UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.*, *Plaintiffs,* v. CENTRAL INTELLIGENCE AGENCY, *Defendant*.	Civil Action No. 18-2784 (CJN)

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant respectfully moves for summary judgment on Plaintiffs' claims under the Freedom of Information Act. This motion is accompanied by a memorandum, *Vaughn* index, supporting declaration, exhibits, and proposed order.

Respectfully submitted,

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STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 7(h), Defendant respectfully submits this Statement of Material Facts Not in Dispute in support of Defendant's Motion for Summary Judgment.

1. Plaintiffs submitted a FOIA request dated May 4, 2018 to CIA. Declaration of Vanna Blaine, Information Review Officer for the Litigation Information Review Office ("Blaine Decl.") ¶ 5. The request sought all records concerning CIA efforts to support Gina Haspel's nomination for Director, including but not limited to:

> 1. All records regarding the selective declassification of information concerning Ms. Haspel, including the decision to declassify Ms. Haspel's encounter with Mother Theresa while keeping classified Ms. Haspel's actions in the Rendition, Detention, and Interrogation Program;
>
> 2. Any records regarding whether Ms. Haspel serves as the original classification authority over information concerning her own participation in abuse, torture,

rendition, and detention, and any consideration of possible conflicts of interest in this position;

3. Communications between CIA personnel and journalists regarding Ms. Haspel's nomination, including Agency efforts to promote public perception of Ms. Haspel as "fair," "objective," and "committed to the rule of law," and to discredit accounts of Ms. Haspel's involvement in torture, destruction of evidence of torture, and other actions in the Rendition, Detention, and Interrogation program;

4. Communications between current CIA personnel and former CIA employees seeking statements of support or other legislative and/or media outreach for Ms. Haspel's nomination, including efforts to promote perception of Ms. Haspel as "fair," "objective," and "committed to the rule of law,";

5. Records concerning CIA decisions to promote coverage deemed favorable of Ms. Haspel, including through the Agency's official twitter account;

6. Records documenting the use of CIA resources, including expenditures of personnel time and money, to support Ms. Haspel's nomination;

7. Records showing actions undertaken by career, nonpolitical CIA employees in support of Ms. Haspel's nomination;

8. Records concerning coordination with nongovernmental actors to promote Ms. Haspel's nomination, including any records concerning CIA contacts with public relations firms and nongovernmental organizations;

9. All CIA guidance on permissibility of using Agency resources, including expenditures of nonpolitical personnel time, to promote a nominee facing Senate confirmation;

10. Communications from CIA Staff to the White House concerning efforts to promote Ms. Haspel's nomination.

Id.

2. In response to Plaintiffs' FOIA request, CIA searched electronic and hard copy records. *Id*. ¶ 11. CIA identified the following offices as likely to contain any responsive materials: Office of Congressional Affairs, Office of Public Affairs, Directorate of Digital Innovation, Office of the Director, and the Office of General Counsel. *Id*. The Office of Congressional Affairs was selected because, among its other responsibilities, it ensures that Congress is kept informed of intelligence issues and activities - such as the issues that may arise during the selection process for the Director of the CIA. *Id.* The Office of Public Affairs was selected because part of its mission is to conduct public outreach and field public inquiries on the behalf of CIA. *Id.* The Directorate of Digital Innovation, as part of its area of responsibility, provides guidance for the public release of Agency information, in compliance with Federal law and Executive mandates, while protecting the Agency's classified equities and promoting transparency with the public. *Id.* The Office of the Director was selected because this office provides direct support to Agency principals and addresses questions regarding the Director nomination and transition process. *Id.* The Office of General Counsel was chosen because it is responsible for the legal affairs of the Agency to include providing legal guidance during the Director nomination and transition process. *Id.* No additional offices were identified as maintaining any responsive records. *Id.*

3. Following discussions with the officers who are knowledgeable of each offices' holdings noted above, CIA conducted a search that included emails of certain custodians who were identified as subject matter experts, internal share drives, relevant databases and paper and

electronic file holdings to include archived documents and CADRE, the Agency's repository for records that have been previously disclosed to the public. *Id*. ¶¶ 12-13.

