10-4290(L)

10-4289(CON), 10-4647(XAP), 10-4668(XAP)

To Be Argued By:
TARA M. LA MORTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 10-4290(L), 10-4289(CON), 10-4647(XAP), 10-4668(XAP)

AMERICAN CIVIL LIBERTIES UNION; CENTER FOR CONSTITUTIONAL RIGHTS, INC.; PHYSICIANS FOR HUMAN RIGHTS; VETERANS FOR COMMON SENSE; VETERANS FOR PEACE,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

DEPARTMENT OF JUSTICE, and its component Office of Legal Counsel; CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellants-Cross-Appellees,

DEPARTMENT OF DEFENSE, and its components Department of Army, Department of Navy, Department of Air Force, Defense Intelligence Agency; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; DEPARTMENT OF JUSTICE components Civil Rights Division, Criminal Division, Office of Information and Privacy, Office of Intelligence, Policy and Review, Federal Bureau of Investigation,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RESPONSE AND REPLY BRIEF FOR DEFENDANTS-APPELLANTS-CROSS-APPELLEES

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Preliminary Statement

Defendants-appellants-cross-appellees the Central Intelligence Agency ("CIA"), the Department of Justice ("DOJ") and DOJ's Office of Legal Counsel ("OLC") (collectively the "Government") appeal, and plaintiffs-appellees-cross-appellants ("Plaintiffs") cross-appeal, from separate portions of the partial final judgment entered by the United States District Court for the Southern District of New York (Hellerstein, J.) on October 1, 2010. (Joint Appendix ("JA") 1383-87; Special Appendix ("SPA") 105-09). That judgment was entered in accordance with the district court's orders dated October 13, 2009, December 29, 2009, and July 15, 2010.

The appeal and cross-appeal in this Freedom of Information Act ("FOIA") action involve extraordinarily sensitive, classified information: (1) documents reflecting the CIA's use of enhanced interrogation techniques (including waterboarding)[*] on detainees in CIA custody at clandestine overseas facilities (the "interrogation records"); (2) an operational photograph of high-value detainee Abu Zubaydah, taken while he was detained in CIA custody overseas; and (3) information in two OLC memoranda pertaining to a highly classified, active intelligence method. As set forth in public and classified declarations by the

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[*] Waterboarding is an interrogation technique formerly employed by the CIA. Information about the technique is contained in various documents in the Joint Appendix. (*E.g.*, JA 510-11).

Director of the CIA and other high-ranking Executive Branch officials, all of these documents and information are exempt from disclosure under exemption 3 of FOIA, 5 U.S.C. § 552(b)(3) ("Exemption 3"), because they pertain to intelligence methods protected under section 102A(i)(1) of the National Security Act of 1947 (the "NSA"), as amended, 50 U.S.C. § 401 *et seq.*, and would reveal CIA functions protected under section 6 of the Central Intelligence Act of 1949 (the "CIA Act"), as amended, 50 U.S.C. § 403 *et seq.* Exemption 1 of FOIA, 5 U.S.C. § 552(b)(3) ("Exemption 1"), also provides an independent basis to withhold these records because they are all properly classified.

With regard to the interrogation records, Plaintiffs do not contest the essential facts underlying the Government's invocation of Exemptions 3 and 1: the records pertain to the application of an interrogation method (waterboarding) used by the CIA in its foreign intelligence-gathering activities, and disclosure of records reflecting the CIA's use of that method is reasonably likely to cause grave national security harm. Plaintiffs' only argument for release of these records is that waterboarding is "illegal." As this Court recently observed, however, the legality of government action is "beyond the scope" of FOIA. *Wilner v. NSA*, 592 F.3d 60, 77 (2d Cir. 2009). The district court thus correctly determined that the CIA

properly withheld documents pertaining to its application of waterboarding, notwithstanding Plaintiffs' claim of illegality.

The district court also correctly sustained the Government's withholding of a photograph depicting Abu Zubaydah in CIA custody overseas. Plaintiffs' contention that the CIA failed to provide any justification for withholding this photograph is incorrect. The CIA's declarations established that the photograph is an operational record, taken during the time frame in which Zubaydah was being interrogated by the CIA, which, if publicly released, would reveal information pertaining to intelligence methods and activities and thereby likely harm the United States' relationships with foreign liaison partners and allies. Having reviewed the photograph *in camera*, the district court properly deferred to the CIA's judgment that the photograph pertains to the CIA's intelligence methods, and thus is protected by Exemption 3.

The district court erred, however, in ordering the Government to disclose information in two OLC memoranda concerning a highly classified, active intelligence method. Contrary to the district court's supposition that the information concerns only a "source of authority," the Government's declarations explain convincingly why the information pertains to both an intelligence method and CIA functions, and is properly classified. Plaintiffs have not set forth any

basis for affirmance of the district court's order compelling release of this information, and they concede that the district court erred in attempting to craft a substitute for information that is exempt from disclosure under FOIA.

Issues Presented for Review on Plaintiffs' Cross-Appeal[*]

1. Whether FOIA Exemption 3, in conjunction with the NSA and CIA Act, permits the Government to withhold, as an intelligence method used in furtherance of the CIA's foreign intelligence-gathering function, records that concern the CIA's application of waterboarding.

2. Whether FOIA Exemption 1 permits the Government to withhold records concerning the CIA's application of waterboarding, where Plaintiffs do not dispute either that the CIA employed waterboarding as an intelligence method in connection with its foreign intelligence-gathering activities, or that release of such records reasonably could be expected to result in exceptionally grave damage to the national security of the United States.

3. Whether FOIA Exemptions 3 and 1, in conjunction with the NSA and CIA Act, permit the Government to withhold the operational photograph of a CIA

[*] The issues raised in, and the facts and procedural history relevant to, the Government's appeal are set forth in the Government's brief dated March 4, 2011 (the "Government's Opening Br.").

detainee in custody overseas, where the disclosure of such records could reasonably be expected to harm national security.

Statement of Facts

A. Factual Background

In this case, the Government has released numerous records discussing Enhanced Interrogation Techniques ("EITs"), including waterboarding. Those documents include four memoranda authored by the OLC between August 1, 2002 and May 30, 2005 (the "OLC Memoranda"), which analyzed a number of legal questions with respect to the application of EITs to detainees held in CIA custody overseas[*] (JA 422-545, 549 ¶ 8, 550-51 ¶ 10), and specifically addressed waterboarding (JA 449-51, 462-66, 482-83, 525, 544).

Other documents in this litigation generally addressing the CIA's use of waterboarding as an interrogation method include a report by the CIA Inspector General, dated May 7, 2004, entitled *Special Review: Counterterrorism Detention and Interrogation Techniques* (the "Special Review"), which reviewed the CIA's counterterrorism detention and interrogation activities from September 2001 to

[*] The parties litigated the Government's withholdings from two of the four OLC Memoranda in the parties' fourth cross-motions for summary judgment. (JA 1370). Portions of the district court's rulings on that motion are the subject of the Government's appeal.

mid-October 2003 (JA 875-1032), and a background paper on the CIA's combined use of interrogation techniques (JA 1033-51). Both the OLC Memoranda and the Special Review also disclose that the CIA employed waterboarding during interrogations of high-value detainees, including Abu Zubaydah, at CIA facilities overseas. (*E.g.*, JA 475, 496, 884, 915, 916, 923-24, 969, 970, 982-83). The Government has not, however, publicly released operational communications or any other documents concerning the application of EITs in actual CIA interrogations overseas. (JA 587 ¶¶ 10-11).

On January 22, 2009, President Obama issued an Executive Order terminating the CIA's detention and interrogation program and mandating that individuals in United States custody "shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in the Army Field Manual." Executive Order 13,491, 74 Fed. Reg. 4,893, 4,894 (Jan. 22, 2009).

B. The District Court Proceedings

On May 7, 2009, the district court ordered the CIA to compile a list of documents related to the contents of 92 destroyed videotapes of detainee interrogations that occurred between April and December 2002 that would otherwise have been responsive to Plaintiffs' FOIA request. (JA 583 ¶ 3).

Pursuant to that order, the CIA identified 580 documents, and proposed a sample of 65 documents, the majority of which are cables to CIA Headquarters from a covert overseas CIA facility reflecting the contents of videotapes of detainee interrogations. (JA 583-84 ¶¶ 3, 5, 1085 ¶ 3).

The Government withheld these records pursuant to FOIA Exemptions 1, 3, 5, and 6 (JA 582-605), and the parties filed cross-motions for summary judgment with regard to the Government's withholdings (JA 67-68, Nos. 360, 366),[*] which the parties and the district court referred to as the "fifth motion for summary judgment." (JA 1371).

[*] Plaintiffs do not challenge the Government's withholdings based on Exemptions 5 and 6, Plaintiffs' Br. at 7 n.3, and they have substantially narrowed their challenge to the Government's withholdings based on Exemptions 3 and 1. Although before the district court Plaintiffs challenged the Government's withholding of records reflecting the application of any EITs, Plaintiffs limit their cross-appeal to those EIT records that "describ[e] the CIA's use of waterboarding." Plaintiffs' Br. at 2. Because the Government has not re-processed these records to determine which of them describe the application of waterboarding, the specific number of documents at issue in Plaintiffs' cross-appeal is not known.

1. The Government's Justification for Withholding Records Under Exemptions 3 and 1

To justify its withholdings of the records in the sample, the Government relied on three declarations executed by then-CIA Director Leon E. Panetta[*] ("Director Panetta"): unclassified declarations dated June 8, 2009 (the "June 8 Declaration") (JA 582-605) and September 21, 2009 (the "September 21 Declaration") (JA 1084-89) and a classified declaration dated June 8, 2009 (the "Classified Declaration") (Classified Appendix ("CA") 53-65).

The June 8 Declaration explained the basis for the Government's withholdings pursuant to FOIA Exemption 3. (JA 597-601 ¶¶ 31-36). As Director Panetta explained, the Exemption 3 withholdings are premised on his authority under the NSA to protect "intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403-1(i)(1), as well as the CIA Act's instruction that the CIA shall be exempted from "the provisions of any other law which requires the publication or disclosure" of the "functions" of the Agency, which includes the collection of intelligence through human sources and by other appropriate means, *id.* §§ 403g, 403-4a(d). (JA 598-600 ¶¶ 32, 34-35).

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[*] Since the Government filed its opening brief, Leon E. Panetta has been confirmed as the Secretary of the Department of Defense, and General David Petraeus has been confirmed as the Director of the CIA.

Director Panetta's declarations explained that the records at issue consist primarily of communications to CIA Headquarters from a covert CIA facility where interrogations were being conducted, and include "sensitive intelligence and operational information concerning interrogations of [high-value detainee] Abu Zubaydah." (JA 584 ¶ 5). The sample also includes miscellaneous documents, including an operational photograph of Abu Zubaydah taken during the time frame that the CIA was conducting such interrogations. (*Id.*). Director Panetta confirmed that, if disclosed, each of these records would "reveal intelligence sources and methods" employed by the CIA (JA 598 ¶ 32), protected from disclosure under section 102A(i)(1) of the NSA, as well as "the organization and functions of the CIA, including the conduct of clandestine intelligence activities to collect intelligence from human sources using interrogation methods" (JA 600 ¶ 35), exempt from disclosure under section 6 of the CIA Act. (*See also* JA 585-86 ¶¶ 6-7 and 1086-87 ¶ 6 (describing examples of types of information at issue in the 65-document sample)). The documents were therefore withheld under Exemption 3.

As Director Panetta's June 8 Declaration explained, these records were also withheld for the independent reason that FOIA Exemption 1 provides for their withholding as records that have been properly classified pursuant to Executive

Order 12,958, as amended.* (JA 590-97 ¶¶ 16-30). Specifically, the records fall within section 1.4 of Executive Order 12,958, as amended, because they contain information concerning: (1) "intelligence activities (including special activities), or intelligence sources or methods," pursuant to section 1.4(c) of the Executive Order, and (2) "foreign relations or foreign activities of the United States, including confidential sources," pursuant to section 1.4(d) of the Executive Order. (JA 593 ¶ 23). Because of the damage to national security that would be caused by their release, Director Panetta explained, the documents were properly classified at SECRET or TOP SECRET levels. (JA 594-95 ¶¶ 24-26).

