segregable material. *Mead Data Central v. Dep't of Air Force*, 566 F.2d 242, 260-63 (D.C. Cir. 1977).

by showing that it contains some exempt material." *Kimberlin v. DOJ*, 139 F.3d 944, 950 (D.C. Cir. 1998) (quoting *Mead Data Central*, 566 F.2d at 260). Courts should not accept conclusory agency affidavits claiming that all reasonably segregable information has been disclosed. *See Animal Legal Defense Fund, Inc.*, 44 F. Supp. 2d at 301-02 (rejecting as "patently insufficient" affidavit with "unsophisticated parroting" of statutory language and ordering submission of a declaration indicating in detail, for each withheld document, which portions of the document were exempt, and correlating claimed exemptions with particular passages); *see also Kimberlin*, 139 F.3d at 950 (rejecting conclusory declaration purporting to demonstrate inability to segregate); *Perry-Torres v. Dep't of State*, 404 F. Supp. 2d 140, 145 (D.D.C. 2005) (same).

The CIA states that there is no reasonably segregable non-exempt information within the withheld cables. CIA/OIPR Brief at 43; Hilton Decl. ¶ 88. Hilton attests that she "conducted a line-by-line review of all the documents at issue," but that "any non-exempt information is so inextricably intertwined with the exempt information that there are no meaningful, reasonably segregable, non-exempt portions of information that can be released." CIA/OIPR Brief at 44; Second Hilton Decl. ¶ 88. Hilton claims to have taken into account those limited official disclosures to which the CIA admits[68] when conducting her line-by-line review but concluded that any unclassified or unprotected information is so inextricably intertwined with classified or protected information that there are no meaningful, reasonably segregable portions. CIA/OIPR Brief at 45; Second Hilton Decl. ¶¶ 68, 87.

[68] As discussed in Section IV.B.1 above, the CIA admits to the existence of the TDI Program; that KSM was detained and questioned outside the United States in a program operated by the CIA; that KSM was one of the individuals formerly in CIA custody and transferred to the United States Naval Base at Guantanamo Bay, Cuba; and that the waterboard technique was used during the interrogation of KSM. CIA/OIPR Brief at 44; Second Hilton Decl. ¶¶ 56-58, 68.

Hilton's statements provide exactly the sort of conclusory justification for all withholdings that have been found inadequate to justify an agency's failure to segregate. *See Kimberlin*, 139 F.3d at 950; *Animal Legal Defense Fund*, 44 F. Supp. 2d at 301-02; *Perry-Torres*, 404 F. Supp. 2d at 144. First, Hilton offers one explanation as to all documents and fails to describe each withheld document, much less indicate in detail which portions of each document are exempt, or correlate claimed exemptions with particular passages.[69] Second, Hilton provides no "detailed justification for [] non-segregability," and instead conclusorily parrots the standard that any non-exempt material is "inextricably intertwined" with exempt material. Third, Hilton did not take into account in her segregability analysis other information that has undeniably been officially acknowledged.[70]

The CIA argues that an agency has no obligation to "segregate non-exempt material that is so inextricably intertwined with exempt material that its disclosure would 'leave only meaningless words and phrases.'" CIA/OIPR Brief at 43 (citing authorities). However, it is not the agency's prerogative to define what is "meaningless," particularly where the officially acknowledged information—*i.e.*, that which is admittedly non-exempt—goes to the very heart of the issue. *See Rugiero v. DOJ*, 234 F. Supp. 2d 697, 707 (E.D. Mich. 2002) (concluding that disclosed language "is more than meaningless; the redacted pages are not limited to merely 'of,' 'a,' 'the,' and the like"). In addition, the agency's argument that the officially acknowledged material is so inextricably intertwined with exempt material that its disclosure would leave only

[69] This failure only serves to underscore the insufficiency of the Hilton Declaration to justify the CIA's withholdings, as it serves none of the functions of a traditional *Vaughn* submission.