4. CIA conducted a line-by-line review of each document and identified information that could be released and information that is exempt from disclosure because of classification, privacy, or privilege concerns. *Id*. ¶ 13.

5. By letter dated February 28, 2020, CIA informed Plaintiffs that it was releasing 153 documents in part and was withholding the remaining documents in full. *Id*. ¶ 8. CIA asserted exemptions 1, 3, 5, and 6. *Id*.

6. On March 24, 2020, CIA issued a supplemental response letter explaining that it was releasing one document in full and seven documents in part. *Id*.

7. CIA released all reasonably segregable, non-exempt information subject to the FOIA. *Id*. ¶ 9.

Respectfully submitted,

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ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

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MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant, the Central Intelligence Agency ("CIA"), respectfully moves for summary judgment in this FOIA case. Defendant has satisfied all of its obligations with respect to Plaintiffs' FOIA request. As described in the attached declaration, Defendant has conducted an adequate search for responsive records and has produced to Plaintiffs all of the responsive records to which they are entitled. Defendant searched for responsive hard copy and electronic files in the offices likely to contain any responsive materials: the Office of Congressional Affairs, Office of Public Affairs, Directorate of Digital Innovation, Office of the Director, and the Office of General Counsel. Defendant searched emails of certain custodians who were identified as subject matter experts, internal share drives, relevant databases and paper and electronic file holdings to include archived documents, and the agency's repository for records that have been previously disclosed to the public. The Court should find that CIA's search was reasonable.

The Court should also affirm the agency's withholdings. The attached *Vaughn* index identifies a representative sample of the withheld documents and explains the contested exemptions that were applied to each document.[1] As demonstrated by the *Vaughn* index and agency declaration, CIA properly withheld information under Exemptions 1, 3, 5, and 6. Pursuant to Exemption 1, CIA withheld classified information such as information regarding covert

[1] Due to the large number of documents that were withheld in full or withheld in part, the parties agreed to use a *Vaughn* index based on a representative sample of withheld records. *See* Blaine Decl. ¶ 14. The D.C. Circuit has held that "[r]epresentative sampling is an appropriate procedure to test any agency's FOIA exemption claims when a large number of documents are involved" because it "allows the court and the parties to reduce a voluminous FOIA exemption case to a manageable number of items that can be evaluated individually through a Vaughn index or an in camera inspection." *Bonner v. United States Dep't of State*, 928 F.2d 1148, 1151 (D.C. Cir. 1991); *see also Meeropol v. Meese*, 790 F.2d 942, 958 (D.C. Cir. 1986) (deeming sample consisting of 1% of documents appropriate); *Blanton v. United States Department of Justice*, 63 F. Supp. 2d 35, 43 (D.D.C. 1999) (approving use of representative Vaughn index of approximately 200 documents).

personnel and covert locations; codewords; specific intelligence sources, methods, and or activities; and classification and dissemination control markings. CIA withheld the same information under Exemption 3, as well as other information protected from disclosure by statute, such as details regarding the agency's information security protocols and identifying information relating to CIA employees.

CIA also properly withheld information subject to the deliberative process privilege and/or the attorney-client privilege under Exemption 5. The pre-decisional, deliberative materials withheld by the CIA include, *inter alia*, draft documents prepared to respond to Senate inquiries, correspondence with the White House regarding such drafts, and documents reflecting deliberative discussions regarding responses to media inquiries. Courts have repeatedly found similar materials to be exempt from disclosure under Exemption 5. Likewise, the withheld confidential communications between agency personnel and attorneys within the CIA's Office of General Counsel are plainly subject to the attorney-client privilege and are therefore exempt from disclosure. Finally, the agency also properly withheld the identifying information of CIA employees, non-agency government personnel, and other third-parties unaffiliated with the agency. Disclosure of this information could subject the individuals to harassment, embarrassment, or unwanted contact. Accordingly, release of the information would constitute a clearly unwarranted invasion of personal privacy.

