UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
.....x
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.
.....x

ECF CASE

07 CV 5435 (LAP)

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

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Defendants
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone No. (212) 637-2678
Facsimile No. (212) 637-2702

JEANNETTE A. VARGAS,
BRIAN M. FELDMAN,
EMILY E. DAUGHTRY
Assistant United States Attorneys

– Of Counsel –

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DECLARATIONS REFERENCED

Central Intelligence Agency:

Second Declaration of Wendy M. Hilton, dated February 26, 2010, submitted *ex parte*

Classified Declaration of Wendy M. Hilton, dated February 19, 2010

Declaration of Wendy M. Hilton, dated September 18, 2009

Declaration of Leon E. Panetta, dated June 8, 2009, submitted in *American Civil Liberties Union v. DOD*, 04 Civ. 4151 (AKH), attached as Exhibit M to the Declaration of Wendy M. Hilton, dated September 18, 2009

Classified Declaration of Leon E. Panetta, dated June 8, 2009, submitted *ex parte* in *American Civil Liberties Union v. DOD*, 04 Civ. 4151 (AKH)

Declaration of Leon E. Panetta, dated September 21, 2009, submitted in *American Civil Liberties Union v. DOD*, 04 Civ. 4151 (AKH), attached as Exhibit A to the Declaration of Jeannette A. Vargas, dated September 22, 2009

Office of the Director of National Intelligence:

Declaration of John F. Hackett, dated September 22, 2009

Department of Justice:

Declaration of David J. Barron, dated September 22, 2009

Declaration of Dione Jackson Stearns, dated September 22, 2009

Department of Defense:

Declaration of William Lietzau, dated March 5, 2010

Declaration of Mark Herrington, dated September 22, 2009

Declaration of Karen L. Hecker, dated September 18, 2009

Declaration of Philip J. McGuire, dated September 21, 2009

Declaration of James P. Hogan, dated September 21, 2009

Department of State:

Declaration of Margaret P. Grafeld, dated September 18, 2009

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Defendant the Central Intelligence Agency (the "CIA"), by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this reply memorandum of law in further support of the CIA's motion for summary judgment and in opposition to Plaintiffs' motion partial for summary judgment in this action brought under FOIA.[1]

PRELIMINARY STATEMENT

The CIA has undertaken extraordinary efforts to release all appropriate information in this case. After President Obama issued an executive order limiting permissible interrogation techniques and closing the CIA's detention facilities, the CIA disclosed significant portions of the Released OLC Memoranda. *See* Memorandum of Law in Support of Central Intelligence Agency's Motion for Summary Judgment ("Mov. Br.") at 3, 7. Moreover, following that release, the CIA voluntarily withdrew its previous motion for summary judgment and reprocessed a sample of approximately 350 records responsive to the FOIA requests to ensure that the CIA's continued withholdings were necessary and consistent with prior releases. The result of this painstaking and resource-intensive reprocessing was that the CIA has released additional information to Plaintiffs from 52 more records, which primarily contain legal and policy analyses of the CIA's TDI program.

The CIA has consistently reaffirmed, however, that much of the information concerning the TDI program, including operational information, continues to be classified as Top Secret. Indeed, the CIA Director, Leon E. Panetta, attests in three declarations submitted in support of this summary judgment motion that the disclosure of operational details regarding the TDI program would do exceptionally grave damage to U.S. national security. The particular harms that would

[1] Terms previously defined in the Memorandum of Law in Support of the Central Intelligence Agency's Motion for Summary Judgment ("Mov. Br.") shall have the same meaning herein.

result from such disclosures are elaborated upon in the voluminous declaration of the Associate Information Review Officer for the National Clandestine Service, the classifying authority with respect to TDI program information.

Despite this record evidence, Plaintiffs would have this Court disregard the CIA's specialized expertise and substitute the Plaintiffs' non-expert judgment as to whether release of the requested information would reveal intelligence sources and methods, or otherwise cause harm to the national security. The Second Circuit, however, has recently admonished that district courts should not second-guess such judgments as to potential national security harm, but should instead defer to the classifying authority so long as the rationale put forth for classification decisions is "rational and plausible." *Wilson v. CIA*, 586 F.3d 171 (2d Cir. 2009). Plaintiffs notably fail to cite to *Wilson*, to other Circuit caselaw that sets forth the standard for reviewing the CIA's classification decisions, or, for that matter, to the two recent district court opinions that have applied this deferential standard in upholding the CIA's withholding of similar information regarding the TDI program.

Rather than applying, or even acknowledging, the relevant standard of review, Plaintiffs instead use this FOIA action as a vehicle for launching an attack against the legality of the TDI program. But as the Second Circuit recently held in *Wilner v. NSA*, 592 F.3d 60 (2d Cir. 2009), an adjudication of the legality of the Government's intelligence operations is beyond the scope of a FOIA action.

Faced with the insurmountable evidence that information regarding the TDI program is exempt from disclosure under FOIA, Plaintiffs have no choice but to posit a novel and unrecognized theory of FOIA law ─ that by voluntarily and in good faith disclosing certain policy

and legal documents concerning its interrogation program, the CIA has effected a broad subject matter waiver that prevents the Government from continuing to protect previously undisclosed intelligence information, regardless of the consequential harm to the national security. Fortunately, Plaintiffs' broad conception of waiver — a conception which would discourage governmental disclosures like those made with respect to the TDI program — has been uniformly rejected by the courts.

Although Plaintiffs argue that the CIA improperly withheld records based upon various FOIA exemptions asserted in the CIA's *Vaughn* Index, the vast majority of documents in the sample set are withheld in full based on a few key exemptions (principally, Exemptions 1 and 3). Thus, the Court can resolve nearly this entire case, including the *Glomar* responses, by upholding the CIA's Exemption 3 assertion of the protection of sources and methods under the NSA and the CIA Act, and/or its Exemption 1 classification-based assertions for national security information.[2] With respect to the small subset of records that are not withheld in full pursuant to Exemptions 1 and 3, the CIA's withholdings will be resolved if the Court upholds the CIA's assertions of deliberative process privilege and the presidential communication privilege, Exemption 7(A) to protect records from open OIG investigations, and the confidentiality of witness statements as a matter of both privilege and Exemption 7(D).[3]

Although Plaintiffs' challenges to the CIA's assertions of each of these Exemptions are unavailing, in an abundance of caution, the CIA submits an *ex parte* classified declaration that

[2] Specifically, of the 382 records contained within the sample set, only 57 documents are withheld in full on grounds other than, exclusively, reliance on Exemptions (b)(1) (classification) and (b)(3) (as sources and methods under the NSA and the CIA Act). *See* Second Hilton Decl. at ¶ 10.

[3] The CIA does not waive the other exemptions and/or privileges asserted in its *Vaughn* index and supporting declarations, and expressly incorporates the arguments made in the CIA's Moving Brief.

further describes the withheld records, details that could not be disclosed without revealing the very information FOIA's exemptions exist to protect. On the basis of the CIA's initial submissions — and, if necessary, the CIA's additional *ex parte* declaration — the Court should enter summary judgment in the CIA's favor.

SUPPLEMENTAL STATEMENT OF FACTS

While reprocessing of the sample set in this case, the CIA identified records that had previously been classified in their entirety and which, due to the recent declassification of certain information pertaining to the TDI program, were no longer exempt in their entirety pursuant to Exemptions 1 and 3. Because certain of these records contained potential Congressional equities, the CIA consulted with Congress prior to making any releases of the information in such records. *See* Second Stipulation at ¶ 4. Moreover, in the interest of efficiency, the CIA selected additional documents from the larger universe of responsive records that similarly required consultation with Congress. *Id.* The parties agreed that the CIA would process such records and defend any redactions at the time of its reply brief. *Id.* at ¶ 10. Accordingly, the CIA has now released an additional 16 records with redactions, and withholds 15 additional records, as described on the supplemental *Vaughn* index now submitted. *See* Second Declaration of Wendy Hilton, dated February 16, 2010 ("Second Hilton Decl.") at ¶¶ 6-8; *id.* at Exhibit ("Ex.") C, Supp. *Vaughn* Index. The rationales for similar withheld information described in the CIA's previous submissions apply equally to the information withheld here. *See id.* at ¶¶ 8-9. The CIA therefore incorporates the arguments in its previous submissions.[4]

[4] In addition, in Documents 375 and 376, the CIA is withholding several lines of confidential information provided by the International Committee of the Red Cross to the Department of Defense, pursuant to Exemption 3 and 10 U.S.C. § 130c. *See* Declaration of William Lietzau, dated Mar. 5, 2010; *see ACLU v. DOD*, 389 F. Supp. 2d 547, 553-56 (S.D.N.Y. 2006).

ARGUMENT

I. THE CIA HAS PROPERLY WITHHELD INFORMATION THAT WOULD REVEAL INTELLIGENCE SOURCES AND METHODS PURSUANT TO EXEMPTIONS 1 AND 3

In arguing that the CIA has improperly withheld records and issued *Glomar* responses pursuant to Exemptions 1 and 3, Plaintiffs' challenge is fairly limited in scope. Plaintiffs have not raised any specific challenges to the CIA's classification of such information as cryptonyms or pseudonyms, cover identities, intelligence obtained from foreign liaisons or governments, intelligence gathered from human sources, or dissemination control markings. *Compare* Hilton Decl. at ¶¶ 39-145 *with* 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 ("Pl. Br.") at 6 n.12. Plaintiffs have not, for example, disputed that each of these is an intelligence source or method or an intelligence activity. Nor have they rebutted the ample evidence submitted by the CIA that the release of such information contained in the withheld records would be reasonably likely to harm the national security.[5] Instead, Plaintiffs' arguments pertain solely to whether the CIA may withhold information regarding the interrogation techniques employed on CIA detainees and the conditions in which CIA detainees were confined. These arguments are unavailing for the reasons set forth below.

A. The TDI Program, and the Intelligence Gathered During the Course of the TDI Program, Constitute "Intelligence Sources and Methods"

Plaintiffs suggest, as a threshold matter, that the withheld information pertaining to the TDI

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[5] The CIA has demonstrated, for example, that disclosure of withheld information would reveal such things as the CIA's intelligence targets and the gaps in the CIA's intelligence information. *See* Hilton Decl. at ¶¶ 143-44; Declaration of Leon E. Panetta, Director, Central Intelligence Agency, dated June 8, 2009 (attached as Exhibit M to Hilton Decl.) ("First Panetta Decl.") at ¶ 6. Plaintiffs cannot prove that these harms are not "rational or plausible."

program cannot be withheld under either Exemption 1 or 3, because such information does not describe "intelligence sources of methods" within the meaning of the NSA, 50 U.S.C. § 403-1(i)(1), the CIA Act, 50 U.S.C. § 403g, or section 1.4(c) of E.O. 12958.[6] This argument runs counter to the "very broad" discretion conferred upon the DNI to determine what constitutes an unauthorized disclosure of intelligence sources and methods. *CIA v. Sims*, 471 U.S. 159, 168-70 (1985).

1. *The TDI Program Does Not Fall Outside the CIA's Broad "Mandate" to Collect Foreign Intelligence*

Plaintiffs first contend that the TDI program, and specifically, the use of EITs, do not constitute "intelligence sources and methods" because their purported illegality and discontinuance place them outside of the CIA's "mandate." Pl. Br. at 20-22. This argument mischaracterizes the law.

