UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY THE CENTRAL INTELLIGENCE AGENCY

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Plaintiffs Amnesty International USA ("AI"), the Center for Constitutional Rights, Inc. ("CCR"), and Washington Square Legal Services, Inc. ("WSLS") (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their cross-motion for partial summary judgment and in opposition to the Motion for Summary Judgment by the Central Intelligence Agency (the "CIA" or the "Agency") in this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (the "CIA Br.").

PRELIMINARY STATEMENT

President Barack Obama's election was intended to mark a clean break with his predecessor's secretive practices concerning the Central Intelligence Agency's secret detention, extraordinary rendition and interrogation program. His initial steps were promising. On only his second day in office, President Obama renewed this country's commitment to transparency through FOIA. On his third day, ended the CIA's program and rescinded its authority to use so-called "enhanced interrogation techniques" ("EITs")—including "walling," "waterboarding," and "sleep deprivation"—against individuals. Exec. Order 13491, Ensuring Lawful Interrogations, January 22, 2009 ("E.O. 13491"). E.O. 13491 also required that all future CIA interrogations rely only on procedures authorized by the publicly available Army Field Manual ("AFM"). Within months, the Obama Administration also released a number of controversial and discredited Office of Legal Counsel ("OLC") memoranda that had tried to provide both legal cover for the CIA's program and a chilling operational roadmap for the use of certain torture techniques. The results of a 2004 CIA Office of Inspector General Special Review were also made public, which exhaustively detailed the use of both authorized and unauthorized, illegal interrogation techniques on particular individuals. Numerous other significant details concerning the CIA's operations, such as information on CIA cable traffic regarding specific interrogations, and requests to the OLC to authorize certain techniques on particular individuals, were disclosed

in the instant and related FOIA litigations. Prompted by certain of these revelations, the CIA in this litigation withdrew the summary judgment motions it had submitted under President Bush in order to revisit its prior FOIA withholdings.

Despite the Obama Administration's commitment to openness, and the vast amount of concrete, particularized public information regarding the CIA's now-defunct operations, the CIA's current brief is a relic of the past. Choosing secrecy over transparency, the CIA invokes one FOIA exemption after another to hide conduct that has been officially acknowledged, is publicly known, and is, in large part, no longer in use. The CIA's extraordinary rendition program has ended. Discredited "enhanced interrogation techniques" are banned. The CIA's "black sites" are closed. Foreign governments are investigating their own roles in the CIA's program. Yet, illogically, the CIA continues to maintain that disclosure of responsive information will severely compromise national security. In fact, the CIA's justifications for withholding information are so thoroughly compromised that it now openly acknowledges that one of its chief motivations for withholding details about the defunct, discredited program is that such disclosures will serve as propaganda: while this is a tacit acknowledgement of the inflammatory nature of the withheld information, it is not an acceptable justification for secrecy. Serious allegations of potential wrongdoing endemic to the CIA's operations also undermine the propriety of its classifications. Finally, the CIA continues its pattern of obfuscation through the submission of boilerplate and conclusory *Vaughns*, which make it essentially impossible for Plaintiffs or this Court to test the legitimacy of the withholdings.

Because the CIA has failed to demonstrate that further secrecy is warranted, its motion for summary judgment should be rejected and Plaintiffs' cross-motion granted. Specifically, the Court should order the CIA to release any records that it cannot adequately show are exempt, or,

alternatively, compel the CIA to support its withholdings in far greater detail (by supplemental, public declarations, more robust *Vaughn* indices and selective *in camera* review) to allow this Court to discharge its duty to review the withholdings *de novo*.[1]

BACKGROUND

Plaintiffs have submitted four FOIA requests to the CIA and other agencies seeking records relating to unregistered, CIA and ghost detainees, and the government's rendition, secret detention and coercive interrogation program ("Plaintiffs' FOIA Requests").

The December 21, 2004 FOIA Request ("CCR Request")[2] and the April 25, 2006 First Amnesty Request[3] sought records concerning, *inter alia*, rendition and secret detention of individuals in the "War on Terror." The Second Amnesty Request,[4] also filed on April 25, 2006, sought, *inter alia*, internal government memoranda of understanding pertaining to the rendition, secret detention and coercive interrogation program.

On December 28, 2007, WSLS served a supplementary FOIA request on the CIA ("Supplementary CIA FOIA Request").[5] The request sought, in pertinent part,[6] categories of

[1] Plaintiffs also specifically reserve the right to request discovery regarding the adequacy of the CIA's FOIA responses to the extent the CIA is unwilling or unable to address those inadequacies through the measures described above. *El Badrawi v. DHS*, 583 F.2d 285, 301 (D. Conn. 2008); *Ray v. Turner*, 587 F.2d 1187, 1196 (D.C.Cir. 1978) (finding numerous issues with the CIA's submissions and ordering a supplemental affidavit, a more specific index, and discovery).

[2] The CCR Request is attached as Exhibit A to the Declaration of David S. Brown, dated November 20, 2009 ("Brown Decl.").

[3] The First Amnesty Request is attached as Exhibit B to the Brown Decl.

[4] The Second Amnesty Request is attached as Exhibit C to the Brown Decl.

[5] The Supplementary CIA FOIA Request is attached as Exhibit D to the Brown Decl.

[6] Plaintiffs withdraw their Categories 3 and 4 requests but without prejudice to reassertion at a later date. Plaintiffs also withdraw their Category 1 request for the disclosure of the "spring

documents, including:

Category 2: The list of "erroneous renditions" compiled by the CIA's OIG.

Categories 5-6, 9-10: CIA cables discussing and/or approving the use of a slap or sleep deprivation on detainees Abu Zubaydah ("Zubaydah") and Khalid Sheikh Mohammed ("Sheikh Mohammed") (collectively, "Cable Requests").

Category 7-8: CIA cables discussing and/or approving the use of an "attention shake" on Zubaydah or Sheikh Mohammed.

Categories 11-12: CIA cables discussing and/or approving the use of waterboarding on Zubaydah or Sheikh Mohammed.

Category 13: Materials related to interrogations of detainees that were acknowledged to exist in a letter from U.S. Attorney Chuck Rosenberg, dated October 25, 2007.

Category 14: The September 13, 2007 notification to the U.S. Attorney for the Eastern District of Virginia that the CIA had a videotape of interrogation(s) of detainee(s).

Categories 15-17: CIA communications with the U.S. Embassy in Sana'a, Yemen, and between the U.S. Government and the Government of Yemen, relating to Mohamed Farag Ahmed Bashmilah and Salah Nasser Salim Ali. ("Bashmilah/Ali Requests").

The CIA's response to Plaintiffs' FOIA Requests is the subject of the present brief.

ARGUMENT

I. THE CIA BEARS THE BURDEN OF JUSTIFYING ANY WITHHOLDINGS.

President Obama affirmed that FOIA "is the most prominent expression of a profound national commitment to ensuring an open Government." Barack Obama, Memorandum on the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009); *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001) ("disclosure, not secrecy, is the dominant objective of" FOIA).[7] Consistent with this presumption of openness, exemptions permitting non-disclosure are to be "narrowly construed with doubts resolved in favor of disclosure," and the government

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2004 report by the [CIA] Office of the Inspector General ("OIG")" based on the CIA's representation that the document is being litigated in *ACLU v. DOD*. Hilton Decl. ¶¶ 43-44.

[7] *See also* Eric Holder, Memorandum for Heads of Executive Departments and Agencies from the Attorney General on the Freedom of Information Act (Mar. 19, 2009).

bears the burden of proving that an exemption applies. *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999) (internal quotation marks omitted).[8] This burden remains even in the national security context.[9] *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 561 (S.D.N.Y. 1989); s*ee also ACLU v. FBI*, 429 F. Supp. 2d 179, 186 (D.D.C. 2006); *Wiener v. FBI*, 943 F.2d 972, 983 (9th Cir. 1991); *Allen v. CIA*, 636 F.2d 1287, 1294 (D.C. Cir. 1980), *overruled on other grounds by Founding Church of Scientology, Inc. v. Smith*, 721 F.2d 828 (D.C. Cir. 1983). Detailed declarations and specific *Vaughn* indices are essential because they force the government to analyze carefully its withholdings, permits "the trial court to fulfill its duty," and, ultimately, allows "the adversary system to operate." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006) (internal quotation marks omitted); *Halpern*, 181 F.3d at 295 ("Absent a sufficiently specific explanation from an agency, a court's *de novo* review is not possible and the adversary process envisioned in FOIA litigation cannot function.").[10] Where a defendant has failed to

[8] *See also Klamath*, 532 U.S. at 8 (exemptions should be given a "narrow compass"); *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 560 (S.D.N.Y. 1989) ("[E]xemptions are intended to be narrowly construed to ensure that Government agencies do not develop a rubber stamp, 'top secret' mentality behind which they can shield legitimately disclosable documents.")

[9] The cases cited by the CIA do not suggest otherwise. CIA Br. at 11-12. *See Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007) (carefully reviewing detailed claims of specified harms and remanding certain records for further proceedings); *Frugone v. CIA*, 169 F.3d 772 (D.C. Cir. 1999) (affirming district court's *de novo* review of *Glomar* response only after CIA submitted specific affidavit describing harm consequences); *Diamond v. FBI*, 707 F.2d 75, 78 (2d Cir. 1983) (affirming district court's *de novo* review of affidavit containing "numerous detailed justifications" and *in camera* review of each document); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) (upholding Exemption 3 withholdings only after CIA's "very convincing" affidavit detailed specific potential harms); *Fitzgibbon v. CIA*, 911 F.2d 755, 757-759 (D.C. Cir. 1990) (requiring "as much specificity as possible").

[10] *Nation Mag. v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995); *Lawyers Comm.*, 721 F. Supp. at 560 (affidavits are insufficient "if they are conclusory, merely reciting statutory standards, or if they are too vague and sweeping") (internal quotation marks omitted).

discharge this basic duty, courts have compelled the production of more detailed declarations.[11] Moreover, summary judgment is inappropriate where, as here, the agency's evidentiary showing leaves material doubt about its search, segregability analysis or withholdings. *See, e.g.*, *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) (summary judgment inappropriate when agency's insufficient evidentiary showing failed to give "reasonably detailed explanations why any withheld documents fall within an exemption").

II. THE CIA HAS NOT JUSTIFIED ITS EXEMPTIONS 1 AND 3 WITHHOLDINGS.

This case involves challenges to withholdings of records describing the United States' calculated use of torture, enforced disappearances and rendition to torture, conduct which the CIA refers to euphemistically as the "terrorist detention and interrogation" ("TDI") program and "enhanced interrogation techniques." Contrary to the CIA's characterizations, the challenged withholdings do not describe legitimate intelligence sources and methods.[12] Rather, Plaintiffs seek disclosure of documents that explain in minute and chilling detail how U.S. personnel disappeared men into secret CIA interrogation facilities and subjected them to multiple acts of torture and cruel, inhuman and degrading ("CID") treatment used in combination to reduce human beings to a state of "learned helplessness and dependence."[13] To further democratic

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[11] *See, e.g.*, *Greenberg v. U.S. Dep't of Treasury*, 10 F. Supp. 2d 3 (D.D.C. 1998) (finding agency affidavits to be insufficiently detailed and ordering production of supplemental *Vaughn* index); *Lawyers Comm.*, 721 F. Supp. at 567 (criticizing agency for not submitting more detailed public affidavits to support its assertion of Exemption 1); *see also Halpern*, 181 F.3d at 295 (finding government evidence insufficient and remanding for district court to order supplemental affidavits, *in camera* review and/or discovery).

[12] By contrast, the CIA relies on case law concerning legitimate sources and methods, including human sources, cover identities, cryptonyms and pseudonyms, or dissemination control markings. *See* CIA Br. at 18.

[13] *See* Declaration of Margaret L. Satterthwaite ("Satterthwaite Decl.") Ex. X (Fax from [Redacted] Assoc. General Counsel, CounterTerrorism Center, CIA to Dav Levin, Acting Assistant Attorney General, Office of Legal Counsel, Dep't of Justice, containing Background

accountability and transparency,[14] the public must have access to these records with disturbingly clinical descriptions of, for example, CIA interrogators' covering an individual's face and pouring water to simulate death by drowning,[15] the method and duration for keeping a person deprived of sleep,[16] and the careful application of "walled standing"[17] and "walling."[18] After interviewing individuals interrogated by the CIA in secret detention, the International Committee of the Red Cross ("ICRC") concluded that "the totality of the circumstances in which they were held effectively amounted to an arbitrary deprivation of liberty and enforced disappearance, in

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Paper on CIA's Combined Use of Interrogation Techniques (Dec. 30, 2004) [hereinafter *CIA Background Paper*]) at 1.

[14] It is precisely when the government's practices are beyond the pale that the citizenry's rights under FOIA are most strongly implicated. *See, e.g.*, *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999).

[15] *See, e.g.*, Satterthwaite Decl., Exhibit AAA (Vaughn Indexes of Document Nos. 303-351) (cables from the field to headquarters describing sessions of "waterboarding" of Sheikh Mohammed); *see also* Satterthwaite Decl. ¶ 35.

[16] *See, e.g.*, *infra* III.1 (describing the CIA's implementation of sleep deprivation); *see also* Satterthwaite Decl. ¶ 35.

[17] The CIA describes "walled standing" as forcing an individual to stand immobile 4 to 5 feet from a wall with his feet spread about shoulder width apart and his arms stretched out in front of him with his fingers resting on a wall to support his body weight. *See* Satterthwaite Decl. ¶ 35. Less than a day of this technique, more often known as "forcible standing," can cause "the ankles and feet of the prisoner to swell to twice their circumference," "the skin to becomes tense and intensely painful," and "large blisters develop which break and exude watery serum" and usually the prisoner develops, "a delirious state … delusions and visual hallucinations." Central Intelligence Agency, *Communist Control Techniques: An Analysis of the Methods Used by Communist State Police in the Arrest, Interrogation, and Indoctrination of Persons Regarded as "Enemies of the State,"* at 37 (Apr. 2, 1956), http://www.americantorture.com/documents/cold_war/01.pdf (last visited Nov. 16, 2009).

[18] The ICRC describes the CIA's "walling" practice as "beatings by use of a collar held around the [individual's] neck and used to forcefully bang the head and body against the wall." *See* ICRC, Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody (Feb. 2007) ("2007 ICRC Report"), at 8, *available at* http://www.nybooks.com/icrc-report.pdf; *see also* Satterthwaite Decl. ¶ 35.

contravention of international law" and that "the ill-treatment" applied against the individuals "either singly or in combination, constituted torture" and "cruel inhuman or degrading treatment."[19] The CIA cannot sustain its Exemption 1 and 3 withholdings concerning its torture, rendition and secret detention practices and the Court should deny its summary judgment motion.

A. The CIA Does Not Support Its Exemption 1 Withholdings.

Exemption 1 authorizes an agency to withhold information only where the requirements of Executive Order 12958 are satisfied (amended by Executive Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003); *see* 5 U.S.C. §552b(c)(1). The CIA maintains that its Exemption 1 withholdings are justified because they concern "intelligence sources or methods," and foreign relations or foreign activities of the United States. CIA Br. at 24. To prevail, the CIA must establish that the disclosure of the information "reasonably could be expected to damage national security" and must sufficiently describe the damage. E.O. 12958, §§ 1.4(c), (d). Executive Order 12958 also expressly prohibits classification, *inter alia*, to "conceal violations of law, inefficiency, or administrative error," to "prevent embarrassment," or to "prevent or delay the release of information that does not require protection in the interest of national security." E.O. 12958, § 1.7(a). Plaintiffs can defeat summary judgment by adducing sufficient evidence to create a disputed issue of material fact as to the propriety of classification. *McDonnell v. United States*, 4 F.3d 1227, 1245 (3d. Cir. 1993); *see also Wilkinson v. FBI*, 633 F. Supp. 336, 341 (C.D. Cal. 1986).[20] The CIA has not met its burden and is not entitled to summary judgment.

