UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, et al.,	
Plaintiffs,	ELECTRONICALLY FILED
v.	04 Civ. 4151 (AKH)
DEPARTMENT OF DEFENSE, et al.,	
Defendants.	

DEFENDANT DEPARTMENT OF DEFENSE'S
REPLY MEMORANDUM OF LAW IN SUPPORT
OF SIXTH MOTION FOR PARTIAL SUMMARY JUDGMENT

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Defendant Department of Defense and its components Department of Army, Department of Navy, Department of Air Force, and Defense Intelligence Agency (collectively, "DoD" or the "Government"), by their attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submit this reply memorandum of law in support of the Government's sixth motion for partial summary judgment regarding its withholding of certain photographs pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

In opposing the Government's motion for summary judgment Plaintiffs continue to rely exclusively on case law outside this Circuit interpreting a provision of the Internal Revenue Code that is unrelated to the statute at issue in the parties' instant cross-motions, i.e., the PNSDA.[1] The Second Circuit has instructed, however, that this Court should focus on the plain language, structure, and legislative history of the PNSDA in determining whether the DoD Photos are properly withheld. Relying on those authorities, the Certification issued by the Secretary on November 13, 2009 meets the Government's burden to establish that the DoD Photos are properly withheld pursuant to FOIA Exemption 3.

Moreover, even if FOIA does not provide a basis for withholding the DoD Photos, the plain language of the PNSDA also requires a finding that the photos are properly withheld. Because the DoD Photos are "protected documents" within the meaning of the PNSDA, the statute bars this Court from ordering their release in this proceeding, "[n]otwithstanding any other provision of law to the contrary." PNSDA § (b). Thus, the DoD Photos are properly

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[1] Acronyms and capitalized terms have the same meaning as their definitions contained in the Government's Memorandum of Law in Support of Sixth Motion for Partial Summary Judgment and in Opposition to Plaintiffs' Sixth Motion for Partial Summary Judgment ("Government's Opening Br.").

withheld regardless of whether the PNSDA is an Exemption 3 statute or instead operates independently of FOIA.

ARGUMENT

I. THE DOD PHOTOS ARE EXEMPT FROM DISCLOSURE UNDER FOIA

Assuming that Plaintiffs are correct that the PNSDA is a FOIA Exemption 3 statute, the PNSDA's plain meaning and structure, as well as its legislative history, demonstrate that the Certification issued by the Secretary on November 13, 2009 provides sufficient grounds to withhold the DoD Photos without judicial review of the Secretary's determination of the harms enumerated in the PNSDA. Government's Opening Br. at 14-26.

A. The Plain Language, Structure, and Legislative History of the PNSDA Supports the Government's Withholding of the DoD Photos

1. The Second Circuit's Holding and Analysis in A. Michael's Piano v. Federal Trade Commission Is on Point

Plaintiffs' assertion that the Second Circuit's decision in A. Michael's Piano, Inc. v. Federal Trade Commission, 18 F.3d 138 (2d Cir. 1994), cert. denied 513 U.S. 1015 (1994), is "simply not relevant" to the issues before this Court is mistaken. Plaintiffs' Reply in Support of Sixth Motion for Partial Summary Judgment and Opposition to Government's Sixth Motion for Partial Summary Judgment dated April 29, 2011 ("Plfs' Opposition Br.") at 6. As a threshold matter, Plaintiffs are incorrect to characterize the Second Circuit's holding in that case as limited to whether "an Exemption 3 withholding statute should be interpreted narrowly." Id. Rather, the Second Circuit addressed the very issue before this Court: the factors that a court should consider when determining whether the Government has properly withheld records pursuant to FOIA Exemption 3. The Second Circuit answered that question by explaining that records are properly

withheld pursuant to Exemption 3 where just two requirements are met: "(1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall within that statute's scope." A. Michael's Piano, 18 F.3d at 143. Because the parties have dedicated the majority of their briefing to the issue of whether the DoD Photos constitute "protected documents" within the meaning of the PNSDA, and thereby fall within the "scope" of documents properly withheld pursuant to that Act, Plaintiffs are wrong to suggest that the test set forth in A. Michael's Piano is not relevant to the issues before this Court.

