UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF THE CENTRAL INTELLIGENCE AGENCY'S MOTION FOR SUMMARY JUDGMENT

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Classified Declaration of Leon E. Panetta, dated June 8, 2009, submitted *ex parte* in *American Civil Liberties Union v. DOD*, 04 Civ. 4151 (AKH)

Declaration of Leon E. Panetta, dated September 21, 2009, submitted in *American Civil Liberties Union v. DOD*, 04 Civ. 4151 (AKH), attached as Exhibit A to the Declaration of Jeannette A. Vargas, dated September 22, 2009

Office of the Director of National Intelligence:

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PRELIMINARY STATEMENT

Defendant the Central Intelligence Agency (the "CIA"), by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in support of the CIA's motion for summary judgment in this action brought under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

The four FOIA requests at issue in this litigation primarily seek information about the CIA's terrorist detention and interrogation program. This program was discontinued on January 22, 2009, when President Barack Obama issued an Executive Order that limited the use of interrogation techniques on any individual in the custody of the United States Government to those in the Army Field Manual and ordered the CIA to close any detention facilities that it was currently operating. The President subsequently declassified three memoranda from the Office of Legal Counsel that described, *inter alia*, the policies governing the CIA's use of Enhanced Interrogation Techniques ("EITs") with respect to the program.

In light of these developments, the CIA voluntarily agreed to reprocess a sample set comprising approximately 350 of the more than 9,000 records responsive to the FOIA requests, and to reprocess the remaining records after the Court issues its ruling on the CIA's motion for summary judgment. The CIA carefully reviewed these records to ensure that, where possible consistent with the national security, as much meaningful exempt information regarding the program as possible was released to the public.[1] Accordingly, of the approximately 350 records that the CIA has reprocessed, the CIA released in whole or in part 35 additional records to the Plaintiffs, comprising primarily legal and policy analysis of the program.

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[1] *See* Declaration of Leon E. Panetta, dated September 21, 2009, at ¶¶ 5-6 submitted in *American Civil Liberties Union v. DOD*, 04 Civ. 4151 (AKH), attached as Exhibit A to the Declaration of Jeannette A. Vargas, dated September 22, 2009.

Notwithstanding these releases, the Director of the CIA, Leon E. Panetta, has affirmed in a series of declarations that are submitted in support of this summary judgment motion that much information regarding the CIA's detention and interrogation operations, including operational information that details how the CIA actually conducted its clandestine intelligence activities, must be withheld to prevent grave harm to national security. Specifically, sensitive operational information such as, *inter alia*, the locations of detention sites, certain details regarding detainee confinement, detailed interrogation plans, and the application of various interrogation methods to particular detainees—as well as intelligence gleaned from interrogations and information regarding foreign governments and liaison services that provided assistance to the United States—remain properly classified. Yet the recent releases of significant information regarding the program serve as evidence of the CIA's commitment to releasing segregable and declassified information from the responsive records.

Aside from these important national security concerns, release of these records would reveal the executive branch's internal deliberations; compromise the confidentiality of legal advice provided to client agencies; disclose presidential communications; reveal the identities of confidential sources; threaten law enforcement investigations and operations; or jeopardize privacy interests. The CIA has submitted a dozen declarations and hundreds of pages of exhibits describing its review process, the documents at issue, and the bases for its withholdings. As these declarations are afforded a presumption of good faith, the Court should grant the CIA's summary judgment motion.[2]

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[2] In accordance with the general practice in this Circuit, the CIA has not submitted a Local Civil Rule 56.1 statement, but will do so if helpful to the Court. *See, e.g., Ferguson v. FBI*, 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), *aff'd*, 83 F.3d 41 (2d Cir. 1996).

STATEMENT OF FACTS

A. The CIA Terrorist Detention and Interrogation Program

Former President George W. Bush officially disclosed the existence of the CIA's terrorist detention and interrogation program (the "TDI program") in a speech on September 6, 2006. In that speech, President Bush also disclosed that fourteen individuals formerly in CIA custody had been transferred to the custody of the Department of Defense at the United States Naval Station at Guantanamo Bay. *See* Declaration of Wendy M. Hilton, dated September 18, 2009 ("Hilton Decl."), at ¶ 156; *see also* Remarks on the War on Terror, 42 Weekly Comp. Pres. Doc. 1569 (Sept. 6, 2006). On January 22, 2009, President Barack Obama issued Executive Order 13491, "Ensuring Lawful Interrogations." This Executive Order affected the TDI program by limiting the use of interrogation techniques on any individual in the custody of the United States Government to those in the Army Field Manual, and by ordering the CIA to close any detention facilities that it was currently operating. *See* Exec. Order No. 13,491 §§ 3(b), 4(a), 74 Fed. Reg. 4893 (Jan. 27, 2009). Over the next several months, the United States Government declassified and disclosed several documents discussing, *inter alia*, the legality of EITs and general conditions of confinement in the CIA's TDI program.

These disclosures, however, do not diminish the fact that "CIA's aggressive global pursuit of al-Qaida and its affiliates continues." *See* Statement to Employees by the Director of the Central Intelligence Agency Leon E. Panetta on the CIA's Interrogation Policy and Contracts, *available at* https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html. Accordingly, much of the information concerning the TDI Program remains highly classified, and continues to be held in a Top Secret, Sensitive Compartmented

Information special access program to enhance its protection from unauthorized disclosure. These records include such sensitive operational information as detention site locations, certain details regarding detainee confinement, detailed interrogation plans, and the application of various interrogation methods to particular detainees—as well as intelligence gleaned from interrogations and information regarding foreign governments that provided assistance to the United States—that still cannot be divulged and must remain classified for reasons of national security.

B. The FOIA Requests

1. The CCR FOIA Request

By letter dated December 21, 2004, plaintiff the Center for Constitutional Rights, Inc., ("CCR") submitted a FOIA request to the CIA. *See* Hilton Decl., Ex. B ("CCR FOIA Request"). The CCR FOIA Request seeks records pertaining to "Unregistered, CIA, and/or 'Ghost' Detainees," including, *inter alia*, records that "propose, authorize, report on, or describe, or that discuss the legality or appropriateness of holding Unregistered, CIA, and/or 'Ghost' Detainees"; records indicating "every location from September 11, 2001 to the present at which the CIA or any other governmental agency has been or is now holding Unregistered, CIA, or 'Ghost' Detainees"; "a list of techniques used for interrogation at each facility"; and "records indicating whether and to what extent any other non-governmental organizations or foreign government had, has, or will have access to Unregistered, CIA, and/or 'Ghost' Detainees." *Id.*

2. The Amnesty International and WSLS FOIA Requests

By letters dated April 25, 2006, plaintiffs Amnesty International, USA ("Amnesty") and Washington Square Legal Services, Inc. ("WSLS") submitted two FOIA requests to the CIA. *See* Hilton Decl. at ¶ 11. The first of these requests is entitled "Request . . . Concerning Detainees,

Including 'Ghost Detainees/Prisoners,' 'Unregistered Detainees/Prisoners,' and 'CIA Detainees/Prisoners.'" *Id*., Ex. F (the "First Amnesty FOIA Request"). The First Amnesty FOIA Request defines the "Scope of Request" as "individuals who were, have been, or continue to be deprived of their liberty by or with the involvement of the United States and about whom the United States has not provided public information." *Id*. at 2. The First Amnesty FOIA Request specifically seeks three categories of records: "records reflecting, discussing or referring to the policy and/or practice concerning (1) [t]he apprehension, transfer, detention, and interrogation of persons within the Scope of the Request, . . . (2) current and former places of detention where individuals within the Scope of the Request have been or are currently held, . . . [and] (3) the names and identities of detainees who fall within the scope of this request." *Id*. at 4-5.

The second of the April 25, 2006, FOIA requests is entitled "Request . . . Concerning Ghost Detainee Memoranda, [DOD] Detainee Reporting, Reports to Certain U.N. Committees, and the Draft Convention on Enforced Disappearance." Hilton Decl., Ex. G (the "Second Amnesty FOIA Request"). The Second Amnesty FOIA Request seeks records relating to, *inter alia*, "any memorandum of understanding, or other record reflecting an agreement or proposed agreement between agencies . . . concerning the handling of ghost or unregistered detainees," as well as records reflecting communications regarding the United States' drafting of reports to the United Nations. *Id.* at 3-7.

3. The Specific FOIA Request

By letter dated December 28, 2007, Plaintiffs jointly submitted a fourth FOIA request to the CIA. *See* Hilton Decl., Ex. H (the "Specific FOIA request"). That request seeks the following 17 specific alleged records or categories of records:

Category 1:	A spring 2004 report by the CIA's Office of the Inspector General ("OIG") regarding "the CIA's compliance with the Convention Against Torture";
Category 2:	"The list of 'erroneous renditions' compiled by the CIA's OIG";
Categories 3-4:	Two documents sent from the CIA to the Royal Canadian Mounted Police Criminal Intelligence Directorate on October 3, 2002, and November 5, 2002, respectively, regarding Maher Arar;
Categories 5-10:	CIA cables regarding the use of a "slap," an "attention shake," and "sleep deprivation" on detainees Abu Zubaydah ("Zubaydah") and Khalid Sheik Mohammed ("KSM");
Categories 11-12:	CIA cables regarding the use of waterboarding on detainees Zubaydah and KSM;
Categories 13:	Certain video tapes, audio tapes, and transcripts of materials related to interrogations of detainees;
Category 14:	The September 13, 2007 notification from the CIA to 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 15:	Certain documents regarding Mohamed Farag Ahmad Bashmilah provided by the CIA to the U.S. Embassy in Sana'a, Yemen; and
Categories 16-17:	Certain documents regarding Mohamed Farag Ahmad Bashmilah and Salah Nasser Salim Ali provided by the U.S. Government to the Government of Yemen.

Id. at 2-5.

C. Procedural Background

On April 21, 2008, pursuant to the Stipulation and Order between Plaintiffs and the Central Intelligence Agency Regarding Procedures for Adjudicating Summary Judgment Motions (the "First Stipulation"), the CIA filed a motion for summary judgment with respect to the CCR FOIA Request and the First and Second Amnesty FOIA Requests (the "First CIA Summary Judgment Motion"). *See* Hilton Decl., Ex. I. On November 14, 2008, the CIA filed a second motion for summary judgment with respect to the Specific FOIA Request (the "Second CIA Summary Judgment

Motion"). Plaintiffs filed cross-motions for summary judgment.

Following the issuance of President Obama's executive order, "Ensuring Lawful Interrogations," and the subsequent release to Plaintiffs on or about April 16, 2009, of significant portions of three memoranda from the Office of Legal Counsel of the Department of Justice (the "Released OLC Memos"), which had previously been withheld in full, the CIA withdrew the First and Second CIA Summary Judgment Motions. Plaintiffs likewise withdrew their corresponding cross-motions.

On or about September 18, 2009, the parties entered into the Second Stipulation and Order Between Plaintiffs and the Central Intelligence Agency Regarding Procedures for Adjudicating Summary Judgment Motions (the "Second Stipulation"), which set forth an agreement between the parties that, *inter alia*, set a schedule according to which the CIA would reprocess, and describe on a *Vaughn* index, certain records responsive to all four FOIA requests. *See* Hilton Decl., Ex. K.

D. The CIA's Search For, And Processing Of, Responsive Records

The CIA has conducted searches of a number of different offices and record systems in order to locate records responsive to the four FOIA requests. These searches have identified more than 9,000 potentially responsive records.

Having stipulated with the Plaintiffs that it would not search its operational files for responsive records, *see* First Stipulation at ¶ 4, the CIA determined that the non-operational files within the CIA that were most likely to possess records responsive to the CCR FOIA Request and the First and Second Amnesty FOIA Requests were located within the Director of CIA Area ("DIR. Area"). *See* Hilton Decl. at ¶ 36. The DIR Area includes those offices within the CIA that report directly to the Director of the CIA, including the Office of General Counsel ("OGC"), CIA OIG, and

the Office of Congressional Affairs. *Id.* at ¶ 31. Electronic record systems were searched using the terms "ghost detainee" and "rendition," among other search terms. *Id.* at ¶ 35. In order to locate responsive records within the OIG, the OIG identified all of its closed case files that concerned issues related to detainees or rendition. *Id.*

The CIA's search identified more than 9,000 records that were responsive, or potentially responsive, to the CCR FOIA Request, and the First and Second Amnesty FOIA Requests. *Id.* at ¶ 7 n.3.[3] In addition to those records, the CIA has categorically withheld all documents from open OIG investigations pursuant to FOIA Exemption 7(A). *Id.* at ¶¶ 200-06.

The CIA also conducted several discrete searches for Categories 1, 2, 7, 8, 11, 12, 13, and 14 of the Specific FOIA Request:

- *Category One:* Based upon the date and the description of the office that authored it, CIA determined that the record requested in Category 1 refers to OIG's Special Review regarding counterterrorism detention and interrogation activities, dated May 7, 2004 (the "OIG Special Review"). *See* Hilton Decl. at ¶ 43. By stipulation, this record is not before this Court. *See* Hilton Decl. at ¶ 44; First Stipulation at ¶ 1.