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[19] *See* 2007 ICRC Report.

[20] The courts have a key role in enforcing the "safeguards" that ensure proper classification under E.O. 12958. *See ACLU v. DOD*, No. 06-3140, 2008 WL 4287823, at *9, 10, 13 (2d Cir. Sept. 22, 2008) (discussing judicial scrutiny as developed through the legislative history); *Ray v. Turner*, 587 F.2d 1187, 1222 (D.C. Cir. 1978) (Wright, C.J., concurring) ("*De novo* review by the courts is essential to assure that government agencies comply with Congress' commitment to compel disclosure of information that is being withheld only to cover up embarrassing mistakes

1. Disclosure is Not "Reasonably Likely" to Harm National Security.

The CIA claims three sets of harms from disclosure of withheld documents: (1) identification of "the CIA's intelligence targets," "information the CIA knows and does not know about that target," and "the information in which the CIA has a particular interest," which could be exploited by hostile entities, CIA Br. at 23 (citing Hilton Decl. ¶ 143); (2) revelation of "operational details" concerning its interrogation and detention program, which would degrade the CIA's effectiveness,[21] *id*. at 19, 23-24 (citing Hilton Decl. ¶¶ 148, 150); and (3) damage to foreign relations, *id*. (citing Hilton Decl. ¶¶ 152-53, 163-64). Yet, the CIA's practices have been unequivocally discontinued and prohibited, and described in extensive detail in the public record. Numerous foreign governments have also voluntarily revealed their involvement with the CIA. Moreover, the speculative examples of harms proffered in the Hilton Declaration are not rationally related to the withheld records.[22] Accordingly, the CIA fails to demonstrate that concrete harms are reasonably likely to flow from disclosure of the withheld information.

a. The Withheld Records Describe Discontinued Activities.

The fact that the secret detention program, "enhanced interrogation techniques" and

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or irregularities."). The unique facts in this case involving torture, rendition and secret detention practices heighten the need for judicial scrutiny of the CIA's assertion of secrecy.

[21] Although the CIA acknowledges that its secret detention program has been discontinued, it contends that disclosures concerning discontinued "enhanced interrogation techniques" would lend insight into *current* strategies and methods used by the United States, including those authorized under the AFM. *See* CIA Br. at 23-24 (citing Hilton Decl. ¶¶ 148, 150).

[22] For example, the CIA conjures a "human sources" scenario in which a U.S. citizen business executive assists the CIA by sharing information learned during business abroad. *See* Hilton Decl. ¶ 93. The CIA does not claim that any *Vaughn* entry describes this type of intelligence source; nor does this seem to be a likely scenario for the human sources allegedly at issue in the withheld records, which involve individuals the CIA kidnapped, disappeared and tortured.

rendition to torture[23] have been discontinued[24] undercuts the CIA's professed need for further secrecy, *see* CIA Br. at 23-24, because revelation cannot reduce the effectiveness of prohibited practices. Despite this obvious logic, the CIA claims that its withholdings are justified because "the CIA will continue to be involved in questioning terrorists under legally approved guidelines . . .[and] information in these documents would provide future terrorists with a guidebook on how to evade such questioning," including questioning conducted pursuant to the AFM. *See* Panetta Decl. ¶11; s*ee also* Hilton Decl. ¶ 150. The CIA's justifications are untenable because the AFM is a public document whose nineteen interrogation techniques are listed in plain view and bear no relation to the prohibited "enhanced interrogation techniques" and conditions of confinement in CIA secret detention.[25] Importantly, except for conclusory statements, the CIA offers no explanation whatsoever as to how disclosures of past use of discontinued, discredited CIA practices could shed any light on the use of different—and entirely public—interrogation sources or methods. Nor does the government address why it cannot disclose information describing prohibited rendition practices. The CIA fails to carry its burden to support its withholdings.

The government's reliance upon *Electronic Privacy Information Center v. Department of Justice* ("*EPIC*"), 584 F. Supp. 2d 65, 70-71 (D.D.C. 2008) is misplaced. *See* CIA Br. at 23-24, 28. In that case, EPIC sought records about the Terrorism Surveillance Program ("TSP").

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[23] Although the current Administration has reserved the right to engage in "renditions to justice," this practice involves an extrajudicial transfer to a third country for legal process. The past practice of rendition to torture has been squarely prohibited. David Johnston, *U.S. Says Rendition to Continue, but With More Oversight*, N.Y. Times, Aug. 24, 2009.

[24] Satterthwaite Decl. ¶¶ 7-11.

[25] Headquarters, Dep't of the Army, Human Intelligence Collectors Operations Field Manual, No. 2-22.3 (Sept. 6, 2006), at ch. 8 & app. M, *available at* http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.

Although the legal authority for the TSP was discontinued, the government still held the authority to conduct lawful Foreign Intelligence Surveillance Act ("FISA") surveillance, possibly including original targets of the TSP who had not been publicly identified. Thus, the intelligence sources and methods in that case were, arguably, still ones that held ongoing value as to undisclosed surveillance targets. Here, however, the secret detention and "enhanced interrogation" program has been terminated, requiring all individuals now in U.S. custody to be identified and not subjected to "enhanced interrogation techniques." Unlike in *EPIC*, the CIA has no ongoing national security interest in concealing records describing torture and CID techniques, as well as disappearances and rendition to torture, that will never be used again.[26]

b. Extensive Details About CIA Practices Have Been Disclosed.

This Court should reject the CIA's claim[27] that because prior disclosures were limited to non-operational details, its withholdings in this case are required to keep information about targets and "operational details" secret. In fact, selectively released documents already provide extensive details about significant operational aspects of the CIA's detention, interrogation and rendition practices. Moreover, the CIA and other government agencies have also disclosed multiple documents that carefully outline intelligence information purportedly gleaned from the use of "enhanced interrogation techniques" and secret detention. *See* Satterthwaite Decl. ¶ 90. No harm is reasonably likely to arise from further disclosure of this information.

For example, the *CIA Background Paper* sets forth in meticulous detail a prototypical CIA interrogation. Once in CIA custody, "a predictable set of events occur." After a rendition

[26] The CIA's reliance upon *Bassiouni v. CIA*, 392 F.3d 244 (7th Cir. 2004), is also unavailing because *Bassiouni* did not involve discontinued and unlawful programs, but rather general intelligence gathering. Further, unlike the extensive disclosures here, *Bassiouni* dealt with the mere "smidgen of disclosure" of "one document bearing [Bassiouni's] name." *Id.* at 246, 247.

[27] *See* CIA Br. at 19, 27-29; Hilton Decl. ¶¶ 155-56; Panetta Decl. ¶¶ 10-11.

flight during which the individual is "securely shackled and [] deprived of sight and sound though the use of blindfolds, earmuffs and hoods," the individual is subjected to a "precise, quiet, and almost clinical" "reception" at a black site that could produce "dread" at being in U.S. custody and involving shaving, nude photos, and medical and psychological evaluations to prepare for interrogations. *Id*. at 2-3. The *CIA Background Paper* further explains three escalating categories of techniques—"conditioning techniques," "corrective techniques," and "coercive techniques"—and a summary of the detention conditions in all secret detention facilities. *Id*. at 4. The baseline conditioning techniques of nudity, sleep deprivation and dietary manipulation "demonstrate" to an individual that "he has no control over basic human needs." *Id*. at 4-5. The paper goes on to detail a "day-to-day look" at the CIA's application of "corrective" and "coercive" techniques in sessions that may last from "30 minutes to several hours," *id*. at 11 & 13, over the course of "several days to several weeks," *id*. at 16.

A series of OLC memos and letters[28] further describe the intended and actual application of the "enhanced" interrogation techniques in meticulous, startling detail. For example, the *May 10, 2005 Combined Techniques Memo*[29] has nine pages of operational details on thirteen "enhanced interrogation techniques" and an additional fifteen pages of mixed description and legal analysis. The memo details each interrogation technique. The CIA's waterboarding, for example, involved "a gurney that is inclined at an angle of 10 to 15 degrees to the horizontal,"

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[28] *See* Satterthwaite Decl. ¶¶ 17- 19, 25-26, 29, 30-31, 33-34, 42, 45-47, 50, 54, 56-57, 59, 67-69, 70-74, 77, 81-84, 90, 99.

[29] Satterthwaite Decl. Ex. RRR (Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, Dep't of Justice, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency, Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005) [hereinafter *May 10, 2005 Combined Techniques Memo*]), at ¶¶ 7-15, 31-45.

the pouring of water "from a height of approximately 6 to 18 inches," applications of water for no more than 40 seconds per "application," "with the duration of an 'application' measured from the moment when water—of whatever quantity—is first poured onto the cloth until the moment the cloth is removed from the subject's face." *Id.* at 13. The number of times per session, day, and month an individual could be waterboarded is detailed, as is the protocol for the presence of medical personnel. *Id.* at 14. Other techniques are also described minutely. *See, e.g.*, *id.* at 9–10 (time limits for "water dousing" depending on the water's temperature: 41°F for 20 minutes, 50°F for 40 minutes, and 59°F for 60 minutes); *id.* at 9 (details on the CIA's three "stress positions"); *see also* Satterthwaite Decl. ¶ 35.

Significantly, the *May 10, 2005 Combined Techniques Memo* also reviewed the CIA's actual application of the techniques and their impact. *See, e.g.*, *id.* at 8 ("walling" "is not intended to—and based on experience you have informed us that it does not—inflict any injury or cause severe pain"); *id.* at 11 ("We understand from you that no detainee subjected to this technique by the CIA has suffered any harm or injury, either by falling down and forcing the handcuffs to bear his weight or in any other way."); *id.* at 11 n.15 ("Specifically, you have informed us that on three occasions early in the program, the interrogation team and the attendant medical officers identified the potential for unacceptable edema in the lower limbs of detainees undergoing standing sleep deprivation, . . . to permit the limbs to recover without impairing interrogation requirements, the subjects underwent horizontal sleep deprivation."); *id.* at 12 ("[T]o date, more than a dozen detainees have been subjected to sleep deprivation of more than 48 hours, and three detainees have been subjected to sleep deprivation of more than 96 hours; the longest period . . . any detainee has been deprived of sleep . . . is 180 hours.").

Like the other memos, the *May 30, 2005 Art. 16 Techniques Memo* provides significant

operational detail about the implementation of the "enhanced interrogation techniques."[30] For example, it notes that the CIA "has employed enhanced techniques to varying degrees in the interrogations of 28 of these detainees," *id*. at 5; that "the CIA has used [waterboarding] in the interrogations of only three detainees to date (KSM, Zubaydah, and 'Abd Al-Rahim Al-Nashiri) and has not used it since the March 2003 interrogation of KSM," *id*. at 6; that "Abu Zubaydah and KSM are representative of the types of detainees on whom the waterboard has been, or might be, used," *id*.; that the "interrogation team 'carefully analyzed [detainee] Gul's responsiveness to different areas of inquiry' during this time and noted that his resistance increased as questioning moved to his 'knowledge of operational terrorist activities,'" *id*. at 7; that an individual "feigned memory problems . . . in order to avoid answering questions," *id*. at 8; that the CIA responded to this by using "'more subtle interrogation measures [such as] dietary manipulation, nudity, water dousing, and abdominal slap,'" *id*. at 8; and that "[t]welve days into the interrogation, the CIA subjected al-Nashiri to one session of the waterboard during which water was applied two times,'" *id*. The memo also describes the types of intelligence elicited using the "enhanced interrogation techniques." *See id.* at 10–11. Far from "abstract" descriptions of the "enhanced interrogation techniques," the OLC documents record comprehensive details about the implementation and effect of the techniques—leaving little to the imagination.

Other documents carefully outline the number and identity of individuals who have been in secret detention, the specific plots and activities the CIA focused upon during interrogations and the intelligence information purportedly gleaned from the interrogations, particularly those

[30] *See* Satterthwaite Decl. Ex. Y (Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, Dep't of Justice, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005) [hereinafter *May 30, 2005 Art. 16 Techniques Memo*]) at ¶¶ 12–15, 29–31.

of Khalid Sheikh Mohammed. *See* Satterthwaite Decl. ¶¶ 17-20, 90.

This detailed information about the CIA's discontinued program render the statements in the Hilton and Panetta declarations illogical. These disclosures directly concern the CIA's target information as well as "operational details" of its activities. For example, the claim that further disclosure of cables describing Sheikh Mohammed's waterboarding would cause harm, *see* Docs. 303-351, ignores the fact that details of his waterboarding, subjection to other techniques, and intelligence purportedly gleaned from him, has already been released by the CIA.[31]

Besides being irrational, the CIA's reasoning was already rejected by none other than President Obama when he released the OLC memoranda, *i.e.*, because the "interrogation techniques described in these memos have already been widely reported," and because "withholding these memos would only serve to deny facts that have been in the public domain for some time."[32] *See, e.g., Wash. Post v. DOD*, 766 F. Supp. 1, 9 (D.D.C. 1991) ("It is a matter of common sense that the presence of information in the public domain makes the disclosure of that information less likely to 'cause damage to the national security.' . . . In other words, if the information has already been disclosed and is so widely disseminated that it cannot be made secret again, its subsequent disclosure will cause no *further* damage to national security."

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[31] *See* Satterthwaite Decl. ¶¶ 27-33, 90. The government's touting the extensive, valuable information extracted through this program makes the redactions in two memoranda requested by former Vice President Cheney, *see* Hilton Decl. Ex. A (Docs. 301, 302), particularly unjustifiable. *See* Satterthwaite Dec. ¶ 90. Similarly, Document 78 is an August 6, 2004 request to the OLC to waterboard an individual, whose name is redacted. Given the CIA's position that no-one was waterboarded after March 2003, no harm arises from disclosure of the name; if this is not the case, then public interest requires full disclosure. Hilton Decl. Ex. L (Doc. 78.). Additionally, name redactions in OLC letters in August and November 2007 are unjustified given the public record (Satterthwaite Dec. ¶73).

[32] *See* President Barack Obama, Statement on the Release of OLC Memos (Apr. 16, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos.

(emphasis in original)); *Founding Church of Scientology, Inc. v. NSA*, 610 F.2 824, 832 (D.C. Cir. 1979). The CIA's withholdings are unjustified.

c. Further Disclosures Are Not Reasonably Likely to Harm Foreign Relations.

Contrary to the CIA's assertion, disclosures are not reasonably likely to harm U.S. relations with foreign governments. Foreign states acting both individually (including Sweden, Germany, Italy, Lithuania, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom)[33] and through inter-governmental organizations[34] have launched investigations and released information on their own involvement with the CIA's practices. At least one country's court has explicitly found that the release of this information would not be inimical to its foreign relations with the United States.[35] Even if the CIA could show possible harm, Exemption 1 cannot be used to conceal foreign governments complicity in illegal conduct. *See infra* II.A.2.