A. Michael's Piano also provides important guidance regarding how to determine the "scope" of an Exemption 3 withholding statute. Specifically, in determining a withholding statute's "scope," the Second Circuit instructed courts to look to the statute's "plain language" and legislative history, 18 F.3d at 144, with the ultimate goal of being "guided by Congress's aim," id. at 145.[2] Applying these factors, it is clear that Congress intended for the DoD Photos to be withheld pursuant to FOIA Exemption 3 without judicial review of the Secretary's determination of the enumerated harm. Government's Opening Br. at 14-26.

A. Michael's Piano likewise reveals the Second Circuit's view of how FOIA principles of de novo review apply in an Exemption 3 case. Specifically, the Second Circuit instructed that de

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[2] Plaintiffs' opposition inaccurately asserts that the Second Circuit in A. Michael's Piano did not reject the holdings of those Circuits that applied "FOIA disclosure and review requirements" to determine the scope of an Exemption 3 statute, see also A. Michael's Piano, 18 F.3d at 144, which Plaintiffs argue this Court should apply. Plfs' Opposition Br. at 5-6. In A. Michael's Piano, the Second Circuit's declined to "choose sides" between other Circuits that had interpreted other FOIA Exemption 3 statutes by applying either "FOIA disclosure and review requirements" or "deferential administrative law standards" because it took a third approach, that is, "construing [a] withholding statute [by] looking to the plain language of the statute and its legislative history, in order to determine legislative purpose." 18 F.3d at 144. By taking that third approach, the Second Circuit necessarily rejected the competing views of the Circuits it cited, including those on which Plaintiffs rely.

novo review in an Exemption 3 case is focused on determining whether the Government has "met its burden of proving that the documents withheld . . . fell within the scope of the [Exemption 3 withholding statute]." Id. at 144. Because of the limited nature of such de novo review, Plaintiffs are wrong to describe their proposed review as imposing only a "procedur[al]" burden on the Government. Plfs' Opposition Br. at 11-12. To the contrary, requiring judicial review of the Secretary's determination of the harms enumerated by the PNSDA would add a substantive condition to the Government's withholding that is not present on the face of the PNSDA itself and is contravened by the Act's legislative history. As even Plaintiffs concede, adding a substantive condition in the guise of FOIA's procedural requirements is impermissible. Plaintiffs' Opposition Br. at 11.

2. The Propriety of the Government's Exemption 3 Withholding Depends on the Existence of a Certification Pursuant to the PNSDA

Plaintiffs misstate the Government's position when they claim that the Government contends that it may withhold the DoD Photos regardless of whether the Secretary has made a finding of the enumerated harms. Plfs' Opposition Br. at 12. The Government is not arguing that it could withhold the DoD Photos under the PNSDA even if the Secretary had not found the enumerated harms to be present. Rather, the Government simply pointed out that the required finding of harm is incorporated in the PNSDA's mandatory requirement that the Secretary "shall" issue a certification containing proscribed language setting forth the enumerated harms that the Secretary finds are present.[3] Government's Opening Br. at 18-19. Thus, while the PNSDA

[3] That the PNSDA still grants the Government discretion to release records even if the Secretary has issued a certification pursuant to the PNSDA, see PNSDA § (e), does not, as Plaintiffs argue, Plfs' Opposition Br. at 13, negate the PNSDA's mandate that the Secretary must issue a certification pursuant to the statute after he has found that the enumerated harms are

requires the Secretary to make a finding of the enumerated harms, and instructs a reviewing court to look to the certification to confirm that such a determination has been made, the PNSDA does not provide any basis for a court to review whether the Secretary's determination of harm is correct. Government's Opening Br. at 17-21.

3. Plaintiffs' Proposed Distinction Between Different Types of Exemption 3 Withholding Statutes Has No Bearing on the Interpretation of the Scope of the PNSDA

Plaintiffs are also incorrect to suggest that there is some difference in the analysis of the scope of an Exemption 3 statute that "establishes particular criteria for withholding" as opposed to a statute that "refers to particular types of matters to be withheld." Plfs' Opposition Br. at 15 (purporting to distinguish the Exemption 3 statute at issue in Lessner v. U.S. Dep't of Commerce, 827 F.2d 1333 (9th Cir. 1987), because it referred to "particular types of matters to be withheld" rather than "particular criteria for withholding"); see also 5 U.S.C. § 552(b)(3)(A)(ii). Indeed, assuming the PNSDA is an Exemption 3 statute, Plaintiffs do not provide any reason why, like the withholding statute at issue in Lessner, the PNSDA cannot properly construed as setting forth "particular types of matters to be withheld"—i.e., those documents that fall within the PNSDA's definition of "protected documents." See PNSDA § (b) ("[N]o protected document, as defined in subsection (c), shall be subject to disclosure. . ."). Ultimately, however, the Court need not determine which type of Exemption 3 statute the PNSDA is, because no matter what type of statute it is, the DoD Photos fall within its scope.