This "mandate" argument relies heavily upon a quotation from the Supreme Court's decision in *Sims* that Plaintiffs have selectively edited and taken out of context. Plaintiffs state in their brief: "In *CIA v. Sims*, the Supreme Court interpreted 'intelligence sources and methods' to allow the CIA to withhold only information about sources and methods that 'fall within the Agency's mandate.'" Pl. Br. at 21 (quoting *Sims*, 471 U.S. at 169). Plaintiffs then extrapolate from this, without any explanation, that discontinued or unlawful practices fall outside of the CIA's purported "mandate." Pl. Br. at 20-22.

Yet the Supreme Court in *Sims* never limited the definition of "intelligence sources and methods" to those that were lawful or in current use by the Agency. Rather, as an examination of the context of the quoted language illustrates, the Supreme Court affirmed that the term

[6] Plaintiffs also challenge the CIA's reliance upon Exemption 3 in issuing *Glomar* responses to Categories 5-6, 9-10, and 15-17 on the same grounds.

"intelligence sources and methods" must be given the broadest sweep possible, and that the agency's only "mandate" is "to conduct foreign intelligence":

> Section 102(d)(3) specifically authorizes the Director of Central Intelligence to protect "intelligence sources and methods" from disclosure. Plainly the broad sweep of this statutory language comports with the nature of the Agency's unique responsibilities. . . . The "plain meaning" of § 102(d)(3) may not be squared with any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate *to conduct foreign intelligence*. Section 102(d)(3) does not state, as the Court of Appeals' view suggests, that the Director of Central Intelligence is authorized to protect intelligence sources only if such protection is needed to obtain information that otherwise could not be acquired. Nor did Congress state that only confidential or nonpublic intelligence sources are protected. Section 102(d)(3) contains no such limiting language.

Sims, 471 U.S. at 169 (emphasis added; footnote omitted). Nothing in *Sims* supports Plaintiffs' arguments that, in construing the Director's discretion to protect sources and methods, courts must consider whether methods are legal or currently in use.

Plaintiffs seek to convert this FOIA lawsuit into a referendum on what actions the CIA may or may not lawfully take in fulfilling its mission to collect foreign intelligence. While this is undoubtedly a topic that has been the subject of intense public debate, such an inquiry is beyond the scope of this FOIA action. Accordingly, courts have long rejected arguments that the legality or illegality of an intelligence activity is relevant in evaluating withholdings under Exemption 3. *See, e.g., Agree v. CIA*, 524 F. Supp. 1290, 1293 (D.D.C. 1981) (finding CIA sources and methods protected, notwithstanding "the legality or illegality of CIA's conduct"); *Lesar v. DOJ*, 636 F.2d 472, 483 (D.C. Cir. 1980) (immaterial whether FBI exceeded "bounds of . . . lawful security aim"); *Navasky v. CIA*, 499 F. Supp. 269, 274 (S.D.N.Y. 1980) ("a claim of activities *ultra vires* the CIA charter is irrelevant"); *cf. Bennett v. DOD*, 419 F. Supp. 663, 666 (S.D.N.Y. 1976) ("nothing . . .

suggest[s] that information vital to the national security is not worthy of protection solely because of the means employed to obtain it").

Indeed, although unmentioned in Plaintiffs' brief, Judge Hellerstein properly rejected this argument when Plaintiff CCR previously advanced it in *ACLU-SDNY*. Judge Hellerstein explained that nothing in the NSA required the court to examine the legality or illegality of the CIA's "intelligence sources and methods" when adjudicating a FOIA withholding.[7] *ACLU-SDNY*, Transcript of Hearing dated September 30, 2009 ("*ACLU-SDNY* Tr."), attached as Exhibit A to the Declaration of Jeannette A. Vargas, dated February 16, 2010 ("Second Vargas Decl."), at 12-15.

Moreover, Judge Hellerstein explained that the "mandate" referred to by the Supreme Court in *Sims* did not refer to a specifically delineated list of activities:

> The mandate is to gather intelligence. The Supreme Court pretty well — the extension of the quotation to which you refer discusses the mandate historically. It comments that it was enacted shortly after World War II. It discusses that it was enacted because it was considered that the tragedy in Pearl Harbor was based, in large part, on deficiencies in American intelligence then and even during the course of the war. And Congress authorized the executive to gather and analyze intelligence, in peacetime as well as in war, and noted that it had to be improved. And the court goes on to note that intelligence had to be gathered from almost an infinite variety of diverse sources, that there was a need to shepherd and analyze massive information in order to safeguard national security in a postwar world. The practical realities of intelligence were noted by the committee. They quoted Admiral Nimitz, who was in charge of our naval forces during World War II, and he had a five-star ranking. This affected intelligence as a composite of authenticated and evaluative information covering not only the armed forces' establishment of a possible enemy, but also industrial capacity, racial traits,

[7] Months after Plaintiffs filed their brief in this case, Judge Hellerstein granted the plaintiffs' motion for reconsideration from his decision on the grounds that "the *in camera* procedures that [he] developed for review of the documents did not permit [full] adversarial treatment," and thus the "motion for reconsideration is the only feasible means by which they could brief the issues in relation to specific redactions." *ACLU-SDNY*, 2010 WL 308810, at *1 (S.D.N.Y. Jan. 26, 2010). Briefing on these "specific redactions" is scheduled to be completed on March 1, 2010. *Id.*

> religious beliefs and other related aspects. Again, Allen Dulles was quoted about the diverse nature of intelligence sources, etc.
>
> I am not able to comment, particularly in the context of FOIA, on the nature of legality or illegality in the development of intelligence. That has been a subject of intense comment and discussion for sometime in our nation. . . . There is nothing that I read in the Act that compromises the mandate of intelligence gathering.

ACLU-SDNY Tr. at 15-16. Judge Hellerstein's conclusion comports not only with cases rejecting similar arguments but, further, with the Second Circuit's recent conclusion that "the legality of [an intelligence program] is beyond the scope of [a] FOIA action." *Wilner*, 592 F.3d at 77.

Similarly, contrary to Plaintiffs' argument, there is nothing in the text of the NSA, E.O. 12958, or the Supreme Court's decision in *Sims*, that suggests that the CIA may only protect *current* intelligence sources and methods. The U.S. District Court in the District of Columbia rejected this same argument in an opinion issued a month before Plaintiffs filed their brief:

> The Court does not see how the President's order prohibiting the use of EITs and closing the CIA's prisons justifies full disclosure of the records sought. Plaintiffs' theory would require the government to fully disclose the details of every classified program that the government discontinues. This simply is not true. A government record remains classified until a government official determines that 'the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure. Exec. Order No. 12,958 § 3.1(b). The President never authorized full disclosure of defendants' interrogation program; he merely ended it. Thus, the fact that the President outlawed the use of EITs and the CIA's operation of detention centers does not warrant full disclosure of the records at issue in this case.

ACLU v. DOD, __ F. Supp. 2d __, 2009 WL 3326114 (D.D.C. Oct. 16, 2009) ("*ACLU-DC* "), at *4. Quite simply, "the fact that EITs and the CIA's detention facilities are no longer in use does not mean that information obtained from their use does not constitute 'intelligence sources and methods.'" *Id.* at *5.

2. *The Enactment of IRTPA Did Not Overturn the Supreme Court's Ruling in Sims*

Plaintiffs further contend that, although never recognized by the numerous courts that have continued to apply *Sims* after the enactment of IRTPA in 2004 ― including the Second Circuit, *see Wilson*, 586 F.3d at 193-94 ― IRTPA implicitly overturned *Sim*'s interpretation of "intelligence sources and methods" and established a new, but unarticulated, standard of review. Pl. Br. at 23-25. Although Plaintiffs devote two and a half pages of their brief to this bold assertion, they are notably vague about the nature of the "substantive changes made by IRTPA" that purportedly wrought this radical jurisprudential shift. Pl. Br. at 23-25.

Plaintiffs' reticence to elaborate on this point is understandable, however, given that the only substantive change IRTPA made to the statutory language at issue in *Sims* was to transfer authority for protecting intelligence sources and methods from the Director of Central Intelligence to the Director of National Intelligence. *Compare* 50 U.S.C. § 403(d)(3) (1988) ("[T]he Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."); *with* 50 U.S.C. § 403-1(i)(1) (2006) ("The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure."). Had Congress intended to overturn the Supreme Court's decision in *Sims*, it presumably would have done so by amending the specific provision of the NSA at issue in that case. *See Agri Processor Co., Inc. v. NLRB*, 514 F.3d 1, 7 (D.C. Cir. 2008) (Congress cannot be found to have overturned a

Supreme Court decision, where it did not "expressly change[] the statutory provision the Court had interpreted to achieve the opposite result."); *id.* at 4 ("Amendments by implication, like repeals by implication, are not favored" (quotation marks omitted)). Yet, Congress declined to do so.

Plaintiffs nonetheless argue that Congress impliedly amended the NSA's definition of "intelligence sources and methods" when it enacted three separate provisions of IRTPA. Pl. Br. at 24 n.54. Only one of those provisions even amends the NSA, and that provision, Pub. L. No. 108-458 at § 1101(a), simply confers upon the DNI the "authority to ensure maximum availability of and access to intelligence information within the intelligence community consistent with national security requirements." 50 U.S.C. § 403-1(g)(1) (2006). Of the remaining two IRTPA provisions, one concerns a wholly separate set of policies regarding the sharing of *unclassified* information between federal agencies and the private sector. *See* Pub. L. No. 108-458 at § 1016(f)(2)(B)(vi). The other IRTPA provision, Pub. L. No. 108-458 at § 1102(f), extends by four years the sunset date for the Public Interest Declassification Act of 2000, Pub. L. 106-567, 114 Stat. 2831 (Dec. 27, 2000) ─ a statute that, by its terms, explicitly provides that "nothing in this title shall be construed to limit the authorities of the Director of National Intelligence as the head of the intelligence community, including the Director's responsibility to protect intelligence sources and methods from unauthorized disclosure as required by section 103(c)(6) of the National Security Act of 1947." Pub. L. 106-567 at § 705, 114 Stat. at 2860. In sum, none of these provisions suggests even remotely that Congress intended to overturn more than twenty years of caselaw by limiting the NSA's definition of "intelligence sources and methods."[8]

[8] Plaintiffs also contend that the CIA Act does not protect intelligence sources and methods. Pl. Br. at 25. The plain text of the Act, however, supports the CIA's reading, *see* 50 U.S.C. § 403g (stating purpose of exemption is "to . . . protect intelligence sources and methods," by exempting, *inter alia*, the CIA's "functions"), as does the case law, *see, e.g.*, *Goland v. CIA*, 607 F.3d 339, 351 (D.C. Cir. 1978); *Makky v. Chertoff*, 489 F. Supp. 2d 421, 442 (D.N.J. 2007).

For these reasons, the CIA has properly withheld intelligence sources and methods pursuant to the NSA, the CIA Act, and the Executive Order.

B. The CIA Has Amply Supported Its Exemption 1 Withholdings By Detailing the Harm to National Security That Is Reasonably Likely to Result from Disclosure of the Withheld Records

The CIA has asserted that both Exemptions 3 and Exemption 1 protect all the information that the CIA has classified pursuant to E.O. 12958. Accordingly, should the Court uphold the CIA's withholdings under the NSA and the CIA Act, it need not reach the CIA's separate and independent argument that such information is properly classified pursuant to E.O. 12958, and therefore properly withheld pursuant to Exemption 1. *See* Mov. Br. at 21. Indeed, the Court's rejection of Plaintiffs' spurious arguments regarding the CIA's Exemption 3 withholdings would resolve the vast majority of the withholdings in this case.