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[33] *See, e.g.*, Chief Parliamentary Ombudsman, Sweden, *A review of the enforcement by the Security Police of a Government decision to expel two Egyptian citizens* (Mar. 22, 2005) *available at* http://www.jo.se/Page.aspx?MenuId=106&MainMenuId=106&Language=en&ObjectClass=DynamX_SFS_Decision&Id=1662; Rachel Donadio, *Italy Convicts 23 Americans in C.I.A. Trials*, N.Y. Times, Nov. 5, 2009; Michael Evans, *MI6 faces torture investigation after reporting its own officer*, The Times (U.K.), Sept. 12, 2009; *Factbox – Next steps in CIA flights probes in Europe*, Reuters, Feb.14, 2007; *Poland Investigating CIA Prison Allegations*, USA Today, Aug. 25, 2008; Letter, Cristian Gaginsky, Deputy Chief of Mission, Romanian Embassy, *U.S., Romania and CIA Jails*, N.Y. Times, Aug. 22, 2009; Stephen Grey & Renwick McLean, *Spain Looks Into C.I.A.'s Handling of Detainees*, N.Y. Times, Nov. 14, 2005; *Lithuania parliament to probe CIA jail allegations*, Reuters, Nov. 5, 2009; *Portugal Probes Alleged CIA Flights*, Assoc. Press, Feb. 5, 2007.

[34] *See, e.g.*, Eur. Parl. Ass., Comm. on Legal Aff. and Hum. Rts., *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, 23rd Sitting, Doc. No. 11302 (2007) available at http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf; *U.N. to scrutinize Obama on counter-terrorism*, Mar. 10, 2009, Reuters.

[35] *The Queen on the application of Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, [2009] High Court (Queen's Bench Division) Divisional Court Judgment at ¶ 104 *available at* http://www.judiciary.gov.uk/docs/judgments_guidance/mohammed-revised-redacted-no5.pdf at 104.

2. The CIA Cannot Invoke Exemption 1 to Conceal Improper, Unlawful, or Embarrassing Conduct or to Delay Disclosure.

The CIA's Exemption 1 claims are also undercut by concrete evidence, unrebutted by the CIA in any meaningful way, that classifications were made to "conceal violations of law, inefficiency, or administrative error," to "prevent embarrassment," or to "prevent or delay the release of information that does not require protection in the interest of national security." 68 Fed. Reg. 15315, 15318 (Mar. 28, 2003). Where, as here, plaintiffs present evidence of improper motive or intent to conceal information, classification is inappropriate.[36]

First, the secret detention and interrogation program was of an improper and illegal nature. *See infra* III.B.2. This alone provides a motive for impermissible classification.

Second, the CIA OIG found that the "enhanced technique" of waterboarding was used in a manner inconsistent with and/or in excess of its purported legal authorization on both Zubaydah and Sheikh Mohammed.[37] Accordingly, these practices were *per se* unlawful.

Third, the *CIA OIG Special Review* and other public records suggest that the CIA applied interrogation techniques prior to their specific authorization. Sleep deprivation, nudity, shaving, cold temperature and the involvement of a Survival, Evasion, Resistance, Escape ("SERE")

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[36] The cases cited by the CIA for the claim that Executive Order 12958 does not bar classification of illegality when there is an independent basis for classification are inapposite. While the Executive Orders considered in these cases contained similar provisions, none of the cases cited discuss Executive Order 12958. *Lesar v. DOJ*, 636 F.2d 472 (D.C. Cir. 1980); *Maxwell v. First Nat. Bank of Maryland*, 143 F.R.D. 590 (D. Md. 1992); *Wilson v. DOJ*, No. 87-2415-LFO, 1991 U.S. Dist. LEXIS 12617 (D.D.C. 1991); *Agee v. CIA*, 524 F. Supp. 1290 (D.D.C. 1981); *Bennett v. DOD*, 419 F. Supp. 663 (S.D.N.Y. 1976). Moreover, unlike here, the information at issue in these cases implicated valid national security concerns, such as the protection of unknown intelligence sources, *Lesar* 636 F.2d at 482; *Bennet* 419 F.Supp. at 666, and the relationship between the CIA and cooperating private companies, *Maxwell*, 143 F.R.D. at 595.

[37] *See* Satterthwaite Decl. Ex. PP (Special Review, Inspector General, Central Intelligence Agency, Counterterrorism Detention and Interrogation Activities (September 2001 - October 2003) (May 7, 2004) [hereinafter *CIA OIG Special Review*]) at 36-37, 44-45, 90-91, 103-104. *See also* Satterthwaite Decl. ¶¶ 33, 46, 94.

psychologist in Zubaydah's interrogation all pre-date any purported authorization of "enhanced interrogation techniques" against him.[38] On July 29, 2003, the Attorney General, after being briefed that the CIA had used "enhanced interrogation techniques" (including waterboarding) on detainees other than Zubaydah, stated that "legal principles reflected in DOJ's specific original advice [on Zubaydah] could appropriately be extended to allow use of the same approved techniques...to other individuals. "[39] Indeed, according to the CIA OIG, "enhanced interrogation techniques" were used against both 'Abd Al-Rahim Al-Nashiri and Khalid Sheikh Mohammed prior to this date, including 183 applications of the waterboard against Mr. Sheikh Mohammed up until March 2003.[40]

Moreover, the CIA OIG identified numerous accounts of the CIA's use of methods against 'Abd Al-Rahim Al-Nashiri that were unaddressed in any OLC memos, including threatening him with a handgun and power drill and using a "stiff brush" on his skin to induce pain. *CIA OIG Special Review* at 41-42, 44. The CIA OIG also found that the CIA used other unauthorized techniques such as painful pressure points, mock executions, extreme cold temperatures, and "hard takedown[s]" to move men between cells. *Id.* at 69-78. Threats were leveled against family members despite the OLC's admonition that "none of these [EIT] procedures involve[] a threat to any third party."[41] Because they are outside of any purported

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[38] *See* Satterthwaite Decl. ¶¶ 27-31.

[39] *See* Satterthwaite Decl. Ex. UU (Memorandum from Jack Goldsmith III, Assistant Attorney Gen., Office of Legal Counsel, Dep't of Justice to John Helgerson, Inspector Gen., Cent. Intelligence Agency, Re: "Special Review: Counterterrorism Detention and Interrogation Activities" (June 18, 2004)); *CIA OIG Special Review* at 43; *see also* Satterthwaite Decl. ¶ 34.

[40] *See May 30, 2005 Art. 16 Techniques Memo* at 6; *see also* Satterthwaite Decl. ¶¶ 46-47.

[41] Satterthwaite Decl. Ex. QQ (Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, Dep't of Justice, to John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency, Interrogation of al Qaeda Operative (Aug. 1, 2002) [hereinafter *August 1, 2002*

legal authorization, these techniques are *per se* unlawful.

Fifth, the CIA's OIG has openly acknowledged that disclosure of the interrogation program could be embarrassing. For instance, the CIA OIG concluded that "[d]uring the course of [the review of the use of "enhanced" techniques], a number of [CIA] officers expressed unsolicited concern about the possibility of recrimination or legal action resulting from their participation in the CTC Program." *CIA OIG Special Review* at 94. The CIA OIG also found the CIA could suffer "serious long-term political and legal challenges as a result" of its practices and that intelligence offers were concerned with their reputations and potential liability upon the "inevitable" disclosure of the program. *Id*. at 7, 103; Satterthwaite Decl. ¶ 98. Despite evidence of illegality, the CIA Director has opposed investigation and prosecution of CIA officers. *See* Satterthwaite Decl. ¶ 105.

This evidence of illegality, coupled with the CIA's expressed fear of legal and reputational harm and manifest desire to protect itself, provides a motive to conceal embarrassing and illegal conduct. At the least, the evidence raises a genuine issue of material fact. Except for Hilton's conclusory statement that she has "determined that [] information has not been classified" for improper purposes, the CIA makes no meaningful effort to address evidence that might suggest otherwise. CIA Br. at 27 (citing Hilton Decl. ¶ 86). More is required before this Court should accept the CIA's justifications.[42]

Zubaydah Memo]) at 12; *CIA OIG Special Review* at 42-43. *See also* Satterthwaite Decl. ¶¶ 40, 49, 96.

[42] Unlike here, in the cases cited by the CIA, the plaintiffs failed to offer any credible evidence of improper motive or intent. CIA Br. at 26-27. *Billington v. DOJ*, 11 F. Supp. 2d 45, 58-59 (D.D.C. 1998) (rejecting plaintiff's "unsubstantiated" and "speculative" circumstantial evidence and "conclusory accusations"), *aff'd in part, vacated in part*, 233 F.3d 581 (D.C. Cir. 2000); *Canning v. DOJ*, 848 F. Supp. 1037, 1047-48 (D.D.C. 1994) (finding "no credible evidence" of motive and holding plaintiff's argument to be "little more than conjecture"); *Arabian Shield Development Co. v. CIA*, 1999 U.S. Dist. LEXIS 2379, *12 (N.D. Tex. 1999) ("Plaintiff has

3. The CIA's "Propaganda" Claim Fails to Justify Nondisclosure.

The claim that further releases could be used as "propaganda," Panetta Decl. ¶ 12, twists FOIA's presumption of openness, recently affirmed by the President.[43] Crediting this argument would lend a perverse hierarchy of secrecy to FOIA: the most inflammatory acts would receive the greatest protection. *See, e.g.*, *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The Court should reject this argument.

4. Discontinued and Unlawful Practices are Not Sources or Methods.

Even assuming *arguendo* that the CIA had shown requisite harm to support its withholdings, as discussed *supra* at III.A.1., the discontinued, unlawful practices the government shields are not sources or methods properly withheld under E.O. 12958.[44]

B. The CIA Does Not Support Its Exemption 3 Withholdings Under the NSA or CIA Act.

The CIA invokes Exemption 3 and the National Security Act of 1947, as amended (the "NSA"), and the Central Intelligence Agency Act of 1949, as amended (the "CIA Act"), to withhold in whole or in part all but two of the *Vaughn* index records. CIA Br. at 12. Although the government claims that Exemption 3 "depends less on the detailed factual contents of

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neither argued nor offered evidence that the CIA classified the requested information for the purpose of concealing a crime."); *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 921-22 (N.D. Ill. 2006) (finding plaintiff's argument to be "without any supporting evidence").

[43] "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, *Freedom of Information Act* (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/.

[44] Because the "inquiries into the applicability of the two exemptions [1 and 3] may tend to merge" with regard to classification of intelligence sources and methods, arguments as to whether discontinued and unlawful practices are properly classified as such are addressed in Section III.B.1-2, but are incorporated herein as objections to the government's Exemption 1 withholdings as well. *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976).

specific documents," the "inclusion of the withheld material within the statute's coverage" requires careful consideration of the documents and factual record. CIA Br. at 13 (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 761-62 (D.C. Cir. 1990)). The CIA has not met its burden to show that the documents fall within Exemption 3.

1. Discontinued Practices Are Not Intelligence Sources and Methods.

In *CIA v. Sims*, the Supreme Court interpreted "intelligence sources and methods" to allow the CIA to withhold only information about sources or methods that "fall within the Agency's mandate." 471 U.S. 159, 169 (1985). Because the President has prohibited the activities at issue ,[45] sources and methods the CIA seeks to shield no longer "fall within the Agency's mandate." No protection exists for intelligence sources and methods no longer within the Agency's mandate.

Despite this requirement, the CIA maintains that "even though the TDI program is now defunct, most, if not all of the operational details regarding the Program" remain secret. CIA Br. at 16 (citing Hilton Decl. ¶ 148). This justification, however, is circular. As discussed *supra*, III.A.1(a), the CIA does not explain how the disclosure of details regarding discontinued practices would betray current intelligence sources and methods and, thus, fails to provide a credible basis for its withholdings. *See Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007) (requiring the CIA to "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information logically falls within the claimed exemptions, and show that the justifications are not controverted by contrary evidence in the record or by evidence of CIA bad faith'" (quoting *Hunt v. CIA*, 981 F.2d 1116, 1119 (9th Cir. 1992)); *see also Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 (D.C. Cir. 2003). None of the

[45] *See* Satterthwaite Decl. ¶¶ 7-11.

cases relied upon by the government, *see* CIA Br. at 18-19, address discontinued practices. Accordingly, the CIA may not rely on Exemption 3 to prevent disclosure.

2. Illegal Conduct Is Not Intelligence Sources or Methods.

Exemption 3 cannot shield unlawful intelligence sources and methods because unlawful activity falls outside an agency's mandate. *Cf. Simms*, 471 U.S. at 169; *Hayden v. NSA/Central Sec. Service*, 608 F.2d 1381, 1389 (D.C. Cir. 1979) ("Certainly where the function or activity is authorized by statute *and not otherwise unlawful*, NSA materials integrally related to that function or activity fall within Public Law No. 86-36 and Exemption 3." (emphasis added)). Prior to 2006, the U.S. government's counter-terrorism activities were premised on the assumption that Common Article 3 of the Geneva Conventions did not apply to "war on terror" detainees.[46] According to President Bush, *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006) (holding that Article 3 does apply to these detainees) jeopardized the continued existence of the CIA's program, requiring the enactment of new authorizing measures. *See* Satterthwaite Decl. ¶¶ 3-5. The U.S. government's admissions about the CIA's practices[47] also make plain that the CIA's acts were prohibited under other federal and international law in force at that time.[48] Summary judgment is unwarranted.

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[46] Memorandum for the National Security Council, from the President, *Re: Human Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002). *See also* Satterthwaite Decl. ¶ 5.

[47] *See supra* III.A.1(b); *infra* III.C; *see also* Satterthwaite Decl. ¶¶ 92-107.

[48] *See, e.g.*, Foreign Affairs and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Sat. 2681; Anti-Torture Statute, 18 U.S.C. §§ 2340-2340A; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. a/39/51 (1984), *entered into force* June 26, 1987; Third Geneva Convention, arts. 122 to 125; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 (Fourth Geneva Convention), arts. 136 to 141, 6 U.S.T. 3516.

3. The CIA Ignores the Significance of the Amendments to the NSA.

The CIA's Exemption 3 withholdings are also improper due to of the restructuring of the nation's intelligence infrastructure through the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638-3872 ("IRTPA"), which amended the NSA and undermined *Sims*.[49] The CIA ignores these substantive changes made by the IRTPA that are consistent with the need for more searching judicial review than the Supreme Court required in *Sims* into whether the CIA is properly withholding "intelligence sources and methods."[50] The IRTPA forced an overhaul of the country's intelligence framework in response to intelligence failures revealed by September 11, 2001.[51] With its enactment, Congress has impliedly repealed

[49] The government cites *ACLU v. Dep't of Defense*, 389 F. Supp.2d 547, 559 n.8 (S.D.N.Y.), in support of its claim that the prior version of the NSA is applicable here. CIA Br. at 13 n. 4. The government's argument in that case was unopposed, and in contested cases, court have rejected this "unduly strict reading." *See, e.g., Wisconsin Project v. United States DOC*, 317 F.3d 275, 283 (D.C. Cir. 2003). Even assuming *arguendo*, however, that the government's assertions are correct, the near-complete overlap between the four requests results in the responsive documents at issue being applicable to requests made subsequent to the IRTPA amendments.

[50] The IRTPA also explicitly stripped the Director of the CIA ("DCI") of its independent authority to withhold "intelligence sources and methods" and requires that the Direct of National Intelligence ("DNI") assert the withholdings. IRTPA § 1011(a) (codified as amended at 50 U.S.C. § 403-1(i) (2004)). Here, the CIA has attempted to comply with this procedural shift in only the barest sense by providing a half-page memorandum from the DNI stating that he has reviewed a "sample" of records, been informed of the record's nature and been told that the CIA will explain the withholdings to the Court. Hilton Decl. Ex. N (Ltr. from DNI to DCI, dated September 18, 2009). The DNI then authorizes the DCI to take measures to protect sources and methods. Congress cannot have intended the DNI to satisfy its independent intelligence oversight responsibilities in this cursory manner. In fact, the DNI expressly delegates these responsibilities to the DCI, contrary to the IRTPA. 50 U.S.C. § 403-1(i)(3) (DNI "may only delegate a duty or authority given to Director under [§ 403-1(i)] to the Principal Deputy of the" DNI.). The DNI must discharge its duties under the NSA without abdication to the CIA.