[70] As described in Section IV.B.1 above, these official acknowledgements are that multiple enhanced interrogation techniques were used on KSM and the numerous specific pieces of intelligence that were learned from the use of the "alternate set of procedures" during his interrogation.

meaningless words and phrases is severely undermined by the fact that the CIA has already released, in the *ACLU* litigation, both (1) cables[71] and (2) documents discussing KSM and waterboarding that have been so heavily redacted that, for example, KSM's name and the word "waterboard" are among the few visible words on a page otherwise covered with large swaths of black redactions.[72] Other documents released by the CIA in *ACLU* reveal even less text—for example, two documents reveal only the word "Waterboard." Satterthwaite Decl. Ex. BB, Other Document #101, Other Document #103. The fact of heavy redaction did not render the information in the *ACLU* documents "meaningless," and it cannot do so here either.

In addition, contrary to the CIA's contention, this is not a case where separation of non-exempt from exempt material would pose an inordinate burden so as to not be "reasonably" segregable. That Hilton was able to conduct a line-by-line review of all 49 of the documents at issue (each of which is from 1 to 15 pages long) demonstrates that a review and separation of the documents would not be unduly burdensome. Thus, these facts are distinguishable from that in *Lead Industries Ass'n v. Occupational Safety and Health Administration*, 610 F.2d 70, 87 (2d Cir. 1979), where the documents submitted for inspection consisted of hundreds of pages of highly technical material, with reference to an additional 40,000 pages of a public record.

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[71] The CIA released Cable #333 in the *ACLU* litigation, which leaves visible only the following typewritten words "[redaction] AFTER UNDERGOING [redaction] APPROVED TECHNIQUES INCLUDING THE WATER BOARD , ((ABU ZUBAYDAH)) [redaction] INTERROGATION SESSIONS INVOLVED USE OF THE WATER BOARD [redaction]" and several numbers. Satterthwaite Decl Ex. BB.

[72] Specifically, the CIA released Other Document #7 in the *ACLU* litigation, whose only visible text is "[redaction] CERTIFIED INTERROGATORS [redaction] HAVE EMPLOYED THE FOLLOWING STANDARD AND ENHANCED INTERROGATION METHODS WITH KHALID SHAYKH ((MUHAMMAD)) [redaction] THE WATERBOARD [redaction]." Satterthwaite Decl Ex. BB. Other examples of heavily redacted documents released by the CIA in *ACLU* include Other Documents #3, 25, 29, 45, 65, 67, 85, 87, 119, 129, 131, and 169; 2004 Special Review; and Interview Report #103. *Id.*

Compare Rugiero, 234 F. Supp. 2d at 709 (finding that the burden of segregation does not outweigh the significant value of the information to the Plaintiff where information was to be segregated from only 364 pages of materials and the government had already expended the time and resources to determine segregability by conducting a line-by-line review), *with Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (citing *Lead Industries* and determining that non-exempt materials were not reasonably segregable when it would take eight work years to identify all non-exempt materials from among millions of pages of files). The CIA has thus failed to fulfill its explicit statutory obligation to release reasonably segregable non-exempt information. Accordingly, summary judgment is not warranted.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for summary judgment and order the agency to (a) provide a *Vaughn* index and declaration for the 49 cables responsive to Category 12 consisting of unclassified descriptions with adequate detail and specificity to enable *de novo* judicial review and adversarial testing; (b) reprocess responsive documents; (c) conduct a reasonable segregability analysis; (d) release reasonably segregable non-exempt information that was improperly withheld; (e) conduct adequate searches in response to the above-enumerated requests, provide reasonably detailed descriptions of the searches conducted, and release or provide an adequately detailed *Vaughn* index and declaration for any additional responsive records; (f) address uncontroverted public disclosures in the record, as set forth herein; (g) release or justify the withholding of records improperly *Glomared*; and (h) submit to discovery with respect to Categories 1 and 2 of the Supplementary CIA FOIA Request.

Respectfully Submitted,

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