The June 8 Declaration described some of the harms that could reasonably be expected to occur if these records were publicly released. In particular, the Director explained that "[i]nformation concerning the details of the EITs being applied would provide ready-made ammunition for al-Qa'ida propaganda," and

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* As with the classified intelligence method at issue in the Government's appeal, the classification decisions at issue in Plaintiffs' cross-appeal were made pursuant to Executive Order 12,958, as amended. (JA 590 ¶ 17 n.3); *see also* Exec. Order 12,958, 3 C.F.R. 333 (1993), reprinted as amended in 50 U.S.C. § 435 note at 91 (Supp. 2004); 68 Fed. Reg. 15,315 (Mar. 28, 2003); Government's Opening Br. at 11. For purposes of Exemption 1, a classification decision should be considered under the criteria of the Executive Order pursuant to which the decision was made. *King v. Dep't of Justice*, 830 F.2d 210, 216 (D.C. Cir. 1987). Accordingly, although Executive Order 12,958 has since been superceded by Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), all citations herein are to Executive Order 12,958, as amended.

that "[t]he resultant damage to the national security would likely be exceptionally grave . . . ." (JA 588 ¶ 12, 585 ¶ 7; *see also* JA 594 ¶ 25, 604-05 ¶¶ 39-40). Director Panetta's September 21 Declaration further explained that release of any information from these documents could lead to a "loss of trust" by "allies, liaison partners and potential human sources," because of the resulting perception that "the CIA is unable to keep secret even its most sensitive records," which "would do lasting damage to the CIA's ability to gather intelligence or conduct clandestine operations." (JA 1088 ¶ 7; *see also* JA 1086-87 ¶ 6). The Director's Classified Declaration describes additional harms to national security that are not discussed in either of his publicly filed declarations, but are reasonably likely to result from the release of such records. (CA 55-57 ¶¶ 6-7, 60-64 ¶¶ 11-15).

Finally, Director Panetta affirmed that the CIA had no improper motive in classifying these records. (JA 595 ¶ 26). Specifically, Director Panetta averred that his "determinations . . . [we]re in no way driven by a desire to prevent embarrassment for the U.S. Government or the CIA, or to suppress evidence of any unlawful conduct." (JA 590 ¶ 15).

2. The District Court's Rulings

On September 30, 2009, the district court held two hearings on the parties' fourth and fifth motions for summary judgment. The first of the hearings was held

ex parte and *in camera*, and the district court reviewed many of the documents included in the 65-document sample. (SPA 31-76; JA 1120-65; CA 76-121). During the *in camera* session, the district court made preliminary rulings upholding the Government's withholding of all but one document, which is not at issue in this appeal or cross-appeal. (SPA 60-76; JA 1149-65; CA 105-21). The documents that the district court reviewed during the *in camera* session included the photograph of Abu Zubaydah in CIA custody. (SPA 75-76; JA 1164-65; CA 120-21). As the court examined that photograph, attorneys for the Government confirmed that the photograph was "actually a CIA photo of a person in custody" (SPA 75-76; JA 1164-65; CA 120-21), and the court observed that "a person's picture gives out a lot more information" than disclosure of simply the detainee's name. (SPA 75; JA 1164; CA 120).

The district court held a public hearing later the same day. (SPA 1-30; JA 1090-1119). During the public hearing, attorneys for the Government publicly announced the court's preliminary rulings with respect to the 65-document sample (SPA 17-18; JA 1106-07), and the court heard argument on those preliminary rulings (SPA 19-29; JA 1109-18). During the public hearing, the district court announced that it "decline[d]" to "rule on the question of legality or illegality" of the CIA's intelligence-gathering methods "in the context of a FOIA request."

(SPA 16-17; JA 1105-06). When explaining its decision to sustain the Government's withholding of the photograph of Abu Zubaydah, the court reaffirmed that "the image of a person in a photograph is [an] aspect of information that is important in intelligence gathering." (SPA 26; JA 1115).

On October 13, 2009, the district court memorialized its rulings in an order upholding the Government's withholding of documents reflecting the CIA's application of EITs under FOIA Exemption 3, without performing an Exemption 1 analysis.* (SPA 77-82; JA 1166-71). In sustaining those withholdings, the district court rejected Plaintiffs' argument that the President's renouncement of the use of EITs, and Plaintiffs' characterization of their use as illegal, negated the Government's otherwise proper Exemption 3 withholding. (SPA 80-82; JA 1169-71). The district court also rejected Plaintiffs' argument that the Supreme Court's decision in *CIA v. Sims*, 471 U.S. 159 (1985), stood for the proposition that "illegal activities fall outside the scope of Exemption 3" (SPA 81; JA 1170), instead determining that "it is inappropriate to consider [under FOIA Exemption 3] the legality of the underlying intelligence sources or methods" (SPA 79; JA 1168).

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* Because Exemption 3 is an independent ground for withholding, the court did not perform an Exemption 1 analysis.

Plaintiffs moved the district court to reconsider its rulings with respect to, *inter alia*, the Government's withholding of intelligence sources and methods that Plaintiffs characterized as "clearly unlawful, banned and repudiated." (JA 73, Record on Appeal ("R.") Doc. 399, at 2-3). After considering Plaintiffs' arguments, the district court adhered to its original rulings. (JA 1369-82). The district court explained that "to limit Exemption 3 to 'lawful' intelligence sources and methods" has no statutory basis. (JA 1378). The district court noted that the Supreme Court's decision in *CIA v. Sims*, 471 U.S. 159 (1985), undermined, rather than supported, Plaintiffs' arguments that the "legality of a particular source or method" was relevant to an Exemption 3 withholding, and rejected any such construction of Exemption 3. (JA 1378-79). The court also relied on this Court's statement in *Wilner v. NSA*, 592 F.3d 60 (2d Cir. 2009), that the legality of government intelligence-gathering is "beyond the scope" of a FOIA action. (JA 1379-80 (quoting *Wilner*, 592 F.3d at 77)). Ultimately, the district court upheld the Government's withholding of the interrogation records, concluding that "[c]ourts are not invested with the competence to second-guess the CIA Director regarding the appropriateness of any particular intelligence source or method." (JA 1380).

On October 1, 2010, the district court entered partial final judgment on the parties' fourth and fifth motions for summary judgment pursuant to Rule 54(b) of

the Federal Rules of Civil Procedure, granting the Government summary judgment with regard to the Government's withholding of records concerning the CIA's application of waterboarding and the operational photograph of Abu Zubaydah, and granting Plaintiffs summary judgment with regard to the Government's withholding of information contained in two OLC memoranda concerning a classified intelligence method. (SPA 105-09); Government's Opening Br. at 17-23 (discussing rulings related to information withheld from OLC memoranda). The instant appeal and cross-appeal followed. (JA 1388-92).

Summary of Argument

This Court should affirm the district court's judgment that the Government properly withheld documents concerning the CIA's application of waterboarding as an interrogation method and the operational photograph of Abu Zubaydah. The Government carried its burden to establish that these documents logically and plausibly fall within the protections of FOIA Exemptions 3 and 1. Indeed, Plaintiffs do not contest that the interrogation methods involved here were used in connection with the CIA's foreign intelligence-gathering activities, nor that disclosure of these records is reasonably likely to cause exceptionally grave damage to national security. *See infra* Points I.A and I.B.

Plaintiffs' only challenge to the Government's withholding of documents concerning the CIA's application of waterboarding is their claim that waterboarding is an "illegal" intelligence method that may not be withheld because it is purportedly outside the CIA's "charter." However, as this Court (and every other to consider the issue) has held, a FOIA action is not the proper forum for determining the legality of governmental activities. *See infra* Point I.A.1. The Supreme Court, moreover, has instructed that courts may not place any limitations on the government's authority to withhold intelligence sources and methods from disclosure under the NSA and Exemption 3. *See infra* Point I.A.2. The cases Plaintiffs rely on to limit the application of Exemption 3 in fact support the Government's withholding of information pertaining to intelligence methods, regardless of their legality. *See infra* Point I.A.3. Nor does the NSA itself limit protection to "legal" intelligence sources or methods. *See infra* Point I.A.4.

FOIA Exemption 1 provides an independent basis to protect documents regarding the CIA's application of waterboarding because they are properly classified pursuant to Executive Order 12,958, as amended. These records are properly classified both because they concern intelligence methods and because they are connected to foreign intelligence-gathering and the United States' foreign activities generally. *See infra* Points I.B.1 and I.B.2. As in the context of

Exemption 3, the alleged illegality of government activity is not a basis to find that records are not properly classified and therefore exempt from disclosure under Exemption 1. *See infra* Point I.B.3.

The district court also correctly sustained the Government's withholding of an operational photograph depicting high-value detainee Abu Zubaydah in CIA custody overseas. Plaintiffs' claim that the Government failed to supply any basis for withholding the photograph is wrong. The Government demonstrated below, and the record shows, that the photograph is an operational record that was created during the time frame that the CIA was interrogating Abu Zubaydah overseas. The photograph thus logically and plausibly falls within the protection of the NSA and CIA Act for information pertaining to intelligence methods and CIA functions. The CIA Director's declarations also establish that public revelation of the photograph is reasonably likely to harm the United States' relations with foreign liaison partners and allies, and thus the photograph independently warrants protection under Exemption 1. The district court's *in camera* review of the operational photograph, after which the court observed that the photograph reveals "information that is important in intelligence gathering," reinforces the Government's assessments. Even if the Court were to determine that the record does not sufficiently support the withholding of the photograph, the proper remedy

is not to order disclosure, but to allow the Government to submit additional support for its withholding. *See infra* Point II.

Finally, the Court should reverse the district court's judgment to the extent it ordered disclosure of information regarding a highly classified intelligence method contained in two OLC memoranda (or a substitute for such information). The Government's detailed declarations, made by officials at the highest level of the Executive Branch, show that the withheld information concerns intelligence methods and activities, and that its disclosure could reasonably be expected to cause exceptionally grave harm to national security. The Government thus sustained its burden of invoking Exemptions 3 and 1. Plaintiffs' argument that the Court should not defer to the Executive Branch's judgment as to whether the information at issue pertains to intelligence methods and activities contravenes well-established principles and should be rejected. *See infra* Point III.

ARGUMENT

The declarations provided by the Government establish that the three categories of documents at issue in these appeals — the interrogation records, an operational photograph of Abu Zubaydah in CIA custody, and information contained in two OLC memoranda concerning a classified intelligence method — are protected from public disclosure under Exemptions 3 and 1 of FOIA. The

Government's justifications for its withholdings are both "logical" and "plausible," and the withholdings therefore should be upheld. *Wilner*, 592 F.3d at 73 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009); *see also* Government's Opening Br. at 26-27.

I. The Government Properly Withheld the Interrogation Records Pursuant to Exemptions 3 and 1

A. The Interrogation Records Are Protected Under Exemption 3

The district court correctly sustained the Government's withholding under FOIA Exemption 3 of documents concerning to the CIA's application of waterboarding. The documents pertain to an "intelligence . . . method" under section 102A(i)(1) of the NSA, and they would reveal CIA "functions" under section 6 of the CIA Act. 50 U.S.C. §§ 403-1(i)(1), 403g.*

Section 102A(i)(1) of the NSA provides that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1). In *CIA v. Sims*, 471 U.S. 159 (1985), the Supreme Court characterized as "sweeping" the government's authority to protect intelligence sources and methods under an earlier but materially similar provision

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* Point II.A of the Government's opening brief sets forth the standards for withholding of intelligence sources, methods and functions under Exemption 3 in conjunction with the NSA and CIA Act.

of the NSA. *Id.* at 169. The Court flatly rejected the argument that "*any* limiting definition" could be engrafted on the "intelligence sources and methods" protected by the NSA, "beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence." *Id.* (emphasis added). The Court explained that through the NSA's "plain statutory language," "Congress simply and pointedly protected *all* sources of intelligence that provide, or are engaged to provide, information the [CIA] needs to perform its statutory duties with respect to foreign intelligence." *Id.* at 169-70 (emphasis added).

Documents concerning the CIA's application of waterboarding fall within this "sweeping" definition because, as Director Panetta's declarations show, the records pertain to an interrogation method used by the CIA in connection with its foreign intelligence-gathering activities. (JA 584 ¶ 5, *see also* JA 598 ¶ 32 (explaining that disclosure of records concerning CIA interrogations "would reveal intelligence sources and methods" in connection with CIA interrogations conducted at a "covert overseas CIA facility")). These documents also reflect CIA "functions" protected from disclosure by section 6 of the CIA Act, because the collection of intelligence through human sources is "foremost" among the CIA's functions. (JA 600 ¶ 34); *see* 50 U.S.C. § 403-4a(d).