[51] *See, e.g.*, S.Rep. No. 108-139, at 4 (2004) (Conf. Rep.) (statement of Senator Susan Collins Chairperson of Conference Committee).

the definition of "intelligence sources and methods" established by *Sims* and its progeny.[52] *See United States v. Fausto*, 484 U.S. 439, 453 (1988) (discussing implied repeals). This is an issue of first impression.[53] *Sims* no longer controls the interpretation of "intelligence sources and methods"; this phrase must now be interpreted in light of the IRTPA amendments, including provisions facilitating the disclosure to the private sector.[54]

The DNI's submission should be reviewed against this background, not the outmoded framework that informed *Sims*. Because the CIA ignores the significance of the IRTPA, it

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[52] Congress has explicitly not acquiesced to the *Sims* interpretation of the term "intelligence sources and methods." Indeed, Congress refused to endorse the *Sims* reading of "intelligence sources and methods" at an earlier date, stating that a "closer, more systematic review" was required. H.R. Rep. No. 102-963, at 23 (1992) (Conf. Rep.), as reprinted in 1992 U.S.C.C.A.N. 2605, 2614 (Intelligence Authorization Act for Fiscal Year 1993 report).

[53] The CIA cites cases inapposite to this issue. CIA Br. at 14. In *Larson v. Dep't of* State, 565 F.3d 857, 865 (D.C. Cir. 2009), and *James Madison Project v. CIA*, 607 F. Supp. 2d 109, 125 (D.D.C. 2009), the plaintiffs did not raise the issue of the NSA's status as a withholding statute, and only the status of the documents in question was litigated. In addition, *Moore v. Bush*, 601 F. Supp. 6, 15 (D.D.C. 2009) only briefly discusses the applicability of 403-1(i)(1) to withholdings by the National Security Agency, not the CIA, and cites additional statutes specifically applicable to that Agency under which it is required to protected classified information. The other two cases are similarly inapposite. *Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007) notes that the change in classification authority had no impact "on this case," relying in turn on *Wolf v. CIA*, in which the court's holding relied on the duties of the Director of Central Intelligence "at the time of Wolf's FOIA request in 2000." 473 F.3d 370, 377 n.6 (D.C. Cir. 2007). To the extent that *Gerstein v. CIA*, 2008 U.S. Dist. LEXIS 82701, *28 (N.D. Cal. 2008) relies on *Berman*, it too is inapposite.

[54] *See* IRTPA § 1101(a) (codified at 50 U.S.C. §s 403-1(g)(1)(2005)); IRTPA § 1016(f)(2)(B)(vi) ("Information Sharing" provision requires the President to create an "Information Sharing Environment" that "allows users to share information . . ., as appropriate, *with the private sector*" (emphasis added)). Further, the IRTPA enhanced declassification procedures. IRTPA § 1102(f) (extending and improving the authorities of the Public Interest Declassification Act of 2000, 50 U.S.C. § 435 note); Pub. Interest Declassification Act of 2000, Pub, L. 105-567, 703(b)(2)-(3), 114 Stat. 2856 (2000) (Public Interest Declassification Board established "to promote the fullest possible public access to a thorough, accurate, and reliable documentary record of significant United States national security decisions and . . . activities" by recommending the "identification, collection, and review for declassification of information of extraordinary public interest that does not undermine the national security. . . .").

wrongly presumes that past precedent retains the same value. The text of the controlling statute and a consideration of its legislative history, however, counsel the Court to require a DNI declaration not provided here and a definition of "intelligence sources and methods" consistent with the IRTPA. Moreover, it may be appropriate for a special master or national security expert to be appointed to assist the Court in evaluating national security claims. *See, e.g.*, *Wash. Post*, 766 F. Supp. at 4; *see also Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (contemplating appointment of expert to assist in assessing potential harm to national security).

4. The CIA's Reading of the CIA Act Is Unsupported.

Section 403(g) only permits withholding of the CIA's "organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency," but inadequate *Vaughn* index descriptions do not reveal whether this structural information is what is withheld. 50 U.S.C. § 403(g); *see Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976) (noting "the limited purpose" of § 403g to permit the CIA to protect information regarding the Agency's "internal structure" from disclosure). Moreover, the CIA offers no support for its overly broad claim that the scope of withholdings under § 403(g) and the NSA Act are co-extensive. *See* CIA Br. at 16.[55]

C. The CIA Has Waived Exemption 1 and 3 Protection.

Finally, even assuming *arguendo* that the Exemption 1 and/or 3 withholdings are justified, extensive and detailed official acknowledgements about the CIA's practices have waived these protections. *See Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007); *Fitzgibbon*, 911 F.2d at 765. In addition to the previously discussed disclosures describing this information, the

[55] *Riquelme v. CIA*, 453 F. Supp. 2d 103, 111 (D.D.C. 2006), offers no support because the court found that the information at issue was "intelligence sources and methods" under the NSA Act.

Satterthwaite Declaration carefully sets forth further sources[56] that constitute official acknowledgements and compel release of withheld documents. The subjects addressed include the following:

- the termination and prohibition of the CIA's use of secret detention, rendition and "enhanced interrogation techniques", *see* Satterthwaite Decl. ¶¶ 3-14;
- the number and identity of individuals rendered, secretly detained and interrogated by the CIA, *see id*. ¶¶ 15-20;
- further details concerning the "initial conditions," "rendition" and "reception at black site, *see id*. ¶¶ 21-24;
- the authorization and implementation of "enhanced interrogation techniques" generally and against specific individuals, *see id*. ¶¶ 25-74;
- the conditions of confinement, *see id*. ¶¶ 75-79;
- details about the interrogation personnel roles, conduct, qualifications and training, *see id*. ¶¶ 80-85;
- "recordkeeping" of interrogations and destruction of records, *see id*. ¶¶ 86-89;
- additional information about and from individuals in CIA detention, *see id*. ¶ 90;
- the "disposition" of individuals after their CIA custody, *see id*. ¶¶ 91-92; and
- the illegality of the CIA's program of rendition, secret detention and "enhanced interrogation techniques, *see id*. ¶¶ 92-107.

Although the CIA is obligated to release officially acknowledged information within the responsive records, *Fitzgibbon*, 911 F.2d at 765, the CIA's reprocessing of these records failed to yield disclosure of all reasonably segregable information. *See infra* at X. Accordingly, the CIA's motion should be denied.

[56] Of the sources in the Satterthwaite Declaration, all but a handful are from the Executive or CIA and, therefore, constitute official acknowledgements waiving any protection from disclosure.

III. THE CIA'S *GLOMAR* RESPONSE IS UNWARRANTED.

The CIA has invoked a *Glomar* response, refusing to confirm or deny the existence of cables regarding use of the "insult slap" and "sleep deprivation" on Sheikh Mohammed and Zubaydah or records relating to the rendition and detention of Bashmilah and Ali. Categories 5-6, 9-10, 15-17. Assuming *arguendo* that the *Glomar* doctrine is recognized in this Circuit,[57] it does not "relieve [an] agency of its burden of proof." *Riquelme v. CIA*, 453 F. Supp. 2d 103, 112 (D.D.C. 2006) (referring to *Phillippi*, 546 F.2d at 1013). An agency must still "tether" its refusal to admit or deny responsive records to a FOIA exemption and explain why any response would in itself cause harm. *Wilner v. NSA*, No. 07 Civ 3883 (DLC), 2008 WL 2567765, at *24 (S.D.N.Y. June 25, 2008).[58] To prevent a *Glomar* response from undermining judicial review, a district court must make a *de novo* determination of the propriety of an agency's *Glomar* claim by first creating "as complete a public record as is possible." *Phillippi*, 546 F.2d, at 1013; *Riquelme*, 453 F. Supp. 2d at 112.

A. Cable Requests.

1. Exemption 1 Cannot Justify the CIA's *Glomar* of the Cable Requests.

The CIA's maintains that a *Glomar* response to the Cable Requests is necessary because any other response would disclose whether, "although authorized in theory, particular EITs were

[57] Despite the CIA's position, CIA Br. at 29 n.9, the Second Circuit has not opined on the legitimacy of a *Glomar* response. *See, e.g.*, *Roman v. NSA*, No. 07-CV-4502, 2009 WL 303686, at *5 n.3 (E.D.N.Y. Feb. 9, 2009) ("The Court recognizes that the Second Circuit has yet to address the legality of the Glomar Response under FOIA…."); *Wilner v. NSA*, No. 07 Civ 3883 (DLC), 2008 WL 2567765, at *2 n.2 (S.D.N.Y. June 25, 2008) (same). *Weberman v. NSA*, cited by the CIA, concerned the narrower issue of whether plaintiff's counsel could be excluded from in camera review of an affidavit, not the use of *Glomar*. 668 F.2d 676, 678 (2d Cir. 1982).

[58] In determining "whether the existence of agency records *vel non* fits a FOIA exemption, courts apply the general exemption review standards established in non-*Glomar* cases." *Wolf*, 473 F.3d at 374.

used in fact upon on specific detainees at specific times," and reveal the "strategy and methods used by the United States when conducting any sort of interrogation, including those under the Army Field Manual." CIA Br. at 34-35 (citing Hilton Decl. ¶ 240.) These claims are baseless.

The information that the CIA maintains must remain secret—whether Zubaydah and Sheikh Mohammed have been subjected to "sleep deprivation" and/or the "insult slap"—has been officially acknowledged. For instance, the *August 1, 2002 Zubaydah Memo*, specifically authorizes the use of 10 "enhanced interrogation techniques" on Zubaydah, including the "facial slap (insult slap)" and "sleep deprivation," and officially acknowledges that Zubaydah was subjected to sleep deprivation. *Id*. at 3 (stating that "you [CIA] have orally informed us that you would not deprive Zubaydah of sleep for more than 11 days at a time ***and that you have previously kept him awake for 72 hours***. . . .") (emphasis added).[59] This official acknowledgement vitiates the need for a *Glomar* response.

The *August 1, 2002 Zubaydah Memo* also expressly states that the ten enhanced interrogation techniques, including the "slap" and "sleep deprivation," should be used in "*escalating* fashion, culminating with the waterboard…." *Id*. at 2 (emphasis added); *see also CIA OIG Special Review* at 20 (same); *May 30, 2005 Art. 16 Techniques Memo* at 30 (enhanced techniques "are used *only* in escalating fashion….") (emphasis added); *see also* Satterthwaite Decl. ¶¶ 29, 45. The *May 30, 2005 Art. 16 Techniques Memo*, in addition to acknowledging that multiple "enhanced interrogation techniques" were used on both detainees, states that the CIA repeatedly used the "waterboard," the "most traumatic" of the EITs, on both Zubaydah and

[59] *See* Satterthwaite Decl. Ex. YY (Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency, Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005) [hereinafter *May 10, 2005 Techniques Memo*]) at 11, 12 (defining "sleep deprivation" as "**more than 48 hours**" without sleep to a maximum duration of 180 hours) (emphasis added).

Sheikh Mohammed. *Id*. at 9, 37. Thus, unless it is the CIA's position that it failed to follow its own escalation protocol and its practice of using sleep deprivation in conjunction with the waterboard[60] these memoranda officially acknowledge that the CIA subjected both detainees to "sleep deprivation" and the "insult slap."

Nor is it a secret *when* these men were subjected to these and other "enhanced interrogation techniques." For instance, the CIA has acknowledged that Zubaydah was captured on March 27, 2002 and waterboarded at least 83 times in August 2002 and that Sheikh Mohammed was captured on March 1, 2003 and waterboarded 183 times that month. *CIA OIG Special Review* at 12, 90-91; *May 30, 2005 Art. 16 Techniques Memo* at 37. Based on the escalating nature of the techniques, the CIA subjected Zubaydah and Sheikh Mohammed to the "insult slap" and "sleep deprivation" within these respective windows.[61] Other than a passing reference to the OLC memoranda (that the techniques were "authorized in theory"), the CIA does not address these officially acknowledged facts, which alone are sufficient to defeat the CIA's motion. *Wash. Post,* 766 F. Supp. at 21; *Founding Church of Scientology, Inc.*, 610 F.2d at 831-832.

The CIA's remaining arguments, for instance, that confirming or denying the existence of

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[60] Satterthwaite Decl. ¶ 66.

[61] The CIA has provided *Vaughn* entries for 47 cables between CIA officers and CIA headquarters dated March 1, 2003 through March 28, 2003, as well as *Vaughns* for similar cables dated August 20, 2003 and September 24, 2003, regarding Sheikh Mohammed's "Interrogation Program." Satterthwaite Decl. Ex. AAA. There are also *Vaughn* entries, dated August 15, 2002 and September 6, 2002, regarding an "Interrogation Session on Abu Zubaydah." Hilton Decl. Ex. A (Docs. 358, 359.) In *ACLU*, the government has identified no less than 549 CIA cables between CIA operatives and CIA headquarters regarding interrogations dated between April 13, 2002 and December 4, 2002. Satterthwaite Decl. Ex. OO (Letter from Lev L. Dassin, Acting United States Attorney, to Hon. Alvin K. Hellerstein, United States District Court Southern District of New York (May 18, 2009)). The CIA has publicly acknowledged when interrogation sessions occurred.

responsive records would reveal the "strategy and methods used by the United States when conducting any sort of interrogation, including those under the Army Field Manual," CIA Br. at 35 (citing Hilton Decl. ¶ 240), are also meritless. The Army Field Manual—now the only legitimate source of interrogation techniques, per E.O. 13491—details nineteen different techniques, which do not include "sleep deprivation" or the "insult slap." AFM 2-22.3 (Chapter 8). In fact, the manual expressly provides that the use of the "separation" isolation technique "must not preclude the detainee getting four hours of continuous sleep every 24 hours." *Id*. at M-10.

Even assuming *arguendo* that a non-*Glomar* response would somehow reveal current interrogation methods and strategies, much detailed information has been already been made public regarding the "enhanced interrogation techniques." The OLC memoranda are, as intended, a roadmap to their use.[62] The CIA's assertion that anything other than a *Glomar* response will compromise national security is insufficient in light of the extensive public knowledge of the frequency and manner of the use of these techniques. *See Wash. Post*, 766 F. Supp. at 25.[63] In short, no harm will result from a non-*Glomar* response.

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[62] For example, the *May 10, 2005 Techniques Memo* describes the protocol for the "insult slap" and "sleep deprivation" in minute detail. *Id*. at 8 (hand contact must occur "directly between the tip of the individuals chin and the bottom of the corresponding earlobe"); *id*. at 11-12 (shackles used in sleep deprivation should allow detainees "approximately a two- to three-foot diameter of movement"); *id*. (in being subjected to sleep deprivation "[d]etainees also subject to nudity as a separate technique will at times be nude and wearing a diaper"); *id.* (sleep deprivation can be no longer than 180 hours). *The May 10, 2005 Combined Techniques Memo* analyzed the use of these and other techniques in combination through a "Prototypical Interrogation." *Id.* at 7, 8 (stating that "[i]f the detainee does not give appropriate answers to the first questions, the interrogators use an insult slap. . . " and that the interrogation session should conclude with "sleep deprivation."); *see also* Satterthwaite Decl. ¶ 35.

[63] The Exemption 1 cases cited by the government do not support a *Glomar* response here. CIA Br. at 35-36 (citing cases). None deal with facts remotely analogous to those here; namely, where the CIA is refusing to confirm or deny the existence of records regarding the officially acknowledged use of EITs on officially acknowledged detainees.