- *Category Two:* In order to determine whether the list of "erroneous renditions" described in Category 2 in fact exists, the CIA officers responsible for this FOIA search consulted with the Deputy Assistant Inspector General for Investigations within the OIG. *See* Hilton Decl., at ¶ 46. The Deputy Assistant Inspector General for Investigations reviewed Category 2 of the Specific FOIA Request and, based on her knowledge of the relevant OIG records, stated that OIG did not compile and does not have a list of "erroneous renditions." *Id.* at ¶ 48. Accordingly, there are no records responsive to Category 2. *Id.*

- *Categories Seven and Eight*: CIA officers consulted with the relevant individuals in the National Clandestine Service ("NCS"), who confirmed that the "attention shake" was not an interrogation technique used by the CIA. *See id.* at ¶ 49. Accordingly there are no responsive records to Categories 7 and 8. *Id.*

[3] The CIA subsequently identified two responsive documents in the Directorate of Intelligence (the "DI"), which the CIA determined were also responsive to the CCR and First and Second Amnesty FOIA Requests and therefore added to the set of responsive records.

- *Categories Eleven and Twelve:* In order to locate the records requested in Categories 11 and 12, CIA information management professionals searched electronic databases of cables maintained by the NCS that were designed to aggregate all cables concerning Zubaydah and KSM, among other individuals. The CIA officers conducting the search used search terms reasonably calculated to retrieve all responsive records, including the terms "waterboard," "water," and "other variations of the term 'waterboard'." *See id.* at ¶ 50. These searches located two responsive cables regarding Zubaydah that were not otherwise being litigated in *ACLU v DOD* and 49 responsive cables regarding KSM. *See id.* at ¶ 51; First Stipulation at ¶ 4. The CIA has withheld all 51 cables in their entirety pursuant to FOIA Exemptions 1 and 3.

- *Category Thirteen*: In order to locate the records requested in Category 13, CIA officers conducting the search consulted with the NCS officers most likely to be able to identify and locate the particular records requested. Those NCS officers confirmed that the responsive records consist of three transcripts, two video recordings, and one audiotape. The CIA has withheld all six records in their entirety pursuant to FOIA Exemptions 1 and 3. *Id.* ¶ 52.

- *Category Fourteen:* CIA officers responsible for this search consulted with the attorneys in the CIA OGC who were familiar with the CIA's involvement in the criminal prosecution *United States v. Zacharias Moussaoui*. *See id.* at ¶ 53. These attorneys stated that the notification to the United States Attorney for the Eastern District of Virginia requested in Category 14 was not a written notification; rather, the notification was made telephonically. *Id.* Accordingly, there are no records responsive to Category 14. *Id.*

The CIA can neither confirm nor deny the existence of records described in categories 3, 4, 5, 6, 9, 10, 15, 16, or 17 of the Specific FOIA Request because the fact of the existence or non-existence of these records is itself classified. *See id.* at ¶¶ 216-25. Accordingly, the CIA did not conduct a search for records within these categories.

On April 15, 2008, the CIA released in whole or in part 104 responsive records, each of which contained segregable, non-exempt information. *Id.* at ¶ 61. After the CIA withdrew its First and Second motions for summary judgment, the CIA reprocessed certain records previously withheld in full or in part pursuant to the Second Stipulation. *Id.* at 62. On August 24, 2009, the CIA then released in part an additional 26 documents, and re-released nine of the records previously released in part with fewer redactions. Thus, in total the CIA has released to the plaintiffs in whole

or in part 133 records. The CIA has withheld the remaining records in their entirety pursuant to 5 U.S.C. § 552(b).

Pursuant to the First and Second Stipulations, the CIA has prepared an index pursuant to *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975) ("the *Vaughn* index"), which describes a representative sample of approximately 350 of the more than 9,000 records responsive to the CCR and First and Second Amnesty Requests, the two documents found in the DI, the two cables responsive to Category 11, the 49 cables responsive to Category 12, and the six records responsive to Category 13. *See* Hilton Decl. at ¶ 66; First Stipulation at ¶ 8, Second Stipulation at ¶¶ 2-6.

ARGUMENT

I. FOIA AND SUMMARY JUDGMENT STANDARDS

FOIA was enacted to "ensure an informed citizenry, . . . needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). At the same time, FOIA exempts nine categories of information from disclosure, while providing that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). In accordance with FOIA's "goal of broad disclosure, [these] exemptions have been consistently given a narrow compass." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citation and quotation marks omitted); *see also Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999). While narrowly construed, however, FOIA exemptions "are intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Indeed, Congress recognized that public disclosure is not always in the public interest. Rather, "FOIA represents a balance struck by Congress between the public's right to know and the

government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency*, 493 U.S. at 152).

Summary judgment is the procedural vehicle by which most FOIA actions are resolved. *See, e.g.*, *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993). "Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) (footnote omitted). The declarations submitted by the agency in support of its determination are "accorded a presumption of good faith." *Id.* (citation and quotation marks omitted).

Although courts review *de novo* an agency's withholding of information pursuant to a FOIA request, "*de novo* review in FOIA cases is not everywhere alike." *Assoc. of Retired R.R. Workers, Inc. v. U.S.R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987) (emphasis added). With respect to national security matters, for example, while *de novo* review provides for "an objective, independent judicial determination," courts nonetheless defer to an agency's determination in the national security context, acknowledging that "the executive ha[s] unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record." *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (quotation marks and footnote omitted).

Accordingly, "in the context of national security concerns, courts must accord *substantial weight* to an agency's affidavit concerning the details of the classified status" of a particular record. *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quotation marks omitted); *see also Diamond v. FBI*, 707 F.2d 75, 79 (2d Cir. 1983). "[T]he court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording

substantial weight to the expert opinion of the agency." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *see Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (disapproving the district court's use of "its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure"). Thus, absent evidence of bad faith, where a court has enough information to understand why an agency classified information, it should not second-guess the agency's facially reasonable classification decisions. *See Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (because "courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security); *Wolf v. CIA*, 357 F. Supp. 2d 112, 116 (D.D.C. 2004) (in reviewing classification decision, "little more" is required "than a showing that the agency's rationale is logical"), *aff'd in part*, 473 F.3d 370 (D.C. Cir. 2007).

II. THE CIA HAS PROPERLY WITHHELD INFORMATION THAT WOULD REVEAL INTELLIGENCE SOURCES AND METHODS PURSUANT TO EXEMPTIONS 1 AND 3

A. The CIA Properly Withheld Records Pursuant to Exemption 3

Pursuant to FOIA Exemption 3, the CIA has withheld, either in whole or in part, all but two of the documents described on the CIA's *Vaughn* index, attached as Exhibit A to the Hilton Declaration. Exemption 3 permits the withholding of information as authorized by separate statute. *See* 5 U.S.C. § 552(b)(3). In the instant case, the National Security Act of 1947, as amended (the "NSA") and the Central Intelligence Agency Act of 1949, as amended (the "CIA Act"), provide the basis for the CIA's withholdings. Hilton Decl. at ¶¶ 168-69, 171, 175.

In examining an Exemption 3 claim, a court must determine whether (1) the claimed statute

is a statute of exemption under FOIA, and (2) whether the withheld material satisfies the criteria of the exemption statute. *See CIA v. Sims*, 471 U.S. 159, 167 (1985); *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994); *Fitzgibbon*, 911 F.2d at 761-62. As the D.C. Circuit has explained, "'Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.'" *Fitzgibbon*, 911 F.2d at 761-62; *see also Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993).

1. The Relevant Provisions Of The NSA And The CIA Act Are Statutes Of Exemption Within The Meaning Of Exemption 3

It is well established that Section 102A(i)(1) of the NSA and Section 6 of the CIA Act are both exempting statutes within the meaning of Exemption 3. *See, e.g.*, *Sims*, 471 U.S. at 167-68 (discussing prior version of the NSA); *Baker v. CIA*, 580 F.2d 664, 667 (D.C. Cir. 1978) (section 6 of the CIA Act); *New York Times Co. v. U.S. Dep't of Defense*, 499 F. Supp. 2d 501, 512 (S.D.N.Y. 2007) (section 102A(i)(1) of the amended NSA).

a. Section 102A(i)(1) of the NSA Is a Withholding Statute

The current version of the NSA provides that the Director of National Intelligence ("DNI") "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1) (2006). Previously, the NSA conferred this same authority on the Director of Central Intelligence. 50 U.S.C. § 403-3(c)(7) (2000 Supp. 3). The NSA was amended, however, by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (December 17, 2004) ("IRTPA"), which created the position of the DNI.[4] Accordingly, although

[4] The effective date of the Intelligence Reform and Terrorism Prevention Act of 2004 was "not later than six months" after the enactment date of December 17, 2004. Pub. L. No. 108-

many of the pre-2004 cases discussed in the text *infra*, including *CIA v. Sims*, refer to the CIA's broad authority to "protect intelligence sources and methods" under the NSA, that authority is now vested in the DNI under the amended statute.

That transfer of authority did not affect the NSA's status as a withholding statute under Exemption 3, however; nor did it effect the standard of review that applies to withholdings under the NSA. *See, e.g., Larson v. Dep't of State*, 565 F.3d 857, 862-63 (D.C. Cir. 2009); *Berman v. CIA*, 501 F.3d 1136 (9th Cir. 2007); *James Madison Project v. CIA*, 607 F. Supp. 2d 109, 125-126 (D.D.C. 2009); *Moore v. Bush*, 601 F. Supp. 2d 6, 15 (D.D.C. 2009); *Gerstein v. CIA*, No. C-06-4643, 2008 WL 4415080 at *9 (N.D. Cal. Sept. 26, 2008).

Moreover, while the IRTPA transferred the duty to protect intelligence sources and methods from the DCI (the former head of the intelligence community) to the DNI (the current head of the intelligence community), the CIA retained its ability to shield its own intelligence sources and methods from disclosure pursuant to the NSA. For example, when the same responsibility to protect intelligence sources and methods from disclosure rested with the DCI, other members of the intelligence community routinely invoked the NSA to withhold such information in FOIA cases. *See, e.g., Krikorian*, 984 F.2d 461 (State Department invokes NSA); *Larson v. Dep't of State*, 02 CV

458, Title I, § 1097(a), 118 Stat. at 3698. Ordinarily, it is "the withholding statute in effect at the time of plaintiffs' requests" that governs the requests. *ACLU v. Dep't of Defense*, 389 F. Supp. 2d 547, 559 n.8 (S.D.N.Y. 2005); *see also Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1284 (D.C. Cir. 1983). As the CCR Request is dated December 21, 2004, and predates the effective date of the Intelligence Reform and Terrorism Protection Act of 2004, it is governed by the prior version of the NSA, while the other three would be governed by the amended NSA. In the present case, however, this is a distinction without a difference, as the CIA is acting under the express direction of the DNI in protecting information regarding "intelligence sources and methods" with respect to all four of the FOIA requests that are at issue in this litigation. Hilton Decl. at ¶ 131. Thus, for purposes of clarity, this brief shall refer solely to the CIA's authority to protect intelligence sources and methods under the NSA.

1937, 2005 WL 3276303, at *19 (D.D.C. Aug. 10, 2005) (National Security Agency invokes NSA). Nothing in the text of the statute or the legislative history of the IRTPA suggests that, in transferring that duty from the DCI to the DNI, Congress intended to depart from this longstanding FOIA practice by barring the CIA or other members of the intelligence community from invoking the NSA. Accordingly, courts have uniformly recognized that not just the DNI, but also the CIA and other members of the intelligence community may rely upon the amended NSA to withhold records under FOIA. *See, e.g.*, *Larson*, 565 F.3d at 862-63 (CIA); *Talbot v. CIA*, 578 F. Supp. 2d 24, 28-29 n.3 (D.D.C. 2008) (State Department).

Although the NSA does not require the DNI to be personally involved in making individual withholding decisions, in an abundance of caution, the DNI was involved with the invocation of the NSA in this case. The CIA provided the DNI with a representative sample of the records at issue. *See* Hilton Decl. at ¶ 170. On September 18, 2009, the DNI issued a memorandum to the Director of the CIA ("DCIA") stating that the "the records I reviewed . . . directly implicate sensitive intelligence sources and methods that must be protected from unauthorized disclosure in the interest of the national security of the United States." *Id.* The DNI further advised the DCIA that he was "authorized to take all necessary and appropriate measures to ensure that these sources and methods are protected during the course of this litigation." *Id.* Thus, although he was not required to do so, there can be no dispute that the DNI concluded that the intelligence sources and methods in this case should not be disclosed.

b. Section 6 of the CIA Act Is Also a Withholding Statute

Section 6 of the CIA similarly qualifies as an exempting statute. *See, e.g.*, *Baker*, 580 F.2d at 667 (D.C. Cir. 1978). The CIA Act provides that, "in the interests of the foreign intelligence

activities of the United States and in order to further implement . . . the Director of National Intelligence[‘s] . . . responsib[ility] for protecting intelligence sources and methods from unauthorized disclosure," the CIA shall be exempted from the provisions of any law that "require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 403g (2006) (emphasis added). One of the CIA's primary functions is to "collect intelligence through human sources and by other appropriate means." 50 U.S.C. § 403-4a(d)(1) (2006). Accordingly, the CIA Act protects information that would reveal the functions of the CIA, including the collection of foreign intelligence through intelligence sources and methods. Hilton Decl. at ¶ 173. In other words, section 6 of the CIA Act further protects the same information regarding intelligence sources and methods that is protected by the NSA. The CIA Act also exempts from disclosure other information regarding the internal functioning of the CIA, such as CIA employee names, titles, signatures, initials, and employee numbers, as well as internal file numbers and internal organizational data. *Id.* at ¶ 173.