Should the Court nonetheless adjudicate the Plaintiffs' challenges to the classification of information regarding the TDI program, the CIA's classification determinations should be upheld. The Second Circuit has recently affirmed that, in reviewing the CIA's classification decisions, "the court's task is not to second-guess the Agency, but simply to ensure that its 'reasons for classification are rational and plausible ones.'" *Wilson*, 586 F.3d at 185-86; *see also Wilner*, 592 F.3d at 76 ("[I]t is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies . . . .") (quotation marks omitted). The CIA's detailed explanation of the national security harms that could result from disclosure of the intelligence and operational information contained within the withheld records — an explanation supported by three separate declarations from the Director of the CIA himself and more than 30 pages of the declaration from the Associate Information Review Officer for the National Clandestine Service,

see Hilton Decl. at ¶¶ 90-166; First Panetta Decl. at ¶¶ 5-12, 14-15, 25; Declaration of Leon E. Panetta, dated September 21, 2009 (attached as Exhibit A to Vargas Decl.) ("Second Panetta Decl.") ─ more than meets this standard.

Notwithstanding the specific and detailed justifications the CIA has advanced in support of its classification determinations, Plaintiffs posit four theories as to why, in their non-expert view, disclosure of additional information regarding the CIA's use of EITs and covert detention facilities is not reasonably likely to harm the national security or is otherwise not properly classified. First, Plaintiffs contend that the TDI program has been discontinued, and thus "revelation cannot reduce the effectiveness of prohibited practices." Pl. Br. at 9-11. Second, Plaintiffs assert that, because the CIA has already provided extensive detail regarding the TDI program, "no harm is reasonably likely to arise from further disclosure[s]." Pl. Br. at 11. Third, Plaintiffs contend that information about the program cannot be classified because it purportedly relates to illegal activities. Pl. Br. at 17-20. Fourth, Plaintiffs dispute that release of information regarding the program could cause harm to foreign relations, because certain European countries have independently begun investigations into the CIA's activities abroad. Each of these arguments is flawed.

1. *The CIA Articulated Rational and Plausible Harms to National Security, Notwithstanding the Discontinuance of the TDI Program*

Plaintiffs' suggestion that disclosure of operational details regarding the TDI program could not possibly harm national security simply because the Program has been discontinued is directly rebutted by the declarations of the Director of the CIA and Ms. Hilton. *See* First Panetta Decl. at ¶¶ 10-12, 25, 30, 39-40; Second Panetta Decl. at ¶¶ 6-8; Hilton Decl. at ¶¶ 149-54. Plaintiffss' challenge rests upon the faulty premise that, because the use of EITs has been

discontinued, disclosure of operational details regarding the actual application of EITs to specific detainees would not reveal information that could be used by terrorists to develop strategies for resisting future interrogations. Pl. Br. at 11-16. This assumption is incorrect.

As Ms. Hilton has explained, "even though . . . the use of [EITs] ha[s] been discontinued, the information withheld from the documents would still be of value to al Qa'ida and must be protected because the withheld information provides insight not only into the use of EITs and conditions of confinement, but also into the strategy and methods used by the United States when conducting any sort of interrogation, including those under the Army Field Manual." Hilton Decl. at ¶ 150. Director Panetta elaborates on this point: "Even if the EITs are never used again, the CIA will continue to be involved in questioning terrorists under legally approved guidelines. The information in these documents would provide future terrorists with a guidebook on how to evade such questioning." First Panetta Decl. at ¶ 11. These assessments of national security harm are entitled to deference. *Wilson*, 586 F.3d at 196.

The district court in the *ACLU-DC* litigation found these factual assertions sufficient to uphold the CIA's withholding of information related to the application of EITs. *ACLU-DC*, 2009 WL 3326114, at *4 ("Moreover, as stated in Ms. Hilton's declaration, the redacted information relates not just to the use of EITs, but also to the interrogation methods and procedures that are authorized in the Army Field Manual and are in use today. Release of such information would seriously damage national security by compromising intelligence sources and methods, even if the damage is not apparent to the casual observer."). As that court properly held, the CIA's declarations establish a "rational and plausible" basis for withholding information regarding the operational use of EITs, notwithstanding their discontinuance.

2. *The National Security Harms Articulated by the CIA Are Not Negated By Prior Government Disclosures With Respect to the TDI Program*

Similarly, Plaintiffs cannot establish that the Government's prior disclosures regarding the TDI program negate the harms that would result from disclosure of additional operational details regarding the Program. *See* First Panetta Decl. at ¶¶ 10-12, 25, 30, 39-40; Second Panetta Decl. at ¶¶ 6-8; Hilton Decl. at ¶¶ 149-54.

Two recent Second Circuit decisions bear directly on this issue. In the *Wilner* case, the Second Circuit affirmed that the public disclosure of the existence of a classified program does not thereby result in the declassification of the operational aspects of that program, or the intelligence gathered through such program. *See Wilner*, 592 F.3d at 70 ("The fact that the public is aware of the [Terrorist Surveillance Program's] existence does not mean that the public is entitled to have information regarding the operation of the program, its targets, the information it has yielded, or other highly sensitive national security information that the government has continued to classify."). The same principle applies with respect to the TDI program. Although the broad outlines of the TDI program have been disclosed, the CIA continues to classify all information regarding the operational aspects of the Program, as well as the intelligence gleaned from it. *See* First Panetta Decl. at ¶¶ 10-12, 25, 30, 39-40; Second Panetta Decl. at ¶¶ 6-8; Hilton Decl. at ¶¶ 149-54. *Wilner* illustrates that such previously undisclosed information is properly withheld.

Likewise, the Second Circuit's decision in *Wilson* reinforces the longstanding principle that courts should defer to intelligence agencies' judgments concerning potential harm arising from additional government disclosures, notwithstanding claims, like those of Plaintiffs' here, Pl. Br. at 9, that information already in the public record makes such harm unlikely. In *Wilson*, the Circuit held that "evidence of public disclosure does not deprive information of classified status."

586 F.3d at 174. There, the CIA argued that whether Valerie Plame Wilson worked with the CIA prior to 2002 was properly classified. *Id.* In response, Ms. Wilson pointed to a CIA letter published in the Congressional Record reporting dates that Ms. Wilson purportedly worked with the CIA prior to 2002. *Id.* at 180. Ms. Wilson argued that, in light of that publication, her "pre-2002 dates of services [were] . . . a matter of such widespread public knowledge as to render unreasonable the Agency's insistence on maintaining the information as classified." *Id.* at 174. The Second Circuit disagreed, however, and deferred to the CIA's evaluation of continuing harm from confirming or denying a pre-2002 relationship. *Id.* at 196. It did so because the CIA had provided "rational and plausible reasons for continued classification," notwithstanding an extensive public record. *Id.* (quotation marks omitted).

As in *Wilson*, the CIA's conclusion that disclosing operational information regarding the TDI program would harm national security, despite past disclosures, is "rational and plausible." The policy documents, legal memoranda and other records regarding the TDI program that have previously been disclosed are distinct from the operational information that the CIA continues to protect. As Director Panetta explains:

> [S]ome of the operational documents currently at issue contain descriptions of EITs being applied during specific overseas interrogations. These descriptions, however, are of EITs *as applied* in actual operations, and are of a qualitatively different nature than the EIT descriptions *in the abstract* contained in the OLC memoranda. As discussed below and in my classified declaration, I have determined that information contained within the operational documents at issue concerning *application* of the EITs must continue to be classified TOP SECRET . . . .

First Panetta Decl. at ¶ 10; *see also id.*, at ¶¶ 25, 30, 39-40; Second Panetta Decl. at ¶¶ 6-8; Hilton Decl. at ¶¶ 149-54. Because Director Panetta's conclusion is, at the very least, "rational and plausible," the Court should defer to the Director's expert judgment in the area of national

security. *Wilson*, 586 F.3d at 196.

Indeed, the two courts that have previously considered whether information regarding the operational aspects of the TDI program remains properly classified in the wake of the releases of the OLC memoranda and related documents have upheld the CIA's classification decisions. In *ACLU-SDNY*, Judge Hellerstein relied upon Director Panetta's declaration in ruling that the release of the OLC memoranda and other documents pertaining to the TDI program did not undermine the CIA's ability to protect records describing the actual application of EITs in the course of specific interrogations:

> It is not the subtraction or addition of details. It is the use in actual cases that makes a dramatic difference with the type of information that is presented in an exemplar. . . . You get a certain quality of information from a composite or an abstract or an exemplar or a summary, but you get a different quality of information in seeing how different things are used in different ways with different people at different times, what sequences are used, what order is used, what evaluations are made and so on. That's the very essence of intelligence gathering. It is not as if a generalized format is imposed by computers or on a particular subject because all are the same. It takes particular training, particular efforts, particular adaptations to do an effective job of intelligence gathering. . . . And all of that is a very difficult and very important process. . . . I have come to the conclusion that a district judge in this context has to defer to the director of the CIA in assessing the information.

ACLU-SDNY Tr. at 7 (citations omitted). Likewise, in *ACLU-DC*, the district court found that, although "the[] records contain general information regarding defendants' interrogation program," "[t]he redacted information at issue in this case . . . is specific and particular to each detainee and would reveal far more about the CIA's interrogation process than the previously released records." 2009 WL 3326114, at *3. It thus properly concluded that "the fact that the government disclosed general information on its interrogation program does not require full disclosure of aspects of the program that remain classified." *Id.*

Accordingly, notwithstanding the CIA's voluntary release of information regarding the

policies governing the use of EITs, the CIA has properly continued to classify records that would detail their application to specific detainees.

3. *The Withheld Information Was Not Classified For an Improper Purpose*

Plaintiffs additionally contend that the CIA's classification determinations were made in contravention of section 1.7(a) of E.O. 12958's prohibition on the classification of information to "conceal violations of law, inefficiency, or administrative error" or to "prevent embarrassment." Pl. Br. at 17. As the CIA explained in its moving brief, however, "in other words, to implicate section 1.7(a), there must be evidence that the agency classified information that was not appropriate for classification under the substantive standards established by the Executive Order with the improper motive or intent of concealing illegalities." Mov. Br. at 25-27 (citing cases). Plaintiffs do not challenge this governing standard, and propose no other understanding of section 1.7(a). Pl. Br. at 17-19.[9]

Here, Plaintiffs cannot credibly maintain that, but for the CIA's purported concern over alleged illegality or embarrassment, information regarding the CIA's detention and interrogation activities – including the operational details of the CIA's TDI program, the locations of overseas detention facilities, or the assistance provided by foreign governments in connection with the program – would not have been classified. In fact, their challenge to the bona fides of the classification decisions at issue here fail because they have offered no evidence of the CIA's motive in classifying information regarding its TDI program, much less evidence indicating that

[9] Plaintiffs contend that "the cases cited by the CIA for the claim that Executive Order 12958 does not bar classification of illegality where there is an independent basis for classification are inapposite" because "none of the cases cited discuss Executive Order 12958." Pl. Br. at 17 n.36. In fact, three of the cases cited in the CIA's moving brief interpreted E.O. 12958: *Billington v. Dep't of Justice*, 11 F. Supp. 2d 45 (D.D.C. 1998), *Arabian Shield Dev. Co. v. CIA*, No. 3-98-CV-0624-BD, 1999 WL 118796 (N.D. Tex. Feb. 26, 1999), and *United States v. Abu Marzook*, 412 F. Supp. 2d 913 (N.D. Ill. 2006). More importantly, however, the prior Executive Orders at issue in other cases cited by the CIA contained provisions substantively identical to section 1.7(a). *See* Exec. Order No. 12,065 at § 1-601 (June 28, 1978); Exec. Order No. 12,356 at § 1-6(a) (April 2, 1982).

