17-3399

IN THE

United States Court of Appeals

FOR THE

Second Circuit

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
Plaintiffs–Appellants,

– v. –

NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF JUSTICE, and UNITED STATES DEPARTMENT OF STATE,
Defendants–Appellees.

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

SPECIAL APPENDIX

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***American Civil Liberties Union, et al. v. National Security Agency, et al.*, No. 17-3399 (2d Cir.)**

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

-against-

NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, and DEPARTMENT OF STATE,

Defendants.

13 Civ. 09198 (KMW) (JCF)

MEMORANDUM OPINION AND ORDER

KIMBA M. WOOD, District Judge:

Plaintiffs, the American Civil Liberties Union and the American Civil Liberties Union Foundation, bring this action challenging the nondisclosure of information requested by Plaintiffs pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), from Defendants, the United States National Security Agency ("NSA"), the United States Central Intelligence Agency ("CIA"), the United States Department of Defense ("DoD"), the United States Department of Justice ("DOJ"), and the United States Department of State ("State"). The parties each move for partial summary judgment on the adequacy of certain agencies' searches and the applicability of certain FOIA exemptions to 150 responsive documents that were partially or fully withheld by Defendants. Over the course of briefing these motions, the parties narrowed the range of disputes and focused on certain issues. The Court's discussion below follows the structure of the parties' briefing and is intended to further narrow the range of open issues. For the reasons stated below, Defendants' motion is GRANTED in part and DENIED in part, and Plaintiffs' motion is DENIED without prejudice.

I. BACKGROUND

A. Executive Order 12,333

On December 4, 1981, President Ronald Reagan signed Executive Order 12,333 ("EO 12,333"), to "provide for the effective conduct of United States intelligence activities and the protection of constitutional rights." 46 Fed. Reg. 59,941, 59,941 (Dec. 4, 1981), *amended by* E.O. 13,284, 68 Fed. Reg. 4077 (Jan. 23, 2003), E.O. 13,355, 69 Fed. Reg. 53,593 (Aug. 27, 2004), *and* E.O. 13,470, 73 Fed. Reg. 45,328 (July 30, 2008), https://www.cia.gov/about-cia/eo12333.html. The executive order stated that"[t]imely, accurate, and insightful information about the activities, capabilities, plans, and intentions" of foreign entities is "essential to informed decisionmaking in the areas of national security, national defense, and foreign relations," such that "[c]ollection of such information is a priority objective and will be pursued in a vigorous, innovative, and responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded." E.O. 12,333 § 2.1. E.O. 12,333 is one of the primary authorities that allow agencies of the intelligence community, such as the NSA and other Defendants, to gather foreign intelligence. *See, e.g.*, NSA, *Frequently Asked Questions*, http://nsa.gov/about/faqs/oversight-faqs.shtml. The Order allows for the collection, retention, and dissemination of information concerning United States citizens, at home and abroad, in certain limited situations, such as information obtained incidentally to a lawful foreign intelligence investigation. E.O. 12,333 § 2.3(C); *see also id.* §§ 2.3 to .4. Questions have been raised about whether agencies such as the NSA have been collecting data about U.S. citizens that are only tangentially related to foreign investigations. *See* Pl. Mem. 1-3, ECF No. 70.[1]

[1] *See also, e.g.*, John Napier Tye, *Meet Executive Order 12333: The Reagan Rule that Lets the NSA Spy on Americans*, Wash. Post (July 18, 2014), https://www.washingtonpost.com/opinions/meet-executive-order-12333-

B. The FOIA Requests

On May 13, 2013, Plaintiffs served substantially similar FOIA requests on seven federal entities: CIA; State; NSA; the Defense Intelligence Agency ("DIA"), an agency within DoD; and three divisions of DOJ: the Federal Bureau of Investigation ("FBI"), the National Security Division ("NSD"), and the Office of Legal Counsel ("OLC"). Second Am. Compl. ¶ 18, ECF No. 44. The request sought from each agency records (1) construing or describing the scope of that agency's authority under E.O. 12,333; (2) describing the minimization procedures used by the agency; and (3) describing the standards that must be satisfied for collecting, acquiring, or intercepting communications. *Id.* ¶ 19.

After corresponding with the agencies and exhausting administrative remedies, Plaintiffs filed this case on December 30, 2013, ECF No. 1, and an amended complaint on February 18, 2014, ECF No. 17. In a stipulation filed on May 9, 2014, the parties agreed to limit the scope of the FOIA requests. ECF No. 30 ("Stipulation"). The Stipulation required NSA, CIA, DIA, FBI, and State to search for and produce five categories of documents:

a. Any formal regulations or policies relating to that Agency's authority under EO 12,333 to undertake "Electronic Surveillance" (as that term is defined in EO 12,333) that implicates "United States Persons" (as that term is defined in EO 12,333), including regulations or policies relating to that Agency's acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.

b. Any document that officially authorizes or modifies under EO 12,333 that Agency's use of specific programs, techniques, or types of Electronic Surveillance that implicate United States Persons, or documents that adopt or modify official rules or procedures for the Agency's acquisition, retention, dissemination, or use of information or communications to, from, or about United States persons under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.

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the-reagan-rule-that-lets-the-nsa-spy-on-americans/2014/07/18/93d2ac22-0b93-11e4-b8e5-d0de80767fc2_story.html. *But see* Alexander W. Joel, *The Truth About Executive Order 12333*, Politico (Aug. 18, 2014), http://www.politico.com/magazine/story/2014/08/the-truth-about-executive-order-12333-110121.

c. Any formal legal opinions addressing that Agency's authority under EO 12,333 to undertake specific programs, techniques, or types of Electronic Surveillance that implicates United States Persons, including formal legal opinions relating to that Agency's acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.

d. Any formal training materials or reference materials (such as handbooks, presentations, or manuals) that expound on or explain how that Agency implements its authority under EO 12,333 to undertake Electronic Surveillance that implicates United States Persons, including its acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.

e. Any formal reports relating to Electronic Surveillance under EO 12,333 implicating United States Persons, one of whose sections or subsections is devoted to (1) the Agency's compliance, in undertaking such surveillance, with EO 12,333, its implementing regulations, the Foreign Intelligence Surveillance Act, or the Fourth Amendment; or (2) the Agency's interception, acquisition, scanning, or collection of the communications of United States Persons, whether "incidental" or otherwise, in undertaking such surveillance; and that are or were:

i. Authored by the Agency's inspector general or the functional equivalent thereof;
ii. Submitted by the Agency to Congress, the Office of the Director of National Intelligence, the Attorney General, or the Deputy Attorney General; or
iii. Maintained by the office of the Agency's director or head.

Stipulation ¶ 3. For the first three categories, the parties agreed that each agency would search for and provide documents "currently in use or effect, or that were created or modified on or after September 11, 2001." *Id.* ¶ 7(a). For the fourth category, each agency would search for and provide documents "currently in use or effect." *Id.* ¶ 7(b). For the fifth category, each agency would initially search for and provide documents created or modified on or after September 11, 2001, after which the parties would confer about whether searching for older documents could be undertaken without being unduly burdensome. *Id.* ¶ 7(c). The parties also agreed to limit CIA's search to certain offices for certain of the requests. *Id.* ¶ 6.

Plaintiffs and NSD separately refined the FOIA request, and, by letter dated July 29, 2014, Plaintiffs submitted a new FOIA request that substantially mirrored the requests in the Stipulation. *See* Decl. of John Bradford Wiegmann ("NSD Decl.") ¶ 6, ECF No. 65; *see also* Stipulation ¶ 4; ECF No. 50.

Plaintiffs and OLC separately agreed to narrow the scope of the FOIA request. Stipulation ¶ 2. OLC agreed to search for and produce "[a]ll OLC final advice" that concerned: (1) "the scope and application of the authority of the United States Government to conduct electronic surveillance of the communications of United States persons pursuant to Executive Order 12333," and (2) "the meaning of the terms 'collection', 'acquisition', and 'interception' as applied to electronic surveillance conducted pursuant to Executive Order 12333." Second Am. Compl. Ex. C, at 1, 3.

Following each agency's search and production, which concluded May 1, 2015, the parties discussed their disagreements regarding the lawfulness of the agencies' withholdings and redactions and the adequacy of the agencies' searches. Joint Letter 1, ECF No. 52. By joint letter dated December 8, 2015, the parties proposed cross-motions for partial summary judgment related to the agencies' searches and a set of 177 documents that were partially or fully withheld. *Id.* at 2; *see also* Def. Mem. Ex. A, ECF No. 59; Decl. of Jonathan Manes ("Manes Decl.") Ex. A ("Pl. Index"), ECF No. 71. Specifically, Plaintiffs contend that four categories of documents were improperly withheld: formal legal memoranda, Inspector General and compliance reports, Rules and Regulations, and training and briefing materials. Pl. Mem. 5-9; *see also* Pl. Index. The letter states that should the Court find that the searches or withholdings were improper, Defendants would agree to conduct further searches or re-process the document withholdings, as appropriate. Joint Letter 2.

In their reply memorandum dated July 8, 2016, Defendants notified the Court that State had identified an additional set of documents that it needed to review for responsiveness to Plaintiffs' FOIA request. *See* Def. Reply Mem. 56-57, ECF No. 75; Suppl. Decl. of Erin F. Stein ("Suppl. State Decl.") ¶ 2, ECF No. 81. On August 18, 2016, the Court gave Defendants additional time to review those documents for responsiveness. ECF No. 83. By letter dated September 26, 2016, Defendants notified the Court that State had completed its review and located no additional documents responsive to the FOIA request. ECF No. 86. This case was transferred to the undersigned on November 22, 2016.

II. LEGAL STANDARD

A. Summary Judgment

A moving party is entitled to summary judgment when the record shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Feingold v. New York*, 366 F.3d 138, 148 (2d Cir. 2004). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Material facts are those that, under the governing law, may affect the outcome of a case. *Id.* The moving party must establish the absence of a genuine dispute of material fact by citing to particulars in the record. Fed. R. Civ. P. 56(a), (c); *Celotex*, 477 U.S. at 322-25; *Koch v. Town of Brattleboro*, 287 F.3d 162, 165 (2d Cir. 2002). If the movant satisfies this burden, the opposing party must then "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). When deciding the motion, the Court must view the record in the light most favorable to the non-moving party, *O'Hara v.*

Weeks Marine, Inc., 294 F.3d 55, 61 (2d Cir. 2002), although speculation and conclusory assertions are insufficient to defeat summary judgment, *see Niagara Mohawk Power Corp. v. Jones Chem. Inc.*, 315 F.3d 171, 175 (2d Cir. 2003).

B. FOIA

"Congress intended FOIA to 'permit access to official information long shielded unnecessarily from public view,'" *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011) (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973)), and accordingly FOIA "calls for 'broad disclosure of Government records,'" *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 111 (2d Cir. 2014) (quoting *CIA v. Sims*, 471 U.S. 159, 166 (1985)). The Government's disclosure obligation is subject to a number of statutory exemptions. *Id.* "However, 'consistent with the Act's goal of broad disclosure, these exemptions have consistently been given a narrow compass.'" *Id.* (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8 (2001)).

FOIA cases are regularly resolved on summary judgment. "In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (citations omitted). "[A]ll doubts as to the applicability of the exemption must be resolved in favor of disclosure." *N.Y. Times*, 756 F.3d at 112 (quoting *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009)).

When an agency withholds records and the requestor challenges such withholdings, the district court must "determine the matter *de novo*, and may examine the contents of . . . agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions." 5 U.S.C. § 552(a)(4)(B). In *Vaughn v. Rosen*, the Court of Appeals for

the D.C. Circuit held that to adequately justify an alleged exemption, the Government should provide "a relatively detailed analysis in manageable segments." 484 F.2d 820, 826 (D.C. Cir. 1973). Thus, agencies submit *Vaughn* indexes listing withheld documents and claimed exemptions and *Vaughn* affidavits that describe the withheld documents and the rationale for withholding them. *See ACLU v. U.S. Dep't of Justice*, No. 13 Civ. 7347, 2016 WL 5394738, at *4 (S.D.N.Y. Sept. 27, 2016). A *Vaughn* submission serves three functions:

> [1] it forces the government to analyze carefully any material withheld, [2] it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, [3] and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court.

Halpern v. FBI, 181 F.3d 279, 291 (2d Cir. 1999) (alterations in original) (quoting *Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 349 (D.C. Cir. 1987)). "The titles and descriptions of documents listed in a *Vaughn* index usually facilitate the task of asserting and adjudicating the requester's challenges to the Government's claims of exemption" by "giv[ing] the court and the challenging party a measure of access without exposing the withheld information." *N.Y. Times Co. v. U.S. Dep't of Justice*, 758 F.3d 436, 439 (2d Cir.), *supplemented by* 762 F.3d 233 (2d Cir. 2014).

Where "such declarations are 'not controverted by either contrary evidence in the record nor by evidence of agency bad faith,' summary judgment for the government is warranted." *Id.* (quoting *Wilner*, 592, F.3d at 73). "When the claimed exemptions involve classified documents in the national security context, the Court must give '*substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record.'" *N.Y. Times*, 756 F.3d at 112 (quoting *ACLU v. Dep't of Justice*, 681 F.3d 61, 69 (2d Cir. 2012)); *see also Wilner*, 592 F.3d at 76 ("[Courts] have consistently deferred to executive affidavits predicting harm to national security." (quoting *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927

(D.C. Cir. 2003))). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner*, 592 F.3d at 73 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)). Accordingly, "the government's burden is a light one." *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 624 (D.C. Cir. 2011). However, *Vaughn* submissions are insufficient where "the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *Quinon v. FBI*, 86 F.3d 1222, 1227 (D.C. Cir. 1996) (quoting *Hayden v. NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)).

The legal standards applicable to the adequacy of FOIA searches and the four FOIA exemptions connected to these motions are discussed in the relevant sections below.

III. DISCUSSION

A. Adequate Searches

Plaintiffs challenge the adequacy of the searches conducted by CIA, FBI, and NSD. Pl. Reply 38, 44-45, ECF No. 82.

i. Legal Standard

"To prevail on summary judgment, . . . the defending 'agency must show beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (quoting *Weisberg v. U.S. Dep't of Justice,* 705 F.2d 1344, 1351 (D.C. Cir. 1983)). "The adequacy of a search is not measured by its results, but rather by its method." *N.Y. Times*, 756 F.3d at 124. "When a request does not specify the locations in which an agency should search, the agency has discretion to confine its inquiry to a central filing system if additional searches are unlikely to produce any marginal return; in other words, the agency generally need not 'search every record system.' However, an agency 'cannot limit its search to only one record system if there are others that are

likely to turn up the information requested.'" *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) (citation omitted) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)).

"[T]o establish the adequacy of a search, agency affidavits must be relatively detailed and nonconclusory, and submitted in good faith." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 488-89 (2d Cir. 1999) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). "A reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched, is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment." *Oglesby*, 920 F.2d at 68; *see Iturralde v. Comptroller of the Currency,* 315 F.3d 311, 313-14 (D.C. Cir. 2003). However, "the law demands only a 'relatively detailed and nonconclusory' affidavit or declaration." *Adamowicz v. IRS*, 402 F. App'x 648, 650 (2d Cir. 2010) (quoting *Grand Cent.,* 166 F.3d at 488-89). "[A]n agency's search need not be perfect, but rather need only be reasonable," and the question is "whether the search was reasonably calculated to discover the requested documents." *Grand Cent.,* 166 F.3d. at 489.

ii. Application

a. FBI

Plaintiffs lodge two objections to FBI's search for responsive records. First, Plaintiffs argue that FBI has "failed to provide adequate detail about which files were searched, by whom, using which search terms." Pl. Reply 39; *see also* Pl. Mem. 58. Second, Plaintiffs contend that FBI improperly limited its search to only a few divisions and units. Pl. Mem. 57; Pl. Reply 40.

An agency affidavit needs to be "reasonably detailed" in "setting forth the search terms and the type of search performed." *Oglesby*, 920 F.2d at 68. For instance, in *Morley v. CIA*, the D.C. Circuit found insufficient a declaration that described that a FOIA request was "divvied up between multiple component units within the CIA" but "provide[d] no information about the search strategies of the components charged with responding to" the request nor "any indication of what each directorate's search specifically yielded." 508 F.3d at 1122. Here, FBI tasked four separate units with searching for responsive documents, but provided no details about how the searches were undertaken. FBI merely states that it "designed and carried out a search tailored to the described scope of responsive records sought," Decl. of David M. Hardy ("FBI Decl.") ¶ 23, ECF No. 63, but that "given the passage of time and the numerous individuals involved in its search, FBI is not in a position to detail all search steps taken by all of its tasked employees, but FBI tasked and gave appropriate search instructions to all relevant personnel and components, and . . . FBI reasonably believes that the search was performed as tasked," Suppl. Decl. of David M. Hardy ("Suppl. FBI Decl.") ¶ 4, ECF No. 78. Although FBI is not required to detail *all* search steps taken, it must "supply more than 'glib government assertions of complete disclosure or retrieval.'" *Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec.*, No. 11 Civ. 3235, 2012 WL 6809301, at *1 (S.D.N.Y. Dec. 27, 2012) (quoting *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982)). As Plaintiffs rightly state, "searching for records without tracking how those searches are conducted makes it impossible for a reviewing court (or plaintiffs) to determine what the agency has actually done to search its files." Pl. Reply 40. FBI must, at the least, detail its search with greater specificity, and, if FBI is unable to do so, it may be necessary to conduct, and properly document, additional searches.

Second, Plaintiffs contend that FBI improperly limited its search to only five offices. FBI circulated the FOIA request to FBI's Corporate Policy Office, Counterintelligence Division, Counterterrorism Division, Training Division, and the Office of the General Counsel Discovery Processing Units. FBI Decl. ¶¶ 21-22. Plaintiffs note two additional divisions where, they suspect, additional documents may reside: the FBI Intelligence Branch, Pl. Reply 40,[2] and the units outside of the Discovery Processing Units in the Office of the General Counsel, Pl. Mem. 58 n.22 ("It is unclear whether this search of the 'Discovery Processing Units' would encompass *all* of the responsive files in the [Office of the General Counsel], or solely those that happen to reside within that particular unit."). FBI has discretion to focus its inquiry if additional searches are unlikely to be fruitful, *Campbell*, 164 F.3d at 28, and has stated that the requests were sent to "locations where responsive documents were reasonably likely to be located," Suppl. FBI Decl. ¶ 4. FBI has further stated that "[t]here is no indication from the information located as a result of the targeted searches of the specified FBI HQ Divisions/Units that responsible material would reside in . . . any other location." FBI Decl. ¶ 23. FBI has not, however, stated that "no *other* record system was likely to produce responsive documents." *Oglesby*, 920 F.2d at 68 (emphasis added). FBI should confirm that no other record system is likely to contain responsive documents, clarify the scope of the search conducted in the Office of the General Counsel, and address whether the Intelligence Branch is likely to produce responsive documents.

[2] *See also, e.g.*, FBI, *About Us: Intelligence Branch*, https://www.fbi.gov/about/leadership-and-structure/intelligence-branch ("[The Intelligence Branch] is the strategic leader of the FBI's Intelligence Program, driving collaboration to achieve the full integration of intelligence and operations and proactively engaging with the Bureau's partners across the intelligence and law enforcement communities. . . . The Intelligence Branch is responsible for all intelligence strategy, resources, policies, and functions.").

b. NSD

Plaintiffs raise two objections to NSD's search. First, Plaintiffs note NSD's failure to provide any search terms used in identifying responsive documents. Pl. Mem. 57; Pl. Reply 42. Second, Plaintiffs take issue with NSD's method of identifying custodians by focusing exclusively on seven attorneys' files in two NSD offices. Pl. Mem. 56-57; Pl. Reply 41.