For these reasons, as discussed in greater detail below, Defendant respectfully requests that the Court grant its motion for summary judgment.

FACTUAL BACKGROUND

Defendant hereby incorporates its Statement of Material Facts Not in Dispute, the Declaration of Vanna Blaine, Information Review Officer for the Litigation Information Review Office ("Blaine Decl."), as well as exhibits referenced therein, including the *Vaughn* index.

LEGAL STANDARD

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 248. A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

The "vast majority" of FOIA cases are decided on motions for summary judgment. *See Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521,527 (D.C. Cir. 2011); *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) ("FOIA cases typically and appropriately are decided on motions for summary judgment."); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) *("CREW").* An agency may be entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records, and each responsive record that it has located either has been produced to the plaintiff or is exempt from

disclosure. *See Weisberg v. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); *Media Research Ctr.*, 818 F. Supp. 2d at 137.

"[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *CREW*, 478 F. Supp. 2d at 80 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible."' *Media Research Ctr.*, 818 F. Supp. 2d at 137 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

ARGUMENT

I. Defendant Complied with Its Obligations to Search for Responsive Information and Properly Applied FOIA Exemptions in Responding to Plaintiffs' FOIA Request

The FOIA requires that an agency release all records responsive to a properly submitted request unless such records are protected from disclosure by one or more of the Act's nine exemptions. 5 U.S.C. § 552(b); *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). Once a court determines that an agency has conducted a reasonable search and released all non-exempt material, it has no further judicial function to perform under the FOIA and the FOIA claim is moot. *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982); *Muhammad v. U.S. Customs & Border Prot.*, 559 F. Supp. 2d 5, 7-8 (D.D.C. 2008). As demonstrated below, Defendant satisfied

its obligation to conduct adequate searches for records responsive to Plaintiffs' FOIA request and properly withheld exempt information pursuant to applicable FOIA exemptions.

A. Defendant Conducted Searches Reasonably Calculated to Uncover Responsive Records in Response to Plaintiffs' Request

Under the FOIA, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice,* 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see Oglesby v. Dep't of the Army,* 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."). A search is not inadequate merely because it failed to "uncover[] every document extant." *SafeCard Servs., Inc. v. SEC,* 926 F.2d 1197, 1201 (D.C. Cir. 1991); *see Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) (noting that "[p]erfection is not the standard by which the reasonableness of a FOIA search is measured"). Rather, a search is inadequate only if the agency fails to "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Oglesby,* 920 F.2d at 68. An agency is not required to examine "virtually every document in its files" to locate responsive records. *Steinberg v. Dept. of Justice,* 23 F.3d 548, 552 (D.C. Cir. 1994). Rather, it is appropriate for an agency to search for responsive records in accordance with the manner in which its records systems are indexed. *Greenberg v. Department of Treasury,* 10 F. Supp. 2d 3, 13 (D.D.C. 1998).

Once an agency demonstrates the adequacy of its search, the agency's position can be rebutted "only by showing that the agency's search was not made in good faith." *Maynard v. CIA,* 986 F.2d 547, 560 (1st Cir. 1993). Hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of an agency's search. *Oglesby*, 920 F.2d at 67 n.l3. "Agency affidavits enjoy a presumption of good faith that withstands purely speculative claims

about the existence and discoverability of other documents." *Chamberlain v. U.S. Dep't of Justice*, 957 F. Supp. 292, 294 (D.D.C. 1997), *aff'd,* 124 F.3d 1309 (D.C. Cir. 1997).

In response to Plaintiffs' request, CIA identified the offices likely to contain any responsive materials: the Office of Congressional Affairs, Office of Public Affairs, Directorate of Digital Innovation, Office of the Director, and the Office of General Counsel. *See* Blaine Decl. ¶ 11. The Office of Congressional Affairs was selected because it is responsible for, among other things, ensuring that Congress is kept informed of intelligence issues and activities – such as the issues that may arise during the selection process for the Director of the CIA. *Id.* The Office of Public Affairs was selected because part of its mission is to conduct public outreach and field public inquiries on the behalf of CIA. *Id.* The Directorate of Digital Innovation, as part of its area of responsibility, provides guidance for the public release of Agency information, in compliance with Federal law and Executive mandates, while protecting the Agency's classified equities and promoting transparency with the public. *Id.* The Office of the Director was selected because this office provides direct support to Agency principals and addresses questions regarding the Director's nomination and transition process. *Id.* The Office of General Counsel was chosen because it is responsible for the legal affairs of the Agency, to include providing legal guidance during the Director nomination and transition process. *Id.* No additional offices were identified as maintaining any potentially responsive records. *Id.*