CIA officials, in making classification determinations, did so in bad faith. *See Wilner*, 592 F.3d at 75 ("We cannot base our judgment on mere speculation that the NSA was attempting to conceal the purported illegality of the TSP . . . . A finding of bad faith must be grounded in 'evidence suggesting bad faith on the part of the [agency].'" (citation omitted)).

Instead, Plaintiffs appear to suggest that, if the withheld records contain evidence of illegality or misconduct, then *ipso facto* they must have been classified for an improper purpose. *See* Pl. Br. at 17-19. Yet that is not the standard. The Government's declarations are afforded a presumption of good faith. *See, e.g.*, *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Accordingly, in order to overcome this presumption, Plaintiffs must adduce actual evidence that the national security concerns asserted by the agency as the bases for its classification decisions are pretextual. *See, e.g.*, *Wilner v. NSA*, 2008 WL 2567765, at *6 n.4 (S.D.N.Y. June 25, 2008); *Hiken v. DOD*, 521 F. Supp. 2d 1047, 1058 (N.D. Cal. 2007); *Peltier v. FBI*, No. 03-CV-905S, 2005 WL 735964, at *8 (W.D.N.Y. Mar. 31, 2005); *Joya-Martinez v. FBI*, No. Civ. A. 91-1433, 1994 WL 118206, at *2 (D.D.C. Mar. 31, 1994); *cf. Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999). This Plaintiffs cannot do.

Instead, Plaintiffs incoherently argue that the CIA's voluntary disclosure of information that, in the Plaintiffs' view, reveals that the CIA engaged in illegal or improper conduct somehow evidences that the CIA has withheld other information about the TDI program for an improper motive. Pl. Br. at 17-19. This argument does not withstand scrutiny.

According to the Plaintiffs, the disclosures that the United States has already made about the TDI program "make plain that the CIA's acts were prohibited under other federal and international law in force at that time." Pl. Br. at 22. The fact that the Government chose to

make extensive disclosures with respect to numerous controversial aspects of the TDI program, however, is inconsistent with Plaintiffs' assertion that the CIA has classified other information regarding the program in a calculated effort to conceal unlawful activities or to avoid embarrassment. If anything, the discretionary disclosures cited by the Plaintiffs make clear that the Government has disclosed substantial information regarding the program without regard for whether the information would be controversial, embarrassing or, for that matter, would expose the Government to criticism. As one district court reasoned when faced with a similar situation – in which the Plaintiffs argued that statements and evidence released by the FBI demonstrated that the agency was allegedly wrongfully withholding other information – it is "difficult to believe that the agency's withholding decisions were motivated by a desire to improperly conceal [embarrassing] facts. If anything, the agency has released sufficient information to facilitate such speculation about the existence of a potentially inappropriate investigation." *Canning*, 848 F. Supp. at 1048; *see also Bassiouni*, 392 F.3d at 247.

For these and similar reasons, the only two district courts to have ruled on the withholding of records pertaining to the TDI program have held that, because such information was properly classified, there was no need to engage in an analysis of the underlying legality of the EITs employed by the CIA. In holding that the CIA may properly withhold cables and other operational records pertaining to the CIA's TDI program, Judge Hellerstein stated:

> The post-9/11 world was a very harsh world. Our fears were great that another attack on our nation was imminent, and there was a strong effort to gather intelligence from the kind of diverse set of sources that the *Sims* court notes. I decline to rule on the question of legality or illegality in the context of a FOIA request. The need to keep confidential just how the CIA and other government agencies obtained their information is manifest, and that has to do with the identities of the people who gave information and who were questioned to obtain information.

ACLU-SDNY, at 16-17. Similarly, the *ACLU-DC* court concluded that, in light of the evidence submitted regarding the national security harms that would result from disclosure of TDI-related information, the Plaintiffs in that case could not establish that the records were classified in order to conceal violations of law. *ACLU-DC*, 2009 WL 3326114, at *6 ("Ms. Hilton swore in her declaration that defendants did not have an improper motive in classifying the information sought by plaintiffs. Plaintiffs have offered no evidence contrary to Ms. Hilton's statement.").

In sum, because the records at issue are independently classifiable, they can be withheld under Exemption 1 regardless of whether they contain evidence of purported illegalities or government misconduct.

4. *The CIA Has Established that Release of the Withheld Information Is Reasonably Likely to Harm Foreign Relations*

The CIA's declarations also illustrate the harm to foreign relations that would result if the CIA was unable to maintain the confidentiality of its covert relationships with foreign liaisons and governments, including those who participated in the TDI program. *See* Hilton Decl. at ¶¶ 100-10; 133-35; 152-53; 163-64; First Panetta Decl. at ¶ 40; Second Panetta Decl. at ¶ 4, 7. For example, Ms. Hilton attests that certain "foreign governments have provided critical assistance to CIA counterterrorism operations, including but not limited to hosting of foreign detention facilities, under the condition that their assistance be kept secret. If the United States demonstrates that it is unwilling or unable to stand by its commitments to foreign governments, they will be less willing to cooperate with the United States on counterterrorism activities." Hilton Decl. at ¶ 153. Ms. Hilton further describes how a particular foreign government reduced its cooperation with the CIA when its role in the TDI program was leaked to another country. *Id.*

at ¶ 164.

Plaintiffs have offered no rebuttal to the concrete examples of the consequential harm to foreign relations that the CIA has provided, other than to speculate that such concerns are overstated because certain European countries — which may or may not be the countries at issue in the instant records, and which may or may not have had any involvement with the TDI program — have launched investigations into their own involvement with the TDI program. Pl. Br. at 16. This non-sequitur is insufficient to overcome the substantial deference that must be accorded to the agency's expertise in this area.

C. The CIA Properly Issued *Glomar* Responses

Although Plaintiffs have abandoned any challenge to the CIA's *Glomar* responses to Categories 3 and 4 of the Specific FOIA Request, *see* Pl. Br. at 3 n.6, they nevertheless continue to challenge the CIA's *Glomar* response to Categories 5-6 and 9-10, regarding the purported use of certain EITs on particular detainees, and Categories 15-17, involving the alleged cooperation by the CIA and the Government of Yemen in certain purported operations, *see id.* at 28-32. These challenges are based on a flawed official acknowledgments analysis, the faulty Exemption 3 objections addressed above, and a series of classification arguments rejected by other courts.

1. Plaintiffs Have Not Established Waiver

In a single sentence, Plaintiffs half-heartedly argue that the CIA has waived the protections of Exemptions 1 and 3 because it has allegedly already officially acknowledged the existence of records responsive to Categories 5-6 and 9-10 (*i.e.*, the items relating to the use of specific EITs with particular detainees).[10] Pl. Br. at 31. They fail, however, to cite the controlling "strict test"

[10] Plaintiffs do not argue that there has been any official acknowledgment — and therefore any waiver — as to the existence or non-existence of records responsive to Categories 15-17.

that applies, by which information "is only deemed to have been officially disclosed if it (1) is as specific as the information previously released, (2) matches the information previously released, and (3) was made public through an official and documented disclosure." *Wilson*, 586 F.3d at 186. Plaintiffs cannot meet this test.

Any response, other than a *Glomar* response, to Categories 5-6 or 9-10 would reveal the existence or non-existence of CIA operational cables discussing or authorizing the use of specific EITs — "sleep deprivation" or a "slap" — on detainees Abu Zubaydah and KSM, respectively. *See* Specific FOIA Request at 2-5; Hilton Decl. at ¶¶ 237-38. Plaintiffs do not — and indeed, cannot — identify any such specific and matching official acknowledgement. Instead, they argue that certain disclosures in OLC memoranda *suggest* that these techniques were likely used on these detainees and thus would likely have been the subject of cable traffic. Pl. Br. at 28-29. This line of speculation founders on the absence of any disclosures "as specific as" what a response here would reveal, as well as on the inability to "match" any of the cited OLC advice and recitations with any CIA raw intelligence that might exist in operational cables. *Wilson*, 586 F.3d at 186.

As for specificity, Plaintiffs identify no source specifying that either Abu Zubaydah or KSM was or was not subject to the particular EITs in question. Instead, they proceed on a patchwork of passages from OLC memoranda and their own assumptions. For instance, Plaintiffs speculate that, because one OLC memorandum advises the CIA to apply EITs in an "escalating fashion, culminating with the waterboard," and because the waterboard was used on these particular detainees, the CIA must have used each and every EIT — such as "sleep deprivation" and the "slap" — on both Abu Zubaydah and KSM. Pl. Br. at 28. Yet, the memoranda leave that

question open.[11] Likewise, Plaintiffs contend that the CIA has already acknowledged that it used the EIT of sleep deprivation in interrogating Abu Zubaydah because a 2002 OLC legal memorandum recites that OLC had been informed that the CIA had "previously kept him awake for 72 hours," while an OLC memorandum written three years later explained that the sleep deprivation EIT could be used for periods between 48 and 180 hours. Pl. Br. at 28 & n.59. Neither document, however, states that the CIA in fact used the sleep deprivation EIT to interrogate Abu Zubaydah. To the contrary, not only does the cited 2002 OLC memorandum nowhere specify why Abu Zubaydah was kept awake (*e.g.*, for interrogation purposes or otherwise), but that memorandum could be read to suggest that the CIA had not used sleep deprivation as a technique in interrogating Abu Zubaydah, as the memorandum constituted a legal opinion on whether OLC believed that "certain *proposed* conduct" — such as employing the EIT of sleep deprivation — would be consistent with the CIA's legal obligations. Given the disparate conclusions that can be drawn from these OLC memoranda, whether this interrogation technique was ever employed in interrogating Abu Zubaydah remains sufficiently an open question to necessitate the CIA's *Glomar* response. *See Wilson*, 586 F.3d at 195 (increments of doubt regarding the reliability of information on public record suffice to justify a *Glomar* response).

Likewise, Plaintiffs cannot satisfy the matching test set forth in *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007), and adopted by the Second Circuit in *Wilson*. *See Wilson*, 586 F.3d at 186. The plaintiff in *Wolf* sought to overcome a CIA *Glomar* response to a request for CIA records relating to Jorge Gaitan, an assassinated Columbian politician. *Wolf*, 473 F.3d at 379. The

[11] Although Plaintiffs argue that the CIA had a specific set "escalation protocol," Pl. Br. at 29, one of the documents released in this case, which Plaintiffs cite, states: "there is no template or script that states with certainty when and how these techniques will be used in combination during interrogation." Document 71, Facsimile dated Dec. 2004, *cited at* Pl. Br. at 6 n.13, 11-12.

plaintiff successfully demonstrated that, in 1948, the CIA Director disclosed the existence of some such records because the Director had read aloud from those records — while explaining he was doing so — at an open congressional hearing. *Id.* at 379. The D.C. Circuit, however, held that "[t]he CIA's official acknowledgment waiver relates only to the existence or nonexistence of the [particular] records about Gaitan disclosed by the [Director's] testimony," "but *not any others*." *Id.* (emphasis added); *see also Wilner*, 592 F.3d at 70 ("An agency only loses its ability to provide a *Glomar* response when the existence or nonexistence *of the particular records* covered by the *Glomar* response has been officially and publicly disclosed." (emphasis added)). Thus, here, even if the Government had disclosed that it had used the specified EITs on Abu Zubaydah or KSM — and it has not — there has never been any disclosure of the existence or non-existence of CIA cables relating to that topic. Thus, in addition to being unable to establish that OLC's disclosures specify whether particular EITs were or were not used on particular detainees, Plaintiffs cannot show that the purported official acknowledgments *match* the information that would be disclosed if the CIA were not permitted to issue a *Glomar* response — that is, the existence of cables reflecting the use of such EITs on particular detainees. *Wolf*, 473 F.3d at 379 ("In the *Glomar* context, then, if the prior disclosure establishes the *existence* (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue — the existence of records — and the specific request for that information.").