2. The CIA Withheld Information Which Would Reveal Intelligence Sources And Methods

To establish Exemption 3's second prong—that the information at issue falls within the scope of the withholding statutes—the CIA must demonstrate that the "release of the requested information can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976). As the Supreme Court held in *Sims*, the CIA's discretion in determining what would constitute an unauthorized disclosure of intelligence sources and methods is "very broad." 471 U.S. at 168-70. The Court thus made clear that the judiciary must defer to the CIA's judgments with respect to whether disclosures affect

intelligence sources and methods:

> [I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process.

Id. at 180; *see also Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992) (describing CIA's discretion to withhold information under Exemption 3 as "a near-blanket FOIA exemption"); *Arabian Shield Dev. Co. v. CIA*, No. 3-98-CV-0624-BD, 1999 WL 118796, at *4 (N.D. Tex. Feb. 26, 1999) (the CIA's determination of what would "lead to the unauthorized disclosure of intelligence sources and methods" is "almost unassailable"), *aff'd*, 208 F.3d 1007 (5th Cir. 2000) (unpublished). Such broad discretion is justified because even "superficially innocuous information" might reveal valuable intelligence sources and methods. *Sims*, 471 U.S. at 178; *see also Fitzgibbon*, 911 F.2d at 762 ("the fact that the District Court at one point concluded that certain contacts between CIA and foreign officials were 'nonsensitive' does not help [plaintiff] because apparently innocuous information can be protected and withheld").

In *Sims*, the Supreme Court gave a broad reading to "intelligence sources and methods" under the NSA. 471 U.S. at 169-74. The Supreme Court held that "[t]he plain meaning of the statutory language, as well as the legislative history of the National Security Act, . . . indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure." 471 U.S. at 168-69. In reaching this conclusion, the Court noted that, with the NSA, Congress granted the CIA "sweeping power" to shield its activities from public disclosure:

> Section 102(d)(3) specifically authorizes the Director of Central Intelligence to protect "intelligence sources and methods" from disclosure. Plainly the broad sweep of this statutory language comports with the nature of the Agency's unique

> responsibilities. To keep informed of other nations' activities bearing on our national security the Agency must rely on a host of sources. At the same time, the Director must have the authority to shield those Agency activities and sources from any disclosures that would unnecessarily compromise the Agency's efforts.

Id. at 169. The Court emphasized that the "plain meaning" of the statute "may not be squared with any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence." *Id.* Congress, the Court observed, did not limit the scope of "intelligence sources and methods" in any way. *Id.* Rather, it "simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence." *Id.* at 169-70.

Here, Ms. Hilton has explained that the information withheld under Exemption 3 concerns a wide range of CIA intelligence sources and methods, including the use of human sources for intelligence gathering, *see* Hilton Decl. at ¶¶ 93-99; the collection of information from foreign liaisons and governments, *see id.* at ¶¶ 100-10; the use of cover identities for its employees and the mechanisms used protect those cover activities, *see id.* at ¶¶ 119-23; information regarding CIA's operation of covert field installations abroad, *see id.* at ¶¶ 124-27; the use of cryptonyms and pseudonyms, *see id.* at ¶¶ 128-32; dissemination control markings, *see id.* at ¶¶ 136-39; clandestine intelligence collection operations, *see id.* at ¶¶ 140-45; the CIA's terrorist detention and interrogation program, *see id.* at ¶¶ 146-54; and interrogation operations, *see id.* at ¶ 149, including the CIA's former use of EITs, *see id.* at ¶¶ 161-62.

Documents describing these sources and methods, including documents describing the CIA's terrorist detention and interrogation program, plainly fall within the protections of the NSA and the CIA Act. *See, e.g., Berman*, 501 F.3d at 1139 (affirming withholding of information that could

reveal identity of foreign governments or liaison services who provided information to the CIA under Exemption 3); *Fitzgibbon*, 911 F.2d at 762-63 (Exemption 3 protects even "nonsensitive contacts" between CIA and foreign officials); *Riquelme v. CIA*, 453 F. Supp. 2d 103, 110-11 (D.D.C. 2006) (human source information protected under Exemption 3); *Davy v. CIA*, 357 F. Supp. 2d 76, 86 (D.D.C. 2004) (cryptonyms; CIA employee names, identifiers, titles, filing instructions and organizational data properly withheld under Exemption 3); *Fitzgibbon v. CIA*, 578 F. Supp. 704, 723 (D.D.C. 1983) (cryptonyms properly withheld under Exemption 3); *Holland v. CIA*, Civ. A. No. 92-1233, 1992 WL 233820, at *9-*10 (D.D.C. 1992) (location of covert CIA field installation properly withheld under Exemption 3); *Assassination Archives and Research Ctr., Inc. v. CIA*, 720 F. Supp. 217, 222 (D.D.C. 1989) (cryptonyms, locations of covert field installations, foreign intelligence activities, CIA employee names, official titles, and organizational data properly withheld under Exemption 3).

The CIA also acted well within the scope of its broad authority in determining that its interrogation operations are likewise "intelligence sources and methods" that must be protected from disclosure under the NSA and the CIA Act. The CIA was authorized to set up terrorist detention facilities outside the United States by the President for the purpose of gathering intelligence to prevent future terrorist attacks. *See* Hilton Decl. at ¶ 146. Even though the TDI Program is now defunct, most, if not all, of the operational details regarding the Program, including some details regarding conditions of confinement, the locations of CIA intelligence activities overseas, the application of EITs to specific detainees and other details regarding how interrogations were conducted in practice, and the assistance provided by certain foreign governments remain classified at the TOP SECRET level. *Id.* at ¶ 148. All such information regarding these intelligence sources

and methods are properly withheld under Exemption 3. *See, e.g., Azmy v. U.S. Dep't of Defense*, 562 F. Supp. 2d 590, 600 (S.D.N.Y. 2008) (techniques and plans used in questioning detainees are properly withheld as intelligence method).

The CIA's determination that the disclosure of the withheld documents would reveal information regarding these particular intelligence sources and methods is entitled to substantial weight from this Court. *See, e.g., Wolf*, 473 F.3d at 374. The CIA has explained, with reasonable specificity, the intelligence sources and methods that are discussed in the documents, and provided the Court with sufficient detail to demonstrate the logical connection between the information contained in the documents and the CIA's decision to withhold the documents from the FOIA requestors. Accordingly, the withheld documents, which contain information regarding intelligence sources and methods, including interrogation methods and authorized detention activities, were properly withheld under Exemption 3.

B. The CIA Has Properly Withheld Documents Pursuant To Exemption 1

Pursuant to Exemption 1, the CIA likewise withheld, in whole or in part, all but twenty of the documents on the *Vaughn* index.[5] Exemption 1 protects records that 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 an E.O. *See* 5 U.S.C. § 552(b)(1). E.O. 12958 governs the classification of national security information.[6]

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[5] CIA was the classifying authority for nearly all of the classified information withheld under the exemption. *But see, e.g.*, Declaration of Mark Herrington, dated September 22, 2009 ("Herrington Decl."), at ¶¶ 5-6.

[6] Executive Order 12958 was amended by Executive Order 13292. *See* Executive Order No. 13292, 68 Fed. Reg. 15315 (March 28, 2003). All citations to Executive Order 12958 are to the order as amended by Executive Order No. 13292.

As a threshold matter, the Court need not reach the Government's Exemption 1 argument if it finds that the CIA has properly invoked the NSA or the CIA Act to shield from disclosure intelligence sources and methods pursuant to Exemption 3. All of the information withheld pursuant to Exemption 1 has also been withheld pursuant to Exemption 3. Moreover, the CIA's authority to withhold information under the NSA and the CIA Act is broader than its classification authority under E.O. 12958. *Cf. Gardels v. CIA*, 689 F.2d 1100, 1107 (D.C. Cir. 1982) (executive order governing classification of documents not designed to incorporate into its coverage the CIA's full statutory power to protect all of its 'intelligence sources and methods'"). For instance, unlike Section 1.1(a)(4) of E.O. 12958, the NSA and the CIA Act do not require a determination that the disclosure of information would be expected to result in damage to national security. *Compare* 50 U.S.C. §§ 403-1(i)(1), 403g *with* E.O. 12958 § 1.1(a)(4). Accordingly, should the Court uphold the CIA's Exemption 3 withholdings, the Court need not consider whether the withheld information also meets all the criteria for classification under E.O. 12958, and therefore is also exempt from disclosure pursuant to Exemption 1. *See Assassination Archives and Research Center v. CIA*, 334 F.3d 55, 58 n.3 (D.C. Cir. 2003) ("Because we conclude that the Agency easily establishes that the records AARC seeks are exempt from disclosure under Exemption 3, we do not consider the applicability of Exemption 1."); *Hunt*, 981 F.2d at 1118 (9th Cir. 1992) ("We need not decide in this case whether exposure of the Agency's 'sources and methods' equals 'damage to the national security' under Exemption 1" because "Exemption 3 provides sufficient grounds to hold in favor of the Agency").

In any event, because the CIA has satisfied both the substantive and procedural prerequisites for classification under the E.O., the information is properly withheld under Exemption 1. *See*

Salisbury v. United States, 690 F.2d 966, 970-73 (D.C. Cir. 1982); *Military Audit Project v. Casey*, 656 F.2d 724, 737-38 (D.C. Cir. 1981). Substantively, the CIA has demonstrated that E.O. 12958 authorizes the classification of the information at issue; and, procedurally, the CIA has demonstrated that it followed the proper procedures in classifying the information.

1. The Withheld Information Was Properly Classified

Section 1.1 of the E.O. lists four requirements for the classification of national security information. The three procedural requirements are: an "original classification authority" must classify the information; the information must be "owned by, produced by or for, or [is] under the control of the United States Government;" and an original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security"[7] and be "able to identify or describe the damage." E.O. 12958 § 1.1(a)(1), (a)(2), (a)(4). The substantive requirement is that the information must fall within one of eight protected categories of information listed in Section 1.4 of the order. *See id.* § 1.1(a)(3).

All of the requirements of Section 1.1 of E.O. 12958 have been satisfied. With respect to the procedural requirements, Ms. Hilton, an original classification authority, has determined that information pertaining to the various intelligence sources, methods and activities she describes in Section V(A)(3) of her declaration is currently and properly classified within the meaning of E.O. 12958. Hilton Decl. ¶¶ 80-81. Ms. Hilton further affirms that this information is owned by, produced by or for, or is under the control of the United States Government. *Id.* at ¶ 82.

In addition, Ms. Hilton details the damage to the national security that reasonably could be

[7] Pursuant to Section 1.1(c), the "unauthorized disclosure of foreign government information is presumed to cause damage to the national security." *Id.* § 1.1(c).

expected to result from the unauthorized disclosure of each of the specific subcategories of classified information contained in the documents. *Id.* at ¶ 84. For example, Ms. Hilton explains that disclosing the details of CIA interrogations of detainees in the custody of other governmental agencies would identify the CIA's intelligence targets, reveal what information the CIA knows and does not know about that target, and identify the information in which the CIA has a particular interest. *Id.* at ¶ 143. "This information would greatly benefit a foreign terrorist organization or intelligence service, as it would disclose gaps in the CIA's intelligence collection, identify areas of vital concern to the United States, and allow the foreign intelligence service or terrorist organization to take counter-measures." *Id.* at ¶ 144.

Ms. Hilton also describes the harm to foreign relations that could result from the disclosure of documents describing the TDI Program. *See* Hilton Decl. at ¶ 152. She explains that

> foreign governments have provided critical assistance to CIA counterterrorism operations, including but not limited to hosting of foreign detention facilities, under the condition that their assistance be kept secret. If the United States demonstrates that it is unwilling or unable to stand by its commitments to foreign governments, they will be less willing to cooperate with the United States on counterterrorism activities.

Id. at ¶¶ 153. Indeed, Ms. Hilton points to a specific instance where the CIA's relationship with a particular foreign government was damaged as a result of a leak regarding its role in the CIA program. *Id.* at ¶¶ 163-64.

Similarly, operational details such as the use of EITs in practice remain classified. The fact that the TDI Program has been discontinued does not affect this analysis. *See Electronic Privacy Information Ctr. v. DOJ*, 584 F. Supp. 2d 65, 70-71 (D.D.C. 2008) (upholding classified status of documents regarding the Terrorism Surveillance Program, notwithstanding that the program had been discontinued). To the contrary, the CIA has concluded that the release of operational details

regarding the TDI Program could do exceptionally grave damage to the national security by, *inter alia*, providing "insights not only into the use of EITs . . . , but also into the strategy and methods used by the United States when conducting any sort of interrogation, including those under the Army Field Manual." Hilton Decl. ¶ 150. "[D]isclosure of such information is reasonably likely to degrade the CIA's ability to effectively question terrorist detainees and elicit information necessary to protect the American people." *Id.* ¶ 148.