Following discussions with the officers who are knowledgeable of each offices' holdings, CIA conducted a search that included emails of certain custodians who were identified as subject matter experts, internal share drives, relevant databases and paper and electronic file holdings to include archived documents and CADRE, the agency's repository for records that have been

previously disclosed to the public. *Id*. ¶ 12. CIA used search terms reasonably tailored to uncover responsive records. *Id*. ¶ 13.

Accordingly, the Court should find that CIA conducted a reasonable search for responsive documents. *See Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009) (observing that the adequacy of an agency's search "is measured by the reasonableness of the effort in light of the specific request"); *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, No. 11-1971 (JEB), 2012 WL 5928643, at *4 (D.D.C. Nov. 27, 2012) (finding that agency's methodology was "sound" where agency compared the FOIA request to its program offices' functions in order to determine which component offices to search); *James Madison Project v. DOJ*, 267 F.Supp.3d 154, 160-61 (D.D.C. 2017) (upholding agency's search which was based, in part, on interviews conducted with knowledgeable agency personnel).

B. Defendant Properly Withheld Information Pursuant to Exemption 1

Defendant withheld certain documents in their entirety, and redacted other documents in part, pursuant to Exemption 1 of the FOIA. Exemption 1 protects from disclosure records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and (B) are in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009), "in turn, establishes procedural and substantive requirements for classification of national security information."

An agency establishes that it has properly withheld information under Exemption 1 if it demonstrates that it has met the classification requirements of Executive Order 13526. Section 1.1 of the Executive Order sets forth the requirements for the classification of national security information: (1) an original classification authority classifies the information; (2) the U.S.

Government owns, produces, or controls the information; (3) the information is within one of eight protected categories listed in section 1.4 of the Order; and (4) there is a determination that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security. E.O. 13526 § 1.1(a). The Court must accord "substantial weight" to agency affidavits concerning classified information, *King v. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987), and must defer to the expertise of agencies involved in national security and foreign policy, particularly to those agencies' articulations and predictive judgments of potential harm to national security, *see Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009).

Here, senior CIA official Vanna Blaine, who holds the authority to determine whether documents are properly classified, *see* Blaine Decl. ¶ 2, has affirmed that the CIA has complied with each aspect of the Executive Order: an original classification authority properly classified the information at issue; the records in question were produced by, and remain under the control of, the United States Government; the information falls under classification category § 1.4(c) of E.O. 13526; and that the withheld information remains currently and properly classified because the disclosure of this information could reasonably be expected to result in damage to national security. Blaine Decl. ¶ 16. Accordingly, for the reasons set forth more fully below, CIA appropriately withheld this information under FOIA Exemption 1.

Section 1.4(c) of Executive Order 13526 permits the classification of information concerning "intelligence activities (including covert action), intelligence sources or methods, or cryptology[.]" 75 Fed. Reg. at 709. CIA withheld information pursuant to Section 1.4(c) consisting of (i) identifying information regarding covert personnel; (ii) codewords; (iii) covert CIA locations; (iv) information that would tend to reveal specific intelligence sources, methods,