Not only are Director Panetta's declarations entitled to "substantial weight," *see, e.g.*, *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007); *see also* Government's Opening Br. at 27 (citing *Sims*, 471 U.S. at 179), but Plaintiffs do not dispute these essential facts. Plaintiffs concede that waterboarding was employed overseas as an intelligence-gathering method. *See* Plaintiffs' Br. at 5, 7. Accordingly, Director Panetta's declarations easily satisfy the highly deferential standard of demonstrating a logical and plausible basis for the CIA's judgment that documents concerning the CIA's application of waterboarding pertain to intelligence methods and CIA functions. *Wilner*, 592 F.3d at 75.

Plaintiffs' sole argument that the documents are not exempt under Exemption 3 is their claim that because the CIA's use of waterboarding purportedly fell outside its "charter," the documents may not be withheld under Exemption 3. Plaintiffs' Br. at 3, 19-31. This claim is not supported by any of the authorities on which Plaintiffs rely, has been refuted by multiple courts, including this Court, and should be rejected.

1. Plaintiffs' Argument That Exemption 3 Does Not Protect Allegedly Illegal Conduct Is Foreclosed by Circuit Precedent

In *Wilner v. NSA*, 592 F.3d 60 (2d Cir. 2009), in construing the scope of the NSA's grant of authority to protect intelligence sources and methods, this Court

held that an analysis of the legality of government action is "beyond the scope of [a] FOIA action." *Id.* at 77. *Wilner* forecloses Plaintiffs' argument that the Government's Exemption 3 withholding turns on the legality of waterboarding.

In *Wilner*, as here, the plaintiffs challenged the agency's invocation of FOIA Exemptions 3 and 1 in connection with a since-discontinued government intelligence source or method — there, the Terrorist Surveillance Program ("TSP"). *Id.* at 71-72. The Court held that the National Security Agency properly withheld documents regarding the TSP under Exemptions 3 and 1, regardless of that program's legality. *Id.* at 77.

Plaintiffs' effort to distinguish *Wilner* is unavailing. Plaintiffs' proposed distinction — that the Court only declined to rule on the legality of the TSP because the TSP was a type of "signals intelligence," and the National Security Agency continued to employ signals intelligence more generally even after discontinuing the TSP, Plaintiffs' Br. at 27-28 — finds no support in the Court's decision. In *Wilner*, the Court did not qualify its analysis or even mention that the documents or information withheld included "legal" signals intelligence methods.

Instead, the Court unambiguously stated that FOIA does not provide a basis to challenge the legality of government action. *Id.* at 77.[*]

Consistent with *Wilner*, other courts have uniformly held that an analysis of the legality of government action has no place in the determination of whether records are properly withheld under FOIA Exemption 3. *See, e.g., ACLU v. Dep't of Def.*, 628 F.3d 612, 622 (D.C. Cir. 2011) (declining to perform analysis of legality of intelligence methods in examining Exemption 3 withholding);[**]

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[*] As the Court noted in *Wilner*, national security concerns have led other circuits to decline to address the legality of government surveillance activity even outside of the context of a FOIA action, including in cases where constitutional rights were implicated. 592 F.3d at 76 (citing *United States of America v. Abu Ali*, 528 F.3d 210, 257-58 (4th Cir. 2008) (affirming, without ruling on legality of TSP program, district court's denial of plaintiff's request for information regarding whether the government used TSP to surveil plaintiff where plaintiff requested access to information to support motion for a new trial); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204-05 (9th Cir. 2007) (upholding the government's invocation of the state secrets privilege as a bar to disclosure of records relating to TSP the release of which "would undermine the government's intelligence capabilities and compromise national security," even where without that information plaintiffs could not establish standing to present their constitutional claims); *ACLU v. NSA*, 493 F.3d 644, 687 (6th Cir. 2007) (dismissing for lack of standing plaintiffs' claims that TSP violated, among other things, plaintiffs' constitutional rights because the only documents that could establish standing were subject to the state secrets privilege)).

[**] As Plaintiffs acknowledge, Plaintiffs' Br. at 31 n.11, in an unpublished decision sustaining the government's withholding of documents concerning EITs, a district court in the District of Columbia recently relied on *ACLU v. Department of Defense*, 628 F.3d 612, to conclude that "the illegality of information is immaterial to the classification of such information under exemptions (b)(1) and

Amnesty Int'l v. CIA, 728 F. Supp. 2d 479, 505 (S.D.N.Y. 2010) ("[T]he CIA is permitted to withhold the[] disclosure [of records that fall within Exemption 3] regardless of the alleged illegality of the practices contained therein."); *People for the Am. Way Found. v. CIA*, 462 F. Supp. 2d 21, 31 (D.D.C. 2006) (potential illegality of activities described in government records cannot be used as basis for challenging withholding of records under Exemption 3); *Navasky v. CIA*, 499 F. Supp. 269, 274 (S.D.N.Y. 1980) ("[A] claim of activities *ultra vires* the CIA charter is irrelevant to an exemption 3 claim."); *Sirota v. CIA*, No. 80 Civ. 2050 (GLG), 1981 WL 158804, at *3 (S.D.N.Y. Sept. 18, 1981) ("[T]he fact that the underlying intelligence activity may have been illegal will not defeat an otherwise valid exemption under § 552(b)(3).").

Congress enacted FOIA for an important, but limited, purpose: to shed light on government activity by requiring disclosure of non-exempt records. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("basic policy" underlying FOIA is "to open agency action to the light of public scrutiny"). FOIA was not intended to provide a forum for courts to opine about the legality of government

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(3) as intelligence sources or methods." *ACLU v. Dep't of Justice*, No. 1:10-cv-123, slip op. at 9 (D.C.C. Feb. 14, 2011). Pursuant to Federal Rule of Appellate Procedure 32.1(b), a copy of this decision is being filed and served herewith.

conduct that may be revealed in such records. *Wilner*, 592 F.3d at 77 (concluding that such determinations are "beyond the scope" of FOIA).

2. Under the Supreme Court's Decision in *CIA v. Sims*, Courts May Not Limit the CIA's Authority to Protect Intelligence Sources and Methods Pursuant to the NSA

Plaintiffs' interpretation of the Supreme Court's decision in *CIA v. Sims*, 471 U.S. 159 (1985), as limiting the CIA's authority under the NSA to protect only those intelligence sources and methods that fall within the CIA's "mandate," Plaintiffs' Br. at 21, turns *Sims* on its head. Far from *limiting* the CIA's authority to protect intelligence sources and methods, *Sims* made clear that the NSA's protection of intelligence sources and methods is *not* subject to "any limiting definition," but rather encompasses any and all sources and methods used in foreign intelligence-gathering activities. *Sims*, 471 U.S. at 169. The Supreme Court's reference in *Sims* to the CIA's "mandate" was simply a reference to the CIA's general authority "to conduct foreign intelligence." *Id.* Because Plaintiffs do not dispute that the CIA employed waterboarding in connection with its foreign-intelligence activities, under *Sims*, documents describing the method are exempt from disclosure under Exemption 3 and the NSA.

Indeed, the D.C. Circuit recently rejected the argument (made by one of the same plaintiffs in this action) that *Sims* limits the protections in the NSA and CIA

Act to only those intelligence sources or methods that have not been banned or later determined to be illegal. In *ACLU v. Department of Defense*, 628 F.3d 612 (D.C. Cir. 2011), the court specifically rejected the plaintiffs' reliance on *Sims* to argue that those intelligence methods that were banned by Executive Order 13,491 could not be withheld as intelligence methods under the NSA. 628 F.3d at 622. The court observed that *Sims* "does not remotely support" the argument that "the change in the specific techniques of intelligence gathering by the CIA renders unprotected sources and methods previously used." *Id.* at 622. Instead, the court observed, because the Supreme Court in *Sims* explicitly rejected any judicial limitation on the CIA's authority to withhold "information fall[ing] within the agency's mandate to conduct foreign intelligence[,] . . . the *Sims* decision refutes rather than supports the ACLU's claim." *Id.* (quoting *Sims*, 471 U.S. at 169).

As the district court noted and Plaintiffs acknowledge, moreover, *Sims* upheld the government's Exemption 3 withholding without regard to the President's subsequent repudiation of those portions of the intelligence method at issue in that case that involved surreptitiously administering dangerous drugs to unwitting human subjects. (JA 1379 (*citing Sims*, 471 U.S. at 162 n.2)); Plaintiffs' Br. at 30 n.10. Plaintiffs' proposed distinctions between this case and *Sims* find no support in *Sims* itself. First, Plaintiffs wrongly suggest that *Sims* upheld the

government's withholding of intelligence sources corresponding to the repudiated portions of the intelligence program only because "an independent ground for withholding existed even though other portions of the program fell outside the CIA's charter." Plaintiffs' Br. at 30 n.10. The Court's analysis in *Sims* did not distinguish between those portions of the intelligence program that had been repudiated and those portions that had not. With regard to the entirety of the government's withholdings under Exemption 3, the Court rejected any judicial limitation on the CIA's "mandate to conduct foreign intelligence." 471 U.S. at 169.

The other distinction that Plaintiffs propose — that in *Sims*, the repudiated portions of the intelligence program were subject to Congressional and Executive investigations, Plaintiffs' Br. at 30 n.10 (citing *Sims*, 471 U.S. at 162) — is similarly unpersuasive. Plaintiffs fail to explain why the existence of such an investigation is relevant to the propriety of the Government's Exemption 3 withholdings, but even if it were relevant, here the CIA's detention and interrogation practices similarly were reviewed by both Congress and the CIA's Office of Inspector General. *See* Press Release of U.S. Senate Select Committee

on Intelligence dated March 5, 2009, *available at* http://intelligence.senate.gov/press/record.cfm?id=309152; (JA 875-1032).*

3. The Other Authorities Cited by Plaintiffs Undermine, Rather Than Support, Their Argument

The other cases on which Plaintiffs rely in fact support the Government's argument that Exemption 3 protects intelligence methods and CIA functions without regard to their legality. The court in *Navasky v. CIA*, 499 F. Supp. 269 (S.D.N.Y. 1980), cited in Plaintiffs' Br. at 23, rejected the argument that records relating to CIA activities can only fall within FOIA Exemption 3 if they are not "*ultra vires* the CIA charter." 499 F. Supp. at 273; *see also id.* at 274. Although the *Navasky* court ultimately denied the government's Exemption 3 withholdings based on the NSA's protection of intelligence sources and methods (albeit without prejudice to the government's renewal of its motion, *id.* at 278), it did so not because the CIA's book publishing activities were illegal, but because book

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* If anything, the fact that Congress has established a "regime of congressional and executive oversight to deter CIA activity," Brief for *Amici Curiae* at 27, but has not provided for *public* disclosure of sensitive intelligence information, undercuts the argument that Congress intended to limit FOIA's exemptions to only "legal" intelligence sources, methods or activities. This legislative scheme also refutes Plaintiff's contention that upholding the Government's withholdings in this case would grant the CIA "virtually unreviewable authority to conceal evidence of illegal activity." Plaintiffs' Br. at 12, 30.

publishing was not an intelligence source or method within the meaning of the NSA in the first place. *Id.* at 275. Book publishing, the court concluded, constituted "propaganda," not "intelligence." *Id.* at 274-75 (holding that "intelligence" could only "result[] from the original collection of information"). Plaintiffs do not argue that the CIA's application of waterboarding did not constitute intelligence-gathering activity, but only make the *ultra vires* and illegality argument that the *Navasky* court explicitly rejected.

Plaintiffs also misunderstand the D.C. Circuit's decision in *Weissman v. CIA*, 565 F.2d 692 (D.C. Cir. 1977), cited in Plaintiffs' Br. at 21-25. The discussion in *Weissman* on which Plaintiffs rely did not address FOIA Exemption 3 (or, for that matter, Exemption 1), but considered only the propriety of the CIA's withholdings under FOIA Exemption 7. *See* Plaintiffs' Br. at 21-22, 24-25 (citing *Weissman*, 565 F.2d at 695-96); *see also Weissman*, 565 F.2d at 695-96. This distinction is important, because unlike Exemptions 3 (in conjunction with the NSA and CIA Act) and 1, Exemption 7 does not protect records relating to foreign intelligence-gathering. Rather, Exemption 7 "shields from disclosure certain records complied for law-enforcement purposes." *Weissman*, 565 F.2d at 694. The *Weissman* court held that the CIA could not withhold records under

Exemption 7 because, under the CIA Act, it was precluded from exercising "police, subp[o]ena, law-enforcement powers, or internal-security functions." *Id.* at 695.