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present. PNSDA § (d)(1) ("[T]he Secretary of Defense shall issue a certification if the Secretary of Defense determines that the disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States.") (emphasis added).

Government's Opening Br. at 14-26.

4. The Ninth Circuit's Holding in Long v. IRS Has No Bearing on the Outcome of the Instant Cross-Motions

This Court should likewise reject Plaintiffs' reliance on the Ninth Circuit's holding and analysis in Long v. IRS, 742 F.2d 1173 (9th Cir. 1984), in arguing that the scope of the PNSDA only includes those photographs for which the Secretary has made an accurate determination of the PNSDA's enumerated harms. Plfs' Opposition Br. at 12-13. Not only was the Long court interpreting an entirely different statute, section 6103 of the Internal Revenue Code (see Government's Opening Br. at 23-25 setting forth the numerous substantive and structural differences between section 6103 and the PNSDA), but also Long has been explicitly rejected by the Seventh Circuit and questioned by the D.C. Circuit. See Government's Opening Br. at 22. Even more importantly, the Long court's ruling that the Secretary's determination of harm under section 6103(b)(2) was subject to judicial review because of the policies and legislative history of FOIA Exemption 3 rather than the withholding statute itself, see Long, 742 F.2d at 1180-81, conflicts with the Second Circuit's decision in A. Michael's Piano. There, the Second Circuit explained that "exemption 3 . . . incorporates the policies of other statutes," and is therefore *not* "defined by FOIA itself." Id. at 143; see also Government's Opening Br. at 14-15, 21-22.[4] Thus, Long has no bearing on the parties' instant cross-motions for partial summary judgment.

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[4] A. Michael's Piano's passing reference to the fact that the records at issue there were subject to disclosure under FOIA if they did not fall within the scope of an Exemption 3 statute, 18 F.3d at 144-45, does not, as Plaintiffs suggest, support Plaintiffs' argument that the determination of the scope of an Exemption 3 statute must take into account the "language and legislative purpose . . . of FOIA." Plfs' Opposition Br. at 6. Indeed, the next sentence in the opinion clarifies that to determine the scope of the withholding statute, the Second Circuit looked to its "plain language." A. Michael's Piano, 18 F.3d at 145.

5. Whether the PNSDA Is an Exemption 3 Statute Does Not Determine Whether Judicial Review of the Secretary's Determination of the Enumerated Harms Is Available

Plaintiffs' Opposition Brief also erroneously conflates two separate issues: (1) whether the PNSDA is an Exemption 3 statute, and (2) whether the Secretary's determination of harm is subject to de novo judicial review. Plfs' Opposition Br. at 2, 3-4. As Plaintiffs acknowledged in their opening brief, these issues are distinct.[5] Specifically, Plaintiffs' opening brief concedes that not all of the Circuits that have held that section 6103 is an Exemption 3 statute have also held that the Treasury Secretary's determination of harm under that statute is subject to de novo judicial review. Compare Memorandum in Support of Plaintiffs' Sixth Motion for Partial Summary Judgment ("Plfs' Opening Br.") at 10 n.4 (listing the D.C. Circuit among the Circuits that have held that section 6103 is a FOIA Exemption 3 statute) with id. at 10 n.5 (not listing the D.C. Circuit as among the Circuits that have held that the Treasury Secretary's determination of harm under subsections of section 6103 is subject to de novo judicial review). Thus, the fact that a statute is an Exemption 3 withholding statute does not necessarily require the court to perform de novo review of the exercises of discretion by a governmental official that underlie the scope of the withholding statute.