and/or activities; and (v) classification and dissemination control markings. Blaine Decl. ¶¶ 17-22. All of this information was properly withheld under Exemption 1. Disclosing the identity of a covert employee could expose the intelligence activities with which the employee has been involved and the sources with whom the employee has had contact. *Id.* ¶ 18. Disclosing code words could permit foreign intelligence services and other groups to fit disparate pieces of information together and to discern or deduce the identity or nature of the project or location for which the code word stands. *Id.* ¶¶ 19-20. As to covert locations, the places where the CIA maintains a presence constitute classified intelligence methods. *Id.* ¶ 20. The agency also properly withheld classified information about clandestine methods used to collect and analyze intelligence, the disclosure of which would undermine their usefulness. *Id.* ¶ 21. Finally, the agency withheld classification and dissemination-control markings, which are among the intelligence methods used to control the dissemination of intelligence related information and to protect such information from unauthorized disclosure. *Id.* ¶ 22. Disclosure of these markings would reveal areas of particular intelligence interest, sensitive collection sources or methods, foreign sensitivities, and procedures for gathering, protecting, and processing intelligence. *Id.*

C. Defendant Properly Withheld Information Pursuant to Exemption 3

Exemption 3 exempts from disclosure records that are "specifically exempted from disclosure by [another] statute." 5 U.S.C. § 552(b)(3)(A). When Exemption 3 applies, "Congress, not the agency, makes the basic nondisclosure decision." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987). Notably, the mandate to withhold information pursuant to Exemption 3 is broader than the authority to withhold information pursuant to Exemption 1, as the agency does not have to demonstrate that the disclosure will harm national security. *See CIA v. Sims*, 471 U.S. 159, 167 (1985); *Gardels v. CIA*, 689 F.2d 1100,

1106–07 (D.C. Cir. 1982). Congress has already made that determination by enacting these statutes. *See Hayden v. Nat'l Sec. Agency/Central Sec. Serv.*, 608 F.2d 1381, 1390 (D.C. Cir. 1979). The propriety of an Exemption 3 withholding thus "depends less on the detailed factual contents of specific documents." *Ass'n of Retired R.R. Workers*, 830 F.2d at 336. Rather, courts evaluate whether an agency has properly invoked Exemption 3 using a two-prong test. *See Sims*, 471 U.S. at 167-68. First, the Court must determine whether the statute qualifies as an exempting statute under Exemption 3; second, the Court must decide whether the withheld material falls within the scope of the exempting statute. *See id*.

Here, the agency relies on two statutes—(1) section 102(A)(i)(1) of the National Security Act of 1947, as amended (now codified at 50 U.S.C. § 3024(i)(1)), which requires that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure"; and (2) section 6 of the Central Intelligence Act of 1949 ("the CIA Act"), 50 U.S.C. § 3507, which provides that the CIA shall be exempted from the provisions of "any other law" (in this case FOIA) that requires, *inter alia*, the disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the agency. Blaine Decl. ¶¶ 25-29. The National Security Act and the CIA Act are both exempting statutes for purposes of Exemption 3. *See, e.g.*, *ACLU v. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011); *Larson*, 565 F.3d at 865. Defendant thus has satisfied the first prong of the *Sims* inquiry. As set forth below, Defendant likewise satisfies the second prong of the *Sims* inquiry with respect to each of the exempting statutes.

1. National Security Act

The Blaine Declaration explains that certain information withheld pursuant to Exemption 3 falls within the scope of the National Security Act, which requires the Director of National

Intelligence to "protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 3024(i)(1). *See* Blaine Decl. ¶¶ 25-27. The Supreme Court has recognized the "wide-ranging authority" provided by the National Security Act, entrusting the agency 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." *Sims*, 471 U.S. at 180. Rather than place any limit on the scope of the Act, "Congress 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; *see Halperin v. CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980) (explaining that the only question for the court is whether the agency has shown that responding to a FOIA request "could reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods"). The agency has identified the same information withheld under Exemption 1 as intelligence sources and methods pursuant to E.O. 13526 § 1.4(c) as properly withheld under Exemption 3. Blaine Decl. ¶ 26. The agency also withheld unclassified information about intelligence methods pertaining to the manner in which the agency protects its intelligence. *Id*. ¶¶ 26-27.