The *Weissman* court did not, however, suggest any limitation on the CIA's ability to protect intelligence sources and methods under Exemptions 3 or 1. To the contrary, the court upheld the government's Exemption 3 and 1 withholdings in their entirety, and ultimately remanded the action to the district court to consider whether those documents that the government had not successfully withheld under Exemption 7 were nevertheless exempt from disclosure under Exemption 3. *Id.* at 698-99. Indeed, because the D.C. Circuit contemplated that Exemption 3 might very well protect from disclosure the same intelligence records to which Exemption 7 did not apply, the *Navasky* court cited *Weissman* for the proposition that "illegality is not a bar to an otherwise valid justification under exemption 3." 499 F. Supp. at 273. Like *Navasky*, therefore, *Weissman* undermines, rather than supports, Plaintiffs' argument.*

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* Plaintiffs also misplace reliance on *dicta* in two district court cases — *People for the American Way Foundation v. National Security Agency*, 462 F. Supp. 2d 21 (D.D.C. 2006), and *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006) — which expressed general concerns about an agency's withholding from the public information concerning its own illegal activity. Plaintiffs' Br. at 30. Neither case held that alleged illegality could defeat an otherwise proper invocation of FOIA Exemptions 3 or 1. Indeed, in *People for the American Way Foundation*, the district court declined to analyze the legality of the TSP as part of its Exemption 3 analysis, and held that the agency's withholdings were proper

4. Other Provisions of the NSA Do Not Limit the Director of National Intelligence's Authority to Protect Intelligence Sources and Methods From Unauthorized Disclosure

Contrary to Plaintiffs' claim, Plaintiffs' Br. at 24, the requirement in section 104A(f)(4) of the NSA that the Director of National Intelligence "shall ensure compliance with the Constitution and laws of the United States by the [CIA]," 50 U.S.C. § 403-1(f)(4), does not limit the Director's independent obligation under section 102A(i)(1) to "protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403-1(i)(1).

As a preliminary matter, and as Plaintiffs concede, Plaintiffs' Br. at 24 n.8, even if section 102A(f)(4) of the NSA could be read as limiting the Director of National Intelligence's authority to protect intelligence sources and methods from unauthorized disclosure, the Government's withholding of interrogation records is independently premised on the CIA Act's command that CIA "functions" be protected from unauthorized disclosure. 50 U.S.C. § 403g. The CIA Act contains no language similar to that in section 102A(f)(4) of the NSA.

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irrespective of whether the TSP was illegal. 441 F. Supp. 2d at 31. *Terkel* was not even a FOIA case, and ultimately held that the government properly invoked the state secrets privilege regardless of the legality of the government conduct at issue. 462 F. Supp. 2d at 917, 920.

In any event, there is nothing inconsistent between the NSA's directions that the Director of National Intelligence protect intelligence sources and methods on the one hand, and ensure the CIA's compliance with the law on the other. Neither provision limits or circumscribes the other; rather, the NSA imposes two separate and independent obligations on the Director of National Intelligence, each of which must be given effect. *See, e.g.*, *Harkless v. Brunner*, 545 F.3d 445, 456-57 (6th Cir. 2008) (rejecting argument that one subsection of statute modifies or limits another subsection where the two subsections can be read as consistent with each other); *Lopez-Soto v. Hawayek*, 175 F.3d 170, 172-73 (1st Cir. 1999) (same); *accord Roberts v. Galen of Virginia*, 525 U.S. 249, 250-53 (1999) (declining to modify one provision of statute based on language in separate provision of statute); *Weinberger v. Hynson, Wescott and Dunning, Inc.*, 412 U.S. 609, 633 (1973) ("[A]ll parts of a statute, if at all possible, are to be given effect.").

Congress easily could have limited the Director's authority in section 102A(i)(1), for example by specifying that only "legal" intelligence sources and methods could be protected. But Congress did not include any such limiting language, and under *Sims*, this Court may not do so. Because information concerning the CIA's use of waterboarding logically and plausibly pertains to

intelligence methods as well as CIA functions, it is exempt from disclosure under Exemption 3.

B. The Interrogation Records Are Protected Under Exemption 1

1. The Interrogation Records Are Properly Classified

Exemption 1 independently protects the interrogation records because such records are "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy," and "are in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). As relevant here, section 1.4 of Executive Order 12,958, as amended, authorized the classification of information concerning "intelligence activities (including special activities), [and] intelligence sources or methods," and records relating to "foreign relations or foreign activities of the United States, including confidential sources," so long as the original classification authority "determines that the unauthorized disclosure of the [information] . . . reasonably could be expected to result in damage to the national security" and "is able to identify or describe the damage." 68 Fed. Reg. at 15,315.

The Government satisfied these criteria here.* First, Director Panetta established in his declarations that the interrogation records concern both "intelligence activities (including special activities) and intelligence sources or methods," under section 1.4(c) of Executive Order 12,958, and "foreign relations or foreign activities of the United States," under section 1.4(d). (JA 593 ¶ 23); 68 Fed. Reg. at 15,317.

Second, Director Panetta established that the unauthorized disclosure of the classified information "reasonably could be expected to result in serious or exceptionally grave damage to the national security, including damage to the United States' defense against transnational terrorism and to the foreign relations of the United States." (JA 594 ¶ 25; *see also* JA 588 ¶ 12, 585 ¶ 7, 1088 ¶ 7; CA 55-57 ¶¶ 6-7, 60-64 ¶¶ 11-15 (elaborating on such harms)). Among other harms, the records if publicly released would "provide ready-made ammunition for al-Qa'ida propaganda" (JA 588 ¶ 12) and cause harm to relations with foreign liaison partners and allies, who would "perceive that the CIA is unable to keep secret even its most sensitive records regarding its clandestine operations" (JA 1088 ¶ 7).

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* There is no dispute that the remaining criteria for classification are satisfied. Director Panetta was delegated original classification authority within the meaning of Executive Order 12,958. (JA 592-93 ¶ 21). Director Panetta personally reviewed the classified information (JA 593 ¶ 21) and determined that it is "owned by the U.S. Government" (JA 593 ¶ 22).

Finally, Director Panetta confirmed that the documents were "classified for a proper purpose." (JA 595 ¶ 26; *see also* JA 590 ¶ 15).

Plaintiffs not dispute the Government's showing of harm, and it is well settled that absent evidence of bad faith, the Court should not second-guess the agency's facially reasonable classification decisions. *See Wilner*, 592 F.3d at 76 ("[W]e have consistently deferred to executive affidavits predicting harm to the national security. . . ." (internal citations and quotation marks omitted)); *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).

Instead, as in the Exemption 3 context, Plaintiffs contend that the interrogation records cannot be properly classified because waterboarding is "illegal," having been discontinued by Executive Order. Plaintiffs' Br. at 20 n.6, 25-27. This argument fails in the Exemption 1 context as well.

2. Plaintiffs Do Not Dispute That the Records Contain Operational Information Concerning Waterboarding That Is Properly Classified Pursuant to Section 1.4(d) of Executive Order 12,958

Plaintiffs incorrectly state that the interrogation records were classified only as intelligence sources or methods under section 1.4(c) of Executive Order 12,958.

Plaintiffs' Br. at 16. In fact, the records were also classified based on their relationship to "foreign relations or foreign activities of the United States" (JA 593 ¶ 23), a basis for classification that Plaintiffs have not challenged. Nor do Plaintiffs argue that alleged "illegality" of foreign activities could negate their classification. Thus, even if Plaintiffs were correct that these records are not properly classified under section 1.4(c) — and, as explained below, Plaintiffs are not correct — section 1.4(d) of Executive Order 12,958 provides an independent and uncontested ground for their classification and withholding under Exemption 1.

3. Alleged Illegality Is Not a Bar to Classification

As in the Exemption 3 context, courts have consistently rejected the argument that the alleged illegality of a classified intelligence method precludes application of Exemption 1. In *ACLU v. Department of Defense*, the D.C. Circuit noted that "there is no legal support for the conclusion that illegal activities cannot produce classified documents." 628 F.3d at 622. The court concluded that the alleged illegality of interrogation techniques and conditions of confinement did not "diminish the government's otherwise valid authority to classify information about those techniques and conditions and to withhold it from disclosure" under Exemption 1. *Id.*; *see also Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 483 (D.C.

Cir. 1980) (recognizing that documents concerning FBI surveillance activities could contain properly classified information even if those activities "strayed beyond the bounds" of the FBI's "lawful security aim"); *Amnesty Int'l*, 728 F. Supp. 2d at 510 ("[T]he fact that . . . interrogation methods may now be considered illegal does not mean that the information cannot be withheld pursuant to Exemption 1."); *Agee v. CIA*, 524 F. Supp. 1290, 1292 (D.D.C. 1981) (holding CIA sources and methods protected, notwithstanding "the legality or illegality of CIA's conduct"); *Navasky*, 499 F. Supp. at 275 (claim of *ultra vires* activities "has no relevance" to the issue of whether a document is properly classified and thus protected under Exemption 1); *Bennett v. Dep't of Def.*, 419 F. Supp. 663, 666 (S.D.N.Y. 1976) (same).

Plaintiffs' claim that classification of information concerning allegedly illegal intelligence sources or methods is appropriate only if there is an independent (*i.e.*, legal) basis for classification, Plaintiffs' Br. at 26-27, 31, has no support in the case law, which flatly rejects the notion that alleged illegality is relevant to a FOIA Exemption 1 analysis. Nor does the language in the Executive Order contemplate such a distinction. Rather, the Executive Order permits classification of any "information concerning intelligence activities (including

special activities) and intelligence sources or methods" that "reasonably could be expected to result in damage to the national security." 68 Fed. Reg. at 15,317.

Plaintiffs cite section 1.7(a) of Executive Order 12,958, which bars the government from classifying information "in order to" conceal violations of law, Plaintiffs' Br. at 16-17, but they misperceive the import of that provision. Section 1.7(a), which contains the only relevant inquiry with respect to the classification of illegal activity, prohibits classification of information where such classification is motivated by an agency's desire to conceal violations of law. 68 Fed. Reg. at 15,318. Section 1.7(a) does not prohibit classification of purportedly illegal activities where the purpose is not to conceal illegal activities, but to protect information the disclosure of which would harm national security. *See e.g.*, *Arabian Shield Development Co. v. CIA*, No. 3-98-CV-0624-BD, 1999 WL 118796, at *4 (N.D. Tex. Feb. 26, 1999) (section of Executive Order that "prohibit[ed] an agency from classifying documents as a ruse when they could not otherwise be withheld from public disclosure" did "not prevent the classification of national security information merely because it might reveal criminal or tortious acts"), *aff'd*, 208 F.3d 1007 (5th Cir. 2000); *see also Wilson v. Dep't of Justice*, Civ. A. No. 87-2415-LFO, 1991 WL 111457, at *2 (D.D.C. June 13, 2009) ("[E]ven if some of the information 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.").

Here, Director Panetta expressly confirmed that the Government did not classify these records out of a desire to "suppress evidence of any unlawful conduct," but for the purpose of "prevent[ing] the exceptionally grave damage to the national security reasonably likely to occur from public disclosure of any portion of these documents, and to protect intelligence sources and methods." (JA 590 ¶ 15; *see also* JA 595 ¶ 26). Director Panetta's declaration is "accorded a presumption of good faith," *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994), and Plaintiffs have not "produce[d any] evidence suggesting bad faith" on the CIA's part. *Wilner*, 592 F.3d at 75 (quoting *Larson*, 565 F.3d at 867, 864) (rejecting claim that National Security Agency had invoked *Glomar* doctrine in bad faith where plaintiffs had not submitted "any evidence that even arguably suggest[ed] bad faith on the part of the NSA, or that the NSA provided a *Glomar* response to plaintiffs' requests for the purpose of concealing illegal or unconstitutional actions").