For these reasons, Plaintiffs cannot meet the strict test for official acknowledgments.

2. Plaintiffs' Exemption 1 Challenges Lack Merit

As with the CIA's withholding of records containing intelligence sources and methods, if this Court properly rejects Plaintiffs' meritless Exemption 3 challenges, *see supra* at Section I.A, it

should uphold the CIA's *Glomar* responses, which are otherwise uncontested on Exemption 3 grounds. If the Court does so, it need not address the parties' arguments (below) regarding Exemption 1 because "FOIA Exemptions 1 and 3 are separate and independent grounds in support of a *Glomar* response." *Wilner*, 592 F.3d at 72.

In any event, Plaintiffs' attacks on the CIA's determinations regarding the harm to national security are unavailing. Plaintiffs primarily challenge the CIA's conclusion that a response to Categories 5-6, 9-10, or 15-17 would harm national security given what Plaintiffs characterize as "the extensive public knowledge of the frequency and manner of the use" of EITs, Pl. Br. at 30, and information "already in the public domain" regarding the alleged cooperation of the United States generally (though, admittedly and significantly, not the CIA specifically) with the Government of Yemen, *see* Pl. Br. at 31-32. This argument is meritless.

The Second Circuit has explained that "anything short of [an official] disclosure necessarily preserves some increment of doubt regarding the reliability of the publicly available information," *Wilson*, 586 F.3d at 195. These "lingering doubts" "maintain[] the secrecy of CIA sources and methods" and, among other things, preserve "the options of deniability and professed ignorance that remain important niceties of international relations." *Id.*; *see also id.* at 197-200 (Katzmann, J., concurring). Thus, just as "the law will not infer official disclosure . . . from . . . widespread public discussion of a classified matter" or "statements made by a person not authorized to speak for the Agency," *id.* at 186-87, so too will such publicity or statements be insufficient to undermine the CIA's predictions of harm from official confirmation or denial, *see id.* at 195; *see also Wilner*, 592 F.3d at 70 ("[T]he fact that the [program's] existence has been

made public reinforces the government's continuing stance that it is necessary to keep confidential the details of the program's operations and scope.").

Here, the CIA has logically explained what harms would flow from a confirmation or denial of the existence of responsive records, *see* Hilton Decl. at ¶¶ 237-42, 245-54, and why such harms would occur notwithstanding the "public record" cited by Plaintiffs, *see id.* at ¶¶ 243-44, 255-60. [12] "The CIA having provided 'rational and plausible' reasons for continued classification," this Court's "review obligations are satisfied" and it should "not further second-guess Agency judgment." *Wilson*, 586 F.3d at 196; *see also supra* at Section I.B.

In addition to their "public record" based arguments, Plaintiffs claim that no harm could flow from disclosing whether particular EITs were used on particular detainees (*i.e.*, Categories 5-6 and 9-10) because CIA's interrogation techniques are now limited to those listed in the Army Field Manual. Pl. Br. at 30. Plaintiffs' argument rests upon the same erroneous assumption that underlies their attack upon the CIA's classification of records discussing the application of EITs — that the disclosure of information regarding the CIA's use of discontinued interrogation methods would provide no insights on current interrogation practices. For the reasons discussed *supra* at Section I.B.2, this argument is incorrect. *See also* Hilton Decl. at ¶ 240 ("The existence or non-existence of cables relating to the use of particular EITs would disclose whether . . . particular EITs were used in fact upon specific detainees at specific times, from which terrorists . . . could

[12] Plaintiffs contend that, in their view, no harm could possibly result from the CIA's response to Categories 15-17, because the Government of Yemen allegedly confirmed contact with the CIA. Pl. Br. at 31-33 & nn.66-67. Yet, Plaintiffs' citations do *not* address any CIA involvement, *see* Pl. Br. at 31-32 (citing purported U.S. Government, not CIA, involvement), and Ms. Hilton has already explained (i) that "[e]ven if a foreign government chooses to release certain information on its own . . . that does not mean that it would welcome CIA confirmation or denial of the statement," Hilton Decl. at ¶ 256; (ii) that doing so would harm CIA relations with other countries, *id.* ¶ 257; and (iii) that "preventing the CIA from issuing a *Glomar* response . . . would leave the CIA and its foreign partners vulnerable to exploitation by hostile . . . foreign governments," which could issue statements (true or false) requiring CIA "to expose [its] capabilities and operations," *id.* at ¶ 258; *see also id.* at ¶ 259.

infer facts about the U.S. government's interrogation processes . . . [including] the strategy and methods used by the United States when conducting any sort of interrogation . . . .").

For these reasons, the Court should uphold the CIA's proper declination to confirm or deny the existence of records responsive to Categories 3-4, 5-6, 9-10, and 15-17.

II. THE CIA HAS PROPERLY WITHHELD DOCUMENTS PROTECTED UNDER THE DELIBERATE PROCESS PRIVILEGE PURSUANT EXEMPTION 5

Plaintiffs raise few substantive challenges to the Government's invocation of the deliberative process privilege. *See* Pl. Br. at 34-36. Rather, Plaintiffs primarily confine their challenges to the adequacy of the Government's descriptions of these documents in its *Vaughn* index and supporting declarations. *See id.* In making this argument, Plaintiffs appear to disregard entirely the numerous supporting declarations that were submitted in support of the CIA's motion for summary judgment. These documents, together with the CIA's *Vaughn* index, provide the Court with the relevant information regarding the contents of the documents themselves and the context in which they were prepared.

In general, Plaintiffs complain that, in support of its assertion of the deliberative process privilege, the CIA "repeatedly resorts to generalized and boilerplate language in support of the exemption." *Id.* at 34. It should be unsurprising, however, given the classified nature of the documents at issue, that the Government is unable to provide extensive details regarding the specific nature of the policy issues under consideration on the public record. Moreover, such information is unnecessary where, as here, the Government provides sufficiently particularized information to satisfy its burden of establishing that the documents are both predecisional and deliberative in nature. As one court has observed, under the case law, the "agency need not pinpoint a particular final decision," and, thus, where "the CIA is concerned that any further

information about the decisions would threaten national security," descriptions were adequate where they "usually just s[aid] that the materials were used 'in arriving at a decision.'" *Greenberg v. U.S. Dep't of Treas.*, 10 F. Supp. 2d 3, 16 n.18 (D.D.C. 1998) (description of record as "contain[ing] a series of questions and issues which were to be addressed by Agency policy makers in arriving at a decision" sufficient to establish deliberative process privilege applied). Nevertheless, to the extent that the Court finds that additional information would confirm that the withheld records fall within the scope of the deliberative process privilege, the CIA's *ex parte*, classified declaration provides additional details regarding the deliberative nature of the records at issue, including the policy decisions that were at issue.

Plaintiffs do raise two substantive challenges to the CIA's invocation of the deliberative process privilege. First, Plaintiffs allege that "numerous withheld records fail the intra- or inter-agency requirement." Pl. Br. at 34. In making this argument, Plaintiffs misrepresent the record evidence. Plaintiffs claim, for example, that the CIA improperly withheld letters sent to and from Congress on deliberative process grounds. *Id.* (citing Documents 96 and 79). Yet the CIA's *Vaughn* index clearly states that neither letter was withheld under Exemption 5; both letters were withheld under Exemptions 1 and 3. The CIA invoked the deliberative process privilege only to protect a one-page "talking points" memorandum attached to a letter that was "prepared in advance of a briefing," Hilton Decl., Ex. A (Document 96), and "handwritten notes on portions of [the other letter] commenting on its text," *id.* (Document 79).

Second, Plaintiffs take issue with respect to the CIA's specific withholding of draft documents, disputing that draft documents are "per se exempt" under the deliberative process privilege. Pl. Br. at 36-37. The CIA has never claimed that all drafts are automatically entitled

to protection, regardless of the nature of the document. Yet courts have almost uniformly held that drafts will "typically" qualify for protection under the privilege. *MacNamara v. City of New York*, 249 F.R.D. 70, 78 (S.D.N.Y. 2008); *see also National Council of La Raza v. Dep't of Justice*, 339 F. Supp. 2d 572, 583 (S.D.N.Y. 2004) ("Drafts and comments on documents are quintessentially predecisional and deliberative."); *Hornbostel v. U.S. Dep't of Interior*, 305 F. Supp. 2d 21, 31 (D.D.C. 2003) (holding drafts that "contain the opinions and suggested changes of federal officials" protected under Exemption 5), *aff'd*, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); *Hamilton Sec. Group, Inc. v. HUD*, 106 F. Supp. 2d 23, 31-32 (D.D.C. 2000) ("[A] draft document is the type of subjective document that reflects the personal opinion of the writer rather than the policy of the agency."); *Cleary, Gottlieb, Steen & Hamilton v. HHS*, 844 F. Supp. 770, 782 (D.D.C. 1993) ("[T]he disclosure of such draft documents would undercut the openness of decision-making embodied by Exemption 5."); *Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983) ("Draft documents . . . are typically predecisional and deliberative [because] they 'reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.'" (citation omitted)); *see also* Mov. Br. at 41 (citing additional cases).

In any event, the declarations submitted by the CIA provide exactly the type of linkage between the drafts at issue and policy formation that was found sufficient to support a withholding on deliberative process grounds in *Arthur Anderson & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982) (holding that IRS properly withheld draft of a proposed revenue ruling, where affidavit demonstrated connection between drafting process and the process of developing a final revenue ruling). Indeed, the declarations submitted by OLC, the State Department, DOD, and the CIA

provide considerable detail as to the role that drafts played in policy formation. *See, e.g.*, Barron Decl. at ¶¶ 12-13; Grafeld Decl. at ¶¶ 12-15, 19; Hecker Decl. at ¶ 3, 9; Hilton Decl., Ex. A.

Thus, the CIA's detailed descriptions of both the withheld records (whether drafts or otherwise) and the purpose for which they were prepared, are a far cry from a "boilerplate" recitation of statutory language. Rather, the Government's declarations establish that these documents were "prepared to assist [agency] decisionmaking on a specific issue." *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002). Accordingly, such documents are not "merely peripheral to actual policy formation" but instead "bear on the formulation or exercise of policy-oriented judgment." *Id.* at 80; *see also Grand Centr. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (document is protected if it is "related to the process by which policies are formulated").

III. THE CIA HAS PROPERLY WITHHELD INFORMATION PROTECTED UNDER THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE

Plaintiffs primarily confine their challenge to the Government's invocation of the presidential communications privilege to the adequacy of the descriptions in the *Vaughn* index and declarations. *See* Pl. Br. at 42-43. Both the Hilton Declaration and the Hackett Declaration explain, however, that the records withheld on the basis of this privilege were either authored by or memorialize communications solicited and received by senior presidential advisers. Many of the these documents describe or were prepared in anticipation of meetings of the Principals' and Deputies' Committee meetings of the National Security Council ("NSC"), and the particular senior presidential advisers who participated in such meetings are identified in the Hackett Declaration.