2. CIA Act

The agency has also identified information that is properly withheld under Exemption 3 because it is covered by the CIA Act. Blaine Decl. ¶ 28. The CIA Act provides that CIA "shall be exempted from the provisions of any other law which 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. § 3507. The Act thus confers specific and absolute protection from disclosure to CIA employees' names and personal identifiers. *See Military Audit Project*, 656 F.2d at 737 n.39; *Morley v. CIA*, 453 F. Supp. 2d 137, 150-51 (D.D.C. 2006) (protecting CIA employee

names and personal identifiers under section 6 of the CIA Act and Exemption 3), *rev'd on other grounds*, 508 F.3d 1108 (D.C. Cir. 2007); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 167-68 (D.D.C. 2004) (same). Accordingly, CIA properly withheld information falling within the scope of the CIA Act.

D. Defendant Properly Withheld Information Pursuant to Exemption 5

The agency also withheld certain documents in their entirety, and redacted other documents in part, pursuant to Exemption 5 of the FOIA. Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Agency." 5 U.S.C. § 552(b)(5). This exemption shields documents of the type that would be privileged in the civil discovery context, including materials protected by the attorney-client privilege and the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *see Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004); *Rockwell Int'l Corp.* v. *DOJ*, 235 F.3d 598, 601 (D.C. Cir. 2001).

1. Deliberative Process Privilege

Documents covered by the deliberative process privilege and exempt under Exemption 5 include those "'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Sears, Roebuck*, 421 U.S. at 150 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)); *see McKinley v. FDIC*, 744 F. Supp. 2d 128, 137-38 (D.D.C. 2010). As the Supreme Court has explained:

> 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.

Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001)

(internal quotation marks and citations omitted).

The deliberative process privilege is designed to prevent injury to the quality of agency decisions by (1) encouraging open, frank discussions on matters of policy between subordinates and superiors; (2) protecting against premature disclosure of proposed policies before they are adopted; and (3) protecting against public confusion that might result from the disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's decision. *See Sears*, 421 U.S. at 151-53; *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Security*, 648 F. Supp. 2d 152, 156 (D.D.C. 2009); *FPL Grp., Inc. v. IRS*, 698 F. Supp. 2d 66, 81 (D.D.C. 2010). Examples of documents covered by the deliberative process privilege include: recommendations, draft documents, proposals, suggestions, advisory opinions and other documents such as email messages, that reflect the personal opinions of the author rather than the policy of the agency. *See Bloomberg, L.P. v. U.S. Securities and Exchange Commission*, 357 F. Supp. 2d 156, 168 (D.D.C. 2004).

To invoke the deliberative process privilege, an agency must show that the exempt document is both pre-decisional and deliberative. *Access Reports v. U.S. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991); *Coastal States Gas*, 617 F.2d at 868; *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). For a document to be pre-decisional, it must be antecedent to the adoption of an agency policy or decision. *See Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc); *see also In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) ("The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made[.]"). To show that a document is predecisional, however, the agency need not identify a specific final agency decision; it is sufficient to establish "'what deliberative

process is involved, and the role played by the documents at issue in the course of that process.'" *Heggestad v. United States Dep't of Justice*, 182 F. Supp. 2d 1, 7 (D.D.C. 2000) (quoting *Coastal States Gas*, 617 F.2d at 868); *see Gold Anti-Trust Action Committee v. Board of Governors*, 2011 U.S. Dist. LEXIS 10319 at *22 (D.D.C. Feb. 3, 2011) ("even if an internal discussion does not lead to adoption of a specific government policy, its protection under Exemption 5 is not foreclosed as long as the document was generated as part of a definable decision-making process.").

A document is "deliberative" if it '"reflects the give-and-take of the consultative process.'" *McKinley*, 744 F. Supp. 2d at 138 (quoting *Coastal States Gas*, 617 F.2d at 866). Thus, "'pre-decisional materials are not exempt merely because they are predecisional; they also must be part of the agency give-and-take of the deliberative process by which the decision itself is made.'" *Jowett, Inc.* v. *U.S. Dept. of the Navy*, 729 F. Supp. 871, 875 (D.D.C. 1989) (quoting *Vaughn* v. *Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975)). The privilege protects factual material if it is "inextricably intertwined" with deliberative material, *FPL*, 698 F. Supp. 2d at 81, or if disclosure "would 'expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."' *Quarles* v. *Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (quoting *Dudman Communications Corp.* v. *Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). "The 'key question' in identifying 'deliberative' material is whether disclosure of the information would 'discourage candid discussion within the agency.'" *Access Reports*, 926 F.2d at 1195 (quoting *Dudman*, 815 F.2d at 1567-68).