2. The CIA's *Glomar* Response is Waived as to the Cable Requests.

Even assuming *arguendo* that the CIA could establish that Exemption 1 or 3 applied, which it cannot, the official acknowledgments described above plainly constitute a waiver. *See Wolf*, 473 F.3d at 378 (official acknowledgment waives Exemption 1 and 3-based *Glomar* response). Thus, the CIA should be ordered to acknowledge if responsive documents exist.[64]

B. Bashmilah/Ali Requests.

1. The CIA's *Glomar* Response is Not Justified by Exemption 1.

The CIA maintains that anything other than a *Glomar* response would require the CIA to "confirm or deny" specific allegations, including "whether the CIA was involved or had an interest in the capture, transfer, and detention" of Bashmilah and Ali and whether the CIA communicated with the Yemeni government in connection with these activities. CIA Br. at 32-33, 35 (citing Hilton Decl. ¶¶ 245-260). But public disclosures also undercut the CIA's *Glomar* response here. Specifically, the following information is already in the public domain[65] and has been confirmed by the United Nations and the Yemeni and Jordanian governments:

- Bashmilah was detained by Jordanian intelligence services, on or about October 21, 2003. After approximately a week, Bashmilah was delivered to another authority and

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[64] As discussed *supra*, Section 1.7(a) of Executive Order 12958 prohibits classification for improper purposes, which are particularly acute in the *Glomar* context and the CIA should address these concerns with particularity. *ACLU v. DOD*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) ("the danger of [*Glomar*] is that [it encourages] an unfortunate tendency . . . to over-classify . . . [and to improperly classify] that which is more embarrassing than revelatory of intelligence sources or methods").

[65] *See* Brown Decl. Ex. E (Bashmilah Decl. Ex. G (Letter from Embassy of the Republic of Yemen in France to Dick Marty, Council of Europe (March 27, 2007)); United Nations Working Group on Arbitrary Detention Opinion 47/2005; Brown Decl. Ex. G (Bashmilah Decl. Ex. V (Letter from the Permanent Mission of the Republic of Yemen to the United Nations Office and Other International Organizations to the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, and the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (December 20, 2005)).

transferred to an unknown location outside the country. Brown Decl. Exs. H, E;

- Ali was detained by Jordanian officials on September 4, 2005 and transferred to an unknown location outside of the country on September 8, 2005. *Id.* Ex. H.

- In 2005, the United States informed the Central Organization for Political Security in Yemen that Bashmilah was in U.S. custody. *Id.* Ex. E

- Following their U.S. detention both men returned to Yemen on May 5, 2005. *Id.*

- The Yemeni government has confirmed that it did not independently arrest or incarcerate Bashmilah or Ali. Instead, U.S. authorities handed the men over to the Yemeni authorities. *Id.* Exs. E, G;

- The Yemeni authorities detained Bashmilah and Ali while awaiting files pertaining to them from the United States, in order to verify the allegations made against the detainees by the U.S. government. *Id.* Exs. E, G;

- Upon receiving a file from the United States pertaining to Bashmilah on November 10, 2005, the Yemeni government tried Bashmilah for using a false document and sentenced him to time served, including the time served outside of Yemen. *See id.*;

- Upon receiving a file from the United States pertaining to Ali on November 10, 2005, the Yemeni government tried Ali for using false documents and sentenced him to time served, including the time served outside of Yemen. *Id.* Ex. G.

It is thus no secret that the CIA communicated with Yemeni authorities regarding the transfer and detention of Bashmilah and Ali. In fact, the Yemeni government has publicly disclosed this relationship.[66] *See* CIA Br. at 32-33, 35; Hilton Decl. ¶ 252; *see* Brown Decl. Ex. F (Bashmilah Decl. Ex. U (United Nations Working Group on Arbitrary Detention Opinion 47/2005)) (stating that in official communications, the Yemeni government confirmed that Bashmilah and Ali were handed over to Yemeni authorities by the U.S. for detention). Until this

[66] Because Yemen has acknowledged the facts above, the diplomatic concerns voiced in certain cases cited by the CIA are absent. *Cf. Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 625 (S.D.N.Y. 1996) ("The CIA further argues that official confirmation that the CIA . . . conducted espionage in a foreign country could cause a diplomatic confrontation and lead to the disruption of foreign relations."); *Arabian Shield Dev. Co. v. CIA*, No. 3-98-CV-0624-BD, 1999 U.S. Dist. LEXIS 2379, at *8-9 (N.D. Tex. Feb. 26, 1999) (discussing diplomatic concerns), *aff'd mem.* 208 F.3d 1007 (5th Cir. 2000).

evidence is addressed, summary judgment is inappropriate. *Wash. Post*, 766 F. Supp. at 31.[67]

C. The CIA's *Glomar* Response is Not Justified by Exemption 3.

The CIA's *Glomar* response is also insufficient under Exemption 3. As noted *supra*, the CIA's declaration is procedurally and substantively inconsistent with IRTPA.[68] Moreover, as with the CIA's general invocation of Exemption 3 to shield information concerning "enhanced interrogation techniques," Exemption 3 cannot support a *Glomar* response here.[69]

IV. THE CIA HAS NOT JUSTIFIED ITS EXEMPTION 5 WITHHOLDINGS.

A. Deliberative Process Privilege.

The deliberative process privilege protects from disclosure intra- or inter-agency documents that are both "(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. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005) (quoting *Grand Central P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999)).

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[67] Cases cited by the government are unavailing. CIA Br. at 35-36 (citing cases). None, for example, concerned communications where the foreign government had acknowledged them. Moreover, because of acknowledgment by the foreign government itself, the CIA could confirm or deny responsive records without creating any adverse precedent concerning the CIA's ability to maintain confidences. *Cf. Wolf*, 473 F.3d 370.

[68] As with Exemption 1, the CIA maintains that to provide anything other than a *Glomar* response would "'necessarily' 'disclose intelligence methods,'" namely, whether "the CIA used the specified EITs on these specific individuals." CIA Br. at 32 (citing Hilton Decl. ¶ 238).

[69] The CIA's Exemption 3 *Glomar* position is also without precedent. *Fitzgibbon v. CIA*, for instance, cited by the CIA, concerned whether "generally known" intelligence methods, "such as physical surveillance, or interviewing, or examination of airline manifests," could be protected. CIA Br. at 32; 911 F.2d at 763; *Schoenman v. F.B.I.*, No. 04-2202 (CKK), 2009 WL 763065, at *25 (D.D.C. Mar 19, 2009) (same). Here, the CIA is not trying to keep secret garden variety intelligence gathering techniques, but information regarding the use of discredited, discontinued and officially acknowledged techniques. In addition, in *Blazy*, the court found that while "the plaintiff's polygraphs constitute intelligence methods and therefore cannot be released," summaries of the test "have been provided." *Blazy v. Tenet*, 979 F. Supp. 10, 23 (D.D.C. 1997). The CIA provides far less here.

The CIA must establish that the Exemption applies. *See id*. at 356.

1. Numerous Records Fail the Intra- or Inter-agency Requirement.

Numerous withheld records fail the intra- or inter-agency requirement. For example, Document 96 is a "one-page letter from the CIA Executive Director to a member of Congress." Hilton Decl. Ex. A (Doc. 96). Under FOIA, members of Congress are *not* within the definition of "agency." 5 U.S.C. § 552(f) (noting that the term agency, as defined in § 551(1), includes, *inter alia*, any executive department, military department, or independent regulatory agency); 5 U.S.C. § 551(1) (defining "agency" to "not include . . . Congress . . ."). Indeed, courts have rejected the very protections sought by the CIA for similar communications with Congress. *Dow Jones & Co. v. DOJ*, 917 F.2d 571, 574 (D.C. Cir. 1990) (concluding that letter from Justice Department to House Ethics Committee about criminal probe was not protected). Accordingly, neither Document 96 nor other similar documents fall within the privilege. Hilton Decl. Ex. A (Doc. 79) (letter from member of Congress to the DNI Intelligence); *id*. (Doc. 66) (meeting summary from a foreign liaison to a CIA/OGC attorney).

2. The Declarations and Vaughn Index Are Insufficient to Establish the Deliberative Process Privilege.

With limited exceptions, the CIA's declarations and *Vaughn* entries are insufficient to test the withholdings. The CIA repeatedly resorts to generalized and boilerplate language in support of the exemption, an approach that has been rejected elsewhere. *See, e.g.*, *Rein v. U.S. PTO*, 553 F.3d 353, 369 (4th Cir. 2009) (finding *Vaughn* submissions inadequate because they used "general language associated with the deliberative process privilege" and left the court no basis to "independently assess the asserted privilege.").

Numerous entries, for instance, do not adequately demonstrate that the records are "deliberative" because they fail to provide meaningful identification of "the deliberative process

involved and the role played by each document in the course of that process." *Greenberg v. Dep't of Treasury*, 10 F. Supp. 2d 3, 16 (D.D.C. 1998).[70] To be "deliberative," documents must be "actually . . . related to the process by which policies are formulated," *Grand Central P'ship*, 166 F.3d at 482 (internal quotation marks omitted), and not to mere "routine operating decisions." *N. Y. Times*, 499 F. Supp. 2d at 514 (quoting *Schiller v. City of New York*, No. 04 Civ. 7922, 2007 U.S. Dist. LEXIS 4285, at *33 (S.D.N.Y. Jan. 19, 2007)). Relevant factors include whether the document "formed an essential link in a specified consultative process," "reflects the personal opinion of the writer rather than the policy of the agency," and "if released, would inaccurately reflect or prematurely disclose the views of the agency." *Grand Central P'ship*, 166 F.3d at 482 (internal quotations marks omitted). Document 61, for example, is a "7-page paper discussing the status of and options regarding a particular set of issues" "[w]ritten by a CIA employee." Hilton Decl. Ex. A (Doc. 61). Nowhere does this description show that the document relates to—much less forms an "essential link" in—an actual policymaking process rather than a routine operating decision. No detail is given to test whether the document reflects the mere personal opinions of the writer or would inaccurately reflect the views of the CIA if released. Accordingly, deliberative process protection is unwarranted for this and similar records. *See, e.g.*, Hilton Decl. Ex. A (Docs. 123, 128).

Likewise, numerous entries fail to show that the withheld records are "predecisional" or "prepared in order to assist an agency decisionmaker in arriving at his decision." *Grand Central P'ship*, 166 F.3d at 482 (internal quotation marks omitted); *see also Elec. Privacy Info. Ctr. v. DOJ*, 511 F. Supp. 2d 56, 70 (D.D.C. 2007) (where agency merely asserts "memoranda are

[70] *See also James Madison Project v. CIA*, 607 F. Supp. 2d 109, 129 (D.D.C. 2009); *N. Y. Times Co. v. DOD*, 499 F. Supp. 2d 501, 514-15 (S.D.N.Y. 2007); *Access Reports v. DOJ*, 926 F.2d 1192, 1196 (D.C. Cir. 1991).

'predecisional,' the court has no way to assess that claim"). Although an agency need not establish that a specific decision was *made* in reliance on a document, an agency must demonstrate that the document "*related to a specific decision facing the agency*." *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002) (emphasis added).[71] The privilege does not protect records "merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *Grand Central P'ship*, 166 F.3d at 482 (internal quotation marks omitted).[72] Document 42, for example, fails this test. The record is an unclassified "one-page email concerning a draft policy paper" between CIA attorneys that "discusses the timeline for circulating and finalizing the draft and several parties involved in the review process." Hilton Decl. Ex. A (Doc. 42). The CIA claims that it warrants protection because "the email discuss [sic] a policy issue under consideration within the executive branch, and outlines the several parties involved in the review process." *Id.* But no specific decision is identified, and the description suggests the document is "peripheral" to policymaking: merely concerning a review timeline. Deliberative process protection is improper for this and similar records. *See, e.g.*, Hilton Decl. Ex. A (Doc. 128).

3. The CIA May Not Rely Solely on Records' Draft Status To Justify Their Withholding.

The CIA also improperly relies on the "draft" status of documents as grounds to withhold

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[71] *See also Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997); *E.B. v. N.Y. City Bd. of Educ.*, 233 F.R.D. 289, 295 (E.D.N.Y. 2005) (finding that defendants had not demonstrated that documents were "intended to … assist in the formulation of a specific decision"). The controlling authority cited by the government accords with this proposition—that a document cannot be unmoored from any specific decision facing the agency and still be considered predecisional. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 n.18 (1975).

[72] *See also Unidad Latina en Accion v. DHS*, 253 F.R.D. 44, 58-59 (D. Conn. 2008); *Sun-Sentinel Co. v. DHS*, 431 F. Supp. 2d 1258, 1277-78 (S.D. Fla. 2006), *aff'd sub. nom. News-Press v. DHS*, 489 F.3d 1173 (11th Cir. 2007).

them. CIA Br. at 41. Contrary to the CIA's position,[73] draft documents are not "per se exempt." *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982). The government still must satisfy the prerequisites for deliberative process protection. *See N.Y. Times Co. v. DOD*, 499 F. Supp. 2d 501, 515 (S.D.N.Y. 2007).[74] For example, Document 46 is a "three-page email train that discusses a non-CIA draft report" which is described to include excerpts of the report, ask for input on specific issues, and discuss the procedure for developing input. Hilton Decl. Ex. A (Doc. 46). "[P]ortions" of the document are claimed as exempt under the deliberative process privilege because it "discusses actions to be taken within the CIA in response to the report." *Id.* But the CIA fails to explain how this record satisfies the exemption instead of being merely peripheral to policy formation (*i.e.*, development of a procedure for review of a draft). Neither this nor other similar records are entitled to deliberative process protection merely because they are drafts. *See, e.g.*, Hilton Decl. A (Docs. 41, 43, 46, 112, 115, 134, 135, 158, 160, 164).

B. Attorney Client Privilege.

1. The CIA's Confidentiality Assertions are Insufficient.

The "attorney-client privilege applies only when information is the product of an attorney-client relationship and is maintained as confidential between attorney and client." *Brinton v. DOS*, 636 F.2d 600, 603 (D.C. Cir. 1980); *Coastal States Gas Corp. v. Dep't of*

[73] The CIA's authorities stand for the uncontroversial proposition that draft documents may satisfy the other requirements of the privilege. *See, e.g., NAACP Legal Defense & Educ. Fund, Inc. v. U.S. Dep't of Housing & Urban Dev.*, No. 07 Civ. 3378, 2007 WL 4233008, at *11 (S.D.N.Y. Nov. 30, 2007); *Moreland Props., LLC v. City of Thornton*, No. 07-cv-00716-EWN-MEH, 2007 WL 2523385, at *3 (D. Colo. Aug. 31, 2007). But designating a document as a draft "does not end the inquiry." *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257-58 (D.C. Cir. 1982) (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

[74] *See also Wilderness Soc'y v. DOI*, 344 F. Supp. 2d 1, 14 (D.D.C. 2004) ("simply designating a document as a 'draft' does not automatically make it privileged under the deliberative process privilege"); *Lee v. FDIC*, 923 F. Supp. 451, 458 (S.D.N.Y. 1996) (same).

Energy, 617 F.2d 854, 863 (D.C. Cir. 1980). The agency has the burden to demonstrate that confidentiality was expected and maintained. *Coastal States*, 617 F.2d at 863; *Hornbeck Offshore Transp., LLC v. U.S. Coast Guard*, 04 Civ. 1724, 2006 U.S. Dist. LEXIS 14389, at *44, 46 (D.D.C. Mar. 20, 2006) (stating that a " [c]ourt cannot assume confidentiality" and that a *Vaughn* index should list "persons to whom the original or any copies of the documents were shown or provided").