Furthermore, the Government has disclosed substantial information in this case concerning waterboarding (as well as other EITs). The records released include not only analysis of the legality of waterboarding as an interrogation

method (JA 449-51, 462-66, 482-83, 525, 544), but also records reflecting the fact that the CIA did, in fact, employ waterboarding (*e.g.*, JA 475, 496, 884, 915, 916, 923-24, 969, 970, 982-83), and has since examined its past interrogation practices in the Special Review (JA 875-1032). The record thus refutes any claim that the interrogation records were classified for the purpose of concealing illegal activity.

II. The Government Properly Withheld the Operational Photograph of Detainee Abu Zubaydah

Plaintiffs erroneously claim that the CIA failed to provide any justification for withholding a photograph of Abu Zubaydah taken while he was in CIA custody overseas. *See, e.g.*, Plaintiffs' Br. at 2-3, 8, 12-13, 32-33. As Director Panetta explained in his June 8 Declaration, all of the records he reviewed in connection with his invocation of Exemptions 3 and 1, including the photograph of Zubaydah, are related to "the contents of 92 destroyed videotapes of detainee interrogations that occurred between April and December 2002." (JA 583 ¶ 3). Each record was "purposefully selected for review based on the sensitive operational information [it] contain[s]." (JA 589 ¶ 14).

The photograph, in particular, is an operational record, taken during the time frame that the CIA was interrogating Abu Zubaydah. (JA 584 ¶ 5; *see also* JA 1085 ¶ 3 (defining "operational records" as those "generated during the course of CIA counterterrorism operations, or their equivalent"); JA 65, R. Doc. 352,

Attachment 2 at 9-10 (dated 10/11/02 and 10/19/02)).* Director Panetta's explanation that the operational records at issue, which include the photograph, contain "details of *actual* intelligence activities" (JA 587 ¶ 11 (emphasis in original); *see also* JA 65, R. Doc. 352, Attachments 1 & 2)), is therefore both logical and plausible. *Wilner*, 592 F.3d at 73, 75. Also logical and plausible is Director Panetta's conclusion that public disclosure of operational records such as the photograph would reveal "the . . . functions of the CIA, including the conduct of clandestine intelligence activities to collect intelligence from human sources using interrogation methods." (JA 600 ¶ 35, 593 ¶ 23 (Director Panetta confirming that the operational documents "concern[] intelligence activities . . . or intelligence sources or methods" and "foreign activities of the United States"), 598 ¶ 32 (Director Panetta confirming that disclosure of the photograph would reveal "intelligence sources and methods")). As the district court correctly observed during its *in camera* review of the photograph and during the subsequent public hearing, a photograph depicting a person in CIA custody "gives out a lot more

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* Director Panetta's June 8 Declaration discusses two categories of miscellaneous documents: those that were created contemporaneously with interrogations, and those that were created "with a viewing of the now-destroyed videotapes" of interrogations. (JA 584 ¶ 5). The operational photograph falls within the former category of operational documents. It was taken on October 11, 2002, while the "viewing of the now-destroyed videotapes" (JA 584 ¶ 5) occurred later in 2002 (JA 915).

information" (SPA 75; JA 1164), and is an "aspect of information that is important in intelligence gathering" (SPA 26; JA 1115).

Accordingly, disclosure of the operational photograph "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods" and CIA functions, *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976), and the photograph is exempt from disclosure under Exemption 3. *See Larson*, 565 F.3d at 865 (court need only decide "whether the withheld material relates to intelligence sources and methods" to adjudicate Exemption 3 claim); *Linder v. NSA*, 94 F.3d 693, 696 (D.C. Cir. 1996) (no showing of harm to national security required to justify invocation of Exemption 3).

For similar reasons, the operational photograph is properly classified, and thus exempt from disclosure under Exemption 1. The photograph concerns "intelligence methods," as well as "intelligence activities" and "foreign activities of the United States," insofar as it depicts Abu Zubaydah during the time frame when he was in CIA custody overseas and was being interrogated by the CIA. *See* Executive Order 12,958 §§ 1.4(c)-(d), 68 Fed. Reg. at 15,317; (JA 593 ¶ 23; JA 65, R. Doc. 352, Attachments 1 & 2; SPA 26; JA 1115).

The Government's declarations also demonstrate that disclosure of any of the operational documents at issue, including the photograph, is reasonably likely

to harm national security, a showing that Plaintiffs do not challenge on appeal. As Director Panetta explained, the United States is "still engaged in extensive counterterrorism operations," including interrogation of terrorists, and public disclosure of "contemporaneous records generated in the course of counterterrorism operations, . . . would lead our allies, liaison partners and potential human sources to perceive that the CIA is unable to keep secret even its most sensitive records regarding its clandestine operations." (JA 1088 ¶ 7). The "loss of trust" that could result from such disclosure "would do lasting damage to the CIA's ability to gather intelligence or conduct clandestine operations." (*Id.*; *see also* CA 55-57 ¶¶ 6-7, 60-64 ¶¶ 11-15 (elaborating on harms to United States' foreign liaison relationships that are likely to result from disclosure of operational documents); JA 1086-87 ¶ 6, 604 ¶ 39 (explaining that "the operational documents at issue are of a qualitatively different nature" than declassified information, and that "exceptionally grave damage to clandestine human intelligence collection and foreign liaison relationships" is reasonably likely to occur from public disclosure), 1085 ¶ 4 (same)).

The Government's justifications for the classification of the photograph are logical and plausible and thus entitled to substantial deference. *Wilner*, 592 F.3d at 73, 75; *ACLU*, 628 F.3d at 619, 624. Courts consistently have deferred to the

Executive Branch's judgments regarding precisely these types of harms. *See* Government's Opening Br. at 52-53 (citing cases).

Moreover, the district court's *in camera* review of the photograph "justifies a deferential review of its decision." *Ferguson v. FBI*, 83 F.3d 41, 43 (2d Cir. 1996); *see also Diamond v. FBI*, 707 F.2d 75, 79 (2d Cir. 1983) (deferring to the "considered opinion of the district judge, who examined each document . . . *in camera*"). While the CIA Director's declarations provide sufficient information, consistent with national security requirements (*see* JA 583 ¶ 4), to adjudicate the CIA's invocation of Exemptions 3 and 1, the district court's *in camera* review reinforces the propriety of the CIA's withholding. *See Diamond*, 707 F.2d at 79.

Plaintiffs' assumption that "the CIA appears to believe that it may classify the photograph merely because the CIA took it," Plaintiffs' Br. at 35, is directly contradicted by the record. (*See* JA 589 ¶ 14 ("I am not suggesting a blanket CIA policy whereby no . . . documents containing operational information, could ever be released in part."), 1087 ¶ 7). The CIA has shown that the photograph relates to "intelligence activities, . . . [intelligence] methods, and foreign relations and foreign activities of the United States" (JA 603 ¶ 39), and that harm to national security is reasonably likely to result from public disclosure. The photograph is thus protected from disclosure under Exemptions 3 and 1 of FOIA.

Even if the Court were to conclude, however, that the CIA did not adequately justify its invocation of Exemptions 3 and 1 with regard to the photograph, the proper remedy is not to order public disclosure, as Plaintiffs request, Plaintiffs' Br. at 36, but rather to remand to the district court to provide the agency with an opportunity to further explain its rationale for the withholding. *See, e.g.*, *Morely v. CIA*, 508 F.3d 1108, 1125 (D.C. Cir. 2007). Remand rather than disclosure is particularly appropriate here, as the Director of the CIA has averred that disclosure of the photograph would harm national security.

III. The Government Properly Withheld Information Concerning a Highly Classified Intelligence Method

As explained in the Government's opening brief, the Government met its burden to show that the information withheld from two OLC memoranda concerning a classified intelligence method logically and plausibly falls within the scope of the NSA and CIA Act: the information "relates to intelligence sources or methods" and CIA functions, including intelligence activities. *Wilner*, 592 F.3d at 73, 75; *Larson*, 565 F.3d at 865; *see also Hayden v. NSA*, 608 F.2d 1381, 1390 (D.C. Cir. 1979); Government's Opening Br. at 29-38, 40-41. The Government further established that public disclosure of this information risks extremely grave damage to the national security of the United States, in several ways.

Government's Opening Br. at 41-51. Accordingly, information concerning the classified intelligence method falls squarely within Exemptions 3 and 1 of FOIA.

Plaintiffs' arguments to the contrary misstate the Government's position and are without merit. While Plaintiffs categorically state that "sources of authority are not 'intelligence methods,'" Plaintiffs' Br. at 38, they admit that withholding a "source of authority" is proper "if disclosing it would reveal . . . intelligence sources, methods, or activities," *id*. at 40-41. Here, the Government's declarants — which include two CIA Directors and the National Security Advisor and Assistant to the President for National Security, *see* Government's Opening Br. at 21 — have established both that the district court erred in its characterization of the withheld information as merely a "source of authority," and that revealing the classified portions of the OLC memoranda would reveal the existence and scope of a highly classified, active intelligence method and activity. *See id*. at 29-35, 40-41.

The Executive Branch's judgment that disclosing the withheld information will reveal an intelligence method and activity is entitled to deference. *See* Government's Opening Br. at 36 (citing cases). The CIA does not, as Plaintiffs represent, contend that it "alone decides whether something is or is not an 'intelligence method.'" Plaintiffs' Br. at 37, 39. Rather, it has long been established that in evaluating "whether [the withheld material] relates to

intelligence sources and methods" or CIA functions, and thus falls within the scope of the NSA or CIA Act, a court must give "substantial weight and due consideration" to the agency's declarations. *Fitzgibbon v. CIA*, 911 F.2d 755, 762 (D.C. Cir. 1990); *Larson*, 565 F.3d at 865; *see also ACLU*, 628 F.3d at 621; *Ctr. for Nat'l Security Studies v. Dep't of Justice*, 331 F.3d 918, 927-928 (D.C. Cir. 2003) ("We have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated."); *Amnesty Int'l*, 728 F. Supp. 2d at 503. As the First Circuit observed in *Maynard v. CIA*:

> In the intelligence area, the [Supreme] Court has commented that judges "have little or no background in the delicate business of intelligence gathering" and may be unable to comprehend the significance of material that appears to be innocuous, but in fact can reveal a significant intelligence source or method. [*Sims*,] 471 U.S. at 176. . . . Therefore, in determining whether withheld material relates to intelligence sources or methods, a court must "accord substantial weight and due consideration to the CIA's affidavits." *E.g.*, *Fitzgibbon v. CIA*, 911 F.2d 755, 762 (D.C. Cir. 1990).

986 F.2d 547, 555 (1st Cir. 1993) (reversing district court order requiring disclosure of information).

Plaintiffs are thus wrong when they argue that judicial deference extends only to "the CIA's determinations of *harm* under Exemption 1" and does not encompass the question whether withheld information pertains to an "intelligence source or method." Plaintiffs' Br. at 39 & n.14 (emphasis in original). Plaintiffs

cite no authority for this proposition, which is contradicted by *Sims*, *Maynard* and the other authorities discussed above. *See also Nat'l Sec. Archive Fund v. CIA*, 402 F. Supp. 2d 211, 216 (D.D.C. 2005) ("The only issues presented in an Exemption 3 claim are the existence of a qualifying disclosure-prohibiting statute, and the logical inclusion of the withheld information within the scope and coverage of that statute. . . . Courts evaluating Exemption 3 claims must accord the same substantial weight due to the agency's judgment as with Exemption 1 claims." (internal citations omitted)).

Contrary to Plaintiffs' contention, Plaintiffs' Br. at 37-38, the Supreme Court's decision in *Sims* supports the Government's argument that the district court inappropriately narrowed the definition of "intelligence methods" rather than deferring to the CIA's informed judgment as to what constitutes a method. As discussed *supra* in Point I.A.2, *Sims* conclusively established that the NSA's command to protect "intelligence sources and methods from unauthorized disclosure" vests the CIA with "broad discretion to safeguard . . . sources and methods of operation," *Sims*, 471 U.S. 159, and is limited only by the requirement that the information at issue "fall within the Agency's mandate to conduct foreign intelligence," *id.* at 169. Thus, the Supreme Court held, the court of appeals in *Sims* erred by imposing limitations on the "intelligence sources" protected under

the NSA, contrary to the agency's interpretation of that term. *See Sims*, 471 U.S. at 169. The district court here likewise erred in narrowing the scope of protected intelligence methods, and in refusing to defer to the CIA's judgment that release of the withheld information would reveal an intelligence method and activity. *See* Government's Opening Br. at 29-38, 40-41.