With respect to the substantive requirement of the E.O., Ms. Hilton's declaration establishes that the withheld information falls within one or more of the categories of information set forth in Section 1.4 of E.O. 12958. *Id.* at ¶ 80; *see also* 68 Fed. Reg. at 15317. Specifically, Ms. Hilton has determined that the information falls within three general categories: "foreign government information" as specified in Section 1.4(b); "information concerning intelligence activities (including special activities) and intelligence sources or methods" as specified in Section 1.4(c); and "foreign relations or foreign activities of the United States, including confidential sources" as specified in Section 1.4(d). Hilton Decl. at ¶ 83. As discussed *supra* in the context of Exemption 3, the Hilton declaration extensively describes the intelligence sources and methods, as well as the foreign relations or foreign activities, that are described in the withheld documents. *See* Hilton Decl. at Section V(A)(3). Just as the withheld information falls within the scope of "intelligence sources and methods" under the NSA, so too it is properly classified under Section 1.4 of the Executive Order.

Where, as here, the CIA has satisfied the conditions for classification under E.O. 12958, such classified information is exempt from disclosure. *See, e.g.*, *Hogan v. Huff*, 00 Civ. 6753 (VM), 2002 WL 1359722, at *8 (S.D.N.Y. June 21, 2002) (information properly withheld under Exemption 1

where disclosure of the information "would potentially harm the agency by exposing its methods"); *Wolf*, 357 F. Supp. 2d at 116 (classification warranted where "disclosure could reveal general CIA methods of information gathering").

2. The Withheld Information Was Not Classified For An Improper Purpose

Section 1.7(a) of the Executive Order prohibits the classification of information for the purpose of concealing violations of law, inefficiency, or administrative error; preventing embarrassment to a person, organization, or agency; restraining competition; or preventing or delaying the release of information that does not require protection in the interest of the national security. E.O. 12958 § 1.7(a). Unlike Section 1.4 of the Executive Order, Section 1.7(a) does not address the substance of what may be classified. Rather, it bars the Government from classifying otherwise unclassifiable information "in order to"— *i.e.*, for the purpose of—concealing violations of law. *Id.*

Accordingly, even assuming that information classified by the Government contains evidence of illegality, E.O. 12958 does not bar such classification where the information is independently subject to classification under the E.O. *See, e.g.*, *Lesar v. DOJ*, 636 F.2d 472, 483 (D.C. Cir. 1980) ("Although the FBI's surveillance of Dr. [Martin Luther] King strayed beyond the bounds of its initial lawful security aim, that does not preclude the possibility that the actual surveillance documents . . . may nevertheless contain information of a sensitive nature, the disclosure of which could compromise legitimate secrecy needs."); *Maxwell v. First Nat. Bank of Maryland*, 143 F.R.D. 590, 598 (D. Md. 1992) ("The Executive Order forbids classification of information that involves violations of law, but is not a threat to national security."); *Wilson v. DOJ*, Civ. A. No. 87-2415-LFO, 1991 WL 111457, at *2 (D.D.C. June 13, 1991) ("[E]ven if some of the

information withheld were embarrassing to Egyptian officials, it would nonetheless be covered by Exemption 1 if, independent of any desire to avoid embarrassment, the information withheld were properly classified."); *see also Agee v. CIA*, 524 F. Supp. 1290, 1293 (D.D.C. 1981) (records that reveal evidence of illegal conduct by CIA nonetheless were properly classified under prior version of E.O. and exempt from disclosure under FOIA because information intertwined with national security information); *cf. Bennett v. DOD*, 419 F. Supp. 663, 666 (S.D.N.Y. 1976) ("[E]ven assuming arguendo that the responsive documents reveal such violations [of law], there is nothing in the FOIA, its legislative history, or in Executive Order 11652 to suggest that information vital to the national security is not worthy of protection solely because of the means employed to obtain it.").

In other words, to implicate section 1.7(a), there must be evidence that the agency classified information that was not appropriate for classification under the substantive standards established by the Executive Order with the improper motive or intent of concealing illegalities. *See, e.g.*, *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 923 (N.D. Ill. 2006) (rejecting argument that information had been improperly classified to prevent embarrassment and to conceal Israel's use of illegal interrogation methods because, *inter alia*, "there is simply no evidence that these materials [were] classified merely to prevent embarrassment to Israel"); *Billington v. DOJ*, 11 F. Supp. 2d 45, 58 (D.D.C. 1998) (rejecting argument that FBI violated Executive Order provisions barring classification in order to conceal violations of law or prevent embarrassment where plaintiff did "not provide any proof of the FBI's motives in classifying the information" and there was no evidence "that the FBI was involved in an attempt to cover-up information"), *aff'd in part, vacated in part*, 233 F.3d 581 (D.C. Cir. 2000); *Canning v. DOJ*, 848 F. Supp 1037, 1047 (D.D.C. 1994) (rejecting

argument that information was classified in order to prevent embarrassment or conceal illegal activities because "the Court finds no credible evidence that the agency's motives for its withholding decisions were improper or otherwise in violation of [section 1.6(a) of prior Executive Order, Executive Order 12356]"). Section 1.7(a) "thus prohibits an agency from classifying documents as a ruse when they could not otherwise be withheld from public disclosure. It does not prevent the classification of national security information merely because it might *reveal* criminal or tortious acts." *Arabian Shield Development Co.*, 1999 WL 118796 at *4.

Ms. Hilton affirms that the information withheld pursuant to Exemption 1 was not classified for an improper purpose, as prohibited by Section 1.7(a) of the E.O.:

> With respect to the information relating to CIA sources, methods, and activities described in section III(A)(2) of this declaration . . . I have determined that this information has not been classified in order to conceal violations of law, inefficiency, or administrative error; prevent embarrassment to a person, organization or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security.

Hilton Decl. at ¶ 86.

3. The CIA Has Not Withheld Reasonably Segregable Officially Acknowledged Information From The Responsive Records

Although an agency's refusal to release classified information "is generally unaffected by whether the information has entered the realm of public knowledge," *Halpern v. FBI*, 181 F.3d 279, 294 (2d Cir. 1999), there is a "limited exception" to this rule, "where the government has officially disclosed the specific information the requester seeks," *id*. *Accord Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414, 421 (2d Cir. 1989).

Courts have "unequivocally recognized," however, "that the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to

intelligence sources, methods and operations." *Fitzgibbon*, 911 F.2d at 766; *accord Wolf*, 473 F.3d at 378. Thus, the test for waiver by official disclosure is necessarily a "stringen[t]" one. *Public Citizen v. Dep't of State*, 11 F.3d 198, 202 (D.C. Cir. 2003). To establish an official disclosure, plaintiffs must show that "the information requested [is] as specific as the information previously released," that "the information requested . . . match[es] the information previously disclosed," and that "the information requested [has] already . . . been made public through an official and documented disclosure." *Fitzgibbon*, 911 F.2d at 765. This test is applied with "exactitude" out of deference to " 'the Government's vital interest in information relating to national security and foreign affairs.'" *Wolf*, 473 F.3d at 378 (citation omitted); *see also Assassination Archives*, 334 F.3d at 60.

In recent months, the CIA has disclosed a number of non-operational details regarding the TDI, including descriptions of the EITs that were authorized for use and legal analysis regarding the conditions of confinement. Yet, as was discussed *supra*, a great deal of information regarding the TDI has not been disclosed or officially acknowledged, and thereby retains its classified status. As a district court in the District of Columbia recently explained:

> [Just] because information about [a discontinued program] has become publicly available there is [no] reason to be skeptical of DOJ's assertion that releasing the withheld documents would harm national security. To the contrary, just because some information about the [the program] has become public, it does not follow that releasing the documents poses any less of a threat to national security.

See Electronic Privacy Information Center, 584 F. Supp. 2d at 71; *see also Bassiouni v. CIA*, 392 F.3d 244, 247 (7th Cir. 2004) ("if even a smidgen of disclosure required the CIA to open its files, there would be no smidgens"). Accordingly, notwithstanding disclosures of other information pertaining to the TDI, the withheld information regarding the program remains properly classified

and exempt from release.

The CIA has determined that the records described on the attached *Vaughn* index do not contain information that is identical to information that has already been officially acknowledged and that can be reasonably segregated from material that remains classified. To the extent there are scattered words or sentences that duplicate what is in the public record, such words or sentences either are intrinsically intertwined with classified material or appear in a context, such as operational records, such that any disclosure would reveal classified information. Hilton Decl. at ¶ 125.

C. The CIA Properly Declined To Confirm Or Deny The Existence Of Records Responsive To Certain Categories Of The Specific FOIA Request

The CIA properly refused to confirm or deny the existence of any records responsive to Categories 3-4, 5-6, 9-10, and 15-17 of the Specific FOIA Request.

It is well established that agencies responding to FOIA requests "may issue a 'Glomar Response,' that is, refuse to confirm or deny the existence of certain records, if the FOIA exemption would itself preclude the acknowledgment of such documents." *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996).[8] The Second Circuit first upheld such a response more than twenty-five years ago, in *Weberman v. NSA*, 668 F.2d 676, 677-78 (2d Cir. 1982).[9] Since then, courts in this Circuit have repeatedly upheld *Glomar* responses where, as here, confirming or denying the existence of a record

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[8] This type of response to a FOIA request is called a "*Glomar* response," after the CIA's successful defense of its refusal to confirm or deny the existence of records regarding a ship named the *Glomar Explorer* in *Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976).

[9] Several recent decisions have overlooked the Second Circuit's opinion in *Weberman* and erroneously stated that the Second Circuit has not yet opined on the *Glomar* response. *See, e.g.*, *Roman v. NSA*, No. 07-CV-4502, 2009 WL 303686, at 5 n.3 (E.D.N.Y. Feb. 9, 2009); *Wilner v. NSA*, No. 07 Civ. 3883 (DLC), 2008 WL 2567765, at *2 n.2 (S.D.N.Y. June 25, 2008).

would either disclose information protected by statute in contravention of Exemption 3 or reveal classified information protected by Exemption 1. *See, e.g.*, *id.* (Exemptions 3 and 1); *Wilner*, 2008 WL 2567765, at *4-5 (Exemption 3); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 627-28 (S.D.N.Y. 1996) (Exemptions 3 and 1), *aff'd*, 128 F.3d 788 (2d Cir. 1997) (adopting district court decision in precedential opinion); *Daily Orange Corp. v. CIA*, 532 F. Supp. 122, 124 (N.D.N.Y. 1982) (Exemption 1). Here, the CIA properly relied upon Exemptions 3 and 1, each of which independently justifies the Agency's *Glomar* responses.

1. The CIA's Decision Not To Confirm Or Deny The Existence Of Responsive Records Is Justified By Exemption 3

The NSA and the CIA Act provide the statutory bases for the CIA's refusal to confirm or deny the existence of records responsive to categories 3-4, 5-6, 9-10, and 15-17. To establish that the information at issue falls within the scope of the NSA and the CIA Act, the CIA must demonstrate that answering the request could reasonably be expected to lead to the unauthorized disclosure of intelligence sources or methods. *See supra* at Part I.A; *see also Gardels*, 689 F.2d at 1103 (reciting NSA standard in *Glomar* context); *Sirota v. CIA*, No. 80 Civ. 2050, 1981 WL 158804, at *2 (S.D.N.Y. Sept. 18, 1981) (stating that the CIA "need show only that confirming or denying the existence of the requested agency files could reasonably be expected to result in disclosing" intelligence sources or methods); *cf. Arabian Shield Develop. Co.*, 1999 WL 118796, at *4 (stating, in *Glomar* context, that the CIA's determination of what would "lead to the unauthorized disclosure of intelligence sources and methods" is "almost unassailable").

Here, the CIA has amply met its burden of demonstrating that the confirmation or denial of the existence of records responsive to Categories 3-4, 5-6, 9-10, and 15-17 could reasonably be

expected to result in the unauthorized disclosure of intelligence sources and methods, by showing that (1) a response would reveal intelligence sources and methods; and (2) such disclosures would be unauthorized.

First, it is beyond cavil that the information that would be revealed by responding to these categories would be information about intelligence sources and methods. The categories at issue seek any records relating to (1) the purported sharing between the CIA and the Government of Canada of information regarding a particular individual, Maher Arar, *see* Categories 3-4; (2) the alleged use of intelligence methods consisting of specific enhanced interrogation techniques on particular individuals, *see* Categories 5-6, 9-10; and (3) the alleged involvement of the CIA and the Government of Yemen in the detention of two specified individuals, *see* Categories 15-17. All of these categories relate directly to intelligence sources, methods, or both.

With respect to Categories 3 and 4, "[i]f the CIA were to provide anything other than a *Glomar* response to these two Categories, it would be forced to acknowledge, at a minimum, (1) whether the CIA had an intelligence interest in Mr. Arar; and (2) whether it exchanged intelligence information regarding Mr. Arar with the Canadian government." *See* Hilton Decl. at ¶ 226. This information "would reveal whether it had an interest in that person related to the CIA's ongoing intelligence gathering function and . . . capabilities," and "could provide insight into the sources for the intelligence information that the CIA collected on the specific individual." *Id.* at ¶ 228. Moreover, revealing "whether the CIA exchanged intelligence information with the Canadian government regarding Mr. Arar similarly would reveal . . . information regarding the CIA's relationship with a foreign liaison." *Id.* at ¶ 229.