See Hilton Decl. at ¶ 193 (describing Documents 98 and 100); Hackett Decl. at ¶ 15-18, 28-29 (describing NSC meetings and Documents 62, 103-104, 107-111, 130, and 243).[13]

As for the merits of the Government's invocation of the presidential communications privilege, Plaintiffs in a footnote challenge the Government's ability to invoke the privilege over records memorializing communications that were solicited and received by senior presidential advisers. Pl. Br. at 43 n.82. As they acknowledge, however, *see id.*, the only authority on this particular issue supports the Government's position. *See CREW v. DHS*, Civ. No. 06-0173, 2008 WL 2872183, at *8 (D.D.C. July 22, 2008). For these reasons, Plaintiffs' challenges to the Government's invocation of the presidential communications privilege are unavailing.

IV. THE CIA HAS PROPERLY WITHHELD CONFIDENTIAL WITNESS STATEMENTS PURSUANT TO EXEMPTIONS 5 AND 7(D)

The CIA has properly protected statements provided by witnesses to the OIG under promises of confidentiality, pursuant to Exemption 7(D) as "information furnished by a confidential source," as well as pursuant to the common law privilege for OIG witnesses, first recognized by the D.C. Circuit in *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963). *See* Mov. Br. at 47-48, 52-54. Plaintiffs' challenges are meritless.

A. Exemption 7(D)

Plaintiffs contend that 7(D) does not protect OIG witness statements because they are purportedly not sufficiently confidential, notwithstanding the fact that the statements here were made in the course of OIG investigations and pursuant to regulations that "require the OIG to maintain the confidentiality of the information," Hilton Decl. at ¶ 213, because the OIG can

[13] While the Hilton and Hackett Declarations are sufficient to support invocation of the privilege, the Government is providing additional detail regarding the particular presidential advisers whose communications are memorialized in Documents 17, 24, 29, 32. *See* Supp. Hilton Decl., Ex. C.

disclose the statements when "the disclosure is made to the Department of Justice for the purpose of deciding whether a criminal prosecution should be undertaken." Hilton Decl. at ¶ 213; Pl. Br. at 44, 47. This suggestion runs contrary to Supreme Court precedent, which holds that statements are "confidential," even if they are subject to disclosure for law enforcement purposes. *DOJ v. Landano*, 508 U.S. 165, 172-74 (1993); *see also* Mov. Br. at 53 (citing cases). As the Supreme Court explained, "an exemption so limited that it covered only sources who reasonably could expect total anonymity would be, as a practical matter, no exemption at all." *Id.* at 174.

B. The *Machin* Privilege

The same statements are also protected by the federal common law privilege recognized in *Machin*. *See* Mov. Br. at 47-48. In challenging the CIA's invocation of this privilege, Plaintiffs reiterate their assertion that the OIG's rules do not provide a sufficient promise of confidentiality. But just as that claim has been rejected in the context of Exemption 7(D), so too has it been rejected in applying the *Machin* prvilege. As one court has explained, while it "is doubtful that [a] limited qualification . . . acts as a major barrier to candid and full testimony by witnesses," "common sense dictates that a warning to witnesses that their testimony will be generally disclosable under the FOIA would discourage candor and would severely limit the effectiveness of Inspector General investigations." *AFGE v. Army*, 441 F. Supp. 1308, 1314 (D.D.C. 1977).

Plaintiffs' claim that the *Machin* privilege only applies to military air crash investigations, Pl. Br. at 44 & n.83, fares no better, as the privilege has not been so narrowly construed, *see, e.g.*, *Ahearn v. U.S. Army Materials & Mechs. Res. Ctr.*, 583 F. Supp. 1123 (D. Mass. 1984), (applying privilege to Army OIG investigation); *AFGE*, 441 F. Supp. at 1313 (same). Indeed, while it is true that *Machin* involved an air crash investigation, the *Machin* court identified the privilege

much more broadly as one protecting all "investigative reports obtained in large part through promises of confidentiality," where disclosure would undermine OIG investigations and thus "hamper the efficient operation of an important Government program . . . [relating to] the national security." 316 F.2d at 339. The witness statements provided to the CIA OIG fit squarely within that definition.[14] *See* Mov. Br. at 47-48.

Finally, Plaintiffs mistakenly argue that, because the OIG has authority to compel testimony via subpoena, the *Machin* protection is unnecessary. Pl. Br. at 45. Yet, compelled testimony is not the equivalent of frank and open testimony, as courts have recognized. *AFGE v. Dep't of the Army* is instructive. There, as here, the witnesses whose statements were being sought could have been required to cooperate in the investigation and, to that extent, "promises of confidentiality were not necessary for securing the[ir] testimony." 441 F. Supp. at 1313-14 & n.21. Nevertheless, the court upheld the *Machin* privilege, noting both that the purpose of the privilege is to facilitate "full testimony from witnesses," and that any discloure would lessen "the degree to which persons w[ould] cooperate by volunteering their unsolicited testimony and by testifying fully." *Id.* at 1313-14. Here, accepting Plaintiffs' arguments would likewise undermine OIG's ability to do its job, Hilton Decl. at ¶¶188-89.

V. THE CIA HAS PROPERLY WITHHELD OPEN OIG INVESTIGATION FILES PURSUANT TO EXEMPTION 7(A)

The CIA has properly withheld records relating to open OIG investigations pursuant to Exemption 7(A). In arguing that the CIA's description of these records is "far too generalized" to demonstrate that the records were compiled for law enforcement purposes, Pl. Br. at 45-46 & n.87,

[14] By contrast, the cases cited by Plaintiffs did not relate to national security matters. *See, e.g., Nickerson v. United States*, 95 C 7395, 1996 WL 563465 (N.D. Ill. Oct. 1, 1996) (hospital report), *cited at* Pl. Br. at 44 n.83; *Kilroy v. NLRB*, 633 F. Supp. 136 (S.D. Ohio 1985) (labor complaints), *cited at* Pl. Br. at 44 n.83.

Plaintiffs simply ignore the CIA's attestation that "*each* of the open OIG investigations was focused upon specific allegations of potentially unlawful activity, for the purpose of determining if there had been a violation of criminal law." Hilton Decl. at ¶ 202 (emphasis added). It is beyond cavil that such records are "complied for law enforcement purposes." *Perlman v. DOJ*, 312 F.3d 100, 105 (2d Cir. 2002) (record compiled for DOJ OIG investigation into possible violation of law considered "compiled for law enforcement purpose"), *reaffirmed after remand*, 380 F.3d 110 (2d Cir. 2004) (per curiam). Indeed, the CIA's attestation meets the very test Plaintiffs have demanded for demonstrating a "law enforcement purpose." *See* Pl. Br. at 45-46 & n.87 (insisting CIA distinguish between investigations into criminal law versus employee regulations); Pl. Br. at 46 (citing *Pratt v. Webster*, 673 F.2d 408, 419 (D.C. Cir. 1982) ("If the purpose of the investigation was . . . an inquiry as to an identifiable possible violation of law, then such inquiry would have been 'for law enforcement purposes.'")).[15]

While Plaintiffs do not dispute that Exemption 7(A) permits the categorical withholding of investigatory records, they complain that the categories of withheld records identified by the CIA are not "sufficiently functional," and that it is therefore unclear how the release of each type of document identified by the CIA would "interfere with enforcement proceedings." Pl. Br. at 46-47. Precedent supports the CIA's categorization.

In *Local 32B-32J, SEIU, AFL-CIO v. GSA*, for instance, the GSA described its OIG investigative file as consisting of the categories of "notes prepared by agents, memoranda summarizing witness interviews and other investigative activities, documents prepared by other sources (either voluntarily or through compulsion by legal process), and other materials." *Local*

[15] Plaintiffs' identical challenge to the CIA's assertion of Exemption 7(D) must fail as well. *See* Pl. Br. at 47.

32B-32J, SEIU, AFL-CIO v. GSA, No. 97 Civ. 8509 (LMM), 1998 WL 726000, at *8 (S.D.N.Y. Oct. 15, 1998). In that case, the GSA explained that the release of any of these categories would have interfered with enforcement proceedings by identifying individuals who OIG had interviewed, which "would have provided clues about the nature and scope of the investigation," as well as by providing targets of the investigation "with a roadmap through the OIG's case, thereby affording critical insights into the investigators' thinking and strategy." *Id.* at *9. The *Local 32B-32J* court held that the GSA's categories and descriptions were sufficient to demonstrate that "its assertion of Exemption 7(A) was proper." *Id.*

Here, the CIA has described its OIG investigative file as consisting of virtually the same categories described in *Local 32B-32J*. And, as in *Local 32B-32J*, the CIA described the ways in which the release of these categories of records would harm the ongoing OIG investigations. *See id.* Accordingly, the CIA has adequately tied the release of categories of withheld records to interference with its open OIG investigations. *See Local 32B-32J*, 1998 WL 726000, at *8-*9; *see also Spannaus v. DOJ*, 813 F.2d 1285, 1287 (4th Cir. 1987) (describing categories of "interviews with witnesses and subjects; investigative reports furnished to the prosecuting attorneys; contacts with prosecuting attorneys regarding allegations, subsequent progress of the investigations, and prosecutive opinions; and, other sundry items of information"); *Cucci v. DEA*, 871 F. Supp. 508, 511-12 (D.D.C. 1994) (describing categories of instructions, routine reporting communications and inter-agency correspondence, witness statements, physical evidence).

Moreover, Plaintiffs fail to controvert the CIA's conclusion that, by reviewing and processing the open OIG records, CIA would, *inter alia*, "[r]eveal[] the nature, scope, and targets of the open OIG investigations to non-OIG personnel at the CIA," which "would be reasonably

likely to harm the OIG's pending law enforcement investigations." Hilton Decl. at ¶ 205; *see also* Pl. Br. at 46-47.[16] The CIA's assertion of Exemption 7(A) is thus entirely appropriate because processing and disclosing the open OIG records would harm the OIG's investigations.

VI. THE CIA HAS PROPERLY WITHHELD PERSONAL IDENTIFYING INFORMATION PURSUANT TO EXEMPTIONS 6 AND 7(C)

Plaintiffs baldly assert that the Government has provided "almost no information to allow for the balancing" required under Exemptions 6 and 7(C). Pl. Br. at 48. Yet, the Government has submitted declarations from seven declarants providing such justifications. *See* Hilton Decl. at ¶¶ 196-99, 207-10; Hogan Decl. at ¶ 3; McGuire Decl. at ¶¶ 8-11; Herrington Decl. at ¶¶ 7-10; Hecker Decl. at ¶¶ 17-20; Barron Decl. at ¶ 14; Stearns Decl. at ¶¶ 18-22; Mov. Br. at 54 (summarizing redactions). Plaintiffs simply ignore this record.