Nor does the Government's assertion that the withheld information concerns a "function" and "intelligence activity" within the meaning of the CIA Act and Executive Order 12,958, respectively, amount to a "refus[al] to provide any information at all about anything [the CIA] does," as Plaintiffs claim. Plaintiffs' Br. at 40. The Government has produced substantial information in this case about waterboarding and other EITs employed by the CIA, and the classified portions of the Government's opening brief explain in detail why the specific information withheld from the OLC memoranda cannot be publicly disclosed without risking grave national security harm, Government's Opening Br. at 41-53.

Plaintiffs' argument that the term "functions" in the CIA Act "protects only intelligence sources and methods and information about the [CIA's] internal structure," Plaintiffs' Opening Br. at 40 (internal quotation marks and citations omitted), is irrelevant, as the Government has established that the information at issue relates to an intelligence method. *See* Government's Opening Br. at 29-35.

But, in any event, it is also erroneous. The plain language of the CIA Act protects CIA functions, and not simply the CIA's internal structure. *See* 50 U.S.C. § 403g (protecting from disclosure the "organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency"). The CIA's functions indisputably include conducting intelligence activities. *See* 50 U.S.C. § 403-4a(d); Government Opening Br. at 10-12; (JA 598-600 ¶¶ 32, 34-35); *see also* 50 U.S.C. § 403g (providing for withholding of information about CIA functions, among other things, "[i]n the interests of *the security of the foreign intelligence activities* of the United States." (emphasis added)).

Plaintiffs' reliance on *Phillippi v. CIA* to suggest limitations on the functions protected under the CIA Act, Plaintiffs' Br. at 40 (citing 546 F.2d at 1015 n.14), is misplaced. That case involved the CIA's refusal to release information "pertaining to intelligence sources and methods" under the NSA, 546 F.2d at 1011; the government did not withhold the information pursuant to the CIA Act. Although the court noted *in dicta* (and in a footnote) that the CIA Act's protection of "functions" was not intended to create a blanket exemption from FOIA, it did not analyze which functions would qualify for protection, nor did it rule out the possibility that protected CIA functions could include intelligence-gathering activities. *See* 546 F.2d at 1015 n.14; *see also* 50 U.S.C. §§ 403g, 403-4a(d); (JA

598-600 ¶¶ 32, 34-35). To the extent Plaintiffs read *Phillippi* as imposing limitations on the statutory definition of protected CIA functions, moreover, such a reading is foreclosed by the Supreme Court's decision in *Sims*. *See supra* Point I.A.2.

Finally, Plaintiffs concede that the district court erred to the extent it attempted to craft a substitute for the information withheld from the OLC memoranda concerning the classified intelligence method. Plaintiffs' Br. at 41. FOIA does not permit courts to create substitutes for information that falls within its exemptions. *See* Government's Opening Br. at Point IV.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Government's opening brief, the district court's judgment compelling disclosure of information contained in the OLC memoranda concerning the classified intelligence method should be reversed, and the district court's judgment should be affirmed in all other respects.

Dated: New York, New York
August 2, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for Defendants-Appellants-Cross-Appellees hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 11,194 words in this brief.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 10-123 (RMC)**
DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiffs, American Civil Liberties Union and American Civil Liberties Union Foundation, filed this lawsuit against Defendant Department of Justice ("DOJ"), seeking "the immediate processing and release of agency records requested by Plaintiffs . . . from Defendant . . .," Compl. [Dkt. #1] ¶ 1, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Specifically, Plaintiffs seek a DOJ Office of Professional Responsibility report "concerning the role that certain Office of Legal Counsel ("OLC") attorneys played in crafting and authorizing the Bush administration's interrogation policies." Compl. ¶ 2. Subsequent to the filing of this lawsuit, that report, titled "Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists" ("Report"), was made available, in a redacted form. Plaintiffs now seek a substantially less redacted Report. Defendant moves for summary judgment, arguing that all of the redactions it has made are pursuant to proper exemptions under FOIA. Plaintiffs likewise move for partial summary judgment, arguing that Defendant has improperly invoked certain exemptions under FOIA to keep certain specified portions of the Report redacted, and accordingly those sections must be disclosed.

The Court will grant Defendant's motion for summary judgment, as Defendant has fully evaluated the Report, segregated what it could, and made redactions according to specific allowable exemptions under FOIA.

I. FACTS

On December 4, 2009, Plaintiffs formally requested release under FOIA of a report by the DOJ's Office of Professional Responsibility on whether government attorneys in the DOJ's Office of Legal Counsel "breached professional or ethical obligations in authorizing the use of" enhanced interrogation techniques. Pls.' Mem. in Support of Pls.' Cross Mot. for Partial Summ. J. ("Pls.' Mem.") [Dkt. # 8] at 1. The information within the Report relates:

> to how the CIA developed and conducted its counter-terrorism operations against al-Qa'ida and affiliated groups in the wake of September 11th. Among these counter-terrorism operations included the now discontinued CIA program designed to capture, detain, and interrogate terrorists ("detention and interrogation program" or "program"). The highly sensitive information in the OPR Report details how the CIA developed the detention and interrogation program; deliberated with various elements of the United States Government ("USG") regarding the creation and operation of the program; targeted, detained, and interrogated terrorists; worked with its foreign liaison partners; and developed intelligence to protect the United States from additional terrorist attacks.

See Def.'s Mem. in Support of DOJ's Mot. for Summ. J. ("Def.'s Mem.") [Dkt. # 7-1], Ex. 3 ("Payne Decl.") ¶ 11.

On January 22, 2010, Plaintiffs "filed this lawsuit to enforce their request and to compel release of the Report . . . ." Pls.' Mem. at 4. On February 19, 2010, "the DOJ provided a redacted copy of the Report to the U.S. House of Representatives Committee on the Judiciary, which posted the Report on its website." *Id*. The Report having been released, Plaintiffs then converted their FOIA

request from one seeking release of the Report itself, to one seeking release of certain redacted information within the Report. Def.'s Mem. at 4. By Order dated March 17, 2010, the Court required Defendant to provide Plaintiff with a preliminary *Vaughn* Index[1] that identified 153 redacted areas throughout the Report. *Id*. Defendant did so, and described every redaction using one or more of eleven different categories of reasoning to support each of the 153 redactions. Pls.' Mem. at 5.

Plaintiffs now limit their request to the disclosure of certain materials redacted under exemptions (b)(1), (3), (5) and (6) of FOIA. *See* 5 U.S.C. 552(b)(1), (3), (5), and (6). Of those materials redacted pursuant to exemptions (b)(1) and (3), Plaintiffs seek the disclosure of any "information concerning classified intelligence sources and methods and the functions of CIA personnel," specifically (1) the "actual and potential implementation" of "enhanced interrogation techniques," including "conditions of confinement" that functioned as part of the "enhanced interrogation techniques;" (2) the names of the detainees; and (3) the name of one interrogation technique that the CIA considered using ("mock burial"), which was declassified on page 174 of the December 22, 2008 draft of the Report. Pls.' Mem. at 7. Of those materials redacted pursuant to exemption (b)(5), Plaintiffs seek the disclosure of any: (1) "[i]nformation concerning inter- and/or intra-agency predecisional deliberations related to the CIA detention and interrogation program including preliminary evaluations, opinions, and recommendations related thereto; (2) "[i]nformation concerning confidential communications between attorneys and clients in connection with the provision of legal advice related to the CIA detention and interrogation program;" (3) "[i]nformation concerning legal analysis, opinion, and/or other information related to the CIA detention and

[1] *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Defendants provided Plaintiffs with an index that, with respect to each redaction or category of redactions, described the redacted material and indicated the FOIA exemption relied upon to justify the redaction.

interrogation program that was prepared by counsel in anticipation of criminal, civil, and administrative proceedings related to the program;" and (4) "[i]nformation concerning communications involving information or recommendations authored or solicited and received by the senior members of the President's national security team in connection with presidential decisionmaking on national security policy." *Id*. at 7–8. Lastly, of the materials redacted pursuant to exemption (b)(6), "information concerning the identity of certain DOJ personnel," Plaintiffs seek the disclosure of the name of DOJ attorney Jennifer Koester whenever redacted. *Id*. at 8.

In support of Defendant's motion for summary judgment, and ultimately in support of its decision to redact portions of the Report, Defendant submits Declarations of Jan M. Payne, Associate Information Review Officer for the Central Intelligence Agency, and David Margolis, Associate Deputy Attorney General for the Department of Justice. Def.'s Mem., Exs. 3 & 4 ("Payne Decl." and "Margolis Decl.").

II. LEGAL STANDARDS

A. Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Moreover, summary judgment is properly granted against a party who "after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In ruling on a motion

for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. FOIA cases are typically and appropriately decided on motions for summary judgment. *Rushford v. Civiletti*, 485 F. Supp. 477, 481 n.13 (D.D.C. 1980).

B. FOIA

FOIA "calls for broad disclosure of Government records." *C.I.A. v. Sims*, 471 U.S. 159, 166 (1985). However, Congress has recognized that "public disclosure is not always in the public interest," *id.* at 167, as "legitimate governmental and private interests could be harmed by release of certain types of information . . . ." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). Recognizing this, Congress provided "nine specific exemptions under which disclosure could be refused." *Id.*; *see* 5 U.S.C. § 552(b). Because the mandate of FOIA calls for broad disclosure of Government records, these FOIA exemptions are narrowly construed. *See U. S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988).

When an agency refuses to disclose requested records, it bears the burden to prove the applicability of its claimed exemptions. *See* 5 U.S.C. § 552(a)(4)(B). "An agency that has withheld responsive documents pursuant to a FOIA exemption can carry its burden to prove the applicability of the claimed exemption by affidavit . . . ." *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir 2009). These affidavits or declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Services v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal citation and quotation omitted). "Summary judgment is warranted on the basis of agency affidavits when the affidavits

describe 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." *Larson*, 565 F.3d at 862. "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982), and *Hayden v. NSA*, 608 F.2d 1381, 1388 (D.C. Cir. 1979)).

C. Segregability

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). The D.C. Circuit has long recognized, however, that documents may be withheld in their entirety when nonexempt portions "are inextricably intertwined with exempt portions." *Mead Data Central, Inc. v. U.S. Dep't of Air Force,* 566 F.2d 242, 260 (D.C. Cir.1977). A court may also rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated for this reason. *Armstrong v. Executive Office of the President,* 97 F.3d 575, 578 (D.C. Cir.1996).

III. ANALYSIS

A. Exemptions (b)(1) and (3)

FOIA provides an exemption from disclosure of materials when those materials are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). In this case, Defendant relies upon Executive Order 13526, "Classified National Security Information," which states information may be classified if: (1) an original

classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the United States Government ("USG"); (3) the information falls within one or more of the categories of information listed in 1.4 of E.O. 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage. *See* 75 Fed. Reg. 707, 707 (Dec. 29, 2009) ("E.O. 13526").

All of these conditions have been satisfied, as declared by the Associate Information Review Officer for the Central Intelligence Agency, Jan. M. Payne. *See* Payne Decl. ¶¶ 12–35. Review Officer Payne has original classification authority and has determined the "information is properly classified as TOP SECRET and/or SECRET," thus satisfying condition (1). *See id.* ¶¶ 14–15. The information identified is "owned by, produced by or for, or is under the control" of the Defendant, thus satisfying condition (2). *See id.* ¶ 16 ("With respect to the information relating to CIA intelligence activities, sources, methods, and foreign relations and foreign activities . . . for which FOIA exemption (b)(1) is asserted in this case, that information is owned by the USG, was produced by the USG, and is under the control of the USG."). The information falls within one or more of the categories of information listed in section 1.4 of E.O. 13526, which includes "intelligence activities," "intelligence sources or methods," and "foreign relations or foreign activities of the United States," *see* E.O. 13526 § 1.4 (c) & (d), thus satisfying condition (3). *See* Payne Decl. ¶ 17 ("With respect to the CIA information for which FOIA Exemption (b)(1) is asserted in this case, that information falls within the following classification categories in the Executive Order: 'information . . . concern[ing] . . . intelligence activities . . . [and] intelligence sources or methods' [] and 'foreign relations or foreign

activities of the United States.'" (citing E.O. 13526 § 1.4 (c))). Lastly, the original classification authority, Review Officer Payne, determined that the unauthorized disclosure of the information "reasonably could be expected to result in damage to the national security," thus satisfying condition (4). *See id.* ¶ 19. And given the specialized nature of such sensitive and privileged information, courts give great deference to such a determination by agency officials. *See Ctr. for Nat'l Sec. Studies v. United States DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003) ("[I]n the FOIA context, we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review.").