For the reasons discussed above, NSD's failure to identify any search terms or methods makes summary judgment in its favor inappropriate. *See, e.g.*, *Morley*, 508 F.3d at 1122. Accordingly, NSD is directed to explain its search with sufficient specificity, as outlined in this opinion.

Second, Plaintiffs challenge the scope of the NSD's search. NSD has explained that "[there] is no central NSD record repository or searchable database that contains all responsive records" and thus identified seven current NSD attorneys who "have worked on issues concerning electronic surveillance under" E.O. 12,333, and stated that "no other NSD personnel were likely to have responsive records that these seven attorneys did not also have." NSD Decl. ¶ 8; *see also* Suppl. Decl. of John Bradford Wiegmann ("Suppl. NSD Decl.") ¶ 11, ECF No. 80. Six of these attorneys work in the NSD's Office of Intelligence, and one attorney works in the NSD's Office of Law and Policy. NSD Decl. ¶ 8. The NSD also searched through historical policy files, NSD Decl. ¶ 9; Suppl. NSD Decl. ¶ 11, and concluded that "it is unlikely that any *additional significant records* would be located in the files of another employee within the Office of Law and Policy," Suppl. NSD Decl. ¶ 11 (emphasis added). This is insufficient: an agency may not limit a search because additional responsive documents may not be "significant." *Oglesby*, 920 F.2d at 68 (stating that agency affidavit must "aver[] that *all files likely to contain responsive materials* (if such records exist) were searched" (emphasis added)). In addition, the

time limitation agreed to in the Stipulation does not cover NSD, and the revised NSD FOIA request contains no time limitation whatsoever. *See* Second Am. Compl. Ex. G; Stipulation ¶¶ 3, 7. The Court is not convinced that NSD's method, of searching only present employees and then one historical database, is "reasonably calculated to uncover all relevant documents." *Morley*, 508 F.3d at 1114. Accordingly, the Court cannot conclude that NSD's search was adequate.

c. CIA

Plaintiffs identify two deficiencies with CIA's search: first, that CIA's explanation of its search methods—stating, for instance, that the agency "used broad search terms, such as '12333,'" Decl. of Antoinette B. Shiner ("CIA Decl.") ¶ 10, ECF No. 60—is insufficient; and second, that CIA has provided insufficient detail about the repositories it searched. Pl. Mem. 59-60; Pl. Reply 42-43.

On the first issue, CIA contends that "CIA's search was so comprehensive that it 'uncovered a large volume of duplicative documents and non-responsive records.'" Def. Reply 48 (quoting CIA Decl. ¶ 11). However, like FBI and NSD, CIA has failed to provide sufficient information for Plaintiffs or the Court to reasonably assess the search efforts undertaken. *See Morley*, 508 F.3d at 1122; *Oglesby*, 920 F.2d at 68. Neither the Court nor Plaintiffs are able to evaluate or confirm whether the duplicative and non-responsive results were attributable to the search's comprehensiveness or, for example, human error. Given the lack of information about the search methods used, the Court can only speculate about whether CIA's efforts were reasonably expected to produce the information requested. *See, e.g.*, *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 152-53 (D.D.C. 2013). The Court will therefore deny summary judgment to CIA on the adequacy of its search.

In describing the repositories it searched, CIA states that "CIA personnel consulted with Agency officials knowledgeable about this subject matter to identify the relevant databases and repositories containing such materials." CIA Decl. ¶ 9. CIA further describes the repositories in terms such as "the database maintained by the [Office of General Counsel] Division that is responsible for providing legal advice on complex or novel questions," "the relevant databases of the [Office of General Counsel] Division and the front offices of the Agency directorates," or "the relevant databases located in the Office of the Inspector General, the Office of Congressional Affairs, and the Director's area." *Id.* ¶ 10. Agency affidavits should sufficiently "'identify the searched files and describe at least generally the structure of the agency's file system' which renders any further search unlikely to disclose additional relevant information." *Katzman v. CIA*, 903 F. Supp. 434, 438 (E.D.N.Y. 1995) (quoting *Church of Scientology v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986), *aff'd*, 484 U.S. 9 (1987)). CIA must, at the least, provide a more complete explanation of the relevant databases that were searched.

* * *

Accordingly, Defendants' motion for summary judgment as to the adequacy of FBI's, NSD's, and CIA's searches is DENIED.

B. Exemption 5

i. Legal Standard

FOIA Exemption 5 protects from disclosure "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). "Stated simply," covered documents include those "which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, executive privilege)." *Tigue v. U.S. Dep't of*

Justice, 312 F.3d 70, 76 (2d Cir. 2002) (internal quotation marks and citation omitted). This exemption is "based on the policy of protecting the decision making processes of government agencies," and protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Brennan Ctr. for Justice v. U.S. Dep't of Justice*, 697 F.3d 184, 194 (2d Cir. 2012) (internal quotation marks and citation omitted). Three privileges are asserted under Exemption 5: deliberative process privilege, attorney-client privilege, and presidential communication privilege.

"An inter- or intra-agency document may be withheld pursuant to the deliberative process privilege if it is: (1) 'predecisional,' *i.e.*, 'prepared in order to assist an agency decisionmaker in arriving at his decision,' and (2) 'deliberative,' *i.e.*, 'actually . . . related to the process by which policies are formulated.'" *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (S.D.N.Y. 2005) (quoting *Grand Cent.*, 166 F.3d at 482); *see also Grand Cent.*, 166 F.3d at 482 ("The privilege protects recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." (internal quotation marks and citation omitted)).

Although Defendants bear the burden of proving the applicability of an exemption, *see Carney*, 19 F.3d at 812, Plaintiffs overstate the burden of specificity required of Defendants in asserting the deliberative process privilege. Plaintiffs argue that each agency is required to list, for each document, "(1) the role of the author and recipient of each document; (2) the function and significance of the document in a decision-making process; (3) the subject-matter of the document and the nature of the deliberative opinion; and (4) the number of employees among whom the document was circulated." Pl. Reply 15 (citing *Senate of P.R. v. U.S. Dep't of Justice*,

823 F.2d 574, 585 (D.C. Cir. 1987); *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 811 F. Supp. 2d 713, 743 (S.D.N.Y. 2011); *Auto. Club of N.Y., Inc. v. Port Auth.*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013)). Plaintiffs are correct that courts in this district have required that an agency state the "function and significance in the agency's decision[-]making process." *Nat'l Day Larborer*, 811 F. Supp. 2d at 743 (alteration in original) (quoting *N.Y. Times Co. v. U.S. Dep't of Def.*, 499 F. Supp. 2d 501, 515 (S.D.N.Y. 2007)); *see also Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982). However, the Second Circuit has held that, although an agency must "be able to demonstrate that, *ex ante,* the document for which executive privilege is claimed related to a specific decision facing the agency . . . the fact that the government does not point to a specific decision . . . does not alter the fact that the Memorandum was prepared to assist [agency] decisionmaking on a specific issue." *Tigue*, 312 F.3d at 80. In addition, *Automobile Club*'s requirement that a privilege log should include, *inter alia*, the number of recipients of a document is based on Local Rule 26.2 governing discovery in civil cases; Plaintiffs have not cited, nor can the Court find, support to suggest that this rule governs *Vaughn* indexes in FOIA cases.

Defendants also assert attorney-client privilege. "The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal assistance." *Brennan Ctr.,* 697 F.3d at 207 (quoting *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011)). "[T]he attorney-client privilege protects most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance." *Id.* (alteration in original) (quoting *In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007)).

Plaintiffs criticize Defendants' *Vaughn* indexes and declarations as insufficient to justify attorney-client privilege because they do not reveal the "identities of the authors and those who received copies of the withheld documents." Pl. Mem. 31; *see also id.* at 32 (citing *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 253-54 (D.C. Cir. 1977); *Adamowicz*, 552 F. Supp. 2d at 366); Pl. Reply 19-20. However, neither *Mead* nor *Adamowicz* requires so detailed a description. *Mead* rejected the assertion of attorney-client privilege because the Government gave "no indication as to the confidentiality of the information on which they are based." 566 F.2d at 253-54. *Adamowicz* found that the Government did not meet its burden of demonstrating attorney-client privilege where "through oversight or otherwise, [the Government failed to] actually state[] that the material withheld constitutes or reflects [attorney-client] communications." 552 F. Supp. 2d at 366. To meet their burden, Defendants need only indicate that the documents withheld as attorney-client communications are, indeed, confidential communications seeking or providing legal advice from government attorneys to their clients.

Finally, Defendants assert presidential communications privilege with respect to a narrow set of documents. "The privilege protects 'communications in performance of a President's responsibilities, . . . of his office, . . . and made in the process of shaping policies and making decisions.'" *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010) (alterations in original) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977)). "The presidential communications privilege 'covers final and post-decisional materials as well as pre-deliberative ones.'" *Id.* (quoting *In re Sealed Case,* 121 F.3d 729, 745 (D.C. Cir. 1997)). The privilege also protects communications involving senior presidential advisers, including "'both . . . communications which these advisers solicited and received from others as well as those they authored themselves,' in order to ensure that such advisers investigate issues and provide appropriate advice to the President." *Id.* (quoting *In re Sealed Case,* 121 F.3d at 752). The

privilege also extends to records memorializing or reflecting covered presidential communications. *Id.* (citing *Citizens for Responsibility & Ethics v. U.S. Dep't of Homeland Sec.*, No. 06 Civ. 0173, 2008 WL 2872183, at *3 (D.D.C. July 22, 2008)).

"The two long-recognized exceptions to Exemption 5 are: (1) adoption, *i.e.*, 'when the contents of the document have been adopted, formally or informally, as the agency position on an issue or are used by the agency in its dealings with the public'; and (2) working law, *i.e.*, 'when the document is more properly characterized as an opinion or interpretation which embodies the agency's effective law and policy.'" *ACLU*, 2016 WL 5394738, at *6 (quoting *Brennan Ctr.*, 697 F.3d at 195). "An 'opinion about the applicability of existing policy to a certain state of facts, like examples in a manual,' constitute working law and accordingly do not fall within the scope of the deliberative privilege. Documents that advise agency personnel of likely legal challenges and potential defenses, however, do not constitute working law." *N.Y. Times v. U.S. Dep't of Justice*, 101 F. Supp. 3d 310, 318 (S.D.N.Y. 2015) (citation omitted) (first quoting *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 868 (D.C. Cir. 1980); then citing *Delaney, Migdail & Young, Chartered v. IRS,* 826 F.2d 124, 127 (D.C. Cir. 1987)).

Plaintiffs take an overly broad view of what constitutes working law, particularly with respect to legal memoranda. Plaintiffs argue that "if the relevant policy-maker reviewed [a legal memorandum] and, on the basis of the analysis in that document, elected to take actions that [the memorandum's author] opined would be lawful, the underlying memo would become working law, as it would reflect the agency's view of 'what the law is.'" Pl. Reply 11 (internal quotation marks and citation omitted) (quoting *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997)). On the contrary, the Second Circuit has explained that "the exemption 'properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and

policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be.'" *Brennan Ctr.*, 697 F.3d at 196 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)). An agency must disclose a "final opinion[]" or a "statement[] of policy and interpretations which [has] been adopted by the agency." *Id.* at 201 (quoting *Sears*, 421 US. at 153). Reports or recommendations that have "no operative effect" do not need to be disclosed even where the agency action agrees with the conclusion of the report or recommendation. *Id.* (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)).

ii. Application

Plaintiffs contest the assertion of Exemption 5 privileges with respect to 109 documents that were withheld in full and 4 documents that were released with redactions. Pl. Mem. 15. Plaintiffs have raised four issues regarding Exemption 5. They contend that Defendants have failed to satisfy their burden of justifying either the deliberative process privilege or the attorney-client privilege. *Id.* 26-32. Plaintiffs also argue that the documents contain working law, thus falling into an exception to Exemption 5. *Id.* 16-26. Finally, Plaintiffs claim that Defendants have failed to justify their withholdings under the presidential communications privilege. *Id.* 15 n.4; Pl. Reply 20-22. The parties discuss deliberative process privilege with respect to documents from CIA, NSA, NSD, and OLC. *See* Def. Mem. 49-55 (discussing CIA, DIA, NSD, OLC, and NSA); *see also* Def. Reply 24 (DIA waiving its reliance on Exemption 5). Each of these is discussed in turn.

a. OLC

The Court finds that OLC has sufficiently justified its exemptions under the deliberative process and attorney-client privileges. Courts routinely find that OLC legal memoranda are

protected by the deliberative process privilege. *See, e.g.*, *N.Y. Times Co. v. U.S. Dep't of Justice*, 806 F.3d 682, 685-87 (2d Cir. 2015); *Brennan Ctr.*, 697 F.3d at 202-03. In addition, the Honorable Royce C. Lamberth of the United States District Court for the District of Columbia held that three of the documents at issue—OLC 4, 8, and 10—were properly withheld under Exemptions 1, 3, and 5 after *in camera* review. Def. Mem. 36 (citing *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, Nos. 06 Civ. 96, 06 Civ. 214, 2014 WL 1279280 (D.D.C. Mar. 31, 2014)). OLC's index describes the documents in question as legal memoranda, or cover notes to legal memoranda, regarding contemplated intelligence activities under E.O. 12,333. Decl. of Paul P. Colborn ("OLC Decl.") Ex. A, ECF No. 67; *see also* OLC Decl. ¶¶ 21, 27. Further, Plaintiffs do not mention OLC's invocation of these privileges in their opening memorandum. *See* Pl. Mem. 26-30 (discussing deliberative process privilege with respect to only CIA, DIA, NSA, and NSD). Accordingly, OLC has sufficiently justified that these documents are protected by the deliberative process and attorney-client privileges.

Plaintiffs argue that these OLC legal memoranda contain working law and are therefore not subject to Exemption 5. Pl. Mem. 18-26. In general, as the Second Circuit has recently held, OLC memoranda are not working law unless expressly adopted: "At most, they provide, in their specific contexts, legal advice as to what a department or agency 'is *permitted* to do,' but OLC 'did not have the authority to establish the "working law" of the [agency],' and its advice 'is not the law of an agency unless the agency adopts it.'" *N.Y. Times*, 806 F.3d at 687 (alteration in original) (quoting *Elec. Frontier Found. v. U.S. Dep't of Justice,* 739 F.3d 1, 8, 10 (D.C. Cir. 2014)). As the OLC declaration explains, "OLC provides advice and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch. OLC does not purport to make policy decisions, and in fact lacks authority to make such

decisions. OLC's legal advice and analysis may inform the decisionmaking of Executive Branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted." OLC Decl. ¶ 2.

Although Plaintiffs argue that these memoranda were relied upon as part of the regular reauthorization of the STELLAR WIND warrantless wiretapping program, there is no indication that these memoranda were "adopted, formally or informally, as the agency position on an issue" or "used by the agency in its dealings with the public." *Brennan Ctr.*, 697 F.3d at 195 (quoting *La Raza*, 411 F.3d at 356).

For example, document OLC 2 is a memorandum written by Theodore Olson in 1984. Plaintiffs discuss a 2007 memorandum—not produced as part of this litigation, but which has been published in the press—that quotes from OLC 2 to argue that OLC 2 contains working law. Hanes Decl. ¶ 10 & Ex. G; *see also* Pl. Mem. 24-25. However, the 2007 memorandum does not support Plaintiffs' argument. The 2007 memorandum cites the Olson memorandum as an example of support for the proposition that "analysis of information legally within the possession of the Government is likely neither a 'search' nor a 'seizure' within the meaning of the Fourth Amendment." Hanes Decl. Ex. G, at 4 n.4. The 2007 memorandum goes on to state that, "[i]n an abundance of caution, then, we analyze the constitutional issue on the assumption that the Fourth Amendment may apply even though the Government has already obtained the information lawfully." *Id.* The very fact that the 2007 memorandum conducts a Fourth Amendment inquiry is indicative that the 1984 memorandum was not "adopted, formally or informally, as the agency position on an issue." *Brennan Ctr.*, 697 F.3d at 195. Instead, this citation to the Olson memorandum is among the "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are

formulated" that lie at the heart of Exemption 5. *Sears, Roebuck*, 421 U.S. at 150 (quoting *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)).

Therefore, Defendant's motion for summary judgment is GRANTED with respect to Exemption 5 and the OLC memoranda.

b. NSD

NSD asserts Exemption 5 with respect to thirteen contested documents. *See* Def. Index 2. The documents are grouped below based on their content.

NSD 2 is a "draft of the DHS Procedures Governing Activities of the Office of Intelligence and Analysis that Affect United States Persons. . . . The Attorney General subsequently declined to approve the draft procedures submitted by the Secretary of Homeland Security and inter-agency negotiations over the content of these procedures remain ongoing to this day." Decl. of Arthur R. Sepeta ("DHS Decl.") ¶ 12, ECF No. 61. This document is clearly deliberative and pre-decisional. The Government has satisfied its burden to justify its withholding. Further, as a draft document where no policy has been made, this document could not have been adopted or become working law. Accordingly, this document is properly withheld.

NSD 9 and 36 are "classified OLC legal advice memoranda," similar to the other OLC memoranda discussed above. OLC Decl. ¶ 20. NSD 9 contains "OLC Legal Advice Memorandum to FBI General Counsel," and NSD 36 contains "OLC Legal Advice Memorandum on an NSA Program." NSD Decl. Ex A ("NSD *Vaughn* Index"), at 2, 6-7. Like the OLC memoranda discussed above, these documents are protected, at the least, by attorney-client privilege. As there is no indication that these documents contain working law or have been expressly adopted, they have been properly withheld.

NSD 18 is a "memorandum from the Attorney General to the President that reveals advice and recommendations relating to an NSA program." Decl. of Christina M. Butler ("OIP Decl.") ¶ 9, ECF No. 66. In addition to asserting deliberative process privilege, Defendants assert presidential communications privilege, which Plaintiffs do not contest except to the extent that they argue that the privilege is voided by the working law doctrine. *See* Pl. Mem. 15 n.4. However, because the presidential communications privilege protects "final and post-decisional materials as well as pre-deliberative ones," *In re Sealed Case*, 121 F.3d at 745, the working law exception does not apply to the presidential communication privilege. Indeed, Plaintiffs do not mention NSD 18 in their reply brief. *See generally* Pl. Reply. Accordingly, NSD 18 has been properly withheld.

NSD 17, much of NSD 4, and some of NSD 31 "discuss legal issues pertaining to an NSA program, set forth legal advice prepared by NSD lawyers for other attorneys to assist those other attorneys in representing the Government, and were sought by a decision-maker for the Government to obtain legal advice on questions of law and indeed reflect such advice." NSD Decl. ¶ 14; Decl. of David J. Sherman ("NSA Decl.") ¶¶ 45-46, ECF No. 64. *See generally* Classified NSA Decl. Even assuming, as Plaintiffs argue, that NSD adopted the recommendations outlined in these legal memoranda, these memoranda do not automatically become the working law of the agency. *See Brennan Ctr.*, 697 F.3d at 196; *see also* Suppl. NSD Decl. ¶ 10 ("NSD Document 4 is a recommendation memo; it does not have the force and effect of law within the Department, and it has not been adopted by the Department as a governing policy. . . . I am unaware of any official acknowledgment or release of NSD Document 4."). Exemption 5 applies to these documents and excerpts, and they were properly withheld.