In the three isolated instances where Plaintiffs in fact join issue with particular redactions, their arguments are meritless. Their argument on the redacted name of a detainee alleging abuse in Document 249, *see* Pl. Br. at 48 n.93, is foreclosed by *Associated Press v. DOD*, 554 F.3d 274 (2d Cir. 2009), which rejected the same argument. Plaintiffs likewise fail to articulate why, contrary to past precedents, the names of lower-level military personnel should be released in the investigative report at Document 247. *Compare* Pl. Br. at 49 n.96 (citing no cases) *with* Mov. Br. at 54-56 (citing precedents). They should not. Herrington Decl. at ¶¶ 9-10; Hogan Decl. at ¶¶ 2-3 & Exs. A-D. As for Document 45, Plaintiffs' challenge to the CIA's redaction of the "names

[16] Try as they might, Plaintiffs cannot distinguish this Court's August 29, 2008, decision granting John Durham's stay application because the CIA's search for and processing of certain categories of records would have interfered with Mr. Durham's criminal investigation. Contrary to Plaintiffs' assertions, Mr. Durham had submitted only a public declaration at the time of the Court's decision. Pl. Br. at 47 n.91. Moreover, the fact that he was "appointed by the Attorney General to conduct a relatively discrete, narrowly defined criminal investigation" is irrelevant to the Court's reasoning that the processing and release of records would have interfered with his investigation. *Id.*

of various individuals copied on February 2005 emails," Pl. Br. at 49 n.98, is entirely unavailing because those names are properly redacted under the CIA Act, pursuant to Exemption 3.

VII. THE CIA HAS PROPERLY WITHHELD INFORMATION PURSUANT TO EXEMPTION 2

The CIA properly invoked a "low 2" Exemption to withhold internal administrative information, which is by its very nature trivial and of no conceivable public interest. *See Schiller v. N.L.R.B.*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) ("Predominantly internal documents that deal with trivial administrative matters fall under the 'low 2' exemption.") For each document where CIA has asserted a low 2 Exemption, the CIA has identified, in the individual Vaughn index descriptions, the particular type of information that it has withheld pursuant to that exemption: routing sheets and distribution slips (*see, e.g.*, Documents 3, 26, 58, 102), internal filing and handling information (*see, e.g.*, Documents 41, 52, 163, 257), fax cover sheets, phone numbers, and e-mail addresses (*see, e.g.*, Documents 8, 12, 31), and similar information. The identification of these specific types of information is a far cry from the descriptions found insufficient in *Morley v. CIA*, 508 F. 3d 1108, 1125 (D.C. Cir. 2007), where CIA made only general assertions that it had withheld "CIA internal organizational data" and "internal Agency regulations and practices." *Id.* The withholding of the type of trivial administrative information at issue in these documents is routinely upheld by courts. *See, e.g., The James Madison Project v. CIA*, 607 F.Supp.2d 109, 124-125 (D.D.C. March 2009).[17] Indeed, the D.C. Circuit has held that if material withheld under exemption 2 "relates to trivial administrative matters of no genuine public interest, exemption [is] automatic under the statute." *Founding Church of Scientology of Washington v. Smith*, 721 F.2d 828, 831 (D.C. Cir. 1983).

[17] *Public Citizen, Inc. v. OMB*, 569 F.3d 434, 439 (D.C. Cir. 2009), relied upon by plaintiffs, is inapposite as it deals exclusively with a "high" Exemption 2. CIA has not asserted a "high 2" exemption over any withheld information.

In addition to the internal, administrative information withheld by CIA, DOD has asserted a low 2 exemption over its internal, administrative information in Document 249 to "protect the identification of special agents and their identification numbers." The withholding of such identification numbers is appropriate under a low 2 exemption. *See Bangoura v. Dept of Army*, 607 F. Supp.2d 134, 145-146 (D.D.C. 2009).

Plaintiffs have provided no evidence that this information is not trivial. Although Plaintiffs argue that there is "evident public interest" in knowing which senior officials may have been identified in the cover and routing sheets withheld in Doc. 243, this information has already been disclosed. The Vaughn index entry for Doc. 243 states that the memorandum was "sent to senior Presidential advisors, including the Counsel to the President and Chief of Staff to the President," and describes issues, "to be discussed in an upcoming meeting of the Principals Committee of the National Security Council." *See* Hilton Decl., Ex. A, Doc. 243; *see also* Hacket Decl. at ¶ 17. Plaintiffs fail to identify any public interest in the administrative and organizational information in the cover and routing sheets included in this document.

VIII. THE CIA HAS PROPERLY ACCOUNTED FOR OFFICIAL ACKNOWLEDGMENTS AND RELEASED ALL REASONABLY SEGREGABLE NON-EXEMPT INFORMATION

Despite the CIA's unprecedented declassifications and disclosures in this case, its voluntary agreement to reprocess the records before this Court in light of those disclosures, and its diligence in releasing appropriate information within those records and articulating rationales for the remaining withholdings, Plaintiffs complain that the CIA has failed to "release officially acknowledged information" and that its "reprocessing . . . failed to yield disclosure of all

reasonably segregable information." Pl. Br. at 26; *see also id.* at 9-16, 56-60. These arguments mischaracterize the record before the Court and ignore controlling and apposite precedents.

As an initial matter, Plaintiffs have not met their burden of establishing that any withheld information has been officially acknowledged by the CIA. *See* Pl. Br. at 9-16, 25-26. As the Second Circuit held in *Wilson*, "[a] strict test applies," and information "is only deemed to have been officially disclosed if it (1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure." *Wilson*, 586 F.3d at 186-87 (quotation marks and brackets omitted). Plaintiffs nowhere articulate how they could meet this standard and offer no evidence that officially acknowledged information has been withheld. *See* Hilton Decl. at ¶ 165 ("[t]he CIA released all . . . segregable information . . . that has been officially disclosed").

Their contention, instead, that CIA's disclosures "have waived" national security protections because the "subjects" of the withheld records are the same as the "subjects" of disclosed records, *see* Pl. Br. at 25-26, is wholly without merit. *See Wilson*, 586 F.3d at 187. As the Second Circuit held in *Wilner*, an agency may properly withhold information "gathered under a program whose existence has been publicly revealed." *Wilner*, 2009 WL 5158035, at *5. Thus, in similar cases, courts have rejected the argument that CIA disclosures regarding the TDI effected a wholesale waiver of FOIA protections. *See, e.g.*, *ACLU-DC*, 2009 WL 3326114, at *3-*6.

Indeed, the CIA's disclosures in this case, coupled with its efforts to reprocess hundreds of documents, and to make line-by-line releases and redactions within records in light of relevant disclosures, powerfully illustrate that the CIA took account of official acknowledgments in processing the documents at issue, as Ms. Hilton has affirmed. *See* Hilton Decl. at ¶¶ 20-23,

62-63, 150-166. The reasoning applied in the *ACLU-DC* case, in which the CIA voluntarily reprocessed records relating to the TDI following the same declassifications and releases cited by Plaintiffs, applies equally here: "Because defendants reprocessed Plaintiffs' requests and released new versions of many of the requested documents, the Court can 'see no reason to question [defendants'] good faith in withholding the remaining [information] on national security grounds.'" *ACLU-DC*, 2009 WL 3326114, at *4 (quoting *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 835 (D.C. Cir. 2001)). Contrary to Plaintiffs' speculation, the CIA's actions therefore "indicate diligent respect . . . to Executive Order 12,958 and bolster [its] position that it has withheld only that information which it must under the applicable exemptions." *Whalen v. U.S. Marine Corps*, 407 F. Supp. 2d 54, 57 (D.D.C. 2005). Plaintiffs' unfounded challenges to the bona fides of the CIA's reprocessing of records in light of official acknowledgments thus fly in the face of reality.

Nor is there any merit to Plaintiffs' challenges to the reasonableness of the CIA's efforts to segregate and release nonexempt information. *See* Hilton Decl. at ¶ 62 (explaining that review resulted in segregation and release of new material within 35 records). Plaintiffs' first argument – that CIA "opined on a mere subset of the records at issue," Pl. Br. at 57 – simply misstates the record. On this point, Plaintiffs contend that the CIA should have provided an attestation "that official acknowledgments were taken into account for segregability purposes" for all of the records listed on the *Vaughn* index. Pl. Br. at 57. Yet that is precisely what Ms. Hilton has done, explaining, *inter alia*, that "[t]he CIA released all reasonably segregable information from the records described on the *Vaughn* index, including segregable information regarding the Program

that has been officially disclosed or otherwise declassified at the time these records were processed." Hilton Decl. at ¶ 165; *see id.* at ¶ 215.

Contrary to Plaintiffs' second and related segregability argument, the detailed declaration provided by the CIA, and its repeated efforts to process and release information in this case, are entirely sufficient to meet its obligations under FOIA. *See* Pl. Br. at 57-58. As noted, Ms. Hilton's declaration provides exactly that attestation which Plaintiffs argue would be appropriate. *Compare* Pl. Br. at 57 *with* Hilton Decl. at ¶ 165. Moreover, Ms. Hilton does so in the context of a 117-page declaration, with repeated descriptions of the CIA's deliberate segregation efforts in light of official acknowledgments, and the concrete fruits of those efforts in the form of 52 records with newly segregated and released material. Hilton Decl. at ¶¶ 20-23, 62-63, 88, 150-66; Supp. Hilton Decl. at ¶¶ 6-7. These extensive explanations – including document by document segregability descriptions and attestations – are far from "conclusory" as Plaintiffs assert.

Plaintiffs illustrate how weak their arguments are when they finally focus on specifics – in particular, their arguments that segregability determinations in Document 30 and in classified cables "cannot be squared with the public record." Pl. Br. at 58. As for Document 30, Plaintiffs insist that it must have segregable information because it is a draft of a released OLC memorandum. *See* Pl. Br. at 58. Yet, as a general matter, the Second Circuit has permitted agencies to withhold drafts, including facts within drafts, recognizing that "stripping [drafts] down to their bare bone facts" may render them "too illuminating of the agency's deliberative process." *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988); *see also Mapother v. DOJ*, 3 F.3d 1533, 1538 (D.C. Cir. 1993); *Nat'l Wildlife Fed. v. United States Forest Serv.*, 861 F.2d 1114, 1118 (9th Cir. 1988); *Dudman Commc'ns Corp. v. Dep't of the Air Force*,

815 F.2d 1565, 1569 (D.C. Cir. 1987); *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048-49 (D.C. Cir. 1982); *Montrose Chem. Corp. of California v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974).

Here, the CIA properly withheld the factual material within a variety of draft documents because, as explained in by Ms. Hilton, "[t]he particular facts contained in these drafts . . . were identified, extracted, and highlighted out of other potentially relevant facts and background materials by the authors, in their exercise of their judgment," such that "the disclosure of the facts that were selected for inclusion in drafts . . . would themselves tend to reveal the author's and the agency's deliberative process." Hilton Decl. at ¶ 185. Moreover, with respect to Document 30 specifically, it is a draft legal memorandum, in which the selection of pertinent facts reflects a key component of legal analysis and deliberation. *Cf. Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (noting that a lawyer's role is to "sift what he considers to be the relevant from the irrelevant facts"). The Acting Assistant Attorney General for OLC accordingly attested that *no portion* of Document 30 (including its facts) could be released without causing the very harm that Exemption 5 is meant to prevent in this instance, *i.e.*, deterring "Executive Branch attorneys [from] examin[ing] legal arguments and theories candidly, effectively, and in writing." Barron Decl. at ¶¶ 13, 15. Plaintiffs simply ignore this record, and their challenge to Document 30 lacks merit.