FOIA also provides a similar exemption from disclosure of materials when those materials are:

> specifically exempted from disclosure by statute (other than section 552b of this title [5 U.S.C. § 552b]), if that statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld; and if enacted after the date of enactment of the OPEN FOIA Act of 2009 [enacted Oct. 28, 2009], specifically cites to this paragraph.

5 U.S.C. § 552(b)(3). Under exemption (b)(3), "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage." *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978). Again, great deference is paid to the agency and its declarations in determining whether withheld material falls within the statute's coverage. *See Fitzgibbon v. CIA*, 911 F.2d 755, 762 (D.C. Cir. 1990).

Defendant relies upon the National Security Act of 1947, 50 U.S.C. § 403-1, and the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403(g), as two statutes that specifically exempt from disclosure the classified information in the Report. The former requires the Director of National

Intelligence to "protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403-1(i)(1), and has previously been recognized as a legitimate source for an exemption under 5 U.S.C. § 552(b)(3). *See Larson*, 565 F.3d at 865. The latter provides that:

> [i]n the interests of the security of the foreign intelligence activities of the United States and in order further to implement section 102A(i) of the National Security Act of 1947, that the Director of National Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency 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. § 403(g). Defendant argues that the "information withheld from the Report falls squarely within the collection function" of the CIA, including "details of functions of CIA personnel engaged in counter-terrorism operations." Def.'s Mem. 16 (citing Payne Decl. ¶ 29).

Rather than arguing that exemptions (b)(1) and (3) are inapplicable under the Executive Order or the proffered statutes, Plaintiffs argue that the substance of the redactions: (1) the names of the detainees; and (2) the "actual and potential implementation" of "enhanced interrogation techniques," including "conditions of confinement" that functioned as part of the "enhanced interrogation techniques," are unlawful, and therefore fall outside the protection of "intelligence sources and methods" granted by those exemptions. Pls.' Mem. at 11–24. But, as recently stated by the D.C. Circuit, the illegality of information is immaterial to the classification of such information under exemptions (b)(1) and (3) as intelligent sources or methods. *See ACLU v. United States DOD*, Civ. No. 09-5386, 2011 U.S. App. LEXIS 1271, *19 (D.C. Cir. Jan. 18, 2011) ("To the extent that the ACLU's claim rests on the ACLU's belief that the enhanced interrogation techniques were illegal, there is no legal support for the conclusion that illegal activities cannot produce classified documents. In

fact, history teaches the opposite."); *see also ACLU v. Dep't of Def.*, 723 F. Supp. 2d 621, 628–29 (S.D.N.Y. 2010) (finding that "to limit Exemption 3 to 'lawful' intelligence sources and methods, finds no basis in the statute" and that "[d]eclining to reach the legality of the underlying conduct is not . . . an abdication of . . . the Court's responsibility . . . under the statutory structure[; i]t is the result commanded by the statute"); *see also Agee v. C.I.A.*, 524 F. Supp. 1290, 1292 (D.D.C. 1981) ("While some of the documents shed light on the legality or illegality of CIA's conduct, the (b)(1) or (b)(3) claims are not pretextual. Any possibility of illegal conduct on the part of the CIA does not defeat the validity of the exemptions claimed."). Stated simply, Defendant has appropriately and logically detailed its rationales for redaction under exemptions (b)(1) and (3) for the "actual and potential implementation" of "enhanced interrogation techniques," including "conditions of confinement" that functioned as part of the "enhanced interrogation techniques," and the names of the detainees.

Plaintiffs next argue that the name of the interrogation technique that the CIA considered using, *i.e.* "mock burial," has already been unclassifed and thus should be disclosed. It is true that when the government has officially acknowledged information, a FOIA plaintiff may compel disclosure of that information even over an agency's otherwise valid exemption claim. *See Wolf*, 473 F.3d at 378; *Fitzgibbon*, 911 F.2d at 765. For information to qualify as "officially acknowledged," however, it must satisfy three criteria: (1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure. *Id*. After reviewing additional information *in camera*, the Court finds that the redacted information does not match the very broad information previously disclosed. Due to the specificity and context of the redacted information, coupled with the agency affidavit that

affirmatively states that: "notwithstanding these prior disclosures (which I took into account when reviewing the Report), many details of the detention and interrogation program and the intelligence activities undertaken in support of it remain classified," Payne Decl. ¶ 28, the Court is satisfied that this redacted information has not been already "officially acknowledged," and thus is appropriately redacted pursuant to exemptions (b)(1) and (3) as "intelligent sources or methods."

Therefore, the classified information withheld pursuant to Executive Order 13526, and the National Security Act of 1947 and the Central Intelligence Agency Act of 1949, are properly withheld under 5 U.S.C. § 552(b)(1) and (3).[2]

B. Exemption 5

FOIA provides another exemption from disclosure of materials involving "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). "Exemption [(b)(5)] incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant." *Baker & Hostetler LLP v. United States DOC*, 473 F.3d 312, 321 (D.C. Cir. 2006). This includes the deliberative process privilege, the attorney-client privilege, the attorney work product privilege, and the presidential communications privilege. *Id.*; *see also Loving v. DOD*, 550 F.3d 32, 37 (D.C. Cir. 2008).

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[2] Attached to the Payne Declaration is a chart ("Exhibit A") that identifies which exemptions have been invoked for which redactions. The redactions identified on Exhibit A for which "(b)(1)" is listed are Item Nos. 2, 12, 13, 15, 16, 17, 18, 20, 24, 29, 35, 38, 39, 46, 49, 50, 51, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 77, 78, 85, 86, 91, 93, 95, 96, 99, 100, 102, 103, 104, 106, 107, 108, 109, 111, 112, 113, 114, 118, 123, 133, 135, 137, 138, 141, 142, 143, 144, 146, and 147. Exemption (b)(3) contains the same Item Nos. that were withheld under exemption (b)(1), but also include Item Nos. 41, 42, 43, 53, 56, 57, 75, 79, 80, 82, 110, 116, and 140. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(1) and/or (3).

Of the materials redacted under exemption (b)(5), Plaintiffs seek the disclosure of what has been characterized by Defendant as: (1) "[i]nformation concerning inter- and/or intra-agency predecisional deliberations related to the CIA detention and interrogation program including preliminary evaluations, opinions, and recommendations related thereto," *i.e.* deliberative process privilege material; (2) "[i]nformation concerning confidential communications between attorneys and clients in connection with the provision of legal advice related to the CIA detention and interrogation program," *i.e.* attorney-client privilege material; (3) "[i]nformation concerning legal analysis, opinion, and/or other information related to the CIA detention and interrogation program that was prepared by counsel in anticipation of criminal, civil, and administrative proceedings related to the program," *i.e.* attorney work-product privilege material; and (4) "[i]nformation concerning communications involving information or recommendations authored or solicited and received by the senior members of the President's national security team in connection with presidential decisionmaking on national security policy," *i.e.* presidential communications privilege material. Pls.' Mem. at 7–8.

1. Deliberative-process privilege

"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." *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975)). The deliberative process privilege "'protects the decisionmaking processes of government agencies' and 'encourages the frank discussion of legal and policy issues' by ensuring that agencies are not 'forced to operate in a fishbowl.'" *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir.

1993) (quoting *Wolfe v. Dep't of Health and Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988)).

To qualify for withholding under the deliberative process privilege, the redacted material must be both predecisional and deliberative. *See Wolfe*, 839 F.2d at 774.

> A document is predecisional if it was prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made. Material is deliberative if it reflects the give-and-take of the consultative process. [The D.C. Circuit's] recent decisions on the deliberativeness inquiry have focused on whether disclosure of the requested material would tend to discourage candid discussion within an agency.

Petroleum Info. Corp. v. Dep't of Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (citations and internal quotation marks omitted). This exemption "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). However, predecisonal and deliberative material can lose this protected status if the policy is officially adopted, formally or informally. *See id*. Further, "the privilege applies only to the 'opinion' or 'recommendatory' portion of the report, not to factual information which is contained in the document." *Id*. at 867. Thus, all factual matters that can be segregated from the deliberative process should be disclosed. *See Ryan v. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980) (requiring disclosure of facts only if they "do not reveal the deliberative process and are not intertwined with the policy-making process")

Plaintiff objects to the redactions under exemption (b)(5) here because it claims that (1) Defendant has redacted purely factual matter, as opposed to the opinion portion of the Report; and (2) "it is likely that much of what the government has withheld as predecisional is either post-decisional or adopted as agency policy." Pls.' Mem. at 27–28. Based upon this speculation, Plaintiffs

request *in camera* review of the materials.

In this Circuit, "when the agency meets its burden by means of affidavits, *in camera* review is neither necessary nor appropriate." *Hayden*, 608 F.2d at 1387. "If the agency's affidavits 'provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents.'" *Larson*, 565 F.3d at 870 (quoting *Hayden*, 608 F.2d at 1387). Plaintiffs' speculation does not override Defendant's uncontradicted and sufficiently detailed declaration, which explains:

> [t]he information that was redacted from the OPR Report on deliberative process grounds includes pre-decisional discussions among Executive Branch officials regarding possible approaches to take with respect to these outstanding legal and policy issues; candid internal discussions and exchanges of opinion among CIA staff regarding these issues; and recommendations for actions to policymakers from staff members.

Payne Decl. ¶ 42. A declaration is entitled to a presumption of good faith, which can only be rebutted by evidence of bad-faith and not by purely speculative claims. *See SafeCard Services*, 926 F.2d at 1200. Here, Defendant conducted a "a line-by-line review of the OPR Report to identify and release all reasonably segregable, nonexempt portions from it," Payne Decl. ¶ 53, and voluntarily disclosed additional material that was previously redacted on seven pages. Def.'s Mem. at 5. Because the declaration sufficiently details its rationale for redaction, the Court finds that Defendant has satisfied its burden as to its redactions pursuant to the deliberative process privilege under exemption (b)(5).[3]

[3] The redactions identified on Exhibit A for which "(b)(5)" is listed pursuant to the deliberative process privilege are Item Nos. 14, 16, 18, 20, 24, 29, 35, 38, 39, 42, 46, 49, 50, 57, 61, 64, 65, 66, 70, 73, 75, 76, 77, 78, 80, 82, 86, 91, 93, 95, 96, 100, 102, 103, 106, 107, 110, 111, 112, 113, 114, 116, 123, 134, 135, 137, 138, 140, 141, 143, 144, 146, and 147. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(5). All of these redactions were also

2. Attorney-Client/Attorney Work Product Privilege

The attorney-client privilege exists "to assure that a client's confidences to his or her attorney will be protected, and therefore encourage clients to be as open and honest as possible with attorneys." *Coastal States Gas Corp.,* 617 F.2d at 862. "The privilege is not limited to communications made in the context of litigation or even a specific dispute, but extends to all situations in which an attorney's counsel is sought on a legal matter." *Id.* The attorney work-product privilege "provides a working attorney with a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." *Id*. at 864. But unlike the attorney-client privilege, the attorney work product is "limited to documents prepared in contemplation of litigation." *Id*.

Plaintiffs argue that the government fails to justify its withholding based upon these privileges because: (1) "many of the portions of the Report withheld under Exemption 5 appear to contain information that is segregable, purely factual, or adopted or incorporated as policy or into practice, and may not, therefore be withheld;" and (2) the Government has failed to show that the Report was prepared "in anticipation of litigation." Pls.' Mem. at 29. The key word in the former argument is "appear," evincing the speculative nature of the Plaintiffs' assertion.

The Court notes again that a declaration is entitled to a presumption of good faith, which can only be rebutted by evidence of bad-faith and not by purely speculative claims. *See SafeCard Services*, 926 F.2d at 1200. Review Officer Payne declares, contrary to Plaintiffs claims, that she:

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redacted under exemption (b)(1) and (3), with the lone exceptions of 14, 76, and 134. Item Nos. 14, 76, and 147 are also properly redacted under the attorney client privilege, *see* fn. 4 *infra*, and the attorney work product privilege, *see* fn. 5 *infra*.