The CIA's confidentiality arguments are insufficient. The CIA asserts generally that the documents were prepared "by and at the direction of the CIA's attorneys, with the joint expectation of the attorneys and the CIA staff that they would be held in confidence. Moreover, these documents have been held in confidence, except insofar as there are limited quotations from these letters in OLC memoranda that have been released . . . ." CIA Br. at 43; Hilton Decl. ¶ 178. However, in 25 of the 38 documents listed on the *Vaughn* index, the entries do not contain the word "confidential" at all,[75] much less describe the CIA's basis for asserting that confidentiality was expected and maintained.[76] *See* Hilton Decl. Ex. A (Docs. 16, 18, 29, 33, 34, 41, 43, 44, 49, 53, 56, 66, 67, 69, 72, 76, 81, 84, 102, 137, 192, 220, 263)[77]; *see, e.g.*, *id*. (Doc. 66) (asserting, with regard to memoranda sent by a foreign liaison to a CIA/OGC attorney, "[t]he memoranda discuss legal advice and analysis provided by CIA and DOJ attorneys. The document is therefore withheld pursuant to the attorney-client communication privilege."). The

[75] If the CIA intends to rely merely on records' classified status to establish their confidentiality, this is neither expressed nor sufficient to evaluate whether confidentiality has been maintained.

[76] The CIA's brief (at 42-43) identifies 32 records withheld under the attorney-client privilege but the Addendum identifies 38. Exhibit A of the Hilton Declaration also indicates some of the records listed on the Addendum do not actually assert the privilege. *See, e.g.*, Hilton Decl. Ex. A (Docs. 16, 284). The Plaintiffs address the items on the Addendum.

[77] The Hecker and Grafeld Declarations describe in more detail the basis for the assertion of confidentiality over the records discussed therein.

CIA has failed to show that the documents were circulated "no further than among those members 'of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication.'" *Coastal States*, 617 F.2d at 863.

2. Attorney-Client Privilege is Waived as to Certain OLC Letters and Documents Containing Portions of the Released OLC Opinions.

Even if certain withheld document were once privileged, the CIA has waived this protection by expressly incorporating and relying on these documents in public memoranda. Hilton explains that there are "limited quotations" from otherwise "confidential" letters in released OLC memoranda. Hilton Decl. ¶ 178.[78] Although the government does not specifically identify these letters (which is itself an insufficiency), Document 76, an August 25, 2004 letter from the CIA OGC to the DOJ OLC, and Document 81, a July 30, 2004 letter from the CIA OGC to the DOJ OLC, are the only "letters" that correspond to the dates and descriptions of letters quoted in the released OLC memoranda, for which attorney-client privilege is claimed. Hilton Decl. Ex. J (*May 10, 2005 Techniques Memo*) at 6-15, n.9. Where, as here, assertedly privileged materials are incorporated and cited as support in a public document, privilege as to those materials is waived. *Rein*, 553 F.3d at 376 (citing *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 253 (D.C. Cir. 1977) (privilege is waived if document is disclosed to private individuals or nonfederal agencies); *G.E. v. Johnson*, No. 00-2855, 2006 U.S. Dist. LEXIS 64907, at *63-64 (D.D.C. Sept. 12, 2006) (production of documents waives privilege over, *inter alia*, portions of allegedly privileged materials incorporated in or cited as substantive support by disclosed documents). Thus, Documents 76 and 81 cannot be withheld as privileged.

Similarly, the government cannot invoke attorney-client privilege for documents

[78] Hilton makes the same statement in arguing for work product protection. Hilton Decl. ¶ 182. For the same reasons as discussed herein with respect to the attorney-client privilege, work product protection over the quoted materials has been waived.

containing portions of the released OLC legal opinions because, through release, it has waived privilege over the subject matter of those documents. *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (voluntary disclosure to unnecessary third parties may waive the privilege "not only as to the specific communication but often as to all other communications relating to the same subject matter"); *G.E. v. Johnson*, No. 00-2855, 2006 U.S. Dist. LEXIS 64907, at *63-64 (D.D.C. Sept. 12, 2006) (by production of documents, EPA waived the privilege over, *inter alia*, drafts of those documents concerning the same subject). By not invoking the attorney-client privilege for draft OLC opinions listed on the *Vaughn* (an otherwise classic example of a document over which such privilege might be claimed), the government has implicitly acknowledged that it waived any privilege by release of the corresponding final OLC opinions. *See, e.g.*, Hilton Decl. Ex. A (Docs. 1, 9, 12, 13, 16, 19, 25, 30, 65, 68). The same subject matter waiver of the privilege applies to, *inter alia*, comments on and discussions of the released opinions, portions of other allegedly-privileged materials that address the same subject matter as the released opinions, and portions of allegedly-privileged materials that are incorporated in or cited as substantive support by the released opinions. *G.E. v. Johnson*, 2006 U.S. Dist. LEXIS 64907, at *63-64. Accordingly, such documents are not privileged either. Hilton Decl. Ex. A (Docs. 8, 10, 11, 67, 69, 72, 82, 84).

3. The CIA's Descriptions regarding "Facts" are Insufficient.

Finally, the *Vaughn* descriptions are also so threadbare as to prevent any meaningful analysis of whether exceptions to the attorney-client privilege apply. For instance, third-party facts communicated by an agency to its counsel may not be considered sufficiently confidential to warrant protection. *See, e.g., Coastal States Gas Corp.*, 617 F.2d at 863; *cf. Brinton v. DOS*, 636 F.2d 600, 604 (D.C. Cir. 1980) ("[W]hen an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged."). Similarly, if legal advice is

based solely on third-party facts, the attorney-client privilege may not apply. *Tax Analysts v. IRS*, 117 F.3d 607, 619 (D.C. Cir. 1997). Because the government is silent as to the source of the CIA's facts, and states only that the legal advice was based upon "facts provided by the CIA to its attorneys," Hilton Decl. ¶ 178, it is impossible to tell if such exceptions might apply.

C. Attorney Work Product Privilege.

The CIA's assertions of the work-product privilege are also insufficient. The privilege is "limited in scope" and "exempts those documents prepared in contemplation of litigation," not "every written document generated by an attorney." *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 268 (D.D.C. 2004) (internal quotation marks omitted); *see also A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 146 (2d Cir. 1994). In addition, the CIA must "make the correlation between each withheld document and the 'litigation for which the document was created.'" *Maine v. DOI*, 298 F.3d 60, 69 (1st Cir. 2002).

Instead, Hilton's Declaration states only generally that the CIA lawyers communicating with OLC lawyers had "as one purpose to prepare for the possibility of criminal, civil, or administrative litigation against the CIA and CIA personnel who participated in the Program." Hilton Decl. ¶ 179. Hilton also asserts generally that the records on the *Vaughn* index were prepared in contemplation of "specific litigation," that certain documents were prepared in "recognition of existing litigation," and that when some were prepared, "criminal, civil and administrative proceedings regarding the detention and interrogation activities were already proceeding in a number of forums." *Id.* at ¶¶ 180-81. The *Vaughn* entries themselves provide no more detail to demonstrate that the documents were created *because of* actual or impending litigation. *United States v. Adlman*, 134 F.3d 1194, 1202-03 (2d Cir. 1998) (stating the test for documents to be considered prepared "in anticipation of litigation" and, thus, protected by the privilege). Hilton Decl. Ex. A (Doc. 32) (stating only that the "document was prepared by

attorneys in contemplation of potential litigation and/or administrative proceedings."). The CIA's generic approach has been rejected elsewhere. *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 237 (1st Cir. 1994). Thus, work product protection for Document 32 and other similar documents is unwarranted. *See, e.g., id.* (Docs. 33, 43, 49, 51, 53, 56).[79]

D. Presidential Communications Privilege.

The CIA and the Office of the DNI invoke the presidential communications privilege to withhold twenty documents. This privilege is limited to communications by presidential advisers and their staffs "in the course of preparing advice for the President." *In re Sealed Case*, 121 F.3d at 752. The privilege protects only documents "authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate." *Id*. The CIA must show that the exemption applies, *Ctr. for Biological Diversity v. OMB*, No. C 07-4997 MHP, 2008 WL 5129417, at *12 (N.D. Cal. Dec. 4, 2008) (agency failed to meet its burden when it neglected "to provide the individuals' specific capacities or other indicators of proximity to the President or key advisers"), and the privilege must be narrowly construed. *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1114 (D.C. Cir. 2004).

[79] Cases cited by the CIA support Plaintiffs' position. CIA Brief at 44-45 (quoting *In re Grand Jury Proceedings*, No. M-11-189, 2001 WL 1167497, at *13 (S.D.N.Y. Oct. 3, 2001)); *see also Prebena Wire Bending Mach. Co. v. Transit Worldwide Corp.*, No. 97 Civ. 9336 (KMW) (HBP), 1991 U.S. Dist. LEXIS 19643 (S.D.N.Y. Dec. 22, 1999) (non-FOIA case where basis of potential litigation—a truck accident—was specific and clear). In *In re Grand Jury Proceedings*, this Court denied work product protection to a broad swath of documents supported only by conclusory, after-the-fact declarations detailing a "generalized desire to avoid litigation" and "obscure references to unspecified threats of civil litigation (and particularized references to another type of litigation)." *Id.* at *15-16. The CIA's declarations here are no better. *N.Y. Times Co. v. DOD*, 499 F. Supp. 2d 501, 517 (S.D.N.Y. 2007) (in FOIA case, work product protection improper because, even though documents may have helped in litigation, they were not created because of actual or impending litigation).

The government has not met its burden to establish the privilege. Document 32, for example, listed as being sent from a CIA officer to a CIA attorney, is described as an "email train concerning a recent meeting"[80] and invokes the presidential communications privilege on the basis that the document "reflects information or recommendations authored or solicited and received by the President's senior advisors in connection with a decision, or potential decision, to be made by the President." Hilton Decl. Ex. A (Doc. 32). But a boilerplate recitation of the legal standard is not enough. *Ctr. for Biological Diversity*, 2008 WL 5129417, at *12. The *Vaughn* entry does not explain the substance of the specific decision at issue,[81] establish that the document is anything other than an internal agency document, or demonstrate that the document ever made its way to the Office of the President. *Judicial Watch, Inc.*, 365 F.3d at 1123. Nowhere does the *Vaughn* entry otherwise demonstrate the cited individuals' specific capacities. *Ctr. for Biological Diversity*, 2008 WL 5129417, at *12.[82] Without sufficiently detailed *Vaughns*, the CIA cannot support the withholding of Document 32 or other similar records. *See, e.g.*, Hilton Decl. Ex. A (Docs. 17, 29, 98, 100).

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[80] The Hilton Declaration further explains, in summary form and without detail, that the email describes a meeting with senior presidential advisors. Hilton Decl. ¶ 193.

[81] The Hilton Declaration sheds little additional light, merely explaining that the withheld documents it describes were "generally among those relied on by senior presidential advisors" in providing advice to President Bush regarding the TDI program. Hilton Decl. ¶ 192. Although it identifies some of the public decisions made by President Bush regarding detainee policies, it does not tie any of the records to those specific decisions. *Id.*

[82] The CIA's claim that the privilege protects records "memorializing" presidential communications is unsupported. The only authority cited, *Citizens for Responsibility & Ethics* ("*CREW*") *v. DHS*, No. 06-0173 (RJL), 2008 U.S. Dist. LEXIS 57442, at *8 (D.D.C. July 22, 2008), specifically observed that the D.C. Circuit had not addressed the issue. Moreover, in *CREW* the communications were more specifically described as those of the President or his immediate advisors and concerning the President's decisions on the federal response to Hurricane Katrina. *Id.* at *8, 11.

E. Witness Statements.

The CIA invokes Exemption 5 to protect fifty-three documents that it deems entitled to special protection because they concern witness statements to CIA OIG investigators. CIA Br. at 48. Although a limited protection for confidential witness statements in air crash safety investigations has been recognized, *see United States v. Weber Aircraft Corp.*, 465 U.S. 792, 796 (1984) (discussing the "*Machin*" privilege and citing *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963)), *cert. denied*, 375 U.S. 896 (1963), the CIA cites no authority for extending this privilege to statements given in an investigation conducted by the CIA OIG,[83] particularly in the context of a FOIA case. *See Badhwar v. Dep't of Air Force*, 829 F.2d 182, 184 (D.C. Cir. 1987) (stating that FOIA case was inappropriate forum to revisit *Machin* privilege, since FOIA requires application of existing discovery rules, not their reformulation).

Moreover, a key consideration in *Machin* was the fact that the witness statements were obtained under "promises of confidentiality." *Machin*, 316 F.2d at 339; *see also Weber*, 465 U.S. at 795, 797; *Ahearn v. U.S. Army*, 583 F. Supp. 1123, 1124 (D. Mass. 1984). Here, by contrast, the CIA merely asserts that statements were made "under circumstances where confidentiality could *reasonably be inferred*." *See, e.g.*, Hilton Decl. Ex. A (Docs. 126, 131, 134, 135, 138, 139) (emphasis added). In fact, the OIG can disclose the statements when it deems necessary. This is hardly a case such as *Machin*, or its progeny, where assurances of confidentiality were required to encourage cooperation with investigators lacking subpoena

[83] The FOIA cases cited by the government are distinguishable because the investigations were conducted by the military, not the CIA. CIA Br. at 47. *Compare Kilroy v. NLRB*, 633 F. Supp. 136, 142 (S.D. Ohio 1985) (finding *Weber* not to control in case involving NLRB documents where *Machin* privilege is a "narrow discovery privilege aimed specifically at confidential witness statements taken during crash investigations"), *aff'd mem.* 823 F.2d 553 (6th Cir. 1987); *Nickerson v. United States*, No. 95 C 7395, 1996 U.S. Dist. LEXIS 14489, at *8 (N.D. Ill. Oct. 1, 1996) (finding *Machin* privilege not to apply where case did not involve confidential statements made to air crash safety investigators).

power. *See Badhwar*, 829 F.2d at 183, 185. Here, the OIG has subpoena power and may take testimony under oath and administrative action against those who refuse to cooperate. 50 U.S.C. § 403q(e)(2), (4), (5). Thus, the CIA's expansion of the privilege is unwarranted.

F. The CIA's Bare Assertions Do Not Permit Review of Whether Key Exceptions Apply.

Finally, the CIA's assertions are so non-specific that Plaintiffs and this Court cannot determine whether a number of key exceptions to the Exemption 5 privileges apply. For instance, it is impossible to determine whether waiver by adoption has occurred,[84] or if any privilege has been vitiated by violations of attorneys' professional standards.[85] More robust descriptions are necessary for *de novo* review to occur.

V. THE CIA HAS IMPROPERLY WITHHELD INFORMATION UNDER EXEMPTION 7 (A) AND 7(D).

A. The CIA Has Failed to Provide an Adequate Basis Under 7(A) to Withhold Open OIG Investigative Files.

The CIA maintains that it has properly withheld information from open OIG investigation files because such records were "compiled for a law enforcement purpose" (5 U.S.C. § 552(b)(7)) that would, if released, "interfere with enforcement proceedings," (5 U.S.C. § 552(b)(7)(A)). The CIA's claims are far too generalized to permit the withholding.

For instance, the CIA asserts that the "thousands of records" which comprise this category of documents all "relate to pending law enforcement proceedings." CIA Br. at 49; Hilton Decl. ¶¶ 201-03.[86] CIA OIG investigations, however, deal with both law enforcement

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[84] *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

[85] *Moody v. IRS*, 654 F.2d 795, 800-01 (D.C. Cir. 1981) (in FOIA case, noting that attorney's unprofessional behavior could vitiate work product privilege).