NSD 12, 13, 14, 23, 33, and 49 are "memoranda from NSD attorneys to other Government attorneys, and they provide advice with respect to one or more NSA programs or other intelligence activities." NSD Decl. ¶ 15. *See generally* Classified NSA Decl. "The *vast majority* of these memoranda constitute legal advice prepared by NSD Lawyers to assist other attorneys who represented the Government. As a result, the *vast majority* of the memoranda are protected from disclosure under the attorney-client privilege." NSD Decl. ¶ 15 (emphases added). Similarly, the NSD Declaration states that the "*vast majority* of the memoranda contained in NSD 12, 13, 14, 23, 33, and 49" are pre-decisional and deliberative. NSD Decl. ¶18 (emphasis added). Accordingly, the Court cannot conclude that the attorney-client privilege or the deliberative process privilege applies to each of these documents in their entirety. The NSD is directed to supplement its submissions with detail about what portions of these documents do, and do not, contain legal advice or deliberative and pre-decisional analysis.

Therefore, Defendants' motion for summary judgment is GRANTED with respect to Exemption 5 for NSD 2, 4, 9, 17, 18, and 36, and DENIED with respect to Exemption 5 for NSD 12, 13, 14, 23, 33, and 49.

c. CIA

CIA asserts Exemption 5 with respect to memoranda, correspondences, and other documents, marked CIA 13 to CIA 94, that were withheld in full. *See* Def. Index 1. First, the Court notes that CIA's *Vaughn* index does not appear to assert Exemption 5 with respect to CIA 30 or 77, and these documents are discussed below regarding Exemptions 1 and 3. *See generally* CIA Decl. Ex. A ("CIA *Vaughn* Index").

CIA asserts deliberative process privilege and/or attorney-client privilege as to 74 legal memoranda: CIA 13-21, 23-29, 31-35, 37-41, 44, 47-76, and 78-94. *Id.* These documents

conveyed legal advice "by attorneys in the CIA's Office of General Counsel to Agency employees and by Department of Justice attorneys to CIA officials," CIA Decl. ¶ 23, and contain "factual information supplied by the clients in connection with their requests for legal advice, discussions between attorneys that reflect those facts, and legal analysis and advice provided to the clients," *id.* ¶ 26. The Court is satisfied that these documents are protected by attorney-client privilege and therefore need not also evaluate the deliberative process privilege. Plaintiffs contend that these documents may contain working law, as "the Office of General Counsel can and typically does establish the final *legal* position of the agency." Pl. Reply 12. In response, the CIA states that "CIA 13-21, 23-35, 37-41, 44, 47-76, 78, 79, [and] 92-94" are "not controlling interpretations of policy that the Agency relies upon in discharging its mission" but instead contain legal advice that "served as one consideration, among others, weighed by Agency personnel in deciding whether to undertake a particular intelligence activity." Suppl. Decl. of Antoinette B. Shiner ("Suppl. CIA Decl.") ¶ 3, ECF No. 76. Given this description, the Court finds that these documents do not constitute working law, and their being withheld was proper.

However, the omission of CIA 80-91 suggests that perhaps those memoranda do not fit the description above. CIA is invited to further supplement its description of these documents to better describe these documents so that the Court may determine whether these documents constitute working law. *See, e.g.*, *ACLU*, 2016 WL 5394738, at *13 ("If the agency fails to provide a sufficiently detailed explanation to enable the district court to make a de novo determination of the agency's claims of exemption, the district court then has several options, including inspecting the documents *in camera,* requesting further affidavits, or allowing the plaintiff discovery.").

CIA withheld four documents under the deliberative process privilege but not the attorney-client privilege: CIA 42, 43, 45, and 46. *See* CIA *Vaughn* Index. These documents are described in CIA's *Vaughn* index as "[c]lassified talking points and presentation notes prepared for briefing on E.O. 12333." *Id.* at 19-21. CIA describes these documents as:

> [T]alking points and outlines used by presenters who provided instruction on the legal requirements of E.O. 12333. They are not polished pieces, prepared remarks intended to be delivered as written, or handouts provided to trainees. Rather, these documents served as presentation tools for only the presenters that contained potential responses, legal examples and points to be made should certain questions arise. As such, these documents served as informal outlines or talking points that, although not necessarily linked to specific proposals or decisions, provided guidance on E.O. 12333 intended to inform subsequent Agency decision-making regarding the use of specific authorities.

CIA Decl. ¶ 24. The Court notes that if these documents are as informal as CIA suggests, they would not be responsive to the FOIA request, which sought "formal training materials or reference materials (such as handbooks, presentations, or manuals)." Stipulation ¶ 3. Given this description, the Court cannot conclude that Exemption 5 applies: for the exemption to apply, an agency must "be able to demonstrate that, *ex ante*, the document for which executive privilege is claimed *related to a specific decision facing the agency*," which these training materials do not do. *Tigue*, 312 F.3d at 80. Further, even if the deliberative process privilege applied, these documents may reflect working law. *See N.Y. Times*, 101 F. Supp. 3d at 318 ("An 'opinion about the applicability of existing policy to a certain state of facts, like examples in a manual,' constitute working law . . . ." (quoting *Coastal States Gas Corp.*, 617 F.2d at 868)). Accordingly, Defendants have not met their burden with respect to CIA 42, 43, 45, and 46.

Defendants assert the deliberative process privilege and the presidential communications privilege with respect to CIA 22. CIA 22 is a "classified correspondence between CIA and the National Security Council providing guidance on a particular issue." Suppl. CIA Decl. ¶ 9. This

document contains "several memos—a memorandum from the White House, a memorandum written from the Director of the CIA to the National Security Advisor recommending and requesting certain action, and internal Agency correspondence preceding those memos." *Id.* These communications include an "authorization request by the CIA Director to a White House official, and the White House's communication back to CIA of the President's grant of the authorization in question, whose nature is classified." Def. Reply 31. Although the presidential communications privilege "could attach to communications to and from . . . officials at the highest levels . . . at the National Security Council," *ACLU. v. Dep't of Justice*, No. 15 Civ. 1954, 2016 WL 889739, at *4 (S.D.N.Y. Mar. 4, 2016), this privilege "should be construed . . . narrowly," *id.* (quoting *In Re Sealed Case*, 121 F.3d at 752). Accordingly, the Court concludes that only the two memoranda to or from the National Security Advisor are protected by the presidential communications privilege. The preceding internal memoranda, however, are therefore clearly protected by the deliberative process privilege. As internal legal memoranda preceding a formal recommendation to the White House, it is unlikely that these memoranda contain working law. CIA 22 was properly withheld.

Finally, Defendants assert the presidential communications privilege regarding CIA 36, which is a "[c]lassified correspondence from National Security Council to CIA providing guidance on a particular issue." CIA *Vaughn* Index 16. There is no indication that the correspondence was sent from the National Security Advisor or any other high level National Security Council official nor any indication that it sent or received as part of presidential decisionmaking. *See ACLU*, 2016 WL 889739, at *4. Construing the privilege narrowly, Defendants have not met their burden of justifying the presidential communications privilege with respect to CIA 36.

Therefore, Defendants' motion for summary judgment regarding Exemption 5 is GRANTED with respect to CIA 13-29, 31-35, 37-41, 44, 47-76, 78, 79, and 92-94 and DENIED with respect to CIA 36, 42, 43, 45, 46, and 80-91.

d. NSA

NSA asserts both attorney-client privilege and deliberative process privilege with respect to NSA 11 and 12 and attorney-client privilege regarding NSA 7, 14-21, and 28.

NSA 11 and 12 contain "memoranda from NSD attorneys to other Government attorneys, and they provide advice with respect to one or more NSA programs or other intelligence activities." NSD Decl. ¶ 15. NSA 11 is a "legal memorandum written by DOJ concerning classified SIGINT [signals intelligence] activities and undertaken pursuant to EO12333 and supporting documentation providing non-segregrable details of classified NSA COMINT [communications intelligence] activities, sources, and methods." NSA Decl. Ex. A ("NSA *Vaughn* Index"), at 2. NSA 12 consists of an "approval package for a classified NSA program, including a formal legal memorandum written by DOJ concerning classified COMINT activities undertaken pursuant to EO12333 and supporting documentation providing non-segregable details of classified NSA COMINT activities, sources, and methods." *Id.* The "*vast majority* of the memoranda contained in . . . NSA Documents 11 and 12 are . . . 'pre-decisional' because they related to and preceded a final decision regarding one or more NSA programs or other intelligence activities. Further, . . . the *vast majority* of the memoranda contained in . . . NSA Documents 11 and 12 are 'deliberative' because they reflect ongoing deliberations by government attorneys on DOD procedures and one or more NSA programs." NSD Decl. ¶ 18 (emphasis added). Without more, Defendants cannot satisfy their burden that Exemption 5 applies to these two documents; Defendants are invited to supplement their submissions if they

wish to do so. However, Defendants also assert presidential communications privilege with respect to pages 2-4 and 30-38 of NSA 12, which Plaintiffs do not contest, except to the extent that the privilege is voided by the working law doctrine. *See* Pl. Mem. 15 n.4. As discussed above, the working law doctrine does not vitiate the presidential communications privilege, and these pages are properly withheld.

Defendants assert attorney-client privilege regarding NSA 7, 14, 15, 16, 17, 18, 19, 20, 21, and 28. These documents "contain correspondence between NSA [Office of General Counsel] and its internal clients, such as the Signals Intelligence Directorate, the NSA organization tasked with carrying out NSA's SIGINT mission." NSA Decl. ¶ 53. These communications "were made in order to provide legal advice to Agency clients on a variety of operational issues that arose under EO 12333, [and] the communications were made in confidence." *Id.* The Court is satisfied that these documents are protected by attorney-client privilege. The NSA further states that these documents "have not since been used to *publically* justify NSA actions or [have not been] *expressly* adopted as Agency policy." NSA Decl. ¶ 53 (emphasis added). This states the rule too narrowly. *See Brennan Ctr.*, 697 F.3d at 195 (describing formal and *informal* adoption, including documents "more properly characterized as an opinion or interpretation which embodies the agency's effective law and policy," even if not done so publicly). The Court therefore cannot determine whether these documents contain working law or have not been adopted. Defendants are invited to supplement their submissions to address this point.

Accordingly, Defendants' motion for summary judgment on Exemption 5 is DENIED with respect to NSA 7, 11, 12, 14-21, and 28, except for pages 2-4 and 30-38 of NSA 12, for which Defendants' motion is GRANTED.

C. Exemptions 1 and 3

i. Legal Standards

a. Exemption 1

The Government may withhold records under Exemption 1 if the records are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Executive Order 13,526 sets forth the current standard for classification, which lists four requirements: "(1) an original classification authority [has classified] the information; (2) the information is owned by, produced by or for, or is under the control of the United States Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and (4) the original classification authority [has] determine[d] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security . . . and the original classification authority is able to identify or describe the damage." Exec. Order No. 13,526, § 1.1(a)(1)-(4), 75 Fed. Reg. 707 (Dec. 29, 2009). Section 1.4 of E.O. 13,526 protects, *inter alia*, information that describes "intelligence activities (including covert action), intelligence sources or methods, or cryptology"; "foreign relations or foreign activities of the United States, including confidential sources"; and "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security." *Id.* § 1.4(c), (d), (g).

To satisfy its burden on summary judgment, the Government must establish through affidavits "that it complied with proper procedures in classifying materials and that the withheld information falls within the substantive scope" of a particular executive order. *Amnesty Int'l USA*, 728 F. Supp. 2d at 506 (citing *Salisbury v. United States*, 690 F.2d 966, 971-72 (D.C. Cir.

1982)). These affidavits must "contain sufficient detail to forge the logical connection between the information [withheld] and [Exemption 1]." *Id.* (alterations in original) (quoting *Physicians for Human Rights v. U.S. Dep't of Def.*, 675 F. Supp. 2d 149, 166 (D.D.C. 2009)). However, "the Court is 'mindful that issues of national security are within the unique purview of the executive branches, and that as a practical matter, few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information.'" *Id.* (quoting *Physicians for Human Rights*, 675 F. Supp. 2d at 166). Accordingly, the Court gives deference to the Government's justifications for classifying information. *Id.*

b. Exemption 3

Under FOIA Exemption 3, the Government is permitted to withhold information that is "specifically exempted from disclosure by [a] statute" that requires certain information to be withheld or that establishes criteria for the withholding of information. 5 U.S.C. § 552(b)(3). The Court's assessment of the applicability of this exemption "depends less on the detailed factual contents of specific documents" than with other FOIA exemptions; rather "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage." *Amnesty Int'l USA*, 728 F. Supp. 2d at 501 (quoting *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978)).

Defendants invoke five statutes to justify nondisclosure under Exemption 3: 50 U.S.C. § 3605, which exempts from disclosure "the organization or any function of the [NSA], or any information with respect to the activities thereof"; 50 U.S.C. § 3024(i)(1), which directs the director of national intelligence to "protect intelligence sources and methods from unauthorized disclosure" and to "establish and implement guidelines for the intelligence community" regarding the classification and dissemination of sensitive information; 18 U.S.C. § 798, which

criminalizes the unauthorized disclosure of classified information, *inter alia*, "concerning the communication intelligence activities of the United States" or "obtained by the processes of communication intelligence from the communications of any foreign government"; 50 U.S.C. § 3507, which prohibits disclosure of the "organization, functions, names, official titles, salaries, or numbers of personnel employed by the [CIA]"; and 10 U.S.C. § 424, which prohibits disclosure of "the organization or any function of an organization" of the DIA, including "the number of persons employed by or assigned or detailed to any such organization or the name, official title, occupational series, grade, or salary of any such person." Plaintiffs do not contest that each law qualifies as an exemption statute under Exemption 3. *See* Pl. Mem. 32-34; *see also Elec. Frontier Found. v. Dep't of Justice*, 141 F. Supp. 3d 51, 58 n.8 (D.D.C. 2015). The Court must, therefore, "consider whether the withheld material satisfies the criteria of the exemption statute[s]." *Wilner*, 592 F.3d at 69 (quoting *Wilner v. NSA*, No. 07 Civ. 3883, 2008 WL 2567765, at *4 (S.D.N.Y. June 25, 2008)).

Under FOIA, "[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 under this subsection." 5 U.S.C. § 552(b). "This provision requires agencies and courts to differentiate among the contents of a document rather than to treat it as an indivisible 'record' for FOIA purposes." *ACLU*, 2016 WL 5394738, at *13 (quoting *FBI v. Abramson*, 456 U.S. 615, 626 (1982)). In invoking these exemptions, and the segregability of the documents or lack thereof, "an agency's justification . . . is sufficient if it appears 'logical' or 'plausible.'" *N.Y. Times*, 756 F.3d at 119 (quoting *Wolf v. CIA,* 473 F.3d 370, 374-75 (D.C. Cir. 2007)).

ii. Application

Plaintiffs argue that Defendants have improperly withheld information that is not "inextricably intertwined" with the properly exempt material. Pl. Mem. 34 (quoting *ACLU v. FBI*, No. 11 Civ. 7562, 2015 WL 1566775, at *2 (S.D.N.Y. Mar. 31, 2015)).

Plaintiffs make three arguments to Defendants' withholdings: the withholding of pure legal analysis in legal memoranda, the withholding of segregable non-exempt information from Inspector General and compliance reports, and the withholding of segregable non-exempt information from documents that Plaintiffs refer to as rules and regulations. *See id.* 35-43.

a. Pure Legal Analysis

Plaintiffs argue that pure legal analysis—that is, "constitutional and statutory interpretation, discussions of precedent, and legal conclusions that can be segregated from properly classified or otherwise exempt facts"—"cannot be withheld under Exemptions 1 or 3." *Id.* at 35 (citing *N.Y. Times*, 756 F.3d at 119-20). However, the Second Circuit has acknowledged that broader withholding may be appropriate: "We recognize that in some circumstances *the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation*, but that is not the situation here where drone strikes and targeted killings have been publicly acknowledged at the highest levels of the Government." 756 F.3d at 119 (emphasis added) (redacting an entire section of OLD-DOD memorandum that mentions intelligence gathering activities). Executive Order 13,526 provides that information "shall not be considered for classification unless . . . *it pertains to*" a protected category. Exec. Order No. 13,526 § 1.4 (emphasis added). As the D.C. Circuit has recently and repeatedly stated, "pertains is not a very demanding verb." *ACLU v. U.S. Dep't of Justice*, 640 F. App'x 9, 11 (D.C. Cir. 2016) (quoting *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 715 F.3d

937, 941 (D.C. Cir. 2013)). And as the Second Circuit in *N.Y. Times* acknowledged, disclosure of even pure legal analysis concerning covert intelligence operations could jeopardize those operations. *See* 756 F.3d at 119.

Defendants' declarations support the conclusion that the intelligence operations described in the withheld documents are not public knowledge and that disclosure of even the pure legal analysis therein would result in damage to the national security. The NSA's supplemental declaration states that "the mere subject matter of these memoranda and opinions pertains to classified NSA operations and activities that have not been publicly acknowledged" such that the "release of even the basic factual or legal background in these memoranda could reasonably be expected to cause harm to the national security or an interest protected by statute, as the formulation of the legal analysis itself could enable Plaintiffs and the public to discern classified or protected facts about the program or activity being discussed." Suppl. Decl. of David J. Sherman ("Suppl. NSA Decl.") ¶ 4, ECF No. 79; *see also* NSA Decl. ¶ 39 ("Disclosure of any information about these sources and the methods by which NSA effects collection, as well as the scope of that collection, would demonstrate the capabilities and limitations of the U.S. SIGINT system, and the success (or lack of success) in acquiring certain types of communications."); *id.* ¶ 80 ("Some of the other information concerns particularly sensitive intelligence collection and processing techniques, the unauthorized disclosure of which could be reasonably expected to cause exceptionally grave damage to the national security. Once alerted to these collection and processing methods, adversaries could develop additional countermeasures to thwart collection and effective analysis of electronic communications."). *See generally* NSA Classified Decl. Similarly, the CIA's supplemental declaration states that "disclosure of the facts, analysis, and even citations to legal authorities in this context would tend to reveal not only the nature of the

legal advice sought, but also the underlying classified material associated with those programs and techniques." Suppl. CIA Decl. ¶ 5; *see also* Suppl. FBI Decl. ¶¶ 9-10.

In sum, giving appropriate deference to the assessment of the agencies, the Court finds it logical and plausible that there is no segregable non-exempt content contained in the legal memoranda withheld in full.[3] The Court credits Defendants' declarations that affirm that disclosure of these documents would tend to cause harm to the national security and would reveal intelligence sources and methods. The documents were properly withheld under Exemptions 1 and 3, and Defendants' motion for summary judgment is GRANTED.

b. Inspector General and Compliance Reports

Plaintiffs contend that Defendants did not properly release segregable, non-exempt information from thirteen documents that were withheld at least in part: CIA 8, 10, 12, 30, and 77; NSA 22, 23, and 79; and NSD 7, 37, 42, 44, and 47. Pl. Index 9-10. Plaintiffs argue that Defendants: (1) failed to conduct a line-by-line segregability review, Pl. Mem. 39-40; (2) improperly withheld material that is marked as unclassified or has been inadequately justified, *id.* at 40; and (3) improperly withheld information about the number of certain types of compliance incidents, *id.* at 41-42.

On the first issue, Defendants do not address in their reply whether they did conduct a line-by-line segregability review on these thirteen documents. *See* Def. Reply 36-38. As it is Defendants' obligation to do so, *see* 5 U.S.C. § 552(b), Defendants are instructed to conduct such a segregability review if they have not done so, or inform the Court that this review has already occurred.