> conducted a line-by-line review of the OPR Report to identify and release all reasonably segregable, nonexempt portions from it. Based on this review, I have determined that the information released to the Plaintiffs has been released in segregable form while the remaining information is exempt from disclosure under the FOIA exemptions described above.

Payne Decl. ¶ 53. Without evidence of Defendant's bad-faith or contradictory evidence, Plaintiffs' speculative argument fails, and the Court shall credit the declaration of Review Officer Payne with the good faith presumption due to it.

In making its argument that the document was not created "in anticipation of litigation," which would only apply to the attorney work-product privilege, Plaintiffs admit "all of the OLC memos, which were the product of legal advice sought by the CIA, confirm that the purpose of the CIA's requests was to assure compliance with the law, not to prepare for litigation." *Id*. at 30. In doing so, Plaintiffs concede that the OLC memo is attorney-client privileged material because it is a "situation[] in which an attorney's counsel is sought on a legal matter." *Coastal States Gas Corp.,* 617 F.2d at 862. This is further cemented by the declaration of Review Officer Payne, which, again, is accorded a presumption of good faith:

> The redactions identified on the attached chart for which the CIA has asserted the attorney-client privilege contain confidential communications between CIA staff and the CIA's legal advisors (including both attorneys within the CIA's Office of General Counsel and attorneys from the Department of Justice, acting in their capacity as legal advisors to the CIA), as well as communications among the CIA's legal advisors that reflect information provided by their client.

Payne Decl. ¶ 45. As such, Defendant has sufficiently stated its case supporting its withholding of information under the attorney-client privilege.[4]

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[4] The redactions identified on Exhibit A for which "(b)(5)" is listed pursuant to the attorney-client privilege are Item Nos. 14, 16, 18, 24, 29, 35, 38, 39, 42, 49, 57, 75, 76, 77, 78,

Regarding the attorney work-product privilege, Defendant, recognizing that the attorney work-product doctrine is only for the "anticipation of criminal, civil, or administrative proceedings," *id*. at ¶ 46, declared that "[t]he CIA's purpose in requesting advice from the Justice Department was the prospect of criminal, civil, or administrative litigation related to the program." *Id*. at ¶ 47. Again, without evidence of bad-faith or contrary evidence, *see SafeCard Services*, 926 F.2d at 1200, the Court will credit the declaration and will find that it has sufficiently stated its case supporting its withholding of information under the attorney work-product privilege.[5]

3. Presidential communications privilege

The presidential communications privilege is a recognized privilege based on the necessity of candor from presidential advisers and to provide "[a] President and those who assist him . . . [with] freedom 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." *United States v. Nixon*, 418 U.S. 683, 708 (1974). This privilege extends to communications authored or received in response to a solicitation by members of a presidential adviser's staff, since in many instances advisers must rely

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80, 86, 91, 93, 95, 96, 100, 103, 106, 112, 116, 118, 123, 134, 135, 137,138, 140, 141, 143, 144, 146, and 147. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(5). All of these redactions were also properly redacted under exemption (b)(1) and (3), with the lone exceptions of Item Nos. 14, 76, and 134. Item Nos. 14, 76, and 147 are also properly redacted under the deliberative processing privilege, *see* fn. 3 *supra*, and the attorney work product privilege, *see* fn. 5 *infra*.

[5] The redactions identified on Exhibit A for which "(b)(5)" is listed pursuant to the attorney work product privilege are Item Nos. 14, 16, 18, 24, 29, 35, 38, 39, 42, 49, 57, 75, 76, 77, 78, 80, 86, 91, 93, 95, 96, 100, 103, 106, 112, 116, 118, 123, 134, 135, 137,138, 140, 141, 143, 144, 146, and 147. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(5). All of these redactions were also properly redacted under exemption (b)(1) and (3), with the lone exceptions of Item Nos. 14, 76, and 134. Item Nos. 14, 76, and 147 are also properly redacted under the deliberative processing privilege, *see* fn. 3 *supra*, and the attorney client privilege, *see* fn. 4 *supra*.

on their staff to investigate an issue and formulate the advice to be given to the President. *See In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir.1997).

Plaintiffs argue that the presidential communications privilege "is not applicable in this instance because there is no evidence that the withheld material was related to the presidential decisionmaking process." Pls.' Mem. at 31. This is not so. Despite Plaintiffs' protests otherwise, Review Officer Payne's declaration is sufficient evidence that the withheld material was related to the presidential decisionmaking process:

> The passages over which the presidential communications privilege is being asserted contain information reflecting communications between senior presidential advisors and officials from the CIA and the Department of Justice. They describe meetings convened or attended by senior members of the President's national security team and briefings provided to them by Executive Branch officials; they also reflect opinions voiced or questions posed by these same senior presidential advisors. This withheld information memorializes communications between Executive Branch officials and senior presidential advisors, and among senior presidential advisors, that related to advice on presidential decision-making.

Payne Decl. ¶ 51. Absent a showing of bad faith or contradictory evidence, *see SafeCard Services*, 926 F.2d at 1200, the Court will again credit this declaration in regard to this asserted privilege.

Plaintiffs argue alternatively that, even if the privilege is applicable, it can be overcome by a showing of compelling need, *see Judicial Watch v. DOJ*, 365 F.3d 1108, 1114 (D.C. Cir. 2004), which they argue is the "public's interest in disclosure of the discussions that resulted in the authorization of harsh and unlawful interrogation techniques." Pls.' Mem. at 32. While the Court recognizes the public's interest, this interest does not overcome the need for frank discussions on serious issues that confront a President. Without a free and candid dialectic, the President cannot be properly armed with the tools required to make difficult decisions on consequential issues. Because

the declaration sufficiently details its rationale for redaction, and because the public's interest does not overcome the privilege in this case, the Court finds that Defendant has satisfied its burden as to the limited redactions withheld pursuant to the presidential communications privilege.[6]

C. Exemption 6

FOIA provides an exemption from disclosure of materials involving personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552(b)(6). Under exemption (b)(6), the "presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Washington Post Co. v. United States Dep't of Health & Human Services*, 690 F.2d 252, 261 (D.C. Cir. 1982). To support such a redaction, an individual's privacy rights are balanced against the public's interest in disclosure, and only when the invasion of the privacy interest is clearly unwarranted will the redaction survive under the exemption. *See id.* One factor that may bear on the public interest is "the level of responsibility held by a federal employee." *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984). Further, individuals "have a strong [privacy] interest in not being associated unwarrantedly with alleged criminal activity." *Id.* at 91–92.

Plaintiffs seek the disclosure of any information related to one specific DOJ attorney, Jennifer Koester, the identity of whom Plaintiffs claim has been redacted under exemption (b)(6).

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[6] The redactions identified on Exhibit A for which "(b)(5)" is listed pursuant to the presidential communications privilege are Item Nos. 24, 29, 46, 49, 78, 85, 86, and 137. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(5). All of these redactions were also properly redacted under exemption (b)(1) and (3). With the exception of Item Nos. 46 and 85, all of the above Item Nos. are also properly redacted under the deliberative processing privilege, *see* fn. 3 *supra*, the attorney client privilege, *see* fn. 4 *supra*, and the attorney work product privilege, *see* fn. 5 *supra*. Item Nos. 46 and 85 are also properly redacted under the deliberative processing privilege, *see* fn. 3 *supra.*

Defendants state that the redactions pursuant to exemption (b)(6) "consist[] of names of lower-level Department employees and other identifying information (e.g. educational background, marital status, non-federal employment background)." Margolis Decl. ¶ 12. Mr. Margolis also declares that these individuals were not decisionmakers, and that the Report "did not conclude that any of these low-level employees committed professional or other misconduct in connection with their role in that work." *Id*. Lastly, Mr. Margolis declares there is little to no public interest in the "disclosure of the identities of lower-level Department personnel who were not responsible for the Department decision in the development of the CIA's detention and interrogation program." *Id*. ¶ 14. Plaintiffs disagree and argue that the public's interest in knowing only Jennifer Koester's involvement in the Report outstrips her privacy interest, thereby failing to reach the requisite "clearly unwarranted" level of invasion of her privacy.

The Court finds the Defendant's argument more persuasive, based upon the particular facts in this case. First, the redacted individuals, who may or may not include Ms. Koester, are minor players, and as such, the public's interest in their involvement is diminished. Of note, all of the major decisionmakers are disclosed within the Report. *See generally* Pls.' Mem., Exs. 4–9. Second, the redacted individuals have a privacy right in "not being associated unwarrantedly with alleged criminal activity." *Stern*, 737 F.2d at 91–92. While the redacted individuals have never been charged criminally, Plaintiffs essentially allege that any individual involved in the policy decisions concerning "enhanced interrogation techniques" violated the law. This is especially troublesome here, where the low-level individuals were not decisionmakers, have not been found to have "committed professional or other misconduct in connection with their role in that work," Margolis Decl. ¶ 12, yet would undoubtedly be linked to those decisionmakers who were found to have committed misconduct. Third,

the Court finds the public's interest is minimally served by knowing the personal information of low-level individuals who worked under those decisionmakers, including Ms. Koester.[7] After balancing these competing interests, the Court finds Defendant has satisfied its burden of showing that the disclosure of redacted materials under exemption (b)(6) would constitute a clearly unwarranted invasion of personal privacy.[8]

D. Segregability

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). This is established by the good-faith declaration of Review Officer Payne:

> I have conducted a line-by-line review of the OPR Report to identify and release all reasonably segregable, nonexempt portions from it. Based on this review, I have determined that the information released

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[7] Further, it is of no moment that Ms. Koester's name has appeared unredacted in the Report. First, just because Ms. Koester has been named in a single footnote, see Pls.' Mem., Ex. 5, at 50 n.53, does not mean that she has lost all privacy rights. *See Canaday v. United States Citizenship & Immigration Servs.*, 545 F. Supp. 2d 113, 117 (D.D.C. 2008) (finding that there "is a privacy interest in the identifying information of the Federal employees even though the information may have been public at one time"); *see also Halpern v. FBI*, 181 F.3d 279 (2d Cir.1999) ("Confidentiality interests cannot be waived through prior public disclosure or the passage of time."). Second, this lone disclosure of her name does not make reference back to any other redactions, thus it is readily distinguishable from *Hall v. United States DOJ*, 552 F. Supp. 2d 23, 31 (D.D.C. 2008), wherein the Court ordered disclosure of redacted statements that were unredacted in other portions of the document. Lastly, Defendant may have waived any ability to redact the lone redaction of Ms. Koester's name within the footnote, but it has not waived its ability to invoke exemption (b)(6) throughout the rest of the Report as to any other material where disclosure would constitute a clearly unwarranted invasion of personal privacy, including material related to Ms. Koester's name.

[8] The redactions identified on Exhibit A for which "(b)(6)" is listed are Item Nos. 3-7, 9-11, 21-28, 30-34, 37, 40-45, 47-49, 52-56, 58, 69, 73, 78-80, 82, 88-89, 92, 94, 115, 117, 119-22, 124-33, 136, 138-39, and 148-52. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(6). A substantial number of these redactions are also redacted under exemptions (b)(1), (3), and (5).

> to the Plaintiffs has been released in segregable form while the remaining information is exempt from disclosure under the FOIA exemptions described above.

Payne Decl. ¶ 53. The Court credits this declaration and thus finds that the requirements of segregability have been met.

Further, FOIA requires only satisfaction of one exemption to refuse disclosure. *See generally* 5 U.S.C. § 552(b); *see ACLU*, 2011 U.S. App. LEXIS 1271, *8 fn.2. Each of these redactions under exemptions (b)(1), (3), and three privileges asserted under exemption (b)(5) are properly redacted under other exemptions, therefore there are multiple layers providing support for the withholding of this information. This is similarly true for a number of redactions under exemption (b)(6).

IV. CONCLUSION

"Summary judgment is warranted on the basis of agency affidavits when the affidavits describe 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." *Larson*, 565 F.3d at 862. This is precisely what has occurred in this case. For the foregoing reasons, Defendant's Motion for Summary Judgment [Dkt. # 7] will be **GRANTED**, and Plaintiffs' Cross-Motion for Partial Summary Judgment [Dkt.# 8] will be **DENIED**. This case will be dismissed. A memorializing Order accompanies this Memorandum Opinion.

Date: February 14, 2010

/s/
ROSEMARY M. COLLYER
United States District Judge