Here, Exemption 5 has been asserted to protect pre-decisional, deliberative information. CIA withheld, *inter alia*, draft documents including drafts prepared to respond to Senate inquiries, correspondence with the White House regarding such drafts, and documents reflecting deliberative

discussions regarding responses to media inquiries. Blaine Decl. ¶¶ 31-33. These materials do not convey final agency viewpoints but rather reflect different considerations, opinions, options, and approaches that preceded the agency's final decisions. *Id.* ¶ 31. These materials were properly withheld under Exemption 5 and the deliberative process privilege. "Draft documents, by their very nature, are typically predecisional and deliberative[.]" *Blank Rome LLP v. Dep't of the Air Force*, Civ. A. No. 15- 1200, 2016 U.S. Dist. LEXIS 128209, at *14 (D.D.C. Sept. 20, 2016); *see also Sourgoutsis v. United States Capitol Police*, 323 F.R.D. 100, 111 (D.D.C. 2017) ("The drafts are a quintessential example of deliberative material."). Likewise, communications that "solicit[] revisions and feedback on a draft" are "plainly predecisional and deliberative." *Judicial Watch, Inc. v. U.S. Dep't of State*, Civ. A. No. 16-885, 2018 U.S. Dist. LEXIS 170199, *9 (D.D.C. Oct. 2, 2018); *Hunton & Williams LLP v. EPA*, 346 F. Supp. 3d 61, 78 (D.D.C. 2018) ("emails seeking and giving input on drafts of letters . . . fall squarely within the privilege").

Moreover, courts in this district routinely find the deliberative process privilege applicable to deliberations about agency responses to press inquiries and news articles. *See, e.g., Gellman v. Dep't of Homeland Security*, No. 16-cv-635, 2020 U.S. Dist. LEXIS 48492, at *36 (D.D.C. Mar. 20, 2020) ("'the overwhelming consensus' among courts in this District is that discussions about how to respond to the press are protected by this privilege"); *American Center for Law & Justice v. U.S. Dep't of State*, 330 F. Supp. 3d 293, 302 (D.D.C. 2018) ("the deliberative process privilege applies to documents generated in the crafting of an agency's public statements"); *Comm. on Oversight & Gov't Reform, U.S. House of Rep. v. Lynch*, 156 F. Supp. 3d 101, 111–12 (D.D.C. 2016) (privilege covers deliberations about how to respond to press inquiries regarding a law enforcement initiative); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 949 F. Supp. 2d 225, 234, 236 (D.D.C. 2013) (emails discussing how to respond to press inquiry

were deliberative). Accordingly, the CIA properly invoked Exemption 5 to withhold these materials subject to the deliberative process privilege.

2. Attorney-Client Privilege

The attorney-client privilege "protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) (citing *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984)). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." *Id*. To invoke the attorney-client privilege, a party must demonstrate that the document it seeks to withhold: (1) involves "confidential communications between an attorney and his client"; and (2) relates to "a legal matter for which the client has sought professional advice." *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).

The Blaine Declaration and Vaughn Index explain that the information CIA withheld under Exemption 5 as protected by the attorney-client privilege consists of confidential communications between agency officials or agency personnel and attorneys within the CIA's Office of General Counsel. Blaine Decl. ¶ 35. In those communications, agency employees requested legal advice related to responses to Senate inquiries and certain proposed courses of action. *Id*. The communications consist of factual information supplied by the clients in connection with their requests for legal advice, discussions between attorneys that reflect those facts, and legal analysis and advice provided to the clients. *Id*. CIA thus properly withheld information under Exemption 5 that is covered by the attorney-client privilege.