This information would thus reveal intelligence sources and methods. *See, e.g.*, *Wolf*, 473

F.3d at 377-78 (disclosing the existence of CIA records regarding a particular individual would reveal intelligence sources and methods); *Hunt*, 981 F.2d at 1118-21 (same); *Rubin v. CIA*, No. 01 Civ. 2274 (DLC), 2001 WL 1537706, at *4 (S.D.N.Y. Dec. 3, 2001) (same); *cf. Sims*, 471 U.S. at 176-77 ("Disclosure of the subject matter of the Agency's . . . inquiries may compromise the Agency's ability to gather intelligence . . . .").

As for Categories 5, 6, 9 and 10, those categories seek documents regarding the use of an acknowledged enhanced interrogation technique ("EIT") on a specific detainee. "Anything other than a *Glomar* response would confirm that the CIA did or did not use the specified EIT on these specific individuals." *Id.* at ¶ 237. A confirmation or denial would "necessarily" "disclose intelligence methods" (*i.e.*, "whether or not the CIA used certain specified methods to interrogate certain individuals"). *Id.* at ¶ 238. For these four categories, the revelation of intelligence methods thus could not be clearer: the categories expressly seek to confirm or deny the use of particular intelligence methods in a particular operation on particular individuals. *Cf. Fitzgibbon*, 911 F.2d at 763 (holding Exemption 3 protects against disclosure of even "methods that might be generally known – such as physical surveillance, or interviewing, or examination of airline manifests"); *Schoenman v. FBI*, No. 04-2202 (CKK), 2009 WL 763065, at *25 (D.D.C. Mar. 19, 2009) (rejecting the argument "the CIA may only protect information concerning unknown intelligence methods," and noting that "the CIA may refrain from disclosing the fact that it uses even the simplest of intelligence gathering methods"); *Blazy v. Tenet*, 979 F. Supp. 10, 23 (D.D.C. 1997) (holding requester's CIA polygraph "constitute[s] intelligence methods" protected from disclosure under Exemption 3).

The last three categories, Categories 15 through 17, concern both intelligence sources and

intelligence methods. These categories seek purported communications regarding the alleged capture, transfer, and/or detention of Mohamed Farag Ahmed Bashmilah, as well as CIA files purportedly provided to the Government of Yemen by the United States regarding Bashmilah and another individual, Salah Nasser Salim Ali. If the CIA were to respond to these categories, it would

> confirm or deny several facts: whether the CIA was involved or had an interest in the capture, transfer, and detention of Bashmilah; whether the CIA communicated with the U.S. Embassy in Yemen on this matter; whether Bashmilah was ever in U.S. custody; whether Bashmilah was transferred from the custody of the U.S. Government to the Government of Yemen; whether the U.S. Government was in communication with the Government of Yemen regarding the custody transfer of Bashmilah; whether the CIA and/or the U.S. Government generally had collected information on Bashmilah and Ali; and whether the U.S. Government shared such information on these two individuals with the Government of Yemen.

Id. at ¶ 245. These intelligence sources and methods are protected from disclosure by the NSA and the CIA Act pursuant to Exemption 3.

Accordingly, for Categories 3-4, 5-6, 9-10, and 15-17, any response other than a *Glomar* response would reveal intelligence sources or methods.

Second, such revelations would be unauthorized. Ms. Hilton has explained that the existence or non-existence of records responsive to these categories has never been officially acknowledged.[10] *See* Hilton Decl. at ¶ 224. The NSA and the CIA Act thus protect this information from disclosure.

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[10] Although the request cites alleged statements by foreign governments and a former CIA employee regarding the specific items at issue, neither type of statement constitutes an official disclosure. *See* Hilton Decl. at ¶¶ 236, 243-44, 255-60. Statements by foreign governments are obviously not disclosures by the United States, much less by the CIA. *See, e.g.*, *Frogone*, 169 F.3d at 775 (CIA not "required either to confirm or to deny statements made by another agency"); *Earth Pledge Found.*, 988 F. Supp. at 628, *adopted by* 128 F.3d 788 (2d Cir. 1997). Likewise, "[o]fficials no longer serving with an executive branch department cannot continue to disclose official agency policy." *Hudson River Sloop Clearwater*, 891 F.2d at 422; *see also Phillippi*, 655 F.2d at 1330-31 (former CIA director statement not official).

2. The CIA's Decision Not To Confirm Or Deny The Existence Of Responsive Records Is Further Justified By Exemption 1

The CIA's *Glomar* responses are independently justified by FOIA Exemption 1.[11] Significantly, "the Executive Order specifically countenances the Glomar Response." *Wilner*, 2008 WL 2567765, at *3. E.O. 12958 instructs the CIA to "refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." E.O. 12958, § 3.6(a).

Here, information regarding the existence or non-existence of records responsive to Categories 3-4, 5-6, 9-10, and 15-17 is properly classified at or above the SECRET level. Hilton Decl. at ¶ 218. For each category, Ms. Hilton has explained the necessity of a *Glomar* response consistent with Exemption 1 because the confirmation of the existence or non-existence of records: (1) would necessarily reveal properly classified information regarding intelligence activities, sources, and methods, or foreign relations or activities; and (2) could reasonably be expected to cause at least serious damage to the national security. *See* Hilton Decl. at ¶¶ 223, 225, 231-35, 240-42, 250–53; *see also* E.O. 12958, §§ 1.1(a)(4), 1.4(c), 1.4(d). As for the first prong, the previous section illustrated how a response to each category would reveal intelligence sources or methods, and could also reveal intelligence activities, foreign relations, or foreign activities. *See supra* Part II.C.1; *see* Hilton Decl. ¶¶ 231-34, 240-41, 250-54. Further, such information has never been officially acknowledged. *See supra* Part II.C.1; Hilton Decl. at ¶ 224.

As for the second prong, Ms. Hilton has explained that the information revealed through any

[11] The Court need not reach this question if it holds that Exemption 3 justifies the *Glomar* responses, for the reasons set forth in Part II.C.1, *supra*.

response other than a *Glomar* response could reasonably be expected to damage the national security because:

- Responding to Categories 3 and 4 could (1) "provide foreign intelligence services or other hostile entities with information concerning the reach of the CIA's intelligence monitoring to the detriment of the United States," (2) "provide insight into the sources for the intelligence information that the CIA collected on [Mr. Arar], if any," and (3) "provide to foreign intelligence services and other hostile entities valuable information regarding the extent of the CIA's liaison relationships generally and in this specific instance." Hilton Decl. at ¶¶ 232-34.

- Responding to Categories 5-6, and 9-10 could give terrorists insights into the "strategy and methods used by the United States when conducting any sort of interrogation, including those under the Army Field Manual" and allow them to train to evade interrogation. Hilton Decl. at ¶ 240.

- Responding to Categories 15-17 could (1) "provide to foreign intelligence services and other hostile entities valuable information regarding the extent of the CIA's liaison relationships generally and with respect to these individuals," (2) "weaken, or even sever, the relationship between the CIA and its foreign partners, degrading the CIA's ability to combat terrorism," and (3) "provide foreign intelligence services or other hostile entities with information concerning the reach of the CIA's intelligence monitoring." Hilton Decl. at ¶¶ 250-51, 254.

The CIA has therefore established that a response to these categories of the Specific FOIA Request would reveal information that is properly classified. Accordingly, the CIA's *Glomar* responses are justified under Exemption 1. *See, e.g.*, *Wolf*, 473 F.3d at 375-77 (holding CIA properly issued *Glomar* response to FOIA request seeking any records relating to a specified foreign national); *Weberman*, 668 F.2d at 677-78 (NSA properly issued *Glomar* response as to whether NSA had intercepted telegram sent from Jack Ruby's brother to Cuba); *Pipko v. CIA*, 312 F. Supp. 2d 669, 677 (D.N.J. 2004) (*Glomar* response appropriate where FOIA request sought records relating to requester); *Nayed v. INS*, Civ. A. No. 91-805 SSH, 1993 WL 524541, at *2 (D.D.C. Nov. 29, 1993) (CIA properly issued *Glomar* response where confirmation or denial of information requested would

"be an admission of the identity of a CIA intelligence interest"); *Earth Pledge Found.*, 988 F. Supp. at 627 (holding that CIA properly issued *Glomar* response to FOIA request, where response could confirm or deny whether CIA had certain foreign contacts), *adopted by* 128 F.3d 788 (2d Cir. 1997).

For all of these reasons, the CIA properly withheld information under Exemptions 1 and 3.

III. THE CIA HAS PROPERLY WITHHELD DOCUMENTS PROTECTED UNDER CIVIL DISCOVERY PRIVILEGES PURSUANT TO EXEMPTION 5

Pursuant to Exemption 5, the CIA also has withheld documents either in whole or in part. Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991); *see also Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5 . . . ." *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (citation omitted). The exemption protects both "intra-" and "inter-agency" records. 5 U.S.C. § 552(b)(5). "While 'intra-agency' documents are those that remain inside a single agency, and 'inter-agency' documents are those that go from one governmental agency to another, they are treated identically by courts interpreting FOIA." *Tigue*, 312 F.3d at 77.

As described on the attached *Vaughn* index, the CIA withheld documents, in whole or in part, under the deliberative process privilege, the attorney-client privilege, the attorney work product doctrine, the presidential communication privilege, and the privilege protecting witness statements

to OIG investigators.

A. Deliberative Process Privilege

In enacting Exemption 5, "[o]ne privilege that Congress specifically had in mind was the 'deliberative process' or 'executive' privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84; *see also* H.R. Rep. No. 89-1497, at 10 (1966) *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427 (recognizing that "a full and frank exchange of opinions would be impossible if all internal communications were made public" and that "advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.'").

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.

Klamath, 532 U.S. at 8-9 (citations and quotation marks omitted); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975) ("[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process. Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.") (citation, footnote, and quotation marks omitted) (alteration in original); *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002) ("The purpose of this privilege is to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." (citation and quotation

marks omitted)); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (deliberative process privilege protects documents the release of which would "stifle honest and frank communication within the agency").

An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Id.* at 482 (citations omitted); *see also Hopkins*, 929 F.2d at 84; *Local 3, Int'l Brotherhood of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988). A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd.*, 421 U.S. at 184, *quoted in Hopkins*, 929 F.2d at 84, and *Grand Cent. P'ship*, 166 F.3d at 482. This category of material includes "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Grand Cent. P'ship*, 166 F.3d at 482 (citation and quotation marks omitted).

While a document is necessarily predecisional if it "precedes, in temporal sequence, the 'decision' to which it relates," *see id.*, the government need not "point to a specific decision" made by the agency to establish the predecisional nature of a particular record. *Tigue*, 312 F.3d at 80. Rather, so long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is predecisional. *Tigue*, 312 F.3d at 80; *see also Moye, O'Brien, O'Rourke, Hogan, & Pickert v. Nat. R.R. Passenger Corp.*, 376 F.3d 1270, 1280 (11th Cir. 2004) ("Amtrak need not cite to a specific policy decision in connection with which the audit work papers and internal memoranda were prepared in order for these documents to be protected from disclosure by the deliberative process privilege."). As the Supreme Court explained, the "emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an

agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18.

"A document is 'deliberative' when it is actually . . . related to the process by which policies are formulated." *Grand Cent. P'ship*, 166 F.3d at 482 (citation and quotation marks omitted; alteration in original); *see also New York Public Interest Research Group v. EPA*, 249 F. Supp. 2d 327, 337 (S.D.N.Y. 2003) ("A record is deliberative when 'it reflects the give-and-take of the consultative process.'") (quoting *Wolfe v. HHS*, 839 F.2d 768, 774 (D.C. Cir. 1988) (*en banc*)) (citation and quotation marks omitted). The Second Circuit has defined "deliberative" as "indicative of the agency's thought processes." *Local 3*, 845 F.2d at 1180. In determining whether a document is deliberative, courts inquire as to whether it "formed an important, if not essential, link in [the agency's] consultative process," *Grand Cent. P'ship*, 166 F.3d at 483, whether it reflects the opinions of the author rather than the policy of the agency, *id.* at 483; *Hopkins*, 929 F.2d at 84, and whether it might "reflect inaccurately upon or prematurely disclose the views of [the agency]," *Grand Cent. P'ship*, 166 F.3d at 483.

Here, the vast majority of the documents for which the deliberative process privilege is claimed are predecisional recommendations and proposals, *see, e.g.*, Hilton Decl., Ex. A (Documents 3, 98, 101, 111, 113, 142); legal advice, *see, e.g., id.* (Documents 41, 51, 67, 69); talking points and briefing papers, *see, e.g., id.* (Documents 96, 120); and records reflecting internal discussions regarding policy issues that were under consideration within the Executive Branch, *see, e.g.*,Hilton

Decl. at ¶ 184, Ex. A (Documents 37, 42, 47, 100, 110, 123); Declaration of Margaret P. Grafeld, dated September 18, 2009 ("Grafeld Decl."), at ¶¶ 11-17 (Document 103); Declaration of John F. Hackett, dated September 22, 2009 ("Hackett Decl.") at ¶¶ 12-21 (Documents 3, 4, 62, 103-104, 107-111, 130 and 243); Declaration of Dione Jackson Stearns, dated September 22, 2009 ("Stearns Decl.") at ¶¶ 9, 11-12 (Document 284); Declaration of Karen L. Hecker, dated September 18, 2009 ("Hecker Decl."), at ¶¶ 4-5, 11-12 (Documents 103, 192). The deliberative process privilege plainly encompasses such documents because they "reflect[] advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated." *Hopkins*, 929 F.2d at 84-85 (citation and quotation marks omitted); *see also Grand Cent. P'ship*, 166 F.3d at 482 ("The privilege protects recommendations . . . proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy for the agency.").