[3] Defendants did not conduct a segregability review of certain OLC memoranda for purposes of Exemptions 1 and 3 because the documents were withheld in full under Exemption 5. Def. Reply 35 n.7. As the Court is granting summary judgment on Exemption 5 regarding the OLC memoranda, *see supra* Part III(b)(ii)(a), segregability review is not required.

Second, Plaintiffs point to material explicitly marked as "U/FOUO"—that is, "Unclassified/For Official Use Only"—which was improperly withheld under Exemption 1. Pl. Mem. 40 n.15 (citing CIA 10 at 8). Defendants are instructed to review these thirteen documents for improper withholding of this sort, and inform the Court of the results.

Plaintiffs also specifically challenge the redactions in three sections of CIA 10, labeled "Targeting Standards," "The Department of Justice's Role in EO Compliance," and information about "real or perceived legal and policy concerns" associated with targeting U.S. persons abroad for surveillance. Pl. Mem. 40 (citing CIA 10 at 14, 23-24, 32-43). However, these sections "discuss specifics of the Agency's intelligence collection—both methods and process—which remain classified." Suppl. CIA Decl. ¶ 8. The Court is satisfied that these sections are properly withheld.

Finally, Plaintiffs challenge the redaction of the number of compliance incidents. For example, the following excerpts appear in NSA 79: "During the fourth quarter of CY2012, in [redacted] instances, signals intelligence (SIGINT) analysts inadvertently targeted communications to, from, or about USPs, while pursuing foreign intelligence tasking or performed mistaken queries that potentially sought or returned information about USPs." Pl. Reply 26 (quoting NSA 79 ¶ I.A.1). And: "On [redacted] occasions during the fourth quarter, NSA analysts performed queries in raw traffic databases without first conducting the necessary research . . . ." *Id.* (quoting NSA 79 ¶ I.A.1.b). Although some of these redactions contain only unclassified documents, Defendants have met their burden regarding Exemption 3. The supplemental NSA declaration states that "the withheld numbers all relate to NSA's collection, analysis, and dissemination of signals intelligence for foreign intelligence purposes and the manner in which NSA conducts compliance and oversight over the SIGINT mission," Suppl.

NSA Decl. ¶ 10, and "the disclosure of such numbers, in compilation with information that has been previously released, would tend to disclose the overall scope of NSA's foreign intelligence collection efforts . . . [and] could be pieced together to reveal highly sensitive information to our adversaries," *id.* ¶ 11. Such information is protected under 50 U.S.C. § 3605 as "information with respect to the activities" of the NSA, and the Court is satisfied that Exemption 3 applies.

Accordingly, as described above, Defendants' motion for summary judgment is GRANTED in part and DENIED in part.

c. Rules and Regulations, Training and Briefing Materials

Plaintiffs make explicit challenges about two documents. The first is CIA 11,[4] a training slide entitled "AR 2-2 Collection Rules." Pl. Mem. 42-43. The supplemental CIA declaration states that CIA 11 "contains details about specific intelligence collection techniques" that, if disclosed, would reveal "how intelligence is obtained [and] would permit the targets of those efforts to evade detection, which in turn could reasonably be expected to cause damage to the national security." Suppl. CIA Decl. ¶ 10. The Government has met its burden regarding CIA 11. The second, NSD 94-125, is a 1988 version of the "Classified Annex to DoD Procedures under EO 12333," as to which Plaintiffs argue the Government has officially released some of this withheld material in a subsequent version of the document. Pl. Mem. 42-43. Defendants state that NSA "is 'reviewing ACLU's assertions and hopes to complete its assessment within 30 days.'" Def. Reply 39 (quoting Suppl. NSA Decl. ¶ 16 n.3). The Court tends to agree with Plaintiffs that the withholdings may be inappropriate. Defendants shall inform the Court of the result.

[4] Plaintiffs' argument about CIA 11 is listed under "Rules and Regulations" in their briefs, Pl. Mem. 42; Pl. Reply 28-29, but is listed in Plaintiffs' Index under "Training and Briefing Materials," Pl. Index 11. Plaintiffs do not discuss the category of "Training and Briefing Materials" documents in their briefs. The Court discusses both categories of documents here.

Plaintiffs challenge, without discussion in their briefs, the withholding of a number of additional "rules and regulations" and "training and briefing materials." Pl. Index 10-11. First, Plaintiffs challenge the withholding of CIA 1, 2, 3, 4, 5, 6, 7, 9, 22, 36, 42, 43, 45, and 46. Many of these documents were released in part. *See* CIA *Vaughn* Index. CIA states that "the information withheld pursuant to Exemption 1 deals with the intelligence priorities set forth in [E.O. 12,333], such as intelligence collection related to espionage, terrorism and proliferation. It tends to identify the targets of intelligence-gathering efforts, reveal the specific collection techniques and methods employed, and contain details concerning the locations and timing of that collection." CIA Decl. ¶ 16. These documents are classified, *id.* ¶ 13, and disclosure of this information would "undermine U.S. intelligence capabilities and render collection efforts ineffective" and could reasonably be expected to damage national security, *id.* ¶ 18. These documents are also protected under 50 U.S.C. § 3024(i)(1) as "intelligence sources and methods." *Id.* ¶ 19. The Court concludes that Exemptions 1 and 3 are properly invoked.

Plaintiffs challenge the withholding of FBI 30-35 and FBI 57-65. As the FBI declaration describes, these documents are properly classified, FBI Decl. ¶¶ 30-32, and the withheld information "describes and pertains to intelligence activities, sources, and methods utilized by the FBI in gathering intelligence information," *id.* ¶ 35, such that the release of such information would "disrupt the FBI's intelligence-gathering capabilities and could cause serious damage to our national security," *id.* ¶ 37. Accordingly, withholding the information pursuant to Exemptions 1 and 3 was appropriate.

Plaintiffs also challenge the withholding of NSA 5 and documents labeled NSA # 4086222 and NSA # 4086223. The NSA declaration states that each of these documents "implements EO 12333 and prescribes policies and procedures for ensuring that SIGINT is

conducted in accordance with the EO and applicable law." NSA Decl. ¶ 71. These documents are confidential, *id.* ¶ 72, and their disclosure would reveal the methods, procedures, nature, and scope of communications intelligence activity, *id.* ¶ 73, as well as their vulnerabilities, *id.* ¶ 74. Such information relates to the function of the NSA. *Id.* ¶ 75 (quoting 50 U.S.C. § 3605). Defendants have met their burden regarding Exemptions 1 and 3.

The final rules and regulations document of which Plaintiffs challenge the withholding is NSD 202-207, which was withheld in part and described as a "Supplemental Guidelines for Collection, Retention, and Dissemination of Foreign Intelligence." NSD *Vaughn* Index 9. Parts of the document were withheld under Exemptions 1 and 3. As explained by the FBI declaration, the withheld information is properly classified, FBI Decl. ¶ 30, and "describes and pertains to intelligence activities, sources, and methods utilized by the FBI in gathering intelligence information," *id.* ¶ 35. Release of this information "would reveal intelligence activities and methods used by the FBI against targets who are the subject of foreign counterintelligence investigations or operations; identify a target of a foreign counterintelligence investigation; or disclose the intelligence gathering capabilities of the activities or methods directed at targets," *id.* ¶ 36; "would severely disrupt the FBI's intelligence-gathering capabilities and could cause serious damage to our national security," *id.* ¶ 37; and would disclose intelligence sources and methods, *id.* ¶¶ 39-41. Accordingly, Defendants have met their burden regarding their redactions under Exemptions 1 and 3.

Finally, Plaintiffs challenge the withholding of the training materials contained in DIA V-4. Although the Government also asserted Exemption 5 with respect to DIA V-4, it waived this argument on reply and relies solely on Exemptions 1 and 3. Def. Reply 12 (citing Suppl. Decl. of Alesia Y. Williams ("Suppl. DIA Decl.") ¶¶ 5-8, ECF No. 77). DIA V-4 is a classified

presentation entitled "DoD HUMINT [human intelligence] Legal Workshop" on "Fundamentals of HUMINT Targeting." DIA V-4 at 1. As the DIA declaration explains, "[t]he withheld information contains material discussing intelligence methods, specifically the means by which DIA legally collects intelligence and the legal restrictions on collecting intelligence on U.S. persons. The withheld information also contains information relating to intelligence sources, including detailed and specific discussion and guidance on the rules for legally collecting intelligence on sensitive source categories and explaining those sensitive source categories." Decl. of Alesia Y. Williams ("DIA Decl.") ¶ 15, ECF No. 62. This information is properly classified, *id.* ¶ 14, and disclosure "of the sources and methods the U.S. government implements could reasonably be expected to enable persons and groups hostile to the United States to identify U.S. intelligence activities, methods or sources, and to design countermeasures to them," *id.* ¶ 17; *see also id.* ¶¶ 20, 21. The document was "carefully reviewed line-by-line by a subject matter expert for reasonably segregable information." *Id.* ¶ 24. Defendants have met their burden regarding their redactions under Exemptions 1 and 3.

Accordingly, Defendants' motion for summary judgment is DENIED as to NSD 94-125 and GRANTED as to CIA 1, 2, 3, 4, 5, 6, 7, 9, 22, 36, 42, 43, 45, and 46; DIA V-4; FBI 30-35 and 57-65; NSA 5, NSA # 4086222, and NSA # 4086223; and NSD 202-207.

D. Exemption 7

i. Legal Standard

Defendants invoke Exemption 7(D) and 7(E) of the FOIA statute. Def. Mem. 60-63. Under this exemption, records or information are exempted when "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). Information is compiled for law-enforcement purposes where the "withheld record has a rational nexus to the agency's law-enforcement duties, including the

prevention of terrorism and unlawful immigration." *Bishop v. U.S. Dep't of Homeland Sec.*, 45 F. Supp. 3d 380, 387 (S.D.N.Y. 2014) (citation omitted). "[A]ll records of *investigations* compiled by the FBI are for law enforcement purposes." *Halpern*, 181 F.3d at 296 (emphasis added). "As the D.C. Circuit has explained, 'Law enforcement entails more than just investigating and prosecuting individuals *after* a violation of the law.' The 'ordinary understanding' of the term 'includes . . . proactive steps designed to prevent criminal activity and maintain security.'" *Human Rights Watch v. Dep't of Justice Fed. Bureau of Prisons*, No. 13 Civ. 7360, 2015 WL 5459713, at *5 (S.D.N.Y. Sept. 16, 2015) (citation omitted) (quoting *Pub. Emp. for Env't'l Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n,* 740 F.3d 195, 203 (D.C. Cir. 2014)).[5]

Under Exemption 7(D), a law enforcement record is exempted from FOIA to the extent it "could reasonably be expected to disclose the identity of a confidential source . . . and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). "'[A] source should be deemed confidential if the source furnished information with the understanding that the [agency] would not divulge the communication except to the extent the [agency] thought necessary for law enforcement purposes.' As such, disclosure is not required 'if the source provided information under an express assurance of confidentiality or in circumstances from

[5] Plaintiffs urge the Court to adopt the stringent standard set forth by the D.C. Circuit in *Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982). *See* Pl. Br. 44. *Pratt* required that an agency identify "a particular individual or a particular incident as the object of [the agency's] investigation" and "the connection between that individual or incident and a possible security risk or violation of federal law." *Pratt*, 673 F.2d at 420. However, "Congress amended FOIA since the D.C. Circuit decided *Pratt*, removing a requirement that the records be 'investigatory.'" *Human Rights Watch*, 2015 WL 5459713, at *5. Since courts should take "a practical approach when . . . confronted with an issue of interpretation of" FOIA, *id.* (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989)), the Court declines to adopt so "wooden" a test, *id.*

which such an assurance could be reasonably inferred.'" *Halpern*, 181 F.3d at 298 (citation omitted) (quoting *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172, 174 (1993)).

Under Exemption 7(E), records may be withheld to the extent they "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Once the "threshold requirement" of showing that a record was compiled for law enforcement purposes is satisfied, "a court must determine if either of Exemption 7(E)'s 'two alternative clauses' applies." *Bishop*, 45 F. Supp. 3d at 387. A record discloses "techniques and procedures" if it "refers to how law enforcement officials go about investigating a crime." *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010). "The term 'guidelines'—meaning . . . 'an indication or outline of future policy or conduct'—generally refers . . . to resource allocation." *Id.* (quoting Webster's Third New International Dictionary).

ii. Application

Plaintiffs challenge the application of Exemption 7 to two formal legal memoranda—OLC 5 and 6—and to five rules and regulations—FBI 13-15, 30-35, and 57-65; NSD 202-07; and CIA 4.[6] Pl. Mem. 6-8, 43 n.16.

The two formal legal memoranda are discussed above, and, in short, they discuss legal advice concerning surveillance under E.O. 12,333. *See* OLC Decl. Ex. A ("OLC *Vaughn* Index"), at 1-2. Defendants assert Exemption 7(D) with respect to OLC 6 and Exemption 7(E) regarding both documents. FBI Decl. ¶¶ 47, 54. Regarding Exemption 7(D), FBI explains that

[6] The portions of CIA 4 that were withheld under Exemption 7(E) were also withheld under Exemptions 1 and 3. See Def. Reply 41 n.9. Having granted summary judgment for Defendants on those exemptions, the Court need not address Exemption 7 for these redactions.

OLC 6 includes "specific and detailed information that is singular in nature, concerning the activities of a subject of investigative interest to the FBI" including about individuals "specifically referred to as 'confidential sources.'" *Id.* ¶ 47 & n.21. To the narrow extent OLC 6 includes such information, Defendants are correct to withhold it; however, given the nature of the document as a formal legal memorandum, Exemption 7(D) cannot justify complete withholding the document, but other exemptions discussed above also apply. FBI asserts that OLC 5 and OLC 6 both contain sensitive techniques and procedures about its surveillance and information collection and analysis activities. *Id.* ¶¶ 53-56; *see also, e.g.*, *id.* ¶ 54 ("Revealing details about information-gathering methods and techniques commonly used in national security investigations, and the circumstances under which they are used, would enable the targets of those methods and techniques to avoid detection of and develop countermeasures to circumvent the FBI's ability to effectively use such critical law enforcement methods and techniques in current and future national security investigations, thus risking the circumvention of the law."). As these documents are formal legal memoranda, Exemption 7(E) may indeed justify partial withholding but, standing alone, cannot justify complete withholding. *See, e.g.*, *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 251-52 (D.C. Cir. 1993) (denying agency's request to withhold legal analysis and digest of caselaw under Exemption 7(E)).

FBI 13-15 includes selections from FBI's Domestic Investigations and Operation Guide ("DIOG"), from which FBI withheld three paragraphs. FBI Decl. ¶ 59 & Ex. H. FBI explains that the DIOG "provides FBI employees with the rules, regulations, and procedures it is to use when conducting both criminal and national security investigations." Suppl. FBI Decl. ¶ 15. FBI 30-35 contains excerpts from an electronics communication "from FBI's Office of General Counsel, National Security Law Branch to all FBI Offices setting out the policy and procedure

for requesting Attorney General authority under Executive Order 12333, Section 2.5 to collect intelligence on U.S. persons overseas." FBI Decl. Ex. I ("FBI *Vaughn* Index"), at 2. FBI 57-65 contains excerpts from FBI's Counterintelligence Division Policy Implementation Guide, FBI Decl. ¶ 59, which "sets forth specific policies, procedures and investigative techniques used by the FBI in its counterintelligence investigations," Suppl. FBI Decl. ¶ 18. NSD 202-07 contains supplemental guidelines for collection, retention, and dissemination of foreign intelligence. FBI *Vaughn* Index 3.

Defendants have met their burden regarding Exemption 7. As the supplemental FBI declaration states, "each of these records identify a clear and direct nexus to the FBI's law enforcement duties[,] [s]pecifically, how the FBI collects, disseminates and retains intelligence is all part of its law enforcement mission." Suppl. FBI Decl. ¶ 13. FBI 13-15 "discusses tools, techniques and methods used during investigations, how they are implemented, as well as the authority required to implement them." *Id.* ¶ 15. FBI 30-35 "sets forth specific policies, procedures and investigative techniques used by the FBI in its counterintelligence investigations. These investigations are, by definition, both criminal in nature and for the purpose of collecting intelligence." *Id.* ¶ 18. Releasing the information in all of these documents would "provide subjects and their associates with non-public information pertaining to the FBI's obligations or internal procedures under EO 12333 allowing these individuals to develop countermeasure to avoid detection and surveillance by the FBI, thus nullifying the effectiveness of these important investigative/national security techniques/procedures." *Id.* ¶ 19.

Accordingly, Defendants' invocation of Exemption 7, as described above regarding OLC 5, OLC 6, FBI 13-15, FBI 30-35, FBI 57-65, and NSD 202-07 is proper, and summary judgment on Defendants' motion is GRANTED.

E. Reprocessing

Plaintiffs seek reprocessing of OLC 4, 8, and 10 in light of documents that have been recently released by the Government that may have been officially acknowledged. Pl. Mem. 49-50; Pl. Reply 35-36. "As a general rule, a FOIA decision is evaluated as of the time it was made and not at the time of a court's review." *N.Y. Times*, 756 F.3d at 111 n.8; *see also Florez v. CIA*, 829 F.3d 178, 188 (2d Cir. 2016) ("[T]o require an agency to adjust or modify its FOIA response based on post-response occurrences could create an endless cycle of judicially mandated reprocessing each time some circumstance changes." (quoting *Bonner v. Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991))). Accordingly, Plaintiffs' request is DENIED.

F. *In Camera* Review

In FOIA cases, a court should conduct *in camera* review only as a last resort. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). "'[A] district court should not undertake *in camera* review of withheld documents as a substitute for requiring an agency's explanation of its claimed exemptions in accordance with *Vaughn*.' Rather, '[t]he district court should first offer the agency the opportunity to demonstrate, through detailed affidavits and oral testimony, that the withheld information is clearly exempt and contains no segregable, nonexempt portions.' 'If the agency fails to provide a sufficiently detailed explanation to enable the district court to make a de novo determination of the agency's claims of exemption, the district court then has several options, including inspecting the documents *in camera*, requesting further affidavits, or allowing the plaintiff discovery.'" *ACLU*, 2016 WL 5394738, at *13 (alterations in original) (citations omitted) (quoting *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 997 (D.C. Cir. 1998)). The Court finds that *in camera* review is premature at this time and invites the Government to supplement its submissions and Plaintiffs to respond.

IV. CONCLUSION

For the reasons stated above, Defendants' motion is GRANTED in part and DENIED in part, and Plaintiffs' motion is DENIED without prejudice. The parties are directed to confer and jointly submit a proposed briefing schedule on any further motions on or before **April 26, 2017**. The Clerk of Court is directed to terminate the motions at ECF Nos. 58 and 69.

SO ORDERED.

Dated: March 27, 2017
New York, New York

KIMBA M. WOOD
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

-against-

NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, and DEPARTMENT OF STATE,

Defendants.