E. Defendant Properly Withheld Information Pursuant to Exemption 6

Exemption 6 allows agencies to withhold "personnel and medical files and similar files" whenever "disclosure . . . would constitute a clearly unwarranted invasion of personal privacy." 5

U.S.C. § 552(b)(6). To determine whether a file qualifies as "similar" to "personnel or medical files," courts examine whether information in that file "applies to a particular individual." *Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982). Therefore, not only does the exemption protect files, "but also bits of personal information, such as names and addresses, the release of which would create a palpable threat to privacy." *Prison Legal News v. Samuels*, 787 F.3d 1142, 1147 (D.C. Cir. 2015) (citation omitted). If the threshold requirement is met, a court must next ask whether disclosure would compromise a "substantial" privacy interest, since FOIA requires the release of information "[i]f no significant privacy interest is implicated." *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (citation omitted). "Anything greater than a de minimis privacy interest" is generally sufficient. *Id.* at 1229–30. Finally, courts test whether release of such information would constitute a "clearly unwarranted invasion of personal privacy," *Wash. Post Co. v. Dep't of Health & Human Servs.*, 690 F.2d 252, 260 (D.C. Cir. 1982), by balancing "the privacy interest that would be compromised by disclosure against any public interest in the requested information," *Multi Ag Media*, 515 F.3d at 1228. Courts examine the "public need for the information" in light of "the basic purpose of [FOIA] to open agency action to the light of public scrutiny, rather than . . . the particular purpose for which the document is being requested." *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 772 (1989) (internal citations omitted). "That purpose . . . is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id.* at 773.

Here, CIA withheld under Exemption 6 the identifying information of CIA employees, non-agency government personnel, and other third-parties unaffiliated with the Agency. Blaine Decl. ¶ 37. CIA determined that the individuals maintain a strong privacy interest in their identities

because release of the information could subject them to harassment, embarrassment, or unwanted contact. *Id*. The agency further determined that there is no countervailing public interest that would be served by disclosure of the information. *Id*. ¶ 38. Accordingly, the agency concluded that the release of the information would constitute a clearly unwarranted invasion of personal privacy. *Id*.

There is a substantial privacy interest in the personal information at issue here. "A substantial privacy interest is anything greater than a *de minimis* privacy interest." *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229-30 (D.C. Cir. 2008); *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989) ("the privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant"). Furthermore, it is settled that individuals have a privacy interest where disclosure of information would invite unwarranted intrusions. *See Horner*, 879 F.2d at 878 (disclosure invades privacy if it "invites unwanted intrusions"); *Lahr v. NTSB*, 569 F.3d 964, 976 (9th Cir. 2009) (explaining that "protection from . . . unwanted contact facilitated by disclosure of a connection to government operations and investigations is a cognizable privacy interest under Exemption[] 6"); *Island Film, S.A. v. Dep't of the Treasury*, 869 F. Supp. 2d 123, 136 (D.D.C. 2012) (individuals had "privacy interest in avoiding the harassment that could ensue following the disclosure of their personal information" where they could face harassing phone calls). And because there is no public interest in the release of these individuals' names, disclosure would constitute a clearly unwarranted invasion of privacy. *See Horner*, 879 F.2d at 879 ("something, even a modest privacy interest, outweighs nothing every time").

II. Defendant Properly Produced All Segregable Records

Under the FOIA, if a record contains information exempt from disclosure, any "reasonably segregable," non-exempt information must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are "inextricably intertwined with exempt portions." *Mead Data*, 566 F.2d at 260. To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with 'reasonable specificity'" that the information it has withheld cannot be further segregated. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. DOJ*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by some "quantum of evidence" by the requester. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). Here, where non-exempt information could be segregated from exempt information, Defendant segregated and disclosed the non-exempt information from the records. Blaine Decl. ¶ 39. Indeed, the declaration demonstrates throughout, with reasonable specificity, that all documents reviewed were processed to achieve maximum disclosure consistent with the provisions of FOIA. Therefore, the Court should find that CIA has properly complied with the duty to segregate exempt from non-exempt information.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court grant summary judgment in favor of Defendant as to all claims in this case.

Respectfully submitted,

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