This is true regardless of whether the recommendations or proposals originated from subordinate employees within a particular agency, or instead were part of interagency discussions with respect to a particular policy issue. *See, e.g.*, *Renegotiation Bd.*, 421 U.S. at 188 ("Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency."). Accordingly, these documents are properly exempt.

Legal advice, no less than other types of advisory opinions, "fits exactly within the deliberative process rationale for Exemption 5." *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980); *see also Int'l Paper Co. v. Federal Power Comm'n*, 438 F.2d 1349, 1358-59 (2d Cir.

1971); *Nat'l Council of La Raza v. DOJ*, 339 F. Supp. 2d 572, 582 (S.D.N.Y. 2004), *aff'd* 411 F.3d 350 (2d Cir. 2005); *Morrison v. DOJ*, Civ. A. No. 87-3394, 1988 WL 47662, at *1-2 (D.D.C. Apr. 29, 1988); *Southam News v. INS*, 674 F. Supp. 881, 886 (D.D.C. 1987). Similarly, the disclosure of "work plans, status reports, briefings, opinion papers, and proposals" would "stifle the candor necessary in an agency's policy making process." *Hornbostel v. DOI*, 305 F. Supp. 2d 21, 31 (D.D.C. 2003).

The CIA further withheld draft documents, and comments on draft documents, pursuant to the deliberative process privilege. *See, e.g.*, Hilton Decl. at ¶ 145 & Ex. A (Documents 1, 40, 41, 43, 46, 65, 58, 109, 112, 115, 134, 135, 152, 158, 160, 164); Declaration of David J. Barron, dated September 22, 2009 ("Barron Decl.") at ¶¶ 10-13 (Documents 1, 8, 9, 10, 11, 12, 13, 16, 19, 25, 30, 65, 68, and 83); Herrington Decl. at ¶¶ 3-4 (Document 247); Grafeld Decl. at ¶¶ 18-19 (Document 82); Hackett Decl. at ¶¶ 20-21 (Document 79); *id.* at ¶ 22 (Doc. 360); Hecker Decl. at ¶¶ 3, 8-10 (Document 20). It is well established that "draft documents, by their very nature, are typically predecisional and deliberative." *NAACP Legal Defense and Educ. Fund, Inc. v. U.S. Dep't of Housing*, No. 07 Civ. 3378 (GEL), 2007 WL 4233008, at *11 (S.D.N.Y. Nov. 30, 2007); *see also, e.g.*, *Coastal States*, 617 F.2d at 866 (recognizing that draft documents fall within scope of deliberative process privilege); *Grand Cent. P'ship*, 166 F.3d at 482; *Moreland Properties, LLC v. City of Thornton*, 07-cv-00716, 2007 WL 2523385, at *3 (D. Colo. Aug. 31, 2007); *Van Aire Skyport Corp. v. FAA*, 733 F.Supp. 316, 321 (D. Colo. 1990). Further, suggested revisions, comments, or opinions expressed about a draft are no less predecisional and deliberative than the actual text of the draft. *Robert v. HHS*, No. 01-CV-4778 (DLI), 2005 WL 1861755 (E.D.N.Y. Aug. 1, 2005), *aff'd* 217 Fed. Appx. 50 (2d Cir. 2007).

In sum, the CIA properly withheld records reflecting predecisional deliberations within the Executive Branch pursuant to Exemption 5.

B. Attorney Client Privilege

The CIA has likewise properly supported its assertions of the attorney client privilege. In defining the attorney-client privilege, the Second Circuit has explained that "(1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived." *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 119 F.3d 210, 214 (2d Cir. 1997) (quotation marks omitted). The attorney-client privilege is designed "to encourage full and frank communication between attorneys and their clients," and thereby encourage "the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "[T]he traditional rationale for the privilege applies with special force in the government context," *In re Grand Jury Investig.*, 399 F.3d 527, 534 (2d Cir. 2005), because public officials need "candid legal advice" to "understand and respect constitutional, judicial and statutory limitations," *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007).

Documents reflecting communications to, from or among attorneys with the CIA's OGC, which reflect the legal advice, analysis or opinions provided by those attorneys to its client, the CIA, have properly been withheld under the attorney-client privilege. *See* Hilton Decl. at ¶ 178 & Ex. A (Documents 29, 33, 34, 41, 43, 44, 49, 51, 53, 66, 67, 69, 72, 76, 81-84, 102-03, 137, 148, 176, 177, 184, 191-92, 194, 199, 220, 263); *see also* Hecker Decl. at ¶¶ 13-16 (Department of Defense legal

advice contained in Documents 20, 103, and 192); Grafeld Decl. at ¶¶ 9, 15, 20 (State Department legal advice contained in Documents 103 and 82). In the governmental context, the client may be the agency itself, and the attorney may be an agency lawyer. *See, e.g., In re Lindsey*, 148 F.3d 1100, 1104 (D.C. Cir. 1998).

It is also clear from the record that these communications were confidential in nature, and that the confidentiality of these documents have been maintained. *See* Hilton Decl. at ¶ 178 ("These documents were prepared . . . with the joint expectation . . . that they would be held in confidence. Moreover, these documents have been held in confidence."). Accordingly, the prerequisites for protection under the attorney-client privilege have been met.

C. Attorney Work Product Protection

The attorney work product doctrine exempts from disclosure "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation," *see* Fed. R. Civ. P. 26(b)(3), prepared "in anticipation of litigation," *A. Michael's Piano*, 18 F.3d at 146. Without such protection, an entity, like the CIA, would have to choose between protecting its litigation prospects by "scrimp[ing] on candor and completeness," or prejudicing its litigation prospects, by disclosing "assessment of its strengths and weakness . . . to litigation adversaries." *United States v. Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998).

Under the doctrine, the "anticipation of litigation" element is satisfied where, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because* of the prospect of litigation." *Id*. at 1202 (emphasis in original). Notably, there is no requirement that a protected document be prepared "primarily or exclusively to assist in litigation." *Id.* at 1198. Yet, "documents that are prepared in the ordinary

course of business or that would have been created in essentially the same form irrespective of . . . litigation" are unprotected. *Id*. at 1202. In sum, "[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3)." *Id.* at 1195.

There is no requirement that litigation exist at the time a protected document is created. As this Court has held, "[a] document is prepared in anticipation of litigation if there is the threat of some adversary proceeding." *In re Grand Jury Proceedings*, No. M-11-89 (LAP), 2001 WL 1167497, at *13 (S.D.N.Y. Oct. 3, 2001); *see also Rexford v. Olczak*, 176 F.R.D. 90, 91 (W.D.N.Y. 1997) (courts look to whether, at the time the materials were created, the party asserting the privilege believed that "litigation was likely and whether that belief was reasonable") (quotation omitted); *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 475 (S.D.N.Y. 2003) (same). Thus, documents may be considered work product when created with the reasonable belief of future litigation. *See, e.g.*, *Upjohn Co.*, 449 U.S. at 388, 397; *A.I.A. Holdings, S.A. v. Lehman Bros.*, No. 97 Civ. 4978, 2002 WL 31556382, at *6-*7 (S.D.N.Y. Nov. 15, 2002).

Here, the CIA is asserting work product protection over documents that reflect "CIA attorneys' analysis, thoughts, opinions, mental impressions and/or advice regarding the legal implications of certain operational aspects" of the TDI. Hilton Decl. at ¶ 180, and Ex. A (Documents 33, 43, 53, and 66). These records were "prepared in recognition of existing litigation concerning the [TDI], and in preparation for future anticipated civil, criminal and administrative proceedings." *Id.* Indeed, "at the time some of these documents were prepared," such proceedings had already commenced. *Id.* at ¶ 181. Given the CIA's subjective and reasonable belief that litigation would follow from the use of EITs, these documents are protected by the attorney work product doctrine.

See Prebena Wire Bending Mach. Co. v. Transit Worldwide Corp., No. 97 Civ. 9336 (KMW) (HBP), 1999 WL 1063216, at *4 (S.D.N.Y. Nov. 23, 1999) ("Since Universal has submitted unrebutted evidence that it had a subjective belief that litigation would follow and that its subjective belief was reasonable, . . . [the] emails are protected by the attorney work-product doctrine."); *see also In re Grand Jury Proceedings*, 2001 WL 1167497, at *14 ("[A] document may be protected even if it was 'created prior to the event giving rise to litigation' because '[i]n many instances, the expected litigation is quite concrete, notwithstanding that the events giving rise to it have not yet occurred.'"). Accordingly, the CIA has properly relied upon the attorney work product doctrine to withhold these documents.

D. Presidential Communications Privilege

Exemption 5 also exempts from disclosure information protected by the presidential communications privilege. *See Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113 (D.C. Cir. 2004). The Supreme Court has recognized a "presumptive privilege for Presidential communications" that is "fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974) ("*Nixon I*"). The presidential communications privilege protects "communications 'in performance of a President's responsibilities,' . . . 'of his office,' . . . and made 'in the process of shaping policies and making decisions.'" *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (quoting *Nixon I*, 418 U.S. at 708, 711, 713). It is justified in part because "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Nixon I*, 418 U.S. at 708. The presidential communications privilege "covers final and post-decisional materials as well as pre-deliberative

ones." *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997); *see also Judicial Watch, Inc.*, 365 F.3d at 1113-14.

In addition to protecting communications directly with the President, the privilege protects communications involving senior presidential advisers, including "both [] communications which these advisers solicited and received from others as well as those they authored themselves," in order to ensure that such advisers investigate issues and provide appropriate advice to the President. *In re Sealed Case*, 121 F.3d at 752. Furthermore, the privilege extends to both presidential communcations themselves and records memorializing or reflecting such communications. *See CREW v. DHS*, 06-0173, 2008 WL 2872183, at *8 (D.D.C. July 22, 2008) (holding that documents memorializing communications that were solicited and received by the President or his immediate advisers are subject to presidential communications privilege).

Pursuant to the presidential communications privilege, the CIA has properly withheld information from eight documents, and the Office of the DNI ("ODNI") has properly withheld information from twelve documents. *See* Hilton Decl. at ¶¶ 190-95 & Ex. A (Documents 14, 17, 24, 29, 32, 98, 100, 152); Hackett Decl. at ¶¶ 11-17, 24-29 (Documents 3-4, 62, 103-104, 107-11, 130, 243). All twenty documents reflect or memorialize communications between senior presidential advisers and other United States government officials, including CIA and ODNI officials, where presidential advisers solicited and received information and/or recommendations in the course of gathering information related to detainee policies, including the CIA terrorist detention and interrogation program, in connection with decisions, or potential decisions, to be made by the President. *See id.*

E. Privileged Witness Statements To OIG Investigators

Courts have long recognized that witness statements made in confidence in the course of agency inspector general investigations are privileged in civil discovery. *See, e.g., United States v. Weber Aircraft Corp.*, 465 U.S. 792, 796, 802-03 (1984); *Machin v. Zuckert*, 316 F.2d 336, 339 (D.C. Cir. 1963); *Ahearn v. U.S. Army Materials & Mechs. Research Ctr.*, 583 F. Supp. 1123, 1124 (D. Mass. 1984); *AFGE v. Dep't of the Army*, 441 F. Supp. 1308, 1313 (D.D.C. 1977); *Rabbitt v. Dep't of the Air Force*, 401 F. Supp. 1206, 1208-09 (S.D.N.Y. 1974). Such statements are therefore exempt from disclosure under FOIA Exemption 5. *See Weber Aircraft Corp.*, 465 U.S. at 798-804; *Ahearn*, 583 F. Supp. at 1124; *AFGE*, 441 F. Supp. at 1313; *Rabbitt*, 401 F. Supp. at 1209.

This privilege is necessary to "ensure frank and open discussion and hence efficient governmental operations." *Weber Aircraft Corp.*, 465 U.S. at 802. Courts have repeatedly stressed the importance of this privilege for internal investigations by agencies, like the CIA, whose proper and efficient operations are vital to the national defense. *See, e.g., Machin*, 316 F.2d at 339 ("[D]isclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program and perhaps even . . . impair the national security by weakening a branch of the military."); *Rabbitt*, 401 F. Supp. at 1209 ("[T]he importance of the Air Force's need to preserve its sources in order to assure the greatest possibility of prevention of fatal accidents in a critical sector of the national defense outweighs her particular need."). Likewise, in creating an OIG at the CIA that has the authority to compel testimony, *see* Intelligence Authorization Act, Fiscal Year 1990, Pub. L. 101-193, Title VIII, § 801, 103 Stat. 1711, 1711-1715 (Nov. 30 1989), codified at 50 U.S.C. § 403q, the President of the United States warned that the quality of the OIG's work would "depend[] on the willingness of Agency

employees to be candid during confidential interviews," and that "the promise of confidentiality would be cast in doubt" if confidential statements were regularly disclosed. *See* 2 Pub. Papers 1609, 1610 (Nov. 30, 1989).