13 Civ. 9198 (KMW) (JCF)

ORDER

KIMBA M. WOOD, District Judge:

Plaintiffs, the American Civil Liberties Union and the American Civil Liberties Union Foundation, bring this action challenging the nondisclosure of information requested by Plaintiffs pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, from Defendants: the United States National Security Agency ("NSA"), the United States Central Intelligence Agency ("CIA"), the United States Department of Defense ("DOD"), the United States Department of Justice ("DOJ"), and the United States Department of State ("State") (collectively, "Defendants" or "the Government"). The parties each previously moved for partial summary judgment on the adequacy of certain agencies' searches in response to Plaintiffs' FOIA requests and the applicability of certain FOIA exemptions to 150 responsive documents that were partially or fully withheld by the Government. On March 27, 2017, the Court issued a memorandum opinion and order (the "Order") granting in part and denying in part the Government's motion, and denying Plaintiffs' motion without prejudice. ECF No. 93. The parties now each move for partial summary judgment as to the remaining 46 documents that are contested. In accordance with the Order, the Government has conducted additional review and

searches, and provided additional support for its motion. For the reasons stated below, Defendants' motion is GRANTED and Plaintiffs' motion is DENIED.

I. BACKGROUND

The Court assumes familiarity with the previous summary judgment opinion in this matter, which provides a more complete background. In short, Plaintiffs seek information from seven federal entities—CIA; State; NSA; the Defense Intelligence Agency ("DIA"), an agency within DOD; and three divisions of DOJ: the Federal Bureau of Investigation ("FBI"), the National Security Division ("NSD"), and the Office of Legal Counsel ("OLC")—relating to the agencies' authority under Executive Order 12,333 ("E.O. 12,333") and related procedures and standards. Second Am. Compl. ¶¶ 18-19, ECF No. 44. The Executive Order allows intelligence agencies to gather information from foreign sources, and allows for the collection, retention, and dissemination of information concerning United States citizens, at home and abroad, in certain limited situations. E.O. 12,333 § 2.3(C); *see also id.* §§ 2.3 to 2.4.

In the Order, the Court addressed the parties' arguments regarding the adequacy of certain agencies' searches, as well as the lawfulness of certain withholdings and redactions. Specifically, the Order held that:

- FBI's, NSD's, and CIA's searches were inadequate or inadequately explained, Order 9-15;
- the Government sufficiently justified its withholdings under Exemption 5 of the FOIA as to certain OLC, NSD, and CIA documents, but found that the Government's justifications for other NSD, NSA, and CIA documents were lacking,[1] *id.* at 15-30;
- the Government's invocation of FOIA Exemptions 1 and 3 with regard to certain legal memoranda was justified, *id.* at 31-36;

[1] Specifically, the Court denied the Government's motion as to the following documents: NSD 12, 13, 14, 23, 33, and 49; CIA 36, 42, 43, 45, 46, and 80-91; and NSA 7, 11, 12 (except for pages 2-4 and 30-38), 14-21, and 28. Plaintiffs no longer challenge the assertion of the presidential communications privilege to CIA 36. Pl. Opp. 5 n.5, ECF No. 107. And Defendants have since released CIA 46 to Plaintiffs. *Id.*

- the Government was required to conduct a segregability review on certain documents, to the extent it had not done so, and had to review certain material marked "Unclassified/For Official Use Only" for content that should be disclosed,[2] *id.* at 36-38;
- the Government justified its withholdings under FOIA Exemptions 1 and 3 regarding some rules and regulations and training and briefing materials, but not as to one document (NSD 94-125),[3] *id.* at 38-41;
- the Government's withholdings pursuant to Exemption 7 of the FOIA was justified, *id.* at 41-45; and
- Plaintiffs' request for the reprocessing of certain OLC documents was not justified, and that *in camera* review was premature, *id.* at 46.

II. LEGAL STANDARD

A moving party is entitled to summary judgment when the record shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Feingold v. New York*, 366 F.3d 138, 148 (2d Cir. 2004). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Material facts are those that, under the governing law, may affect the outcome of a case. *Id.* The moving party must establish the absence of a genuine dispute of material fact by citing to particulars in the record. Fed. R. Civ. P. 56(a), (c); *Celotex*, 477 U.S. at 322-25; *Koch v. Town of Brattleboro*, 287 F.3d 162, 165 (2d Cir. 2002). If the movant satisfies this burden, the opposing party must then "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). When deciding the motion, the Court must view the record in the light most favorable to the non-moving party, *O'Hara v.*

[2] Specifically, these documents include CIA 8, 10, 12, 30, and 77; NSA 22, 23, and 79; and NSD 7, 37, 42, 44, and 47.

[3] Following the Court's Order, Defendants provided Plaintiffs with a less redacted version of NSD 94-125, and Plaintiffs withdraw their challenge to the remaining redactions of that document. Pl. Opp. 4 n.4.

Weeks Marine, Inc., 294 F.3d 55, 61 (2d Cir. 2002), although speculation and conclusory assertions are insufficient to defeat summary judgment, *see Niagara Mohawk Power Corp. v. Jones Chem. Inc.*, 315 F.3d 171, 175 (2d Cir. 2003).

FOIA cases are regularly resolved on summary judgment. "In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) (citations omitted). "[A]ll doubts as to the applicability of the exemption must be resolved in favor of disclosure." *N.Y. Times Co. v. DOJ*, 756 F.3d 100, 112 (2d Cir. 2014) (quoting *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009)).

When an agency withholds records and the requestor challenges such withholdings, the district court must "determine the matter *de novo*, and may examine the contents of . . . agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions." 5 U.S.C. § 552(a)(4)(B). In *Vaughn v. Rosen*, the Court of Appeals for the D.C. Circuit held that to adequately justify an alleged exemption, the Government should provide "a relatively detailed analysis in manageable segments." 484 F.2d 820, 826 (D.C. Cir. 1973). Thus, agencies submit *Vaughn* indexes listing withheld documents and claimed exemptions, along with *Vaughn* affidavits that describe the withheld documents and the rationale for withholding them. *See ACLU v. DOJ*, No. 13 Civ. 7347, 2016 WL 5394738, at *4 (S.D.N.Y. Sept. 27, 2016).

Where "such declarations are 'not controverted by either contrary evidence in the record nor by evidence of agency bad faith,' summary judgment for the government is warranted." *Id.* (quoting *Wilner*, 592, F.3d at 73). "When the claimed exemptions involve classified documents in the national security context, the Court must give '*substantial weight* to an agency's affidavit

concerning the details of the classified status of the disputed record.'" *N.Y. Times*, 756 F.3d at 112 (quoting *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012)). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner*, 592 F.3d at 73 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)). Accordingly, "the government's burden is a light one." *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 624 (D.C. Cir. 2011). However, *Vaughn* submissions are insufficient where "the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *Quinon v. FBI*, 86 F.3d 1222, 1227 (D.C. Cir. 1996) (quoting *Hayden v. NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)).

III. DISCUSSION

A. Adequate Searches

"To prevail on summary judgment, . . . the defending 'agency must show beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (quoting *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). "The adequacy of a search is not measured by its results, but rather by its method." *N.Y. Times*, 756 F.3d at 124. "[T]o establish the adequacy of a search, agency affidavits must be relatively detailed and nonconclusory, and submitted in good faith." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 488-89 (2d Cir. 1999) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). "A reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched, is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment." *Oglesby v.*

U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990). However, "the law demands only a 'relatively detailed and nonconclusory' affidavit or declaration." *Adamowicz v. IRS*, 402 F. App'x 648, 650 (2d Cir. 2010) (quoting *Grand Cent. P'ship*, 166 F.3d at 488-89).

In the Order, the Court found that FBI, NSD, and CIA failed to show that their searches were adequate. Order 9-15. In support of its motion, the Government has submitted supplemental declarations from CIA and NSD that more extensively describe the searches that each agency undertook. *See* Second Suppl. Decl. of Antoinette B. Shiner ("Second Suppl. CIA Decl.") ¶¶ 3-11, ECF No. 101; Decl. of Kevin G. Tiernan ("Second Suppl. NSD Decl.") ¶¶ 9-21, ECF No. 104. In addition, because FBI could not adequately describe the search it previously undertook, it conducted a new search in collaboration with Plaintiffs and guided by the requirements set forth in the Order. *See* Third Decl. of David M. Hardy ("Second Suppl. FBI Decl.") ¶¶ 4-8, ECF No. 102; Fourth Decl. of David M. Hardy ("Third Suppl. FBI Decl.") ¶¶ 3-10, ECF No. 105. Plaintiffs no longer challenge the agencies' searches. Pl. Opp. 1. The Court has reviewed the supplemental declarations and agrees that Defendants' searches were adequate. Accordingly, Defendants' motion for summary judgment as to the adequacy of FBI's, NSD's, and CIA's searches is GRANTED.

B. Segregability

In the Order, the Court directed the Government to (a) confirm that a line-by-line segregability review had taken place or to conduct one if it had not, and (b) address certain redactions of content labeled as unclassified. Order 36-38 (denying the Government's motion for summary judgment as to CIA 8, 10, 12, 30, and 77; NSA 22, 23, and 79; and NSD 7, 37, 42, 44, and 47). As discussed below, the Government's supplemental briefing has sufficiently addressed the Court's concerns.

Under FOIA, "[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 under this subsection." 5 U.S.C. § 552(b). "This provision requires agencies and courts to differentiate among the contents of a document rather than to treat it as an indivisible 'record' for FOIA purposes." *ACLU*, 2016 WL 5394738, at *13 (quoting *FBI v. Abramson*, 456 U.S. 615, 626 (1982)). "[I]t is unlikely that each and every word in [a document] is classified. But case citations and quotations standing in a vacuum would be meaningless. If sufficient context was disclosed to make the non-exempt material meaningful, the circumstances warranting the classification of the [document] would be revealed. FOIA does not require redactions and disclosure to this extent." *ACLU v. DOJ*, 229 F. Supp. 3d 259 (S.D.N.Y. 2017) (citing *Rodriguez v. IRS*, No. 09 Civ. 5337, 2012 WL 4369841, at *8 (E.D.N.Y. Aug. 31, 2012), *report and recommendation adopted*, 2012 WL 4364696 (E.D.N.Y. Sept. 24, 2012)). In invoking these exemptions, and the segregability of the documents or lack thereof, "an agency's justification . . . is sufficient if it appears 'logical' or 'plausible.'" *N.Y. Times*, 756 F.3d at 119 (quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007)).

In its supplemental submissions, the Government has adequately confirmed that the documents have been reviewed for segregable disclosable content and that no such content exists. As to NSD 7, 37, 42, 44, and 47, the NSA declarant reaffirms that the documents have undergone a segregability review and no portion could be reasonably segregated, and that the content is classified and prohibited from public disclosure by statute, satisfying Exemptions 1 and 3. Suppl. Decl. of David J. Sherman ("Second Suppl. NSA Decl.") ¶ 19, ECF No. 103. The Government also confirms that NSD 42 and 47 contain little unclassified information, and the unclassified content both falls under Exemption 3 and is, for the most part, meaningless in

isolation. Suppl. Decl. of David J. Sherman ("Third Suppl. NSA Decl.") ¶ 8, ECF No. 111. As to NSA 22, 23, and 79, the Government confirms that disclosure of even the unclassified content is prohibited by statute and falls under Exemption 3. *See id.* ¶¶ 4, 6, 7. As to CIA 8, 10, 12, and 77, the Government confirms that CIA conducted a line-by-line segregability analysis and any unclassified material is either mismarked or protected by Exemption 3. Second Suppl. CIA Decl. ¶¶ 19, 20. Finally, the Government avers that, upon further review, CIA 30 was not responsive to Plaintiffs' FOIA request and it was inadvertently produced. *Id.* ¶ 21.

The Court is satisfied that the Government has met its obligation to perform a careful segregability review, including of content otherwise labeled as unclassified. Accordingly, Defendants' motion for summary judgment on this issue is GRANTED, and Plaintiffs' motion for summary judgment is DENIED.

C. Remaining Documents

The parties dispute at length the scope of Exemption 5 and its application to the remaining 33 documents. However, the Court need not resolve these issues, as Plaintiffs do not contest the validity of the Government's assertion of Exemptions 1 and/or 3 as to these documents, aside from the segregability issue addressed above. *See N.Y. Times Co. v. DOJ*, 806 F.3d 682, 687 (2d Cir. 2015) ("Whether or not 'working law,' the documents are classified and thus protected under Exemption 1 . . . ."). Accordingly, the Court only briefly discusses Exemptions 1 and 3.

The Government may withhold records under Exemption 1 if the records are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). To satisfy its burden on summary judgment, the

Government must establish through affidavits "that it complied with proper procedures in classifying materials and that the withheld information falls within the substantive scope" of a particular executive order. *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 506 (S.D.N.Y. 2010) (citing *Salisbury v. United States*, 690 F.2d 966, 971-72 (D.C. Cir. 1982)). However, "the Court is 'mindful that issues of national security are within the unique purview of the executive branches, and that as a practical matter, few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information.'" *Id.* (quoting *Physicians for Human Rights v. DOD*, 675 F. Supp. 2d 149, 166 (D.D.C. 2009)). Accordingly, the Court gives deference to the Government's justifications for classifying information. *Id.*; *see also Wilner*, 592 F.3d at 76 ("Recognizing the relative competencies of the executive and judiciary, . . . it is bad law and bad policy to 'second-guess the predictive judgments made by the government's intelligence agencies' regarding questions such as whether disclosure of [classified] records would pose a threat to national security." (quoting *Larson*, 565 F.3d at 865)).

Under FOIA Exemption 3, the Government is permitted to withhold information that is "specifically exempted from disclosure by [a] statute." 5 U.S.C. § 552(b)(3). "[T]he sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage." *Amnesty Int'l USA*, 728 F. Supp. 2d at 501 (quoting *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978)).

The Government has met its burden under Exemptions 1 and 3 as to the remaining documents. First, as to NSD 12, 13, 14, 23, 33, and 49, and NSA 11 and 12, the NSA declarant has averred that the documents are properly classified and properly withheld under Exemption 1, and that the documents discuss NSA data and intelligence collection efforts, which relate to topics protected from release by statute. Decl. of David J. Sherman ("NSA Decl.") ¶¶ 38-44

(citing, *inter alia*, 50 U.S.C. §§ 3024(i)(1), 3605), ECF No. 64. Similarly, the NSA declaration describes that NSA 14 through 21 and 28, which relate to NSA intelligence functions that are protected from disclosure by statute, are classified at the secret or top-secret level and their disclosure would harm NSA foreign intelligence activities. *Id.* ¶¶ 45-55. Finally, as to CIA 42, 43, 45, and 80-91, the CIA declaration explains that the documents are properly classified because disclosure of CIA's intelligence-gathering techniques would reasonably be expected to cause harm to national security, and the documents describe intelligence sources and methods that are prohibited from disclosure by statute. Decl. of Antoinette B. Shiner ("CIA Decl.") ¶¶ 12-18, 19-21 (citing, *inter alia*, 50 U.S.C. § 3024(i)(1)), ECF No. 60.

The Court therefore concludes that the Government properly withheld these documents under FOIA Exemptions 1 and/or 3, and therefore need not reach the parties' arguments regarding Exemption 5. Accordingly, Plaintiffs' motion for summary judgment on this issue is DENIED and Defendants' motion for summary judgment is GRANTED.

IV. CONCLUSION

For the reasons stated above, Defendants' motion is GRANTED and Plaintiffs' motion is DENIED. The Court believes that this order resolves all remaining issues. If the parties disagree, they shall file a letter on the docket within 30 days explaining any outstanding issues. The Clerk of Court is directed to terminate the motions at ECF Nos. 99 and 106 and to close the case.

SO ORDERED.

Dated: August 17, 2017
New York, New York

Kimba M. Wood

KIMBA M. WOOD
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AMERICAN CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

-against-

NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, and DEPARTMENT OF STATE,

Defendants.

----------X

13 **CIVIL** 9198 (KMW)(JCF)

JUDGMENT

The parties having moved for partial summary judgment as to the remaining 46 documents that are contested, and the matter having come before the Honorable Kimba M. Wood, United States District Judge, and the Court, on August 17, 2017, having rendered its Order granting Defendants' motion and denying Plaintiffs' motion. The Court believe that the Order resolves all remaining issues. If the parties disagree, they shall file a letter on the docket within 30 days explaining any outstanding issues; and directing the Clerk of Court to close the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated August 17, 2017, Defendants' motion is granted and Plaintiffs' motion is denied. The Court believes that the Order resolves all remaining issues. If the parties disagree, they shall file a letter on the docket within 30 days explaining any outstanding issues; accordingly, the case is closed.

Dated: New York, New York
August 22, 2017

RUBY J. KRAJICK

Clerk of Court

BY: K Mango

Deputy Clerk

Exec. Order No. 13526, 75 FR 707, 2009 WL 6066991(Pres.)
Executive Order 13526

Classified National Security Information

December 29, 2009

***707** This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information both within the Government and to the American people. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security and demonstrating our commitment to open Government through accurate and accountable application of classification standards and routine, secure, and effective declassification are equally important priorities.

NOW, THEREFORE, I, BARACK OBAMA, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

PART 1_ORIGINAL CLASSIFICATION

Section 1.1.Classification Standards. (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

(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;

(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; 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.
(b) If there is significant doubt about the need to classify information, it shall not be classified. This provision does not:

(1) amplify or modify the substantive criteria or procedures for classification; or

(2) create any substantive or procedural rights subject to judicial review.
(c) Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.

(d) The unauthorized disclosure of foreign government information is presumed to cause damage to the national security.

Sec. 1.2.Classification Levels. (a) Information may be classified at one of the following three levels:

(1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

(2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the ***708** national security that the original classification authority is able to identify or describe.

(3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.
(b) Except as otherwise provided by statute, no other terms shall be used to identify United States classified information.

(c) If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level.

Sec. 1.3.Classification Authority. (a) The authority to classify information originally may be exercised only by:

(1) the President and the Vice President;

(2) agency heads and officials designated by the President; and

(3) United States Government officials delegated this authority pursuant to paragraph (c) of this section.
(b) Officials authorized to classify information at a specified level are also authorized to classify information at a lower level.

(c) Delegation of original classification authority.

(1) Delegations of original classification authority shall be limited to the minimum required to administer this order. Agency heads are responsible for ensuring that designated subordinate officials have a demonstrable and continuing need to exercise this authority.

(2) "Top Secret" original classification authority may be delegated only by the President, the Vice President, or an agency head or official designated pursuant to paragraph (a)(2) of this section.

(3) "Secret" or "Confidential" original classification authority may be delegated only by the President, the Vice President, an agency head or official designated pursuant to paragraph (a)(2) of this section, or the senior agency official designated under section 5.4(d) of this order, provided that official has been delegated "Top Secret" original classification authority by the agency head.

(4) Each delegation of original classification authority shall be in writing and the authority shall not be redelegated except as provided in this order. Each delegation shall identify the official by name or position.

(5) Delegations of original classification authority shall be reported or made available by name or position to the Director of the Information Security Oversight Office.
(d) All original classification authorities must receive training in proper classification (including the avoidance of over-classification) and declassification as provided in this order and its implementing directives at least once a calendar year. Such training must include instruction on the proper safeguarding of classified information and on the sanctions in section 5.5 of this order that may be brought against an individual who fails to classify information properly or protect classified information from unauthorized disclosure. Original classification authorities who do not receive such

mandatory training at least once within a calendar year shall have their classification authority suspended by the agency head or the senior agency official designated under section 5.4(d) of this order until such training has taken place. A waiver may be granted by the agency head, the deputy agency head, or the senior agency official if an individual is unable to receive such training due to unavoidable circumstances. Whenever a waiver is granted, the individual shall receive such training as soon as practicable.

(e) Exceptional cases. When an employee, government contractor, licensee, certificate holder, or grantee of an agency who does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent y709with this order and its implementing directives. The information shall be transmitted promptly as provided under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within 30 days whether to classify this information.