[86] The CIA's claim that Exemption 7 requires only a "nexus between the investigation and one of the agency's law enforcement duties…based on information sufficient to support at least a

issues and internal employee regulation.[87] When investigations can serve mixed purposes, courts are required to critically scrutinize assertions that records were compiled for a "law enforcement purpose." *Pratt v. Webster*, 673 F.2d 408, 418 (D.C. Cir. 1982).[88] The CIA's broad, categorical statement, however, does not permit this level of scrutiny.[89]

Likewise, the CIA's claim that processing the open OIG investigatory files would compromise the integrity of investigations or the confidentiality of the sources and targets of such investigations is far too broad. CIA Br. at 50-51 (citing Hilton Decl. ¶¶ 203-06). The CIA must group the documents "into relevant categories that are sufficiently distinct to allow a court to grasp 'how each…category of documents, if disclosed, would interfere with the investigation.'" *Bevis v. DOS*, 801 F.2d 1386, 1389 (D.C. Cir. 1986); *Local 32B-32J v. Gen. Svc. Admin.*, No. 97 Civ. 8509 (LMM), 1998 U.S. Dist. LEXIS 16095, at *12-13 (S.D.N.Y. 1998). Although the Hilton declaration appears to superficially meet this requirement, the categories provided are not sufficiently "functional" to permit the court to "trace a rational link

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'colorable claim' of its rationality" fails to acknowledge the additional specificity requirements. *See Pratt v. Webster*, 673 F.2d 408, 421 (D.C. Cir. 1982); CIA Br. at 48-49.

[87] The CIA acknowledges the open investigations at issue pertain to employee compliance with agency standards and regulations, as well as law enforcement purposes. Hilton Decl. ¶ 201. Moreover, "[m]aterial compiled in the course of such internal agency monitoring does not come within Exemption 7(C) even though it 'might reveal evidence that later could give rise to a law enforcement investigation.'" *Kimberlin v. DOJ*, 139 F.3d 944, 947 (D.C. Cir. 1998); *Perlman v. DOJ*, 312 F.3d 100, 105 (2d Cir. 2002).

[88] The CIA inappropriately relies on *Keys v. DOJ*, 830 F.2d 337, 340 (D.C. Cir. 1987), a case dealing with an agency whose sole and primary purpose is law enforcement.

[89] The CIA's reliance on *Ortiz v. United States Department of Health and Human Services*, 70 F.3d 729, 732-33 (2d Cir. 1995) to suggest that all OIG records are "compiled for law enforcement purposes" is misplaced. CIA Br. at 49. In *Ortiz*, the government had identified direct connections between documents and the criminal investigation. *See Ortiz*, 70 F.3d at 731; *see also Local 32B-32J, Serv. Employees Int'l Union, AFL-CIO v. GSA*, No. 97 Civ. 8509 (LMM), 1998 U.S. Dist. LEXIS 16095, at *4 (S.D.N.Y. Oct. 15, 1998); *Perlman*, 312 F.3d at 105 .

between the nature of the document and the alleged likely interference" or to understand "how the release of each category would interfere with enforcement proceedings." *Bevis*, 801 F.2d at 1389-90 ("teletypes" and "letters" too general and broad); *ACLU v. FBI*, 429 F. Supp. 2d 179, 191 (D.D.C. 2006) (conducting *in camera* review to determine whether Exemption 7(A) was properly invoked).[90] The CIA's Exemption 7(A) justifications are not sufficient.[91]

B. The CIA Has Not Satisfied its Burden to Withhold Information Under 7(D).

The CIA's Exemption 7(D) claims are similarly insufficient. The CIA has withheld 56 records purporting to contain witness statements made in the course of OIG investigations. The CIA claims that these records were "compiled for a law enforcement purposes" (5 U.S.C. § 552(b)(7)), and, if released, would "disclose the identity of a confidential source." (5 U.S.C. § 552(b)(7)(D)).

First, as with above, the record is insufficient to test whether such statements were, in fact, compiled for law enforcement purposes. The Hilton Declaration merely avers that the statements were compiled for the ultimate purpose of "determining if there had been a violation of criminal law." *See* Hilton Decl. ¶ 212. Second, as discussed *supra* IV.E, even if the CIA could satisfy the first prong of this exemption, it has failed to satisfy the second by showing the statements are indeed "confidential." The CIA's withholdings are unjustified.

VI. THE CIA HAS IMPROPERLY WITHHELD PERSONAL IDENTIFYING

[90] *See also Elec. Privacy Info. Ctr. v. DOJ*, 511 F. Supp. 2d 56, 69, 70 (D.D.C. 2007) (requiring further details for categories "records related to targets of [Terrorism Surveillance Program (TSP)]" and "final OLC memoranda").

[91] The CIA's reliance on the stay related to John Durham's investigation into the CIA's destruction of videotaped interrogations is misplaced. *See* CIA Br. at 51-52; Order, dated Sept. 24, 2008, Docket Entry No. 109; Oral Opinion of Hon. Loretta A. Preska, dated Aug. 29, 2008, Docket Entry No. 106. Durham was appointed by the Attorney General Mukasey to conduct a relatively discrete, narrowly defined criminal investigation, and the stay relief was supported with specific statements to the Court from Durham himself through an in camera affidavit.

INFORMATION UNDER EXEMPTIONS 6 AND 7(C).

The CIA's Exemption 6 and 7(C) justifications are also flawed. The Court must balance the rights of individuals against the public interest in the information requested when analyzing an agency's claim under Exemption 6 and 7(C).[92] *Perlman v. DOJ*, 312 F.3d 100, 106 (2d Cir. 2002); *see also Fed. Labour Relations Auth. v. Dep't of Veterans Affairs*, 958 F.2d 503, 505 (2d Cir. 1992).

The CIA has provided the Court almost no information to allow for the balancing mandated by the Second Circuit where the privacy interests of government employees are at stake.[93] *Perlman*, 312 F.3d at 107 (requiring that the courts should consider five specific factors in balancing the public interest in disclosure against any privacy rights).[94] Here, the public interest[95] far outweighs any discernable privacy interest. The public interest in disclosure of

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[92] The CIA's Vaughn submissions also do not adequately show that the personal information withheld under Exemption 7 (C) was "compiled for law enforcement purposes" and fail to "identify a particular individual or a particular incident as the object of its investigation and specify the connection between the individual or incident and a possible security risk or violation of federal law." *Pratt*, 673 F.2d at 410, 420; *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 563 (S.D.N.Y. 1989). *See, e.g.*, Doc. Nos. 126, 134, 135, 138-140, 143-146, 149-151, 164-171, 270, 271, 273, 275, 285-296, among others.

[93] The public interest in the withheld information about the detainee in Document 249 is especially high because the document alleges abuse of that detainee. *See ACLU v. DOD*, No. 06-3140, 2008 WL 4287823, at *21 (2nd Cir. Sept. 22, 2008) (noting that where governmental misconduct is at stake in connection to release of detainee photographs, "the public interest in disclosure . . . is strong").

[94] *Wood v. F.B.I.*, 432 F.3d 78, 86-87 (2d Cir. 2005) (noting that "names and other identifying information do not always present a significant threat to an individual's privacy interest.").

[95] *See, e.g.*, Satterthwaite Decl. Ex. M (Statement by Leon E. Panetta, Dir., Cent. Intelligence Agency, to Employees, Cent. Intelligence Agency, Message from the Director: Release of Department of Justice Opinions (Apr. 16, 2009)) ("This is not the end of the road on these issues. More requests will come—from the public, from Congress, and the Courts—and more information is sure to be released. We cannot control the debate about the past."); *see also* Satterthwaite Decl. ¶¶ 101, 104-07.

negligent or improper government misconduct is acute.[9697] *See ACLU v. DOD*, No. 06-3140, 2008 WL 4287823, at *21 (2d Cir. Sept. 22, 2008) (noting where governmental misconduct is at stake in release of detainee photographs, "the public interest in disclosure . . . is strong").[98]

VII. THE CIA HAS IMPROPERLY INVOKED EXEMPTION 3.

The CIA wrongly contends that Document 300 finds protection under Rule 6(e) of the Federal Rules of Criminal Procedure and, therefore, Exemption 3. While the Government may withhold materials *actually* used in a grand jury, the exemption does not apply to Document 300, which merely "concerns an investigation." *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 867 (D.C. Cir. 1981); *Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 235 (1st Cir. Mass. 1994). Document 300 is an e-mail from a prosecutor to an investigator, plainly not an exhibit or document that is "directly" associated with the grand jury proceeding. *Id.* The Government's withholding is unjustified.

VIII. THE CIA HAS IMPROPERLY INVOKED EXEMPTION 2.

The CIA has failed to justify its withholdings under Exemption 2 of "internal personnel

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[96] For instance, the CIA redacts the names of U.S. personnel implicated in Abu Ghraib torture and prisoner abuse scandal in the Taguba Investigative Report—except for the name of Brigadier General Janis Karpinski—pursuant to these exemptions. *See* Hilton Decl. Ex A (Doc. No. 247), Ex. L (Doc. No. 247). The public interest in the participation of others beyond Karpinski in this abuse and torture scandal is manifest.

[97] The CIA's reliance on *Kimmel v. DOD*, Civ. 04-1551, 2006 WL 1126812, at *3 (D.D.C. Mar. 31, 2006) and *Long v. OPM*, 05-Civ-1522, 2007 WL 2903924 (N.D.N.Y. Sept. 30, 2007), is misplaced. CIA Br. at 56, 57. Both cases dealt with matters of significantly less broad-based public interest than the CIA's extraordinary rendition and secret detention program.

[98] For instance, in Document Number 45, the CIA withholds the names of various individuals copied on February 2005 emails to and from CIA acting general counsel John Rizzo regarding "Draft OLC opinion on combined techniques has arrived." In one email, Rizzo states, referring to the Department of Defense, that "Outside of lawyers, I don't see this is [sic] any of anyone else's business on the DOD policy side." There is a clear public interest in learning the identifies of individuals that may have controlled access to policy decisions contained in the OLC memoranda.

rules and practices." 5 U.S.C. § 552(b)(2). Under Exemption 2, an agency must show that the internal rule or practice is "of no genuine public interest *or*, if the material is of public interest … that disclosure of the material would risk circumvention of lawful agency regulations." *Massey v. FBI*, 3 F.3d 620, 622 (2d Cir. 1993) (internal quotation marks and citations omitted); *Germosen v. Cox*, No. 98 Civ. 1294 (BSJ), 1999 U.S. Dist. LEXIS 17400, at *37 (S.D.N.Y. 1999). Since the CIA does not assert this risk of disclosure, *see* Hilton Decl. ¶ 167, it bears the burden of establishing that the information withheld is trivial and not of "genuine public interest." *See Schwaner v. Dep't of Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990). The mere assertion by an agency of a lack of public interest is insufficient to carry its burden. *See Morley v. CIA*, 508 F. 3d 1108, 1125 (D.C. Cir. 2007). The CIA attempts to use the same generalized justification rejected by the D.C. Circuit in *Morley*.[99]

Further judicial oversight is necessary to determine whether the material withheld pursuant to Exemption 2 is in fact purely "internal, clerical information," CIA Br. at 58, particularly in light of contradictory claims by the CIA in its briefings. The CIA asserts it has only exerted a "partial 'low 2' exemption" over a "limited number of documents," Hilton Decl. ¶ 167, yet it has claimed Exemption 2 withholding for ninety documents and explicitly acknowledged in the McGuire Declaration that "Exemption 2 is applied to protect the identification of special agents"—information clearly beyond the classification of "clerical." Without more judicial oversight, through discovery, more detailed *Vaughn* indexes, and/or *in camera* review, this Court cannot properly rule on the issue. McGuire Decl. ¶ 7.

[99] For example, Exemption 2 is invoked in Document 243 to withhold the cover and routing slips of a meeting from the "Executive Secretary of the NSC to Senior Officials" despite evident public interest in knowing about any notification to "Senior Officials" of secret detention and rendition. Moreover, the D.C. Circuit recently emphasized that documents that "concern other government agencies" or the internal workings of "government as a whole" are not covered by Exemption 2. *Public Citizen, Inc. v. OMB*, 569 F.3d 434, 440 (D.C. Cir. 2009).

IX. THE CIA HAS NOT CONDUCTED AN ADEQUATE SEARCH.

A. The CIA Failed to Satisfy the Standards for An Adequate Search.

As this Court has recognized, on motion for summary judgment, "the defending agency has the burden of showing that its search was adequate." *Amnesty Int'l USA v. CIA*, No. 07 Civ. 5435 (LAP), 2008 U.S. Dist. LEXIS 47882, at *24 (S.D.N.Y. June 19, 2008) (internal quotation marks omitted). An adequate search is one "reasonably calculated to uncover all relevant documents." *Id*. at *26 (internal quotation marks and citations omitted). Adequacy of search is a peculiarly fact-sensitive question, and "[r]easonableness must be evaluated in the context of each particular request." *Id*. at *27. Moreover, a plaintiff may challenge adequacy of search by providing "countervailing evidence . . . , which if it raises substantial doubt, particularly in view of well defined requests and positive indications of overlooked materials, may entitle the plaintiff to summary judgment." *Prison Legal News v. Lappin*, 603 F. Supp. 2d 124, 126 (D.D.C. 2009) (internal quotation marks omitted).[100]

1. The CIA Failed to Search Appropriate Sub-Components.

a. The CIA's Interpretation of Plaintiffs' Three Initial FOIA Requests Is Unduly Narrow.

According to the Hilton Declaration, the CIA components are organized into four main directorates—that National Clandestine Service ("NCS"), the Directorate of Intelligence ("DI"), the Directorate of Science and Technology ("DS&T"), and the Directorate of Support ("DS")—and one office cluster, the Director of CIA Area ("DIR Area"). Hilton Decl. ¶¶ 26, 31. The CIA's Information Management Services decided only to search the DIR Area, concluding it was

[100] *See also Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (summary judgment not appropriate if record raises substantial doubt regarding agency's search); *Friends of Blackwater v. DOI*, 391 F. Supp. 2d 115, 120 (D.D.C. 2005) (quoting *Truitt v. DOS*, 897 F.2d 540, 542 (D.C. Cir. 1990)) (same).

"most likely" to have responsive records because: (1) at the time the search was conducted, the CIA Director had acknowledged the existence of a CIA detention program, and (2) the CIA interpreted Plaintiffs' three lengthy and independent requests as pertaining solely to policy and legal analyses of detainee treatment and violations of those policies, which records were the purview of the Office of General Counsel and the OIG (both in the DIR Area). *Id*. at ¶¶ 36, 37.

The CIA's interpretation of Plaintiffs' initial requests is far too narrow. While legal and policy issues relating to the program are *one* subject of the requests, on their face, the Plaintiffs' initial requests seek a much broader set of records.[101] The CIA's narrow interpretation violates its duty to construe the scope of FOIA requests liberally. *Amnesty Int'l USA*, 2008 U.S. Dist. LEXIS 47882, at *37 ("federal agencies should go as far as they reasonably can to ensure that they include what requesters want to have included within the scopes of their FOIA requests") (internal quotation marks omitted); *see also LaCedra v. Executive Office for U.S. Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003) (same). Moreover, because of this narrow interpretation, one cannot reasonably conclude that the DIR Area was "most likely" to have responsive records.[102]

b. The CIA Ignored Specific Evidence Undermining the Adequacy of Its Search.

Evidence of overlooked responsive materials further undermines the adequacy of CIA's search. For instance, Plaintiffs requested that the CIA release two documents that former Vice

[101] For example, the CCR Request also encompasses, *inter alia*, records reflecting the imprisonment and treatment of unregistered detainees. Brown Decl. Ex. A, CCR Request. The First Amnesty Request likewise encompasses, *inter alia*, records relating to unregistered detainees. Brown Decl. Ex. B, First Amnesty Request.