The witness statements being withheld were made in the course of investigations by the CIA's Office of Inspector General. *See* Hilton Decl. at ¶¶ 188-89, and Ex. A (Documents 126, 131, 133-36, 138-40, 143-46, 149-51, 164-171, 173, 187-88, 193, 230-31, 242, 265, 270-73, 275, 278, 282, 286-98). At the time the statements were made, Office of Inspector General regulations provided that witness statements "will be held in confidence, subject to the other duties of the Office." *Id.* at ¶ 189. The statements were thus made in confidence.

"[C]ommon sense dictates that a warning to witnesses that their testimony will be generally disclosable under the FOIA would discourage candor and would severely limit the effectiveness of Inspector General investigations." *AFGE*, 441 F. Supp. at 1314. Here, "[r]evealing these documents would undermine the assurances of confidence and decrease employees' willingness to cooperate with Office of Inspector General Investigations." Hilton Decl. at ¶ 189. Accordingly, the witness statements were properly withheld under Exemption 5. *See Weber Aircraft Corp.*, 465 U.S. at 798-804; *Ahearn*, 583 F. Supp. at 1124; *AFGE*, 441 F. Supp. at 1313; *Rabbitt*, 401 F. Supp. at 1209.

IV. THE CIA HAS PROPERLY WITHHELD LAW ENFORCEMENT RECORDS PURSUANT TO EXEMPTION 7

Exemption 7 exempts from disclosure "records or information compiled for law enforcement purposes" that meet the criteria of any of six enumerated subsections. *See* 5 U.S.C. § 552(b)(7). A record is compiled for law enforcement purposes if the activity that gives rise to the documents is related to the enforcement of federal laws or the maintenance of national security, and the nexus between the activity and one of the agency's law enforcement duties is based on information

sufficient to support at least a "colorable claim" of its rationality. *Keys v. DOJ*, 830 F.2d 337, 340 (D.C. Cir. 1987); *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 563, 564 (S.D.N.Y. 1989); *see also Ctr. for Nat'l Sec'y Studies*, 331 F.3d at 926. Significantly, it is well established that "[a]n Inspector General of a federal government agency engages in law enforcement activities within the meaning of FOIA." *Ortiz v. HHS*, 70 F.3d 729, 732-33 (2d Cir. 1995); *see Local 32B-32J, Serv. Employees Int'l Union, AFL-CIO v. GSA*, No. 97 Civ. 8509 (LMM), 1998 WL 726000, at *7 (S.D.N.Y. Oct. 15, 1998); *see also Associated Press v. DOD*, 554 F.3d 274, 286 (2d Cir. 2009).

A. The CIA Properly Withheld Records Pursuant To Exemption 7(A)

Exemption 7(A) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

Here, the CIA has properly withheld information from the open OIG investigations containing records responsive to Plaintiffs' requests. *See* Hilton Decl. at ¶¶ 201-03. As an intial matter, these files "consist of documents OIG investigators have collected or created in the course of their investigations," *id.* at ¶ 201, which are "focused upon specific allegations of potentially unlawful activity, for the purpose of determining if there had been a violation of criminal law," *id.* at ¶ 202. Accordingly, the records have been compiled for law enforcement purposes. *See Ortiz*, 70 F.3d at 732-33; *Local 32B-32J*, 1998 WL 726000, at *7.

These files are categorically exempt under Exemption 7(A). "[T]he Supreme Court [has] encouraged the making of 'categorical decisions' in deciding whether material requested under FOIA is exempt," *Mapother v. DOJ*, 3 F.3d 1533, 1542 (D.C. Cir. 1993), and the Court has expressly held

that Exemption 7(A) permits categorical exclusion of investigatory records, *see Robbins Tire & Rubber Co.*, 437 U.S. at 236; *see also DOJ v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 779 (1989) (stating, in Section 7(C) case, that "[o]nly by construing the Exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered." (quotation marks omitted)). Accordingly, where the Government can articulate a rationale applicable to an entire category of records, it need not describe the requested records on a document-by-document basis. *See Reporters Comm. for the Freedom of the Press*, 489 U.S. at 776 ("categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction"); *Robbins Tire & Rubber Co.*, 437 U.S. at 236; *Mapother*, 3 F.3d at 1542; *In re DOJ*, 999 F.2d 1302, 1310-11 (8th Cir. 1993).

Here, "[p]rocessing documents in the OIG's open investigatory files would interfere with those investigations because it might alert CIA components and individuals that they are under investigation." Hilton Decl. at ¶ 203. The CIA has explained:

> The OIG's investigations are confidential. The confidentiality of the open investigations, among individuals and components within the CIA, is essential to the efficacy of those investigations. In order to process the open OIG investigations, however, OIG would require the assistance of CIA personnel from outside the OIG's office . . . in order to review potentially responsive documents, to analyze the applicability of FOIA exemptions, to describe the withheld records for a Vaughn index, and to make litigation decisions regarding the records on behalf of the CIA.
>
> Moreover, in order to review and process FOIA requests, IMS personnel must be able to consult with subject matter experts . . . .

Id. ¶¶ 203-04. CIA's need to rely on the assistance of non-OIG FOIA personnel, lawyers, and subject matter experts to process the OIG files would thus inevitably interfere with those investigations:

> In revealing this information to CIA employees outside of OIG, those persons would discover whom and what activities the OIG was investigating and what evidence had been collected, thus revealing the nature, scope, and targets of the OIG

> investigations. Revealing the nature, scope, and targets of the open OIG investigations to non-OIG personnel at the CIA would compromise the confidentiality of the open OIG investigations and would be reasonably likely to harm the OIG's pending law enforcement investigations.

Id. at ¶ 205.

The CIA has further determined that the public release of information in the open OIG investigations "could also reasonably be expected to harm the OIG's pending investigations." *Id.* at ¶ 206. "The open investigatory files are comprised primarily of: (1) interview documentation (*e.g.*, handwritten notes of interviews and interview reports); (2) correspondence of OIG investigators (*e.g.*, e-mails and letters); (3) evidence collected (*e.g.*, intelligence cables, correspondence, reports); and (4) drafts reports and working papers." *Id.* "Release of records from each of these categories of files could (a) reveal the course, nature, scope or strategy of an ongoing investigation; (b) prematurely reveal evidence in the ongoing investigation; (c) hinder OIG ability to control or shape the investigation; and (d) reveal investigative trends, emphasis, or targeting schemes." *Id.* Such disclosures, *i.e.*, "the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding," "was precisely the kind of interference that Congress . . . want[ed] to protect against." *Robbins Tire & Rubber Co.*, 437 U.S. at 247; *see also Local 32B-32J*, 1998 WL 726000, at *8-9 (holding 7(A) exempted entirety of an agency inspector general's office's investigatory file, where the file consisted of "notes prepared by agents, memoranda summarizing witness interviews and other investigative activities, documents prepared by other sources (either voluntarily or through compulsion by legal process), and other materials").

This conclusion – that Exemption 7(A) protects OIG from having to process its open OIG investigatory files and thereby compromise ongoing investigations – is consistent with this Court's oral decision of August 29, 2008, and order of September 24, 2008, in this case. *See* Order, dated

Sept. 24, 2008, Docket Entry No. 109; Oral Opinion of Hon. Loretta A. Preska, dated Aug. 29, 2008, Docket Entry No. 106 ("Oral Opinion"). In its Oral Opinion, the Court granted an application by John Durham, the Acting United States Attorney for the Eastern District of Virginia responsible for the federal criminal investigation into the CIA's destruction of videotaped interrogations to stay processing of records to prevent interference with that matter. In so ruling, the Court found that the involvement of FOIA personnel in processing records could interfere with a law enforcement investigation because revealing potentially sensitive details regarding the conduct of the investigation prematurely could well taint the gathering and processing of the documents by providing further details concerning how the criminal investigation is being conducted. *Id.* at 51. Here, too, the necessary disclosure of sensitive details regarding the OIG's investigations – even within the CIA, and even to individuals identified as outside the scope of the OIG's investigations – would interfere with the OIG's law enforcement proceedings, which could cause permanent harm to those investigations. *Cf. Robbins Tire & Rubber Co.*, 437 U.S. at 242 ("[W]e cannot see how FOIA's purposes would be defeated by deferring disclosure until after the Government has presented its case in court." (quotation marks omitted)).

For these reasons, the CIA has properly withheld the open OIG investigatory records under Exemption 7(A).

B. The CIA Properly Withheld Records Pursuant To Exemption 7(D)

Exemption 7(D) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to disclose the identity of a confidential source . . . , and, in the case of a record or information compiled by a criminal law enforcement authority in the

course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). This provision protects the identities of confidential sources, as well as the confidential information they furnish in the course of investigations. *See Ferguson v. FBI*, 957 F.2d 1059, 1069 (2d Cir. 1992); *Garcia v. DOJ, OIP*, 181 F. Supp. 2d 356, 375 (S.D.N.Y. 2002). Information will be withheld if it was "'furnished . . . with the understanding that the [agency] would not divulge the communication except to the extent the [agency] thought necessary for law enforcement purposes.'" *Ferguson v. FBI*, 83 F.3d 41, 42 (2d Cir. 1996) (quoting *DOJ v. Landano*, 508 U.S. 165, 172-74 (1993)).

Here, Exemption 7(D) protects from disclosure the witness statements contained within Documents 126, 131, 133-36, 138-40, 143-46, 149-51, 164-171, 173, 187-88, 193, 230-31, 242, 265, 270-73, 275, 278, 282, and 286-98. *See* Hilton Decl. at ¶¶ 211-14. Those statements were made pursuant to "Office of Inspector General regulations[, which] require the OIG to maintain the confidentiality of the information that is provided to them during the course of an investigation." *Id.* at ¶ 213.

As an initial matter, the sources are "confidential" within the first clause of Exemption 7(D), both because CIA's regulations are an express assurance of confidentiality, *see Landano*, 508 U.S. at 172 ("[A] source is confidential within the meaning of Exemption 7(D) if the source provided information under an express assurance of confidentiality" (quotation marks omitted)); *Ortiz*, 70 F.3d at 733 (same); *see also Manna v. DOJ*, 51 F.3d 1158, 1167 (3d Cir. 1995) ("*express* assurances of confidentiality clearly meet the requirements of Exemption 7(D)") (emphasis in original), and because a witness would understand that his or her statements would be treated confidentially under such a regulation, *cf. Halpern*, 181 F.3d at 299; *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1445,

1448-49 (D.C. Cir. 1996).

In addition to the sources themselves, the information provided by those sources is likewise exempt from disclosure, under the second clause of Exemption 7(D), because "[a]n Inspector General of a federal government agency engages in law enforcement activities within the meaning of FOIA." *Ortiz*, 70 F.3d at 732-33, and the cited witness statements were made in the course of OIG investigations, *see* Hilton Decl. at 211. *See Providence Journal Co. v. U.S. Dep't of the Army*, 981 F.2d 552, 563-565 (1st Cir. 1992) (holding Exemption 7(D) protected information provided to inspector general by confidential sources); *Ferguson*, 957 F.2d at 1069 ("Once it is shown that information was provided by a confidential source, the information itself is protected from disclosure . . .."). Accordingly, the CIA properly withheld the witness statements under Exemption 7(D).

V. THE CIA PROPERLY WITHHELD PERSONAL IDENTIFYING INFORMATION PURSUANT TO EXEMPTIONS 6 AND 7(C)

The CIA, DOD, and OLC have withheld the names and email addresses of DOD personnel below the office-director level, or officers at or below the rank of Colonel; the names of OLC line attorneys, persons interviewed by the CIA OIG, and a detainee; and personal identifying information such as dates of birth, social security numbers, and biographical information under Exemptions 6 and 7(C). *See, e.g.*, Hilton Decl. at ¶¶ 196-99, 207-10 & Ex. A (Documents 126, 127, 131, 134-36); Declaration of James P. Hogan, dated September 21, 2009, at ¶ 3 (DOD names); Declaration of Philip J. McGuire, dated September 21, 2009, at ¶¶ 8-11 (Document 249); Herrington Decl. at ¶¶ 7-10 (Document 247); Hecker Decl. at ¶¶ 17-20 (Documents 192, 250); Barron Decl. at ¶ 14 (Documents 1, 9, 10, 11, and 83). "Exemption 7(C) and Exemption 6 are specifically aimed at protecting the privacy of personal information in government records." *Associated Press v. DOJ*, No. 06 Civ. 1758 (LAP), 2007 WL 737476, at *4 (S.D.N.Y. Mar. 7, 2007), *aff'd* 549 F.3d 62 (2d Cir. 2008).

Exemption 6 exempts from disclosure information from personnel, medical, or other similar files that "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).[12] Exemption 7(C), which applies only to information contained in law enforcement records, "is more protective of privacy than Exemption 6, because [Exemption 7(C)] applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted.'" *Associated Press*, 2007 WL 737476 at *4; *see Associated Press*, 549 F.3d at 65. In determining if personal information is exempt from disclosure under these provisions, the Court must balance the public's need for this information against the individual's privacy interest. *Wood v. FBI*, 432 F.3d 78, 86 (2d Cir. 2005); *see also Sherman v. Dep't of the Army*, 244 F.3d 357, 361 n.6 (5th Cir. 2001) ("[T]he manner in which courts analyze the applicability of exemption 7(C) is the same as that used with respect to exemption 6."). "The privacy side of the balancing test is broad and encompasses all interests involving the individual's control of information concerning his or her person." *Wood*, 432 F.3d at 88 (quotation marks omitted). For instance, "individuals, including government employees and officials, have privacy interests in the dissemination of their names." *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993); *see Associated Press*, 549 F.3d at 65. On the other side of the scale, "[t]he *only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Bibles v. Or. Natural Desert Assoc.*, 519 U.S. 355, 355-56 (1997) (quotation marks and citations omitted) (emphasis in

[12] Exemption 6 does not merely apply to "files 'about an individual,'" but applies more broadly to "bits of personal information, such as names and addresses," contained in otherwise releasable documents. *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006); *see also, e.g., U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982).

original); *Associated Press*, 549 F.3d at 66; *see also Hopkins*, 929 F.2d at 88.