Sec. 1.4.Classification Categories. Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following:
(a) military plans, weapons systems, or operations;

(b) foreign government information;

(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;

(d) foreign relations or foreign activities of the United States, including confidential sources;

(e) scientific, technological, or economic matters relating to the national security;

(f) United States Government programs for safeguarding nuclear materials or facilities;

(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development, production, or use of weapons of mass destruction.

Sec. 1.5.Duration of Classification. (a) At the time of original classification, the original classification authority shall establish a specific date or event for declassification based on the duration of the national security sensitivity of the information. Upon reaching the date or event, the information shall be automatically declassified. Except for information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, the date or event shall not exceed the time frame established in paragraph (b) of this section.
(b) If the original classification authority cannot determine an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority otherwise determines that the sensitivity of the information requires that it be marked for declassification for up to 25 years from the date of the original decision.

(c) An original classification authority may extend the duration of classification up to 25 years from the date of origin of the document, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under this order are followed.

(d) No information may remain classified indefinitely. Information marked for an indefinite duration of classification under predecessor orders, for example, marked as "Originating Agency's Determination Required," or classified information that contains incomplete declassification instructions or lacks declassification instructions shall be declassified in accordance with part 3 of this order.

Sec. 1.6.Identification and Markings. (a) At the time of original classification, the following shall be indicated in a manner that is immediately apparent:

(1) one of the three classification levels defined in section 1.2 of this order;

(2) the identity, by name and position, or by personal identifier, of the original classification authority;

(3) the agency and office of origin, if not otherwise evident;

(4) declassification instructions, which shall indicate one of the following:

The President

***710** (A) the date or event for declassification, as prescribed in section 1.5(a);

(B) the date that is 10 years from the date of original classification, as prescribed in section 1.5(b);

(C) the date that is up to 25 years from the date of original classification, as prescribed in section 1.5(b); or

(D) in the case of information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, the marking prescribed in implementing directives issued pursuant to this order; and

(5) a concise reason for classification that, at a minimum, cites the applicable classification categories in section 1.4 of this order.

(b) Specific information required in paragraph (a) of this section may be excluded if it would reveal additional classified information.

(c) With respect to each classified document, the agency originating the document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are unclassified. In accordance with standards prescribed in directives issued under this order, the Director of the Information Security Oversight Office may grant and revoke temporary waivers of this requirement. The Director shall revoke any waiver upon a finding of abuse.

(d) Markings or other indicia implementing the provisions of this order, including abbreviations and requirements to safeguard classified working papers, shall conform to the standards prescribed in implementing directives issued pursuant to this order.

(e) Foreign government information shall retain its original classification markings or shall be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the entity that furnished the information. Foreign government information retaining its original classification markings need not be assigned a U.S. classification marking provided that the responsible agency determines that the foreign government markings are adequate to meet the purposes served by U.S. classification markings.

(f) Information assigned a level of classification under this or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings. Whenever such information is used in the derivative classification process or is reviewed for possible declassification, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings.

(g) The classification authority shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document or prepare a product to allow for dissemination at the lowest level of classification possible or in unclassified form.

(h) Prior to public release, all declassified records shall be appropriately marked to reflect their declassification.

Sec. 1.7.Classification Prohibitions and Limitations. (a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:

(1) conceal violations of law, inefficiency, or administrative error;

(2) prevent embarrassment to a person, organization, or agency;

(3) restrain competition; or

(4) prevent or delay the release of information that does not require protection in the interest of the national security.
(b) Basic scientific research information not clearly related to the national security shall not be classified.

(c) Information may not be reclassified after declassification and release to the public under proper authority unless:

***711** (1) the reclassification is personally approved in writing by the agency head based on a document-by-document determination by the agency that reclassification is required to prevent significant and demonstrable damage to the national security;

(2) the information may be reasonably recovered without bringing undue attention to the information;

(3) the reclassification action is reported promptly to the Assistant to the President for National Security Affairs (National Security Advisor) and the Director of the Information Security Oversight Office; and

(4) for documents in the physical and legal custody of the National Archives and Records Administration (National Archives) that have been available for public use, the agency head has, after making the determinations required by this paragraph, notified the Archivist of the United States (Archivist), who shall suspend public access pending approval of the reclassification action by the Director of the Information Security Oversight Office. Any such decision by the Director may be appealed by the agency head to the President through the National Security Advisor. Public access shall remain suspended pending a prompt decision on the appeal.
(d) Information that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552), the Presidential Records Act, 44 U.S.C. 2204(c)(1), the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of section 3.5 of this order only if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order. The requirements in this paragraph

also apply to those situations in which information has been declassified in accordance with a specific date or event determined by an original classification authority in accordance with section 1.5 of this order.

(e) Compilations of items of information that are individually unclassified may be classified if the compiled information reveals an additional association or relationship that:

(1) meets the standards for classification under this order; and

(2) is not otherwise revealed in the individual items of information.

Sec. 1.8.Classification Challenges. (a) Authorized holders of information who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status of the information in accordance with agency procedures established under paragraph (b) of this section.
(b) In accordance with implementing directives issued pursuant to this order, an agency head or senior agency official shall establish procedures under which authorized holders of information, including authorized holders outside the classifying agency, are encouraged and expected to challenge the classification of information that they believe is improperly classified or unclassified. These procedures shall ensure that:

(1) individuals are not subject to retribution for bringing such actions;

(2) an opportunity is provided for review by an impartial official or panel; and

(3) individuals are advised of their right to appeal agency decisions to the Interagency Security Classification Appeals Panel (Panel) established by section 5.3 of this order.
(c) Documents required to be submitted for prepublication review or other administrative process pursuant to an approved nondisclosure agreement are not covered by this section.

***712** Sec. 1.9.Fundamental Classification Guidance Review. (a) Agency heads shall complete on a periodic basis a comprehensive review of the agency's classification guidance, particularly classification guides, to ensure the guidance reflects current circumstances and to identify classified information that no longer requires protection and can be declassified. The initial fundamental classification guidance review shall be completed within 2 years of the effective date of this order.
(b) The classification guidance review shall include an evaluation of classified information to determine if it meets the standards for classification under section 1.4 of this order, taking into account an up-to-date assessment of likely damage as described under section 1.2 of this order.

(c) The classification guidance review shall include original classification authorities and agency subject matter experts to ensure a broad range of perspectives.

(d) Agency heads shall provide a report summarizing the results of the classification guidance review to the Director of the Information Security Oversight Office and shall release an unclassified version of this report to the public.

PART 2_DERIVATIVE CLASSIFICATION

Sec. 2.1.Use of Derivative Classification. (a) Persons who reproduce, extract, or summarize classified information, or who apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority.
(b) Persons who apply derivative classification markings shall:

(1) be identified by name and position, or by personal identifier, in a manner that is immediately apparent for each derivative classification action;

(2) observe and respect original classification decisions; and

(3) carry forward to any newly created documents the pertinent classification markings. For information derivatively classified based on multiple sources, the derivative classifier shall carry forward:

(A) the date or event for declassification that corresponds to the longest period of classification among the sources, or the marking established pursuant to section 1.6(a)(4)(D) of this order; and

(B) a listing of the source materials.
(c) Derivative classifiers shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document or prepare a product to allow for dissemination at the lowest level of classification possible or in unclassified form.

(d) Persons who apply derivative classification markings shall receive training in the proper application of the derivative classification principles of the order, with an emphasis on avoiding over-classification, at least once every 2 years. Derivative classifiers who do not receive such training at least once every 2 years shall have their authority to apply derivative classification markings suspended until they have received such training. A waiver may be granted by the agency head, the deputy agency head, or the senior agency official if an individual is unable to receive such training due to unavoidable circumstances. Whenever a waiver is granted, the individual shall receive such training as soon as practicable.

Sec. 2.2.Classification Guides. (a) Agencies with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information. These guides shall conform to standards contained in directives issued under this order.
(b) Each guide shall be approved personally and in writing by an official who:

(1) has program or supervisory responsibility over the information or is the senior agency official; and

***713** (2) is authorized to classify information originally at the highest level of classification prescribed in the guide.
(c) Agencies shall establish procedures to ensure that classification guides are reviewed and updated as provided in directives issued under this order.

(d) Agencies shall incorporate original classification decisions into classification guides on a timely basis and in accordance with directives issued under this order.

(e) Agencies may incorporate exemptions from automatic declassification approved pursuant to section 3.3(j) of this order into classification guides, provided that the Panel is notified of the intent to take such action for specific information in advance of approval and the information remains in active use.

(f) The duration of classification of a document classified by a derivative classifier using a classification guide shall not exceed 25 years from the date of the origin of the document, except for:

(1) information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction; and

(2) specific information incorporated into classification guides in accordance with section 2.2(e) of this order.

PART 3_DECLASSIFICATION AND DOWNGRADING

Sec. 3.1.Authority for Declassification. (a) Information shall be declassified as soon as it no longer meets the standards for classification under this order.
(b) Information shall be declassified or downgraded by:

(1) the official who authorized the original classification, if that official is still serving in the same position and has original classification authority;

(2) the originator's current successor in function, if that individual has original classification authority;

(3) a supervisory official of either the originator or his or her successor in function, if the supervisory official has original classification authority; or (4) officials delegated declassification authority in writing by the agency head or the senior agency official of the originating agency.
(c) The Director of National Intelligence (or, if delegated by the Director of National Intelligence, the Principal Deputy Director of National Intelligence) may, with respect to the Intelligence Community, after consultation with the head of the originating Intelligence Community element or department, declassify, downgrade, or direct the declassification or downgrading of information or intelligence relating to intelligence sources, methods, or activities.

(d) It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure. This provision does not:

(1) amplify or modify the substantive criteria or procedures for classification; or

(2) create any substantive or procedural rights subject to judicial review.
(e) If the Director of the Information Security Oversight Office determines that information is classified in violation of this order, the Director may require the information to be declassified by the agency that originated the classification. Any such decision by the Director may be appealed to the President through the National Security Advisor. The information shall remain classified pending a prompt decision on the appeal.

***714** (f) The provisions of this section shall also apply to agencies that, under the terms of this order, do not have original classification authority, but had such authority under predecessor orders.

(g) No information may be excluded from declassification under section 3.3 of this order based solely on the type of document or record in which it is found. Rather, the classified information must be considered on the basis of its content.

(h) Classified nonrecord materials, including artifacts, shall be declassified as soon as they no longer meet the standards for classification under this order.

(i) When making decisions under sections 3.3, 3.4, and 3.5 of this order, agencies shall consider the final decisions of the Panel.

Sec. 3.2.Transferred Records.
(a) In the case of classified records transferred in conjunction with a transfer of functions, and not merely for storage purposes, the receiving agency shall be deemed to be the originating agency for purposes of this order.

(b) In the case of classified records that are not officially transferred as described in paragraph (a) of this section, but that originated in an agency that has ceased to exist and for which there is no successor agency, each agency in possession of such records shall be deemed to be the originating agency for purposes of this order. Such records may be declassified or downgraded by the agency in possession of the records after consultation with any other agency that has an interest in the subject matter of the records.

(c) Classified records accessioned into the National Archives shall be declassified or downgraded by the Archivist in accordance with this order, the directives issued pursuant to this order, agency declassification guides, and any existing procedural agreement between the Archivist and the relevant agency head.

(d) The originating agency shall take all reasonable steps to declassify classified information contained in records determined to have permanent historical value before they are accessioned into the National Archives. However, the Archivist may require that classified records be accessioned into the National Archives when necessary to comply with the provisions of the Federal Records Act. This provision does not apply to records transferred to the Archivist pursuant to section 2203 of title 44, United States Code, or records for which the National Archives serves as the custodian of the records of an agency or organization that has gone out of existence.

(e) To the extent practicable, agencies shall adopt a system of records management that will facilitate the public release of documents at the time such documents are declassified pursuant to the provisions for automatic declassification in section 3.3 of this order.

Sec. 3.3Automatic Declassification.
(a) Subject to paragraphs (b)-(d) and (g)-(j) of this section, all classified records that (1) are more than 25 years old and (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. All classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of origin, except as provided in paragraphs (b)-(d) and (g)-(j) of this section. If the date of origin of an individual record cannot be readily determined, the date of original classification shall be used instead.

(b) An agency head may exempt from automatic declassification under paragraph (a) of this section specific information, the release of which should clearly and demonstrably be expected to:

(1) reveal the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security service of a foreign ***715** government or international organization, or a nonhuman intelligence source; or impair the effectiveness of an intelligence method currently in use, available for use, or under development;

(2) reveal information that would assist in the development, production, or use of weapons of mass destruction;

(3) reveal information that would impair U.S. cryptologic systems or activities;

(4) reveal information that would impair the application of state-of-the-art technology within a U.S. weapon system;

(5) reveal formally named or numbered U.S. military war plans that remain in effect, or reveal operational or tactical elements of prior plans that are contained in such active plans;

(6) reveal information, including foreign government information, that would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States;

(7) reveal information that would impair the current ability of United States Government officials to protect the President, Vice President, and other protectees for whom protection services, in the interest of the national security, are authorized;

(8) reveal information that would seriously impair current national security emergency preparedness plans or reveal current vulnerabilities of systems, installations, or infrastructures relating to the national security; or

(9) violate a statute, treaty, or international agreement that does not permit the automatic or unilateral declassification of information at 25 years.

(c)(1) An agency head shall notify the Panel of any specific file series of records for which a review or assessment has determined that the information within that file series almost invariably falls within one or more of the exemption categories listed in paragraph (b) of this section and that the agency proposes to exempt from automatic declassification at 25 years.

(2) The notification shall include:

(A) a description of the file series;

(B) an explanation of why the information within the file series is almost invariably exempt from automatic declassification and why the information must remain classified for a longer period of time; and

(C) except when the information within the file series almost invariably identifies a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, a specific date or event for declassification of the information, not to exceed December 31 of the year that is 50 years from the date of origin of the records.

(3) The Panel may direct the agency not to exempt a designated file series or to declassify the information within that series at an earlier date than recommended. The agency head may appeal such a decision to the President through the National Security Advisor.

(4) File series exemptions approved by the President prior to December 31, 2008, shall remain valid without any additional agency action pending Panel review by the later of December 31, 2010, or December 31 of the year that is 10 years from the date of previous approval.

(d) The following provisions shall apply to the onset of automatic declassification:

(1) Classified records within an integral file block, as defined in this order, that are otherwise subject to automatic declassification under this section shall not be automatically declassified until December 31 of the year that is 25 years from the date of the most recent record within the file block.

***716** (2) After consultation with the Director of the National Declassification Center (the Center) established by section 3.7 of this order and before the records are subject to automatic declassification, an agency head or senior agency official may delay automatic declassification for up to five additional years for classified information contained in media that make a review for possible declassification exemptions more difficult or costly.

(3) Other than for records that are properly exempted from automatic declassification, records containing classified information that originated with other agencies or the disclosure of which would affect the interests or activities of other agencies with respect to the classified information and could reasonably be expected to fall under one or more of the exemptions in paragraph (b) of this section shall be identified prior to the onset of automatic declassification for later referral to those agencies.

(A) The information of concern shall be referred by the Center established by section 3.7 of this order, or by the centralized facilities referred to in section 3.7(e) of this order, in a prioritized and scheduled manner determined by the Center.

(B) If an agency fails to provide a final determination on a referral made by the Center within 1 year of referral, or by the centralized facilities referred to in section 3.7(e) of this order within 3 years of referral, its equities in the referred records shall be automatically declassified.

(C) If any disagreement arises between affected agencies and the Center regarding the referral review period, the Director of the Information Security Oversight Office shall determine the appropriate period of review of referred records.

(D) Referrals identified prior to the establishment of the Center by section 3.7 of this order shall be subject to automatic declassification only in accordance with subparagraphs (d)(3)(A)-(C) of this section.

(4) After consultation with the Director of the Information Security Oversight Office, an agency head may delay automatic declassification for up to 3 years from the date of discovery of classified records that were inadvertently not reviewed prior to the effective date of automatic declassification.
(e) Information exempted from automatic declassification under this section shall remain subject to the mandatory and systematic declassification review provisions of this order.

(f) The Secretary of State shall determine when the United States should commence negotiations with the appropriate officials of a foreign government or international organization of governments to modify any treaty or international agreement that requires the classification of information contained in records affected by this section for a period longer than 25 years from the date of its creation, unless the treaty or international agreement pertains to information that may otherwise remain classified beyond 25 years under this section.

(g) The Secretary of Energy shall determine when information concerning foreign nuclear programs that was removed from the Restricted Data category in order to carry out provisions of the National Security Act of 1947, as amended, may be declassified. Unless otherwise determined, such information shall be declassified when comparable information concerning the United States nuclear program is declassified.

(h) Not later than 3 years from the effective date of this order, all records exempted from automatic declassification under paragraphs (b) and (c) of this section shall be automatically declassified on December 31 of a year that is no more than 50 years from the date of origin, subject to the following:

(1) Records that contain information the release of which should clearly and demonstrably be expected to reveal the following are exempt from automatic declassification at 50 years:

***717** (A) the identity of a confidential human source or a human intelligence source; or

(B) key design concepts of weapons of mass destruction.

(2) In extraordinary cases, agency heads may, within 5 years of the onset of automatic declassification, propose to exempt additional specific information from declassification at 50 years.

(3) Records exempted from automatic declassification under this paragraph shall be automatically declassified on December 31 of a year that is no more than 75 years from the date of origin unless an agency head, within 5 years of that date, proposes to exempt specific information from declassification at 75 years and the proposal is formally approved by the Panel.

(i) Specific records exempted from automatic declassification prior to the establishment of the Center described in section 3.7 of this order shall be subject to the provisions of paragraph (h) of this section in a scheduled and prioritized manner determined by the Center.

(j) At least 1 year before information is subject to automatic declassification under this section, an agency head or senior agency official shall notify the Director of the Information Security Oversight Office, serving as Executive Secretary of the Panel, of any specific information that the agency proposes to exempt from automatic declassification under paragraphs (b) and (h) of this section.

(1) The notification shall include:

(A) a detailed description of the information, either by reference to information in specific records or in the form of a declassification guide;

(B) an explanation of why the information should be exempt from automatic declassification and must remain classified for a longer period of time; and

(C) a specific date or a specific and independently verifiable event for automatic declassification of specific records that contain the information proposed for exemption.

(2) The Panel may direct the agency not to exempt the information or to declassify it at an earlier date than recommended. An agency head may appeal such a decision to the President through the National Security Advisor. The information will remain classified while such an appeal is pending.

(k) For information in a file series of records determined not to have permanent historical value, the duration of classification beyond 25 years shall be the same as the disposition (destruction) date of those records in each Agency Records Control Schedule or General Records Schedule, although the duration of classification shall be extended if the record has been retained for business reasons beyond the scheduled disposition date.

Sec. 3.4.Systematic Declassification Review.
(a) Each agency that has originated classified information under this order or its predecessors shall establish and conduct a program for systematic declassification review for records of permanent historical value exempted from automatic declassification under section 3.3 of this order. Agencies shall prioritize their review of such records in accordance with priorities established by the Center.

(b) The Archivist shall conduct a systematic declassification review program for classified records:

(1) accessioned into the National Archives; (2) transferred to the Archivist pursuant to 44 U.S.C. 2203; and (3) for which the National Archives serves as the custodian for an agency or organization that has gone out of existence.