Indeed, the D.C. Circuit has never held that the propriety of the Treasury Secretary's determination of harm under section 6103(b)(2) is subject to de novo judicial review (contrary to

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[5] Thus, Plaintiffs' reliance on the Second Circuit's unpublished opinion in Adamowicz v. Internal Revenue Service, 402 Fed. App'x 648 (2d Cir. 2010) (see Plfs' Opposition at 3, 4, 6), in which the Court assumed, without analysis, that section 6103 is an Exemption 3 withholding statute, Adamowicz, 402 Fed. App'x at 651-52, has no bearing on whether the Second Circuit would hold that the Treasury Secretary's determination of harm under section 6103(b)(2) would be subject to de novo review.

Plaintiffs' representation in its Opposition brief, see Plfs' Opposition Br. at 3-4), and has even explicitly questioned whether the Ninth Circuit's holding in Long—that FOIA required de novo review of the Treasury Secretary's determination of harm under section 6013(b)(2)—was wrongly decided. See Ass'n of Retired R.R. Workers v. U.S. R.R. Retirement Bd, 830 F.2d 331, 335-37 (D.C. Cir. 1987). Although the D.C. Circuit ultimately did not reach the question of whether Long was wrongly decided, it nevertheless rejected the argument made by the plaintiffs in that case that the agency's exercise of discretion in declining to release the records at issue was subject to de novo review. Id. at 334. Instead, the court held that an agency's exercise of discretion under an Exemption 3 withholding statute is not governed by FOIA, but rather by the terms of the withholding statute itself. Id. at 336 (explaining that "de novo review in FOIA cases is not everywhere alike" and "circumstances define the required scope of de novo review"); see also Aronson v. IRS, 973 F.2d 962, 966 (1st Cir. 1992) ("[H]ow an exemption 3 statute applies to data that arguably fall within its reach, and whether specific circumstances counsel disclosure to further the statute's aim, are legal questions normally governed by that Exemption 3 statute, not by the FOIA itself."). This Court should perform that same analysis. Government's Opening Br. at 22-23.[6]

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[6] As the Second Circuit explained in A. Michael's Piano, Exemption 3 is unique among the FOIA exemptions because, unlike the rest of the FOIA exemptions, Exemption 3 is not "defined by FOIA itself," but rather by the terms of the Exemption 3 statute. 18 F.3d at 143; see also Government's Opening Br. at 14-15. Plaintiffs' arguments regarding the application of those other FOIA exemptions, see Plfs' Opposition Br. at 15-16, are therefore inapposite to the issue of whether the DoD Photos are properly withheld pursuant to Exemption 3. It is nevertheless worth noting the error in Plaintiffs' analogies to other FOIA exemptions, such as Plaintiffs' argument that this Court must review the propriety of the Secretary's determination of harm under the PNSDA because FOIA Exemption 1 requires courts to determine the propriety of the agency's classification decision. Plfs' Opposition Br. at 15-16. This analogy is inapposite because while Exemption 1 explicitly requires that a record must be "properly" classified to fall within

6. Plaintiffs' Unsupported and Hypothetical Accusation of Bad Faith by the Government Should Carry no Weight

Plaintiffs' bald accusation that the Secretary may have been lying or acting in bad faith when he issued the Certification likewise does not provide a basis for judicial review of the Secretary's determination of the harms enumerated under the PNSDA. Plfs' Opposition Br. at 12-13. As an initial matter, courts generally accord a "presumption of legitimacy" to "Government records and official conduct" such as the Secretary's execution of the Certification. U.S. Dep't of State v. Ray, 502 U.S. 164, 179 (1991). Furthermore, there is no question that the Secretary did make a determination of harm, because he stated that determination in the Certification itself. See Declaration of Amy A. Barcelo dated April 1, 2011 ("Barcelo Decl.") Ex. G ("I have determined that the public disclosure of these photographs would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States."). As the Government explained in more detail in its Opening Brief, there is nothing unusual about Congress's decision to grant unreviewable discretion to federal agencies where, as here, the discretion deals with matters of national security or the military, and courts consistently uphold Congress's ability to do so.[7] See

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Exemption 1's protection (see 5 U.S.C. § 522(b)(1)(B)), the PNSDA does not contain any corresponding requirement that a document qualifies as a "protected document" under the PNSDA only if the Secretary's determination of the enumerated harms is accurate or "proper." Unlike the PNSDA, FOIA Exemptions 6 and 7 also provide for limits on the executive discretion that forms the basis for the withholding. See id. § 522(b)(6) (records may be withheld only if they are "personnel [or] medical files [or] similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); id. § 522(b)(7) (records may be withheld "only to the extent that" one of the enumerated subsections under Exemption 7 applies).