Each of the privacy redactions made in this case is appropriate. With respect to the names of DOD personnel below the office-director level, or officers at or below the rank of Colonel, as well as OLC line attorneys, and the myriad bits of personal identifying information, such as social security numbers and dates of birth, it is impossible to conceive of any light that would be shed on agencies' performance of their statutory duties through the disclosure of such information here. *Cf. Wood*, 432 F.3d at 89; *Massey*, 3 F.3d at 624; *Long v. OPM*, 5:05-CV-1522, 2007 WL 2903924 (N.D.N.Y. Sept. 30, 2007) (affirming withholding of DOD names); *Kimmel v. DOD*, Civil Action 04-1551, 2006 WL 1126812, at *3 (D.D.C. Mar. 31, 2006) (same). As for the detainee name in Document 249, the Second Circuit has expressly held that "detainee identifying information contained in records of DOD's investigations of detainee abuse" is "exempt from disclosure under the FOIA privacy exemptions." *Associated Press v. DOD*, 554 F.3d at 278-79, 290.

Finally, the identifying information of OIG witnesses is properly withheld because "[t]he strong public interest in encouraging witnesses to participate in future government investigations offsets the weak public interest in learning witness and third party identities." *Perlman v. DOJ*, 312 F.3d 100, 106 (2d Cir. 2002) ("The public's interest in learning the identity of witnesses . . . is minimal because that information tells little or nothing either about [the agency] or the Inspector General's conduct of its investigation."), *reaffirmed after remand*, 380 F.3d 110 (2d Cir. 2004); *Massey*, 3 F.3d at 624-25 (holding that records "disclosing the identities of FBI agents, cooperating witnesses and third parties, including cooperating law enforcement officials" "implicated . . . exactly the sort of personal privacy interest that Congress intended Exemption 7(C) to protect" (quotations omitted)); *see also NARA v. Favish*, 541 U.S. 157, 166 (2004) (concluding there "is special reason"

to protect the names of witnesses in law enforcement records). Privacy of OIG witnesses is especially important here because identification of these witnesses would link them to the subject matter of the requested documents (*i.e.*, a CIA program to capture and detain terrorists), and could subject them to targeting, stigmatization, or harassment, *see, e.g.*, *ACLU v. FBI*, 429 F. Supp. 2d 179, 192 (D.D.C. 2006); *Electronic Privacy Info. Ctr. v. DHS*, No. 04-1625, 2006 U.S. Dist. LEXIS 94615, at *27 (D.D.C. Dec. 22, 2006); *Kimmel*, 2006 WL 1126812, at *3.

Accordingly, this personal information is properly withheld under Exemptions 6 and 7(c).

VI. THE CIA HAS PROPERLY WITHHELD GRAND JURY INFORMATION UNDER EXEMPTION 3

Grand jury information is protected by Rule 6(e) of the Federal Rules of Criminal Procedure and thus exempt from disclosure under Exemption 3. *See Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 867-68 (D.C. Cir. 1981). Rule 6(e) "encompasses not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like." *Id.* at 869-70; *see also In re Grand Jury Subpoena*, 103 F.3d 234, 237-38 (2d Cir. 1996); *United States v. Lartey*, 716 F.2d 955, 964 (2d Cir. 1983).

As Document 300 "would tend to reveal the identity of witnesses that testified before a grand jury, the strategy of the prosecution before that grand jury, and the target of that grand jury," it is therefore exempt from disclosure. Hilton Decl. at ¶ 176, Ex. A (Document 300); *see also Fund for Constitutional Gov't*, 656 F.2d at 869; *Local 32B-32J*, 1998 WL 726000, at *6; *M.K. v. DOJ*, No. 96 Civ. 1307 (SHS), 1996 WL 509724, at *2 (S.D.N.Y. Sept. 9, 1996).

VII. THE CIA PROPERLY WITHHELD INTERNAL AGENCY INFORMATION UNDER EXEMPTION 2

Exemption 2 applies to, among other things, "those rules and practices that affect the internal workings of an agency[,] and, therefore, would be of no genuine public interest," *Massey*, 3 F.3d at 622 (quotation marks omitted). The CIA has invoked Exemption 2 to withhold, *inter alia*, the NCS's administrative, routing, and handling notations, which reflect the internal workings of the NCS and are routine matters of merely internal interest. *See* Hilton Decl. at ¶ 167. The withheld information is "internal, clerical information," the release of which holds no public interest. *Id.* Accordingly, the CIA has properly withheld materials pursuant to a low Exemption 2. *See, e.g.*, *Massey*, 3 F.3d at 622; Crooker v. ATF, 670 F.2d 1051, 1069 (D.C. Cir. 1981), *Williams v. McCausland*, 90 Civ. 7563 (RWS), 91 Civ. 7281 (RWS), 1994 WL 18510 at *10-11 (S.D.N.Y. Jan. 18, 1994); *Colon v. EOUSA*, No. 98-0180, 1998 WL 695631, at *3 (D.D.C. Sept. 29, 1998).

VIII. THE CIA HAS CONDUCTED AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS

An agency's search, including its decisions about which offices and databases to search, "will be considered adequate if it was reasonably calculated to uncover all relevant documents." *Amnesty Int'l USA*, 2008 WL 2519908, at *9; *see also Grand Cent.P'ship*, 166 F.3d at 489; *Kidd v. DOJ*, 362 F. Supp. 2d 291, 295 (D.D.C. 2005). "Reasonableness does not demand perfection." *Bloomberg L.P. v. Bd. of Governors of Federal Reserve System*, __F. Supp. 2d __, No. 08-9595 (LAP), 2009 WL 2599336, at * 7 (S.D.N.Y. Aug. 24, 2009). A reasonable search encompasses those systems of records the agency reasonably believes likely to contain responsive documents; FOIA does not require an agency to search each and every one of its records systems. *See Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Furthermore, "reasonableness must be evaluated in the context of each

particular request." *Amnesty Int'l USA*, 2008 WL 2519908, at *9.

Once an agency submits a search declaration setting forth facts that indicate that a reasonable search was conducted, the agency is entitled to a presumption of good faith. To establish the sufficiency of its search, "such declarations must be relatively detailed and non-conclusory." *Amnesty Int'l USA*, 2008 WL 2519908, at *8 (quotation marks omitted); *see also Kidd*, 362 F. Supp. 2d at 295 (declarations sufficient where they "explain in reasonable detail the scope and method of the search conducted"). However, they need not "set forth with meticulous documentation the details of an epic search." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). The presumption of good faith afforded to such declarations "cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Grand Central P'ship*, 166 F.3d at 489 (quotation marks omitted).

Ms. Hilton's declaration describing the CIA's search for records responsive to the four FOIA requests establishes that the CIA conducted searches that were "reasonably calculated to uncover all relevant documents." *Amnesty Int'l USA*, 2008 WL 2519908, at *9; *see also* Hilton Decl. ¶¶ 34-56. For example, its searches within the DIR Area cast a wide net, including searches of all of the Office of the Inspector General's "case files that concerned detainees or rendition," and electronic searches using broad search terms such as "ghost detainee" and "rendition." *Id.* at ¶¶ 37-38.

With respect to the CIA's searches for documents responsive to Categories 2, 7, 8, and 14, the CIA consulted with those individuals most likely to know where to find such documents, if such documents existed, and in every instance, the individuals queried told the CIA officers conducting the search that, based on their specific substantive knowledge of the subject matter of the requested records as well as their familiarity with the contents of the relevant CIA files, the specific documents

described did not exist. *See id.* ¶¶ 45-53.

With respect to the CIA's search for "the cables . . . discussing and/or approving the use of waterboarding" on Abu Zubaydah and KSM (Categories 11 and 12), the CIA searched a "database of cables maintained by the NCS that was designed to aggregate all CIA cables concerning Abu Zubaydah and KSM, among other individuals, during the time of their detention and interrogation." CIA officers then completed an adequate search for records by running electronic searches of this database using the search terms "waterboard," "water," and "other variations of the term 'waterboard.'" Hilton Decl. ¶¶ 50-51. *See Moayedi v. CBP*, 510 F. Supp. 2d 73, 80 (D.D.C. 2007) ("[I]f searching only one database would be reasonably calculated to uncover all relevant documents, then such search may be deemed adequate.") (quotation marks omitted); s*ee also Schrecker v. DOJ*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (search adequate where agency "reasonably chose to search the most likely place responsive documents would be located").

In sum, CIA conducted adequate searches by searching in good faith precisely those offices and systems of records that they reasonably believed were most likely to contain responsive records. *See* Hilton Decl. ¶¶ 34-56**;** *Schrecker*, 217 F.Supp. 2d at 35; *Oglesby*, 920 F.2d at 68. Indeed, the fact itself that the CIA found in excess of 9,000 responsive records indicates the breadth and scope of the CIA's search. *Id.* at ¶ 7 n.1. In the absence of any evidence of bad faith, the Court should find that the CIA satisfied its search obligations under FOIA. *See Grand Cent. P'ship*, 166 F. 3d at 489.

CONCLUSION

For the foregoing reasons, the Court should grant the CIA's motion for summary judgment.

Dated: New York, New York
September 22, 2009

Respectfully submitted,

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ADDENDUM

For the Court's convenience, the following is a summary chart of the respective exemptions claimed for each document. *See* Hilton Decl., Ex. A.

Exemption 1

Documents 1 - 360, except:				
31	102	158	247	274
42	125	174	249	280
59	127	175	250	281
88	152	240	269	

Exemption 3

Documents 1-360, except:				
174	247	249		

Exemption 5 (Attorney-Client Privilege)

8	34	66	102	192
10	41	67	103	194
11	43	69	137	199
16	44	72	148	220
18	49	76	176	263
20	51	81	177	284
29	53	82	184	
33	56	84	191	

Exemption 5 (Deliberative Process Privilege)

1	42	102	138	173	237
3	43	103	139	176	238
4	46	104	140	177	239
5	47	105	142	178	241
6	48	106	143	179	242
7	50	107	144	182	243
8	51	108	145	183	244
9	56	109	146	184	248
10	61	110	147	185	260
11	62	111	148	191	261
12	63	112	149	192	263
13	65	113	150	194	265
14	66	115	151	198	267
16	67	116	152	200	270
17	68	117	158	202	271
18	69	120	159	204	272
19	72	123	160	214	273
20	76	126	161	223	275
24	79	128	162	225	276
25	81	129	163	226	277
30	82	130	164	228	278
32	83	131	165	229	279
33	84	132	166	230	282
34	92	133	167	231	284
36	96	134	168	232	285
37	98	135	169	233	286
40	100	136	170	235	287
41	101	137	171	236	288

Exemption 5 (Deliberative Process Privilege, cont.)

289	292	295	298	360	
290	293	296	300		
291	294	297	349		

Exemption 5 (Presidential Communications Privilege)

3	24	98	107	111
4	29	100	108	130
14	32	103	109	152
17	62	104	110	243

Exemption 5 (OIG-Witness Statements)

126	145	170	271	290
131	146	171	272	291
133	149	173	273	292
134	150	187	275	293
135	151	188	278	294
136	164	193	282	295
138	165	231	285	296
139	166	242	286	297
140	167	265	287	298
143	168	266	288	
144	169	270	289	

Exemption 5 (Work Product Privilege)

32	49	66	76	84
33	51	67	81	102
34	53	69	82	284
43	56	72	83	300

Exemption 6

1	151	250	295	328
9	153	262	296	329
10	159	265	297	330
11	164	269	298	331
21	165	270	305	332
45	166	271	306	333
59	167	272	307	334
80	168	273	308	335
83	169	274	309	336
89	170	275	310	337
93	171	277	311	338
126	172	278	312	339
127	173	279	313	340
131	174	280	314	341
133	181	281	315	342
134	187	282	316	343
135	188	283	317	344
136	192	284	318	345
138	193	286	319	346
139	227	287	320	347
140	230	288	321	348
143	239	289	322	349
144	240	290	323	350
145	242	291	324	
146	244	292	325	
149	247	293	326	
150	249	294	327	

Exemption 7(a)

18				

Exemption 7(c)

126	146	173	274	290
127	149	174	275	291
131	150	227	277	292
133	151	230	278	293
134	164	247	280	294
135	165	249	281	295
136	166	262	282	296
138	167	265	283	297
139	168	269	285	298
140	169	270	286	
143	170	271	287	
144	171	272	288	
145	172	273	289	

Exemption 7(d)

126	146	173	272	291
131	149	181	273	292
133	150	187	275	293
134	151	188	278	294
135	164	193	281	295
136	165	230	282	296
138	166	231	285	297
139	167	242	286	298
140	168	265	287	
143	169	266	288	
144	170	270	289	
145	171	271	290	