Sec. 3.5.Mandatory Declassification Review.
(a) Except as provided in paragraph (b) of this section, all information classified under this order or predecessor orders shall be subject to a review for declassification by the originating agency if:

***718** (1) the request for a review describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort;

(2) the document or material containing the information responsive to the request is not contained within an operational file exempted from search and review, publication, and disclosure under 5 U.S.C. 552 in accordance with law; and

(3) the information is not the subject of pending litigation.
(b) Information originated by the incumbent President or the incumbent Vice President; the incumbent President's White House Staff or the incumbent Vice President's Staff; committees, commissions, or boards appointed by the incumbent President; or other entities within the Executive Office of the President that solely advise and assist the incumbent President is exempted from the provisions of paragraph (a) of this section. However, the Archivist shall have the authority to review, downgrade, and declassify papers or records of former Presidents and Vice Presidents under the control of the Archivist pursuant to 44 U.S.C. 2107, 2111, 2111 note, or 2203. Review procedures developed by the Archivist shall provide for consultation with agencies having primary subject matter interest and shall be consistent with the provisions of applicable laws or lawful agreements that pertain to the respective Presidential papers or records. Agencies with primary subject matter interest shall be notified promptly of the Archivist's decision. Any final decision by the Archivist may be appealed by the requester or an agency to the Panel. The information shall remain classified pending a prompt decision on the appeal.

(c) Agencies conducting a mandatory review for declassification shall declassify information that no longer meets the standards for classification under this order. They shall release this information unless withholding is otherwise authorized and warranted under applicable law.

(d) If an agency has reviewed the requested information for declassification within the past 2 years, the agency need not conduct another review and may instead inform the requester of this fact and the prior review decision and advise the requester of appeal rights provided under subsection (e) of this section.

(e) In accordance with directives issued pursuant to this order, agency heads shall develop procedures to process requests for the mandatory review of classified information. These procedures shall apply to information classified under this or predecessor orders. They also shall provide a means for administratively appealing a denial of a mandatory review request, and for notifying the requester of the right to appeal a final agency decision to the Panel.

(f) After consultation with affected agencies, the Secretary of Defense shall develop special procedures for the review of cryptologic information; the Director of National Intelligence shall develop special procedures for the review of information pertaining to intelligence sources, methods, and activities; and the Archivist shall develop special procedures for the review of information accessioned into the National Archives.

(g) Documents required to be submitted for prepublication review or other administrative process pursuant to an approved nondisclosure agreement are not covered by this section.

(h) This section shall not apply to any request for a review made to an element of the Intelligence Community that is made by a person other than an individual as that term is defined by 5 U.S.C. 552a(a)(2), or by a foreign government entity or any representative thereof.

Sec. 3.6.Processing Requests and Reviews. Notwithstanding section 4.1(i) of this order, in response to a request for information under the Freedom of Information Act, the Presidential Records Act, the Privacy Act of 1974, or the mandatory review provisions of this order:

***719** (a) An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.

(b) When an agency receives any request for documents in its custody that contain classified information that originated with other agencies or the disclosure of which would affect the interests or activities of other agencies with respect to the classified information, or identifies such documents in the process of implementing sections 3.3 or 3.4 of this order, it shall refer copies of any request and the pertinent documents to the originating agency for processing and may, after consultation with the originating agency, inform any requester of the referral unless such association is itself classified under this order or its predecessors. In cases in which the originating agency determines in writing that a response under paragraph (a) of this section is required, the referring agency shall respond to the requester in accordance with that paragraph.

(c) Agencies may extend the classification of information in records determined not to have permanent historical value or nonrecord materials, including artifacts, beyond the time frames established in sections 1.5(b) and 2.2(f) of this order, provided:

(1) the specific information has been approved pursuant to section 3.3(j) of this order for exemption from automatic declassification; and

(2) the extension does not exceed the date established in section 3.3(j) of this order.

Sec. 3.7.National Declassification Center. (a) There is established within the National Archives a National Declassification Center to streamline declassification processes, facilitate quality-assurance measures, and implement standardized training regarding the declassification of records determined to have permanent historical value. There shall be a Director of the Center who shall be appointed or removed by the Archivist in consultation with the Secretaries of State, Defense, Energy, and Homeland Security, the Attorney General, and the Director of National Intelligence.

(b) Under the administration of the Director, the Center shall coordinate:

(1) timely and appropriate processing of referrals in accordance with section 3.3(d)(3) of this order for accessioned Federal records and transferred presidential records.

(2) general interagency declassification activities necessary to fulfill the requirements of sections 3.3 and 3.4 of this order;

(3) the exchange among agencies of detailed declassification guidance to enable the referral of records in accordance with section 3.3(d)(3) of this order;

(4) the development of effective, transparent, and standard declassification work processes, training, and quality assurance measures;

(5) the development of solutions to declassification challenges posed by electronic records, special media, and emerging technologies;

(6) the linkage and effective utilization of existing agency databases and the use of new technologies to document and make public declassification review decisions and support declassification activities under the purview of the Center; and

(7) storage and related services, on a reimbursable basis, for Federal records containing classified national security information.

(c) Agency heads shall fully cooperate with the Archivist in the activities of the Center and shall:

(1) provide the Director with adequate and current declassification guidance to enable the referral of records in accordance with section 3.3(d)(3) of this order; and

(2) upon request of the Archivist, assign agency personnel to the Center who shall be delegated authority by the agency head to review and exempt ***720** or declassify information originated by their agency contained in records accessioned into the National Archives, after consultation with subject-matter experts as necessary.

(d) The Archivist, in consultation with representatives of the participants in the Center and after input from the general public, shall develop priorities for declassification activities under the purview of the Center that take into account the degree of researcher interest and the likelihood of declassification.

(e) Agency heads may establish such centralized facilities and internal operations to conduct internal declassification reviews as appropriate to achieve optimized records management and declassification business processes. Once established, all referral processing of accessioned records shall take place at the Center, and such agency facilities and operations shall be coordinated with the Center to ensure the maximum degree of consistency in policies and procedures that relate to records determined to have permanent historical value.

(f) Agency heads may exempt from automatic declassification or continue the classification of their own originally classified information under section 3.3(a) of this order except that in the case of the Director of National Intelligence, the Director shall also retain such authority with respect to the Intelligence Community.

(g) The Archivist shall, in consultation with the Secretaries of State, Defense, Energy, and Homeland Security, the Attorney General, the Director of National Intelligence, the Director of the Central Intelligence Agency, and the Director of the Information Security Oversight Office, provide the National Security Advisor with a detailed concept of operations for the Center and a proposed implementing directive under section 5.1 of this order that reflects the coordinated views of the aforementioned agencies.

PART 4_SAFEGUARDING

Sec. 4.1.General Restrictions on Access.

(a) A person may have access to classified information provided that:

(1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee;

(2) the person has signed an approved nondisclosure agreement; and

(3) the person has a need-to-know the information.

(b) Every person who has met the standards for access to classified information in paragraph (a) of this section shall receive contemporaneous training on the proper safeguarding of classified information and on the criminal, civil, and administrative sanctions that may be imposed on an individual who fails to protect classified information from unauthorized disclosure.

(c) An official or employee leaving agency service may not remove classified information from the agency's control or direct that information be declassified in order to remove it from agency control.

(d) Classified information may not be removed from official premises without proper authorization.

(e) Persons authorized to disseminate classified information outside the executive branch shall ensure the protection of the information in a manner equivalent to that provided within the executive branch.

(f) Consistent with law, executive orders, directives, and regulations, an agency head or senior agency official or, with respect to the Intelligence Community, the Director of National Intelligence, shall establish uniform procedures to ensure that automated information systems, including networks and telecommunications systems, that collect, create, communicate, compute, disseminate, process, or store classified information:

(1) prevent access by unauthorized persons;

(2) ensure the integrity of the information; and

***721** (3) to the maximum extent practicable, use:

(A) common information technology standards, protocols, and interfaces that maximize the availability of, and access to, the information in a form and manner that facilitates its authorized use; and

(B) standardized electronic formats to maximize the accessibility of information to persons who meet the criteria set forth in section 4.1(a) of this order.

(g) Consistent with law, executive orders, directives, and regulations, each agency head or senior agency official, or with respect to the Intelligence Community, the Director of National Intelligence, shall establish controls to ensure that classified information is used, processed, stored, reproduced, transmitted, and destroyed under conditions that provide adequate protection and prevent access by unauthorized persons.

(h) Consistent with directives issued pursuant to this order, an agency shall safeguard foreign government information under standards that provide a degree of protection at least equivalent to that required by the government or international organization of governments that furnished the information. When adequate to achieve equivalency, these standards may be less restrictive than the safeguarding standards that ordinarily apply to U.S. “Confidential” information, including modified handling and transmission and allowing access to individuals with a need-to-know who have not otherwise been cleared for access to classified information or executed an approved nondisclosure agreement.

(i)(1) Classified information originating in one agency may be disseminated to another agency or U.S. entity by any agency to which it has been made available without the consent of the originating agency, as long as the criteria for access under section 4.1(a) of this order are met, unless the originating agency has determined that prior authorization is required for such dissemination and has marked or indicated such requirement on the medium containing the classified information in accordance with implementing directives issued pursuant to this order.

(2) Classified information originating in one agency may be disseminated by any other agency to which it has been made available to a foreign government in accordance with statute, this order, directives implementing this order, direction of the President, or with the consent of the originating agency. For the purposes of this section, "foreign government" includes any element of a foreign government, or an international organization of governments, or any element thereof.

(3) Documents created prior to the effective date of this order shall not be disseminated outside any other agency to which they have been made available without the consent of the originating agency. An agency head or senior agency official may waive this requirement for specific information that originated within that agency.

(4) For purposes of this section, the Department of Defense shall be considered one agency, except that any dissemination of information regarding intelligence sources, methods, or activities shall be consistent with directives issued pursuant to section 6.2(b) of this order.

(5) Prior consent of the originating agency is not required when referring records for declassification review that contain information originating in more than one agency.

Sec. 4.2Distribution Controls.
(a) The head of each agency shall establish procedures in accordance with applicable law and consistent with directives issued pursuant to this order to ensure that classified information is accessible to the maximum extent possible by individuals who meet the criteria set forth in section 4.1(a) of this order.

(b) In an emergency, when necessary to respond to an imminent threat to life or in defense of the homeland, the agency head or any designee y722may authorize the disclosure of classified information (including information marked pursuant to section 4.1(i)(1) of this order) to an individual or individuals who are otherwise not eligible for access. Such actions shall be taken only in accordance with directives implementing this order and any procedure issued by agencies governing the classified information, which shall be designed to minimize the classified information that is disclosed under these circumstances and the number of individuals who receive it. Information disclosed under this provision or implementing directives and procedures shall not be deemed declassified as a result of such disclosure or subsequent use by a recipient. Such disclosures shall be reported promptly to the originator of the classified information. For purposes of this section, the Director of National Intelligence may issue an implementing directive governing the emergency disclosure of classified intelligence information.

(c) Each agency shall update, at least annually, the automatic, routine, or recurring distribution mechanism for classified information that it distributes. Recipients shall cooperate fully with distributors who are updating distribution lists and shall notify distributors whenever a relevant change in status occurs.

Sec. 4.3.Special Access Programs. (a) Establishment of special access programs. Unless otherwise authorized by the President, only the Secretaries of State, Defense, Energy, and Homeland Security, the Attorney General, and the Director of National Intelligence, or the principal deputy of each, may create a special access program. For special access programs pertaining to intelligence sources, methods, and activities (but not including military operational, strategic, and tactical

programs), this function shall be exercised by the Director of National Intelligence. These officials shall keep the number of these programs at an absolute minimum, and shall establish them only when the program is required by statute or upon a specific finding that:

(1) the vulnerability of, or threat to, specific information is exceptional; and

(2) the normal criteria for determining eligibility for access applicable to information classified at the same level are not deemed sufficient to protect the information from unauthorized disclosure.
(b) Requirements and limitations.

(1) Special access programs shall be limited to programs in which the number of persons who ordinarily will have access will be reasonably small and commensurate with the objective of providing enhanced protection for the information involved.

(2) Each agency head shall establish and maintain a system of accounting for special access programs consistent with directives issued pursuant to this order.

(3) Special access programs shall be subject to the oversight program established under section 5.4(d) of this order. In addition, the Director of the Information Security Oversight Office shall be afforded access to these programs, in accordance with the security requirements of each program, in order to perform the functions assigned to the Information Security Oversight Office under this order. An agency head may limit access to a special access program to the Director of the Information Security Oversight Office and no more than one other employee of the Information Security Oversight Office or, for special access programs that are extraordinarily sensitive and vulnerable, to the Director only.

(4) The agency head or principal deputy shall review annually each special access program to determine whether it continues to meet the requirements of this order.

(5) Upon request, an agency head shall brief the National Security Advisor, or a designee, on any or all of the agency's special access programs.

(6) For the purposes of this section, the term “agency head” refers only to the Secretaries of State, Defense, Energy, and Homeland Security, the ***723** Attorney General, and the Director of National Intelligence, or the principal deputy of each.
(c) Nothing in this order shall supersede any requirement made by or under 10 U.S.C. 119.

Sec. 4.4.Access by Historical Researchers and Certain Former Government Personnel.
(a) The requirement in section 4.1(a)(3) of this order that access to classified information may be granted only to individuals who have a need-to-know the information may be waived for persons who:

(1) are engaged in historical research projects;

(2) previously have occupied senior policy-making positions to which they were appointed or designated by the President or the Vice President; or

(3) served as President or Vice President.
(b) Waivers under this section may be granted only if the agency head or senior agency official of the originating agency:

(1) determines in writing that access is consistent with the interest of the national security;

(2) takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with this order; and

(3) limits the access granted to former Presidential appointees or designees and Vice Presidential appointees or designees to items that the person originated, reviewed, signed, or received while serving as a Presidential or Vice Presidential appointee or designee.

PART 5_IMPLEMENTATION AND REVIEW

Sec. 5.1.Program Direction. (a) The Director of the Information Security Oversight Office, under the direction of the Archivist and in consultation with the National Security Advisor, shall issue such directives as are necessary to implement this order. These directives shall be binding on the agencies. Directives issued by the Director of the Information Security Oversight Office shall establish standards for:
(1) classification, declassification, and marking principles;

(2) safeguarding classified information, which shall pertain to the handling, storage, distribution, transmittal, and destruction of and accounting for classified information;

(3) agency security education and training programs;

(4) agency self-inspection programs; and

(5) classification and declassification guides.
(b) The Archivist shall delegate the implementation and monitoring functions of this program to the Director of the Information Security Oversight Office.

(c) The Director of National Intelligence, after consultation with the heads of affected agencies and the Director of the Information Security Oversight Office, may issue directives to implement this order with respect to the protection of intelligence sources, methods, and activities. Such directives shall be consistent with this order and directives issued under paragraph (a) of this section.

Sec. 5.2.Information Security Oversight Office. (a) There is established within the National Archives an Information Security Oversight Office. The Archivist shall appoint the Director of the Information Security Oversight Office, subject to the approval of the President.
(b) Under the direction of the Archivist, acting in consultation with the National Security Advisor, the Director of the Information Security Oversight Office shall:

(1) develop directives for the implementation of this order;

***724** (2) oversee agency actions to ensure compliance with this order and its implementing directives;

(3) review and approve agency implementing regulations prior to their issuance to ensure their consistency with this order and directives issued under section 5.1(a) of this order;

(4) have the authority to conduct on-site reviews of each agency's program established under this order, and to require of each agency those reports and information and other cooperation that may be necessary to fulfill its responsibilities. If granting access to specific categories of classified information would pose an exceptional national security risk, the affected agency head or the senior agency official shall submit a written justification recommending the denial of access to the President through the National Security Advisor within 60 days of the request for access. Access shall be denied pending the response;

(5) review requests for original classification authority from agencies or officials not granted original classification authority and, if deemed appropriate, recommend Presidential approval through the National Security Advisor;

(6) consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the program established under this order;

(7) have the authority to prescribe, after consultation with affected agencies, standardization of forms or procedures that will promote the implementation of the program established under this order;

(8) report at least annually to the President on the implementation of this order; and

(9) convene and chair interagency meetings to discuss matters pertaining to the program established by this order.

Sec. 5.3.Interagency Security Classification Appeals Panel.
(a) Establishment and administration.

(1) There is established an Interagency Security Classification Appeals Panel. The Departments of State, Defense, and Justice, the National Archives, the Office of the Director of National Intelligence, and the National Security Advisor shall each be represented by a senior-level representative who is a full-time or permanent part-time Federal officer or employee designated to serve as a member of the Panel by the respective agency head. The President shall designate a Chair from among the members of the Panel.

(2) Additionally, the Director of the Central Intelligence Agency may appoint a temporary representative who meets the criteria in paragraph (a)(1) of this section to participate as a voting member in all Panel deliberations and associated support activities concerning classified information originated by the Central Intelligence Agency.

(3) A vacancy on the Panel shall be filled as quickly as possible as provided in paragraph (a)(1) of this section.

(4) The Director of the Information Security Oversight Office shall serve as the Executive Secretary of the Panel. The staff of the Information Security Oversight Office shall provide program and administrative support for the Panel.

(5) The members and staff of the Panel shall be required to meet eligibility for access standards in order to fulfill the Panel's functions.

(6) The Panel shall meet at the call of the Chair. The Chair shall schedule meetings as may be necessary for the Panel to fulfill its functions in a timely manner.

(7) The Information Security Oversight Office shall include in its reports to the President a summary of the Panel's activities.

***725** (b) Functions. The Panel shall:

(1) decide on appeals by persons who have filed classification challenges under section 1.8 of this order;

(2) approve, deny, or amend agency exemptions from automatic declassification as provided in section 3.3 of this order;

(3) decide on appeals by persons or entities who have filed requests for mandatory declassification review under section 3.5 of this order; and

(4) appropriately inform senior agency officials and the public of final Panel decisions on appeals under sections 1.8 and 3.5 of this order.

(c) Rules and procedures. The Panel shall issue bylaws, which shall be published in theFederal Register. The bylaws shall establish the rules and procedures that the Panel will follow in accepting, considering, and issuing decisions on appeals. The rules and procedures of the Panel shall provide that the Panel will consider appeals only on actions in which:

(1) the appellant has exhausted his or her administrative remedies within the responsible agency;

(2) there is no current action pending on the issue within the Federal courts; and

(3) the information has not been the subject of review by the Federal courts or the Panel within the past 2 years.

(d) Agency heads shall cooperate fully with the Panel so that it can fulfill its functions in a timely and fully informed manner. The Panel shall report to the President through the National Security Advisor any instance in which it believes that an agency head is not cooperating fully with the Panel.

(e) The Panel is established for the sole purpose of advising and assisting the President in the discharge of his constitutional and discretionary authority to protect the national security of the United States. Panel decisions are committed to the discretion of the Panel, unless changed by the President.

(f) An agency head may appeal a decision of the Panel to the President through the National Security Advisor. The information shall remain classified pending a decision on the appeal.