[7] Plaintiffs' implied argument that this Court should not rely on any non-FOIA cases cited by the Government is without merit. Plfs' Opposition Br. at 14. As the Second Circuit explained in A. Michael's Piano, an Exemption 3 withholding statute is interpreted using the

Government's Opening Br. at 20-21.

7. The PNSDA's Legislative History Demonstrates that the Secretary's Determination of Harm Is Not Subject to Judicial Review

Plaintiffs' opposition almost completely ignores the PNSDA's compelling legislative history, mentioning it only in passing. Plfs' Opposition Br. at 16-17; see also Baldrige v. Shapiro, 455 U.S. 345, 355-59 (1982) (interpreting the scope of a FOIA Exemption 3 statute based on the statute's legislative history even after determining that the language of the withholding statute was "unambiguous"). Likely, that is because the PNSDA's legislative history makes clear that Congress intended for the DoD Photos at issue in this very case to be withheld without judicial review of the Secretary's determination of the enumerated harms. Indeed, the legislative history contains references to Congress's understanding that the PNSDA would "establish a procedure" to "block the release" of the DoD Photos in this case. See Government's Opening Br. at 8-10 (citing at 155 Cong. Rec. at S5987 (daily ed.) (May 21, 2009). The record also reflects Congress's determination to pass the PNSDA as an endorsement of the President's May 13, 2009 statement that he supported withholding of the DoD Photos because their release would "impact the safety of our troops." Barcelo Decl. Ex. C; see also Barcelo Decl. Ex. F.[8]

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same principles as any other statute, i.e., based on the statute's plain meaning with the goal of determining "Congress' purpose." A. Michael's Piano, 18 F.3d at 144.

[8] Plaintiffs wrongly state that the only legislative history relied on by the Government are statements made by Senators Lieberman and Graham, the sponsors of the PNSDA. Plfs' Opposition Br. at 16. On the contrary, while the Government relies on various statements made by Senators Lieberman and Graham (as sponsors of the PNSDA, statements by Senators Lieberman and Graham "are entitled to weight," Lewis v. US, 445 U.S. 55, 63 (1980)), the Government also relies on the Conference Summary by the United States Senate and the U.S. House of Representatives dated October 7, 2009, which reflects Congress's unified intention to

Plaintiffs' reliance on language in the Ninth Circuit's opinion in Long finding the legislative history of section 6103 not to provide a compelling basis to decline judicial review of the Treasury Secretary's determination of harm, Plfs' Opposition Br. at 16, does not provide a basis for this Court to disregard the clear legislative history of the PNSDA. Unlike the legislative history of the PNSDA, the House Report cited in Long did not suggest that the proposed amendment to 6103 was aimed either at ensuring that the records in dispute were withheld or establishing the procedure that the IRS would need to follow to protect them from disclosure. See Long, 742 F.2d at 1176 n.2 (citing H.R. Rep. No. 97-201 at 239 (1981)). Because the PNSDA's legislative history does contain clear statements to that effect, see Government's Opening Br. at 7-12, 25, Plaintiffs are wrong to suggest that the legislative history of the two statutes is similar, Plfs' Opposition Br. at 16.

Finally, Plaintiffs' argument that Congress could have worded the PNSDA differently (by requiring withholding of the DoD Photos without the requirement that the Secretary issue a certification), see Plfs' Opposition Br. at 17, is unavailing. Regardless of the various options available to Congress in structuring the PNSDA, the structure and language that Congress ultimately chose manifests its intent to permit the withholding of the DoD Photos based solely on the Secretary's certification of harm. Government's Opening Br. at 19 n.4. If Plaintiffs were correct that Congress intended for the Secretary's determination of harm to be subject to judicial review, it could have easily added language in the PNSDA that photographs do not constitute "protected documents" within the meaning of the act unless the Secretary's determination of the

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to "[c]odify the President's decision to allow the Secretary of Defense to bar the release of the detainee photos." See Governments Opening Br. at 11, 26; Barcelo Decl. Ex. F.

enumerated harms was accurate, or provided a standard of review. Congress did not include such language, and the plain language and structure of the PNSDA, as well as its legislative history, evidence Congress's intent that the Secretary's determination not be subject to judicial review. Government's Opening Br. at 14-26.