Similarly, Plaintiffs' document-specific challenge to the entire class of CIA classified operational cables, which Plaintiffs contend cannot be withheld in their entirety, is unavailing. Pl. Br. at 59-60. Plaintiffs' argument proceeds on two erroneous premises: first, that, as a matter of law, FOIA imposes an obligation to segregate meaningless words and phrases and, second, that, as a matter of fact, the cables could be so segregated here. As for the first premise, in suggesting that the CIA must segregate and release meaningless words and phrases, Pl. Br. at 59, Plaintiffs

misread applicable precedents. The law is clear that the reasonable segregation requirement of FOIA does not require the CIA "to commit significant time and resources to a task that would yield a product with little, if any, informational value." *Assassination Archives & Research Ctr. v. CIA*, 177 F. Supp. 2d 1, 9 (D.D.C. 2001), *aff'd in relevant part*, 334 F.3d 55, 58 n.3 (D.C. Cir. 2003); *see also Doherty v. DOJ*, 775 F.2d 49, 53 (2d Cir. 1985) ("The fact that there may be some nonexempt matter in documents which are predominately exempt does not require . . . the burdensome task of analyzing approximately 300 pages of documents, line-by-line."); *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979) (Friendly, J.) ("if the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing of this by the courts would impose an inordinate burden, the material . . . is not 'reasonably segregable'"); *Nat'l Sec. Archives Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 221 (D.D.C. 2005) ("Taken in its entirety, [the CIA] declaration provides sufficient detail of the nature of the classified and other exempt information contained in the document for the Court to conclude that those isolated words or phrase that might not be redacted for release would be meaningless.").

Plaintiffs' cited authorities, Pl. Br. at 59-60, do not contradict this principle, but merely restate the familiar FOIA principle that the identity of the requester is irrelevant to segregability. In other words, while there is no duty to segregate meaningless material, an agency cannot avoid segregating meaningful information by claiming that the information would be of no interest to a particular requester. That is not what the CIA is doing here; thus, Plaintiffs' premise is wrong.

Their factual premise – that information from the cables at issue could be segregated – is likewise erroneous. Here, segregation of the contents of the CIA's withheld cables would be inappropriate not only because attempts to delete sensitive source and methods information would

leave meaningless words and phrases, but also because release of any words or phrases from the cables could endanger sources and methods and harm national security, as the Director of the CIA has attested. *See* Second Panetta Decl. at ¶ 4 ("the release of any portion of the operational records at issue would, among other things, cause exceptionally grave damage"). The Director has explained that "the CIA rarely releases operational documents, particular operational cables" and "when such releases do occur, they rarely occur close in time to the operations in question." *Id.* ¶ 7. "Thus, the release, even in redacted form [of such cables] . . . would lead our allies, liaison partners and potential human sources to perceive that the CIA is unable to keep secret even its most sensitive records regarding its clandestine operations," which "would do lasting damage to the CIA's ability to gather intelligence or conduct clandestine operations." *Id.*

Plaintiffs' reference to the *ACLU-SDNY* litigation, as an illustration of the purported need to segregate the cable contents, is misleading. While it is true that, in selected instances in the contempt proceedings in that case, the CIA released certain words and phrases in select cables, Plaintiffs have failed to cite the court's most recent holding in that case, in which Judge Hellerstein upheld the CIA Director's determination that information within operational cables, like those at issue here, need not be segregated, as a matter of law. There, the cables at issue were "from [the] CIA field to the CIA headquarters," *ACLU-SDNY* Tr. at 17, and the CIA relied upon the same declarations from Director Panetta submitted here to withhold the cables in full, *see ACLU-SDNY*, Transcript of Classified Hearing dated September 30, 2009 ("Class. Tr."), attached as Exhibit B to Second Vargas Decl., at 30. There, as here, the CIA explained that release of any portions of the cables would harm national security because, *inter alia*, "even if it is in highly redacted form . . . it raises the specter that the CIA is going to be releasing more of the same kind of information,"

Class. Tr. at 36; *see also* Second Panetta Decl. at ¶ 7, and Judge Hellerstein properly ruled that the cables were thus not reasonably segregable.[18] Thus, while the *ACLU-SDNY* case demonstrates that CIA retains the discretion, based upon its national security expertise, to declassify and release isolated words and phrases within particular cables, FOIA does not require that it do so.

IX. THE CIA HAS CONDUCTED AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS

A. The CCR Request and First and Second Amnesty Requests

The CIA carried out a search "reasonably designed to identify and locate responsive documents," *Garcia v. DOJ, Office of Info.& Privacy*, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002), by searching the DIR area and identifying more than 9,000 records in response to Plaintiffs' request. Plaintiffs do not challenge the adequacy of the CIA's DIR area search, but argue that CIA had to search outside the DIR area based on two flawed arguments. Pl. Br. at 52-53.

First, Plaintiffs contend that the CIA improperly read their requests "as pertaining solely to policy and legal analyses," instead of "a much broader set of records," including "the imprisonment and treatment of unregisered detainees." Pl. Br. at 51-52 & n.101. The CIA, however, did not read their requests so narrowly, and, indeed, the responsive records contain thousands of records that are unrelated to policy and legal analyses, including operational cables. *See* First Stipulation ¶8. The CIA does not dispute that the majority of the requested records are in the CIA's operational files. Yet, in light of the statutory exemption of such files from search, the parties had stipulated that the only operational records that would be searched would be "those records [] found in other non-exempt files, for instance, OIG investigation files." Hilton Decl. at ¶ 35; *see also* First Stipulation at ¶ 4. Accordingly, the CIA's search was necessarily targeted at

[18] The district court in the *ACLU-DC* litigation recently reached a similar conclusion. *See ACLU-DC*, 2009 WL 3326114 at *16.

those non-operational files most likely to contain such records; and the CIA reasonably concluded that responsive records would be found in the DIR area, for the reasons Ms. Hilton has explained. *See* Hilton Decl. at ¶ 37.

Second, Plaintiffs argue that the CIA's search was unreasonable in light of (i) two records (out of the thousands identified in the CIA's search), which the CIA found at the Directorate of Intelligence ("DI") while processing a later request by the former Vice President, and which the CIA stipulated to release in this case, *see* Pl. Br. at 53 & n.103; Second Stipulation at ¶ 4; and (ii) purported references to the Office of Medical Services ("OMS") and the Office of Technical Services ("OTS") in an OIG report that is outside the scope out of this case, *see* Pl. Br. at 53 & n.104 (citing OIG report litigated in *ACLU-SDNY*); First Stipulation at ¶ 1 (scoping out records litigated in *ACLU-SDNY*).

The Second Circuit has recognized, however, that "an agency's search need not be perfect." *Grand Cent. P'Ship v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999). The pertinent question, rather, is "whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." *Id.* As to that question, the CIA's incorporation and release of the two DI records only "suggest[s] a stronger, rather a weaker, basis, for accepting the integrity of the search," *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986) (internal quotation marks omitted).

Indeed, contrary to Plaintiffs' suggestion, the two newly discovered records and the newly discovered references do not require the CIA to reopen its search.[19] "[A]n agency need only pursue leads that raise red flags pointing to the probable existence of responsive agency records

[19] To the extent the CIA identifies additional responsive documents in other FOIA cases, it will add them to the universe of responsive documents subject to the Court's rulings in this case. *See* Second Hilton Decl. at ¶¶ 11-12.

that arise *during* its efforts to respond to a FOIA request." *Wiesner v. FBI*, __ F. Supp. 2d __, Civil Action No. 07-1599(RBW), 2009 WL 3768024, at * 5 (D.D.C. Nov. 12, 2009) (emphasis added); *cf. Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) (noting plaintiff "does not point to evidence . . . at the time the Department searched its files"). The cases Plaintiffs cite to illustrate nothing more. *See Valencia-Lucena v. U.S. Coast Guard*, 180 F. 3d 321, 327 (D.C. Cir. 1999) (agency disregarded records center determined in the course of its search to be "a likely place where the requested documents might be located"); *Friends of Blackwater v. DOI*, 391 F. Supp. 2d 115, 120 (D.D.C. 2005) (agency disregarded leads apparent in documents located in search).[20] By contrast, "an agency's hesitancy to pursue potential leads *after* its search has been completed . . . does not lead to the conclusion that the agency's search was inaccurate." *Wiesner*, 2009 WL 3768024, at *5 (emphasis added). Accordingly, the later-discovered records Plaintiffs identify do not, retroactively, render the CIA's search unreasonable. *Cf. Judicial Watch, Inc. v. DOD*, Civil Action 05-00390(HHK), 2006 WL 1793297, at *3 n.2 (D.D.C. June 28, 2006) (release of record in later request did "not undermine the court's conclusion that DOD's search was adequate").

B. Categories 2, 7, and 8 of the Specific FOIA Request

Disappointed that the specific records Plaintiffs sought in Categories 2, 7, and 8 do not exist, Plaintiffs now belatedly attempt to re-write those requests. Notwithstanding Plaintiffs' unambiguous Category 2 request for "[t]he list of 'erroneous renditions' compiled by the CIA's OIG," Plaintiffs assert that CIA should have understood their request to be, not for "the list," but rather "for information responsive to the underlying request." Pl. Br. at 53-55. Similarly,

[20] Although Plaintiffs also quote *Prison Legal News v. Lappin*, 603 F. Supp. 2d 124, 126 (D.D.C. 2009), that decision focused solely on the sufficiency of the agency's affidavit.

Plaintiffs contend the CIA should treat their specific Category 7 and 8 requests for cables concerning the "use of the 'attention shake'" on particular detainees (an obvious attempt to figure out whether such a technique existed) as if it were a request instead for cables concerning the use of the "attention grasp." *Id.* at 54. Plaintiffs' attempt to cast the CIA's decision to search for the very documents that Plaintiffs requested as a failure "to interpret Plaintiffs' request liberally" defies logic, and amounts to a new request. As this Court has held, "'it would be untenable to hold that, as litigation proceeds, a plaintiff, by continually adding new requests . . . could command a priority based on the date of the initial requests.'" *Amnesty Int'l USA v. CIA*, No. 07 Civ. 5435(LAP), 2008 WL 2519908, at *13 (S.D.N.Y. June 19, 2008) (internal quotation omitted).

It is well settled that "[t]he agency's obligation to search is limited to the four corners of the request." *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 64 (D.D.C. 2003); *see also Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996); *Amnesty*, 2008 WL 2519908, at *12; *Nurse v. Sec'y of the Air Force*, 231 F. Supp. 2d 323, 330 (D.D.C. 2002) (agency "not required to exercise 'clairvoyant capabilities' to determine the nature of the plaintiff[s'] request"). It was thus reasonable for CIA to search only for the documents Plaintiffs described in Categories 2, 7, and 8, not a broader or altogether different set of documents. *See Judicial Watch*, 2006 WL 1793297, at *3 n.3; *National Ass'n of Criminal Defense Lawyers v. United States Dep't of Justice*, No. Civ. A. 04-0697(PLF), 2006 WL 666938 (D.D.C. March 15, 2006).

Hemenway v. Hughes, 601 F. Supp 1002 (D.D.C. 1985), upon which Plaintiffs rely, *see* Pl. Br. at 55, is not to the contrary.[21] There, a *pro se* litigant's FOIA request was ambiguous as to

[21] Plaintiffs' citation to two additional cases, *Schladetsch v. HUD*, No. 99-0175, 2000 WL 33372125 (D.D.C. Apr. 4, 2000) and *International Diatomite Producers v. SSA*, No. C-92-1634-CAL, 1993 WL 137286 (N.D. Cal. Apr. 28, 1993), Pl. Br. at 55 n.105, is puzzling, as the FOIA requestors in both of those cases made precisely the type of broad request for records that Plaintiffs failed to make in the instant FOIA request.

whether it sought a particular record or certain information more generally. Here, by contrast, the specific request, served by Plaintiffs during this litigation with the aid of sophisticated counsel