Sec. 5.4.General Responsibilities. Heads of agencies that originate or handle classified information shall:

(a) demonstrate personal commitment and commit senior management to the successful implementation of the program established under this order;

(b) commit necessary resources to the effective implementation of the program established under this order;

(c) ensure that agency records systems are designed and maintained to optimize the appropriate sharing and safeguarding of classified information, and to facilitate its declassification under the terms of this order when it no longer meets the standards for continued classification; and

(d) designate a senior agency official to direct and administer the program, whose responsibilities shall include:

(1) overseeing the agency's program established under this order, provided an agency head may designate a separate official to oversee special access programs authorized under this order. This official shall provide a full accounting of the agency's special access programs at least annually;

(2) promulgating implementing regulations, which shall be published in theFederal Register to the extent that they affect members of the public;

(3) establishing and maintaining security education and training programs;

(4) establishing and maintaining an ongoing self-inspection program, which shall include the regular reviews of representative samples of the agency's ***726** original and derivative classification actions, and shall authorize appropriate agency officials to correct misclassification actions not covered by sections 1.7(c) and 1.7(d) of this order; and reporting annually to the Director of the Information Security Oversight Office on the agency's self-inspection program;

(5) establishing procedures consistent with directives issued pursuant to this order to prevent unnecessary access to classified information, including procedures that:

(A) require that a need for access to classified information be established before initiating administrative clearance procedures; and

(B) ensure that the number of persons granted access to classified information meets the mission needs of the agency while also satisfying operational and security requirements and needs;

(6) developing special contingency plans for the safeguarding of classified information used in or near hostile or potentially hostile areas;

(7) ensuring that the performance contract or other system used to rate civilian or military personnel performance includes the designation and management of classified information as a critical element or item to be evaluated in the rating of:

(A) original classification authorities;

(B) security managers or security specialists; and

(C) all other personnel whose duties significantly involve the creation or handling of classified information, including personnel who regularly apply derivative classification markings;

(8) accounting for the costs associated with the implementation of this order, which shall be reported to the Director of the Information Security Oversight Office for publication;

(9) assigning in a prompt manner agency personnel to respond to any request, appeal, challenge, complaint, or suggestion arising out of this order that pertains to classified information that originated in a component of the agency that no longer exists and for which there is no clear successor in function; and

(10) establishing a secure capability to receive information, allegations, or complaints regarding over-classification or incorrect classification within the agency and to provide guidance to personnel on proper classification as needed.

Sec. 5.5.Sanctions. (a) If the Director of the Information Security Oversight Office finds that a violation of this order or its implementing directives has occurred, the Director shall make a report to the head of the agency or to the senior agency official so that corrective steps, if appropriate, may be taken.
(b) Officers and employees of the United States Government, and its contractors, licensees, certificate holders, and grantees shall be subject to appropriate sanctions if they knowingly, willfully, or negligently:

(1) disclose to unauthorized persons information properly classified under this order or predecessor orders;

(2) classify or continue the classification of information in violation of this order or any implementing directive;

(3) create or continue a special access program contrary to the requirements of this order; or

(4) contravene any other provision of this order or its implementing directives.
(c) Sanctions may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation.

***727** (d) The agency head, senior agency official, or other supervisory official shall, at a minimum, promptly remove the classification authority of any individual who demonstrates reckless disregard or a pattern of error in applying the classification standards of this order.

(e) The agency head or senior agency official shall:

(1) take appropriate and prompt corrective action when a violation or infraction under paragraph (b) of this section occurs; and

(2) notify the Director of the Information Security Oversight Office when a violation under paragraph (b)(1), (2), or (3) of this section occurs.

PART 6_GENERAL PROVISIONS

Sec. 6.1.Definitions. For purposes of this order:
(a) “Access” means the ability or opportunity to gain knowledge of classified information.

(b) “Agency” means any “Executive agency,” as defined in 5 U.S.C. 105; any “Military department” as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into the possession of classified information.

(c) “Authorized holder” of classified information means anyone who satisfies the conditions for access stated in section 4.1(a) of this order.

(d) “Automated information system” means an assembly of computer hardware, software, or firmware configured to collect, create, communicate, compute, disseminate, process, store, or control data or information.

(e) “Automatic declassification” means the declassification of information based solely upon:

(1) the occurrence of a specific date or event as determined by the original classification authority; or

(2) the expiration of a maximum time frame for duration of classification established under this order.
(f) "Classification" means the act or process by which information is determined to be classified information.

(g) "Classification guidance" means any instruction or source that prescribes the classification of specific information.

(h) "Classification guide" means a documentary form of classification guidance issued by an original classification authority that identifies the elements of information regarding a specific subject that must be classified and establishes the level and duration of classification for each such element.

(i) "Classified national security information" or "classified information" means information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

(j) "Compilation" means an aggregation of preexisting unclassified items of information.

(k) "Confidential source" means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation that the information or relationship, or both, are to be held in confidence.

(l) "Damage to the national security" means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information.

(m) "Declassification" means the authorized change in the status of information from classified information to unclassified information.

(n) "Declassification guide" means written instructions issued by a declassification authority that describes the elements of information regarding y728a specific subject that may be declassified and the elements that must remain classified.

(o) "Derivative classification" means the incorporating, paraphrasing, restating, or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information. Derivative classification includes the classification of information based on classification guidance. The duplication or reproduction of existing classified information is not derivative classification.

(p) "Document" means any recorded information, regardless of the nature of the medium or the method or circumstances of recording.

(q) "Downgrading" means a determination by a declassification authority that information classified and safeguarded at a specified level shall be classified and safeguarded at a lower level.

(r) "File series" means file units or documents arranged according to a filing system or kept together because they relate to a particular subject or function, result from the same activity, document a specific kind of transaction, take a particular physical form, or have some other relationship arising out of their creation, receipt, or use, such as restrictions on access or use.

(s) "Foreign government information" means:

(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) information produced by the United States Government pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence; or

(3) information received and treated as "foreign government information" under the terms of a predecessor order.
(t) "Information" means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, is produced by or for, or is under the control of the United States Government.

(u) "Infraction" means any knowing, willful, or negligent action contrary to the requirements of this order or its implementing directives that does not constitute a "violation," as defined below.

(v) "Integral file block" means a distinct component of a file series, as defined in this section, that should be maintained as a separate unit in order to ensure the integrity of the records. An integral file block may consist of a set of records covering either a specific topic or a range of time, such as a Presidential administration or a 5-year retirement schedule within a specific file series that is retired from active use as a group. For purposes of automatic declassification, integral file blocks shall contain only records dated within 10 years of the oldest record in the file block.

(w) "Integrity" means the state that exists when information is unchanged from its source and has not been accidentally or intentionally modified, altered, or destroyed.

(x) "Intelligence" includes foreign intelligence and counterintelligence as defined by Executive Order 12333 of December 4, 1981, as amended, or by a successor order.

(y) "Intelligence activities" means all activities that elements of the Intelligence Community are authorized to conduct pursuant to law or Executive Order 12333, as amended, or a successor order.

***729** (z) "Intelligence Community" means an element or agency of the U.S. Government identified in or designated pursuant to section 3(4) of the National Security Act of 1947, as amended, or section 3.5(h) of Executive Order 12333, as amended.

(aa) "Mandatory declassification review" means the review for declassification of classified information in response to a request for declassification that meets the requirements under section 3.5 of this order.

(bb) "Multiple sources" means two or more source documents, classification guides, or a combination of both.

(cc) "National security" means the national defense or foreign relations of the United States.

(dd) "Need-to-know" means a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

(ee) "Network" means a system of two or more computers that can exchange data or information.

(ff) "Original classification" means an initial determination that information requires, in the interest of the national security, protection against unauthorized disclosure.

(gg) "Original classification authority" means an individual authorized in writing, either by the President, the Vice President, or by agency heads or other officials designated by the President, to classify information in the first instance.

(hh) "Records" means the records of an agency and Presidential papers or Presidential records, as those terms are defined in title 44, United States Code, including those created or maintained by a government contractor, licensee, certificate holder, or grantee that are subject to the sponsoring agency's control under the terms of the contract, license, certificate, or grant.

(ii) "Records having permanent historical value" means Presidential papers or Presidential records and the records of an agency that the Archivist has determined should be maintained permanently in accordance with title 44, United States Code.

(jj) "Records management" means the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.

(kk) "Safeguarding" means measures and controls that are prescribed to protect classified information.

(ll) "Self-inspection" means the internal review and evaluation of individual agency activities and the agency as a whole with respect to the implementation of the program established under this order and its implementing directives.

(mm) "Senior agency official" means the official designated by the agency head under section 5.4(d) of this order to direct and administer the agency's program under which information is classified, safeguarded, and declassified.

(nn) "Source document" means an existing document that contains classified information that is incorporated, paraphrased, restated, or generated in new form into a new document.

(oo) "Special access program" means a program established for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

***730** (pp) "Systematic declassification review" means the review for declassification of classified information contained in records that have been determined by the Archivist to have permanent historical value in accordance with title 44, United States Code.

(qq) "Telecommunications" means the preparation, transmission, or communication of information by electronic means.

(rr) "Unauthorized disclosure" means a communication or physical transfer of classified information to an unauthorized recipient.

(ss) "U.S. entity" includes:

(1) State, local, or tribal governments;

(2) State, local, and tribal law enforcement and firefighting entities;

(3) public health and medical entities;

(4) regional, state, local, and tribal emergency management entities, including State Adjutants General and other appropriate public safety entities; or

(5) private sector entities serving as part of the nation's Critical Infrastructure/Key Resources.
(tt) "Violation" means:

(1) any knowing, willful, or negligent action that could reasonably be expected to result in an unauthorized disclosure of classified information;

(2) any knowing, willful, or negligent action to classify or continue the classification of information contrary to the requirements of this order or its implementing directives; or

(3) any knowing, willful, or negligent action to create or continue a special access program contrary to the requirements of this order.
(uu) "Weapons of mass destruction" means any weapon of mass destruction as defined in 50 U.S.C. 1801(p).

Sec. 6.2.General Provisions. (a) Nothing in this order shall supersede any requirement made by or under the Atomic Energy Act of 1954, as amended, or the National Security Act of 1947, as amended. "Restricted Data" and "Formerly Restricted Data" shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and regulations issued under that Act.
(b) The Director of National Intelligence may, with respect to the Intelligence Community and after consultation with the heads of affected departments and agencies, issue such policy directives and guidelines as the Director of National Intelligence deems necessary to implement this order with respect to the classification and declassification of all intelligence and intelligence-related information, and for access to and dissemination of all intelligence and intelligence-related information, both in its final form and in the form when initially gathered. Procedures or other guidance issued by Intelligence Community element heads shall be in accordance with such policy directives or guidelines issued by the Director of National Intelligence. Any such policy directives or guidelines issued by the Director of National Intelligence shall be in accordance with directives issued by the Director of the Information Security Oversight Office under section 5.1(a) of this order.

(c) The Attorney General, upon request by the head of an agency or the Director of the Information Security Oversight Office, shall render an interpretation of this order with respect to any question arising in the course of its administration.

(d) Nothing in this order limits the protection afforded any information by other provisions of law, including the Constitution, Freedom of Information Act exemptions, the Privacy Act of 1974, and the National Security Act of 1947, as amended. This order is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law y731by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. The foregoing is in addition to the specific provisos set forth in sections 1.1(b), 3.1(c) and 5.3(e) of this order.

(e) Nothing in this order shall be construed to obligate action or otherwise affect functions by the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(f) This order shall be implemented subject to the availability of appropriations.

(g) Executive Order 12958 of April 17, 1995, and amendments thereto, including Executive Order 13292 of March 25, 2003, are hereby revoked as of the effective date of this order.

Sec. 6.3.Effective Date. This order is effective 180 days from the date of this order, except for sections 1.7, 3.3, and 3.7, which are effective immediately.

Sec. 6.4.Publication. The Archivist of the United States shall publish this Executive Order in theFederal Register.

BARACK OBAMA

THE WHITE HOUSE,December 29, 2010.

Exec. Order No. 1352675 FR 7072009 WL 6066991(Pres.)

End of Document

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)

5 U.S.C.A. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

Effective: June 30, 2016
Currentness

<Notes of Decisions for 5 USCA § 552 are displayed in two separate documents. Notes of Decisions for subdivisions I and II are contained in this document. For Notes of Decisions for subdivisions III to end, see second document for 5 USCA § 552.>

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format--

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii)(I) Except as provided in subclause (II), an agency shall not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) under this subparagraph if the agency has failed to comply with any time limit under paragraph (6).

(II)(aa) If an agency has determined that unusual circumstances apply (as the term is defined in paragraph (6)(B)) and the agency provided a timely written notice to the requester in accordance with paragraph (6)(B), a failure described in subclause (I) is excused for an additional 10 days. If the agency fails to comply with the extended time limit, the agency may not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees).

(bb) If an agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) if the agency has provided a timely written notice to the requester in accordance with paragraph (6)(B) and the agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with paragraph (6)(B)(ii).

(cc) If a court has determined that exceptional circumstances exist (as that term is defined in paragraph (6)(C)), a failure described in subclause (I) shall be excused for the length of time provided by the court order.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[**(D)** Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of--

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination--

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, “unusual circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(8)(A) An agency shall--

(i) withhold information under this section only if--

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically

feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States and to the Director of the Office of Government Information Services a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests;

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests;

(P) the number of times the agency denied a request for records under subsection (c); and

(Q) the number of records that were made available for public inspection in an electronic format under subsection (a)(2).

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available for public inspection in an electronic format. In addition, each agency shall make the raw statistical data used in each report available in a timely manner for public inspection in an electronic format, which shall be made available--

(A) without charge, license, or registration requirement;

(B) in an aggregated, searchable format; and

(C) in a format that may be downloaded in bulk.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Oversight and Government Reform of the House of Representatives and the Chairman and ranking minority member of the Committees on Homeland Security and Governmental Affairs and the Judiciary of the Senate, no later than March 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6)(A) The Attorney General of the United States shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President a report on or before March 1 of each calendar year, which shall include for the prior calendar year--

(i) a listing of the number of cases arising under this section;

(ii) a listing of--

(I) each subsection, and any exemption, if applicable, involved in each case arising under this section;

(II) the disposition of each case arising under this section; and

(III) the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4); and

(iii) a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(B) The Attorney General of the United States shall make--

(i) each report submitted under subparagraph (A) available for public inspection in an electronic format; and

(ii) the raw statistical data used in each report submitted under subparagraph (A) available for public inspection in an electronic format, which shall be made available--

(I) without charge, license, or registration requirement;

(II) in an aggregated, searchable format; and

(III) in a format that may be downloaded in bulk.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make available for public inspection in an electronic format, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration. The head of the Office shall be the Director of the Office of Government Information Services.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) identify procedures and methods for improving compliance under this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a nonexclusive alternative to litigation and may issue advisory opinions at the discretion of the Office or upon request of any party to a dispute.

(4)(A) Not less frequently than annually, the Director of the Office of Government Information Services shall submit to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on the Judiciary of the Senate, and the President--

(i) a report on the findings of the information reviewed and identified under paragraph (2);

(ii) a summary of the activities of the Office of Government Information Services under paragraph (3), including--

(I) any advisory opinions issued; and

(II) the number of times each agency engaged in dispute resolution with the assistance of the Office of Government Information Services or the FOIA Public Liaison; and

(iii) legislative and regulatory recommendations, if any, to improve the administration of this section.

(B) The Director of the Office of Government Information Services shall make each report submitted under subparagraph (A) available for public inspection in an electronic format.

(C) The Director of the Office of Government Information Services shall not be required to obtain the prior approval, comment, or review of any officer or agency of the United States, including the Department of Justice, the Archivist of the United States, or the Office of Management and Budget before submitting to Congress, or any committee or subcommittee thereof, any reports, recommendations, testimony, or comments, if such submissions include a statement indicating that the views expressed therein are those of the Director and do not necessarily represent the views of the President.

(5) The Director of the Office of Government Information Services may directly submit additional information to Congress and the President as the Director determines to be appropriate.

(6) Not less frequently than annually, the Office of Government Information Services shall conduct a meeting that is open to the public on the review and reports by the Office and shall allow interested persons to appear and present oral or written statements at the meeting.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j)(1) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(2) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--

(A) have agency-wide responsibility for efficient and appropriate compliance with this section;

(B) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(C) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(D) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(E) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply;

(F) offer training to agency staff regarding their responsibilities under this section;

(G) serve as the primary agency liaison with the Office of Government Information Services and the Office of Information Policy; and

(H) designate 1 or more FOIA Public Liaisons.

(3) The Chief FOIA Officer of each agency shall review, not less frequently than annually, all aspects of the administration of this section by the agency to ensure compliance with the requirements of this section, including--

(A) agency regulations;

(B) disclosure of records required under paragraphs (2) and (8) of subsection (a);

(C) assessment of fees and determination of eligibility for fee waivers;

(D) the timely processing of requests for information under this section;

(E) the use of exemptions under subsection (b); and

(F) dispute resolution services with the assistance of the Office of Government Information Services or the FOIA Public Liaison.

(k)(1) There is established in the executive branch the Chief FOIA Officers Council (referred to in this subsection as the "Council").

(2) The Council shall be comprised of the following members:

(A) The Deputy Director for Management of the Office of Management and Budget.

(B) The Director of the Office of Information Policy at the Department of Justice.

(C) The Director of the Office of Government Information Services.

(D) The Chief FOIA Officer of each agency.

(E) Any other officer or employee of the United States as designated by the Co-Chairs.

(3) The Director of the Office of Information Policy at the Department of Justice and the Director of the Office of Government Information Services shall be the Co-Chairs of the Council.

(4) The Administrator of General Services shall provide administrative and other support for the Council.

(5)(A) The duties of the Council shall include the following:

(i) Develop recommendations for increasing compliance and efficiency under this section.

(ii) Disseminate information about agency experiences, ideas, best practices, and innovative approaches related to this section.

(iii) Identify, develop, and coordinate initiatives to increase transparency and compliance with this section.

(iv) Promote the development and use of common performance measures for agency compliance with this section.

(B) In performing the duties described in subparagraph (A), the Council shall consult on a regular basis with members of the public who make requests under this section.

(6)(A) The Council shall meet regularly and such meetings shall be open to the public unless the Council determines to close the meeting for reasons of national security or to discuss information exempt under subsection (b).

(B) Not less frequently than annually, the Council shall hold a meeting that shall be open to the public and permit interested persons to appear and present oral and written statements to the Council.

(C) Not later than 10 business days before a meeting of the Council, notice of such meeting shall be published in the Federal Register.

(D) Except as provided in subsection (b), the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by the Council shall be made publicly available.

(E) Detailed minutes of each meeting of the Council shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the Council. The minutes shall be redacted as necessary and made publicly available.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(m)(1) The Director of the Office of Management and Budget, in consultation with the Attorney General, shall ensure the operation of a consolidated online request portal that allows a member of the public to submit a request for records under subsection (a) to any agency from a single website. The portal may include any additional tools the Director of the Office of Management and Budget finds will improve the implementation of this section.

(2) This subsection shall not be construed to alter the power of any other agency to create or maintain an independent online portal for the submission of a request for records under this section. The Director of the Office of Management and Budget shall establish standards for interoperability between the portal required under paragraph (1) and other request processing software used by agencies subject to this section.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54; Pub.L. 93-502, §§ 1 to 3, Nov. 21, 1974, 88 Stat. 1561 to 1564; Pub.L. 94-409, § 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub.L. 95-454, Title IX, § 906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357; Pub.L. 99-570, Title I, §§ 1802, 1803, Oct. 27, 1986, 100 Stat. 3207-48, 3207-49; Pub.L. 104-231, §§ 3 to 11, Oct. 2, 1996, 110 Stat. 3049 to 3054; Pub.L. 107-306, Title III, § 312, Nov. 27, 2002, 116 Stat. 2390; Pub.L. 110-175, §§ 3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8 to 10(a), 12, Dec. 31, 2007, 121 Stat. 2525 to 2530; Pub.L. 111-83, Title V, § 564(b), Oct. 28, 2009, 123 Stat. 2184; Pub.L. 114-185, § 2, June 30, 2016, 130 Stat. 538.)