B. The Government Is Not Required to Create Additional Vaughn Indexes

Plaintiffs' request that the Government provide additional individualized Vaughn indexes for the DoD Photos, see Plfs' Opposition Br. at 17-20, rings hollow in light of the substantial amount of information that the Government has already provided to Plaintiffs regarding those photos. Plaintiffs do not contest that the Government has provided them with Army CID reports corresponding to many of the DoD Photos, Governments' Opening Br. at 5 n.1, and that many of those reports "discuss at length" the photographs associated with the CID reports, id. at 29-30. The Government has also provided Plaintiffs with Vaughn indexes invoking Exemption 7(F) for a sample of the DoD Photos, and Plaintiffs previously agreed to this sampling methodology.[9] Id. at 31.

To the extent that Plaintiffs' argument for additional Vaughn indexes is premised on their erroneous claim that the Secretary's determination of harm is subject to judicial review, Plfs' Opposition Br. at 19, it fails for the reasons discussed above. As demonstrated above, the Secretary's determination of harm is not subject to judicial review, see Government's Opening

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[9] As is explained in detail herein and in the Government's Opening Brief, the Secretary's Certification provides sufficient basis to withhold the DoD Photos without the need for any additional Vaughn indexes. See supra at 2-5, 7-8, 10-11; Government's Opening Br. at 14-30. If the Court were nevertheless to require additional Vaughn indexes in connection with the Government's invocation of Exemption 3, a sampling methodology would be appropriate. Government's Opening Br. at 28 n.8.

Br. at 14-26; instead, the Secretary's Certification fulfills all of the requirements of the PNSDA and FOIA, id. at 17, and the DoD Photos are categorically excluded from release under FOIA as subject to the Secretary's November 13, 2009 Certification, see id. at 27-28; see also Barcelo Decl. Ex. G. Accordingly, the Government is not required to provide Plaintiffs with any additional Vaughn indexes regarding the DoD Photos. Government's Opening Br. at 27-30.

II. IN THE ALTERNATIVE, THE PNSDA OPERATES INDEPENDENTLY OF FOIA

Finally, if this Court holds that the DoD Photos are not properly withheld pursuant to the PNSDA when it is construed as a FOIA Exemption 3 statute, it should nevertheless uphold the Government's withholding by construing the PNSDA as operating independently of FOIA. Government's Opening Br. at 31-32.

Plaintiffs are wrong to argue that the PNSDA does not irreconcilably conflict with FOIA if Plaintiffs' proposed interpretation of the PNSDA is followed. Plfs' Opposition Br. at 8-9. Indeed, if Plaintiffs are correct that when the PNSDA is construed as an Exemption 3 statute a record does not constitute a "protected document" unless the Secretary's determination of the enumerated harms was accurate (where no such requirement exists on the face of the PNSDA), then construing the PNSDA as an Exemption 3 statute adds a substantive requirement that is not present on the face of the PNSDA itself. See supra at 4. Because such an interpretation would be fundamentally inconsistent with the structure, plain meaning, and legislative history of the PNSDA, the PNSDA's "notwithstanding" clause must serve to overrule FOIA with respect to those records that fall within its scope. Government's Opening Br. at 32 (citing Lockhart v. United States, 546 U.S. 142, 144-46 (2005)).

Plaintiffs' reliance on other courts' holdings that section 6103 is an Exemption 3 statute does not answer that same question with respect to the PNSDA. Plfs' Opposition Br. at 8-10. Apart from the other substantial differences between section 6103 and the PNSDA (see Government's Opening Br. at 23-25), the language of the PNSDA is distinguishable because it contains the "notwithstanding" clause that the Supreme Court has described as the most "clear[] statement of legislative intent" it could "imagine." Government's Opening Br. at 32 (citing Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993)).

Thus, the DoD Photos are properly withheld under the PNSDA whether that statute is construed as an Exemption 3 statute or as operating independently of FOIA.

CONCLUSION

For the foregoing reasons, the Court should grant the Government's sixth motion for partial summary judgment.

Dated: New York, New York
May 13, 2011

Respectfully submitted,

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