[102] Authority cited by the CIA itself supports this position. *See, e.g., Oglesby v. Dep't of the Army*, 920 F.3d 57, 68 (D.C. Cir. 1990) (finding State Department's search inadequate when it had not demonstrated, in reasonable detail, that no other records system was likely to produce responsive documents); *cf. Schrecker v. DOJ*, 217 F. Supp. 2d 29, 34-35 (D.D.C. 2002) (finding search adequate because agency *reasonably* chose to search most likely location for responsive documents and reasoning for not searching other sites was sufficient).

President Richard Cheney wanted declassified, but were denied him because they were the subject of this litigation. Second Stipulation and Order, dated September 16, 2009 (as ordered, September 25, 2009) at 4, ¶¶ 6, 7, Docket Entry No. 154. On August 24, 2009, the CIA partially released these documents, which were located in the DI. Hilton Decl. ¶ 54.[103] Yet, despite the presence of these highly relevant records in the DI, the CIA maintains it has not, and is not required to, performed a broader search of the DI because its search was both "adequate and consistent with the standards of reasonableness" in FOIA. *Id.* ¶¶ 54, 56. The CIA's estimation of the adequacy of its own search is a legal conclusion not entitled to deference by this Court; accordingly, the CIA should search the DI for further responsive records.

Likewise, subcomponents of the DS, such as the Office of Medical Services and the Office of Technical Services, were heavily involved in the design and maintenance of the CIA's program, yet the CIA failed to search the DS.[104] Where, as here, there are "positive indications of overlooked materials," plaintiffs may be entitled to summary judgment. *Prison Legal News*, 603 F. Supp. 2d at 126. A search of the DS should be ordered.

2. The CIA Failed to Conduct An Adequate Search for Records Responsive to Plaintiffs' Specific Request.

a. The CIA Conducted An Inadequate Search for Documents Responsive to Category 2, 7, and 8.

In three key instances, the CIA has adopted an overly strict interpretation of Plaintiffs'

[103] The CIA's response to former Vice President Cheney that the two records were being withheld because they were part of this litigation is hard to square with the CIA's representation that the DI was never searched nor these documents located until after the Cheney request was made.

[104] The CIA OIG Report explains that the Office of Medical Services and Office of Technical Services were integral to the program. *CIA OIG Special Review* ¶¶ 27, 251; *see also* Satterthwaite Decl. ¶¶ 22, 51, 61-62, 81-82, 94.

Supplementary CIA FOIA Request, rendering its search inadequate.

Detailing its non-search for records responsive to Plaintiffs' Category 7 and 8 requests, which sought cables concerning the use of the "attention shake" on Zubaydah and Sheikh Mohammed, the CIA simply states that "the 'attention shake' was not an interrogation technique employed by the CIA." Hilton Decl. ¶ 49. Newly released records show that the "attention *grasp*"—not the attention "shake"—was one of the authorized techniques. Satterthwaite Decl. Ex. XX (Guidelines on Interrogations Conducted Pursuant to the [Redacted] (Jan. 28, 2003) [hereinafter *2003 DCI Interrogation Guidelines*]); *August 1, 2002 Zubaydah Memo* at 2. The CIA's response fails to discharge its duty to interpret Plaintiffs' requests liberally and to "go as far as [it] reasonably can to ensure that they include what requesters want to have included within the scopes of their FOIA requests." *Amnesty Int'l USA*, 2008 U.S. Dist. LEXIS 47882, at *37 (internal quotation marks omitted). The CIA may not, as here, "read the request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester." *Id.*

Similarly, Plaintiffs' Category 2 request sought "[t]he list of 'erroneous renditions' compiled by the CIA's OIG" which had been widely reported in the media. Brown Decl. Ex. D Supplementary CIA FOIA Request. But the CIA failed to produce any records in response to Category 2 and asserts formalistically that it is not "aware of the existence of such a list." Hilton Decl. ¶¶ 45-47. First, there is no explanation of the CIA's interpretation of "erroneous rendition" or of what documents it may have deemed responsive to the request. *See Wilderness Soc'y v. U.S. Bureau of Land Mgmt.*, No. Civ. A. 01CV2210, 2003 WL 255971, at *4 n.11 & 12 (D.D.C. Jan. 15, 2003) (search inadequate where declarants did not reveal manner in which they interpreted the request and universe of potentially responsive documents). Second, the CIA's

narrow search for a "list" containing this information, and not a search for information responsive to the underlying request, is inadequate. *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985) ("One need not get involved in a semantic debate over the meaning of the word "list" to understand what information the plaintiff wanted.").[105] Where the CIA has failed to interpret Plaintiffs' request liberally, it has performed an inadequate search.

b. The Search for Categories 11 and 12 was Not Reasonably Calculated to Uncover All Responsive Documents.

The CIA's search for information responsive to Categories 11 and 12, which sought CIA cables concerning the waterboarding of Zubaydah and Sheikh Mohammed was also inadequate. Brown Decl. Ex. D (Supplementary CIA FOIA Request) ¶¶ 11, 12. The CIA maintains that a search of an NCS database that aggregates all CIA cables concerning Zubaydah and Sheikh Mohammed returned forty-nine cables for Category 12 (regarding Sheikh Mohammed's waterboarding) and two cables for Category 11 (regarding Zubaydah's waterboarding) not otherwise being litigated in *ACLU*. Hilton Decl. ¶¶ 50, 51.

First, the limited number of Category 12 responsive records defies common sense. It has been officially acknowledged both that Sheikh Mohammed was waterboarded no less than 183 times and that, under the guidelines for the use of the techniques, interrogators were required to exchange cables with CIA headquarters before use of each technique. *2003 DCI Interrogation Guidelines* at 3. Simple arithmetic dictates that more than forty-nine responsive cables should exist. Second, the CIA's response that it located two Category 11 responsive records that are

[105] *See also Schladetsch v. U.S. Dep't of Housing & Urban Dev.*, No. 99-0175, 2000 WL 33372125, at *2, 3 (D.D.C. Apr. 4, 2000) (where agency had discrete pieces of information sought but not in the requested list form, extracting and compiling the data did not amount to creation of a new record); *Int'l Diatomite Producers Ass'n v. U.S. Soc. Sec. Admin.*, No. C-92-1634-CAL, 1993 WL 137286, at *2, 3, 6 (N.D. Cal. Apr. 28, 1993) (where requester sought listings that could be derived from information within existing records, agency ordered to create a list or produce the multiple redacted listings themselves).

"not otherwise being litigated in the ACLU Litigation" is insufficient because the records withheld in the *ACLU v. DOD* are not described in a manner to permit Plaintiffs to determine the total number of records responsive to Category 11.[106] The CIA should be compelled to provide, at a minimum, the number of cables in *ACLU v. DOD* that are responsive to Category 11 so Plaintiffs can assess the adequacy of CIA's search for responsive documents.

X. THE CIA HAS WITHHELD REASONABLY SEGREGABLE INFORMATION.

The CIA has also failed to disclose reasonably segregable, non-exempt information, as required by statute.[107] The CIA must provide a "detailed justification for [] non-segregability" to carry its burden to show that all reasonably segregable material has been released. *Perry-Torres v. DOS*, 404 F. Supp. 2d 140, 144 (D.D.C. 2005).[108] It is not sufficient for an agency to offer one explanation as to all documents; rather, an agency must offer an explanation for each document withheld. *Id*. at 145 (citing *Animal Legal Def. Fund, Inc. v. Dep't of Air Force*, 44 F. Supp. 2d 295, 302 (D.D.C. 1999)). Indeed, FOIA requires that an agency correlate its theory of exemption to the specific textual segments in a document. *Schiller v. NLRB*, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992). Consonant with President Obama's more transparent approach to FOIA, the segregability review takes on an "added element"—"agencies should also be reviewing records to see if *portions that are technically exempt can be released as a matter of discretion*." OIP

[106] In *ACLU v. DOD*, the government has withheld no less than 549 CIA cables between CIA operatives and CIA headquarters regarding, *inter alia*, Zubaydah's interrogation, but there is no way to determine which among these cables concern use of the waterboard on him. Satterwaite Decl. Ex. OO.

[107] FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . ." 5 U.S.C. § 552(b).

[108] Segregability of non-exempt information is such a basic premise of the FOIA that courts have an affirmative duty to consider the issue *sua sponte* where it is not raised by the parties. *See Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999).

Guidance, "President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a 'New Era of Open Government,'" available at http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm (last visited Nov. 15, 2009) at 4. The CIA's justifications fall well short of what is required.

First, despite the overwhelming volume of official acknowledgements regarding the CIA's practices, discussed *supra*, the CIA has not demonstrated that its withholdings were reviewed against the sum of these acknowledgements with a view toward *segregability*. Although the CIA's brief states that such a review occurred, the portion of the Hilton Declaration that it cites in support says no such thing. CIA Br. at 29 (citing Hilton Decl. ¶ 125).[109] Hilton has opined on a mere subset of the records at issue and has not attested that official acknowledgments were taken into account for segregability purposes. More is required.

Second, the CIA's highly generalized and conclusory statement that there is no "meaningful, reasonably segregable" material is exactly the sort of justification deemed inadequate by other courts.[110] *Stolt-Nielsen Transp. Group, Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (reversing lower court's finding that no portions of the records at issue were reasonably segregable, concluding, *inter alia*, that no deference was due to an agency's conclusory statements).[111] Far from a "detailed justification," the CIA offers a standard

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[109] The paragraph cited pertains to a narrow subsection of withheld records regarding "Field Installations," and the representation in the declaration merely states that "[o]fficial acknowledgment that the CIA maintains an installation in a particular country" could result in harm. Hilton Decl. ¶ 125.

[110] Each of the entries on the *Vaughn* index states, in nearly identical and summary fashion, that "[t]here is no meaningful, reasonably segregable portion of the document that can be released." *See, e.g.*, Hilton Decl. Ex. A (Doc. 1) at 2.

[111] *See also Kimberlin*, 139 F.3d at 950 (rejecting conclusory declaration purporting to demonstrate inability to segregate); *Animal Legal Defense Fund*, 44 F. Supp. 2d at 301 (rejecting as "patently insufficient" affidavit with "unsophisticated parroting" of statutory language and

explanation for all documents without effort to correlate exemptions to particular passages.

Third, the CIA's claim that any unclassified, unprivileged material is so inextricably intertwined with classified, privileged information that any release would produce only "incomplete, fragmented, unintelligible sentences and phrases that are devoid of any meaning" or would reveal classified information (stated in a parenthetical), cannot be squared with the public record. Hilton Decl. ¶ 215; *see also id*. ¶¶ 58, 59 (describing review process). For example, Document 30 is a December 12, 2004, 47-page draft legal opinion from the OLC to the CIA Office of General Counsel withheld on the basis of the deliberative process privilege. Hilton Decl. Ex. A (Doc. 30). The deliberative process privilege does not generally cover "purely factual" material. *Grand Central P'ship*, 166 F.3d at 482 (quoting *Hopkins v. U.S. Dep't of Housing & Urban Dev.*, 929 F.2d 81, 85 (2d Cir. 1991)); *Unidad Latina v. DHS*, 253 F.R.D. 44, 60 (D. Conn. 2008).[112] Although Document 30 is described as being "based on *facts provided by the CIA*," the CIA asserts that there is "no meaningful, reasonably segregable portion of the document that can be released." Hilton Decl. Ex. A (Doc. 30) (emphasis added). Although not identified, this document is presumably a draft of the 48-page, publicly-disclosed *May 10, 2005 Techniques Memorandum* which consists of page after page of "facts" the CIA conveyed to the OLC to facilitate its analysis of the legality of the techniques. Even a cursory review of the final memorandum reveals that broad swaths of facts could be segregated and released (as in the final

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ordering submission of a declaration indicating in detail, for each withheld document, which portions of the document were exempt, and correlating claimed exemptions with particular passages); *Perry-Torres v. DOS*, 404 F. Supp. 2d 140, 144, 145 (D.D.C. 2005) (same).

[112] *See also United Am. Fin., Inc. v. Potter*, 531 F. Supp. 2d 29, 44-45 (D.D.C. 2008) (finding that boilerplate conclusory statement that all reasonably segregable material had been disclosed and withheld information could not be further described failed to explain why purely factual information, "such as a portion of a document that reports or summarizes a telephone call" was not reasonably segregable).

document), yet the draft memorandum is fully withheld. Thus, the CIA's boilerplate assertion that there is no meaningfully segregable, releasable material is not credible.[113] Other documents are similar. *See, e.g.*, Hilton Decl. Ex. A (Docs. 1, 9, 12, 13, 16, 19, 25, 30, 65, 68).

Likewise, the CIA's failure to release any portion of the Category 11 and 12 cables is inexcusable. By definition, records responsive to these requests contain information regarding the waterboarding of Zubaydah and Sheikh Mohammed, which has been officially acknowledged. The CIA has already released, in the *ACLU* litigation, documents discussing Zubaydah, Sheikh Mohammed, and waterboarding that have been so heavily redacted that, for example, the detainees' names and the word "waterboard" are among the few visible words on a page otherwise covered with swaths of black redactions.[114] Any contention that the release of such material would not be "meaningful" to Plaintiffs should be accorded no weight. *Stolt-Nielsen*, 534 F.3d at 734 ("FOIA does not require that information must be helpful to the requestee before the government must disclose it. FOIA mandates disclosure of information, not solely disclosure of helpful information."); *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*,

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[113] *See, e.g.*, *United Am. Fin., Inc.*, 531 F. Supp. 2d at 44-45 (stating that, particularly with regard to the deliberative process privilege which requires purely factual information to be released unless it exposes the deliberative process, a conclusory statement fails to adequately explain why a factual portion of a document that reports or summarizes a telephone call cannot be segregated and released); *ACLU v. FBI*, 429 F. Supp. 2d at 193 ("The agency fails, however, to adequately explain why the factual section of the e-mail, which is responsive to plaintiffs' FOIA request, constitutes the agency's "'deliberative process.'")

[114] The CIA released Cable #333 in the *ACLU* litigation, which leaves visible only the following typewritten words "[redaction] AFTER UNDERGOING [redaction] APPROVED TECHNIQUES INCLUDING THE WATER BOARD, ((ABU ZUBAYDAH)) [redaction] INTERROGATION SESSIONS INVOLVED USE OF THE WATER BOARD [redaction]" and several numbers. Brown Decl. Ex. J. The CIA also released Other Document #7 in the *ACLU* litigation, whose only visible text is "[redaction] CERTIFIED INTERROGATORS [redaction] HAVE EMPLOYED THE FOLLOWING STANDARD AND ENHANCED INTERROGATION METHODS WITH KHALID SHAYKH ((MUHAMMAD)) [redaction] THE WATERBOARD [redaction]." ***Id.***

566 F.2d 242, 261 n.55 (D.C. Cir. 1977) (court should not approve an agency withholding merely because of the court's low estimate of the value to the requestor of the information withheld). If the CIA can segregate and disclose this information in *ACLU*, it can do so here.

The Court should compel the CIA to perform a segregability analysis consistent with its obligation and practice in other litigations or, alternatively, examine withheld records *in camera* to determine whether all reasonably segregable material has been released. *See, e.g.*, *El Badrawi v. DHS*, 596 F. Supp. 2d 389 (D. Conn. 2009) (court examined documents *in camera* and highlighted reasonably segregable information for release); *Lowenstein Int'l Human Rights Project v. DHS*, 603 F. Supp. 2d 354, 360 (D. Conn. 2009) (finding the government's declarations so general and vague as to be of "little, or no, use to the Plaintiffs or this Court," court examined documents *in camera* to review exemptions and segregability).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the CIA's motion for summary judgment and grant Plaintiffs' motion for summary judgment.

Respectfully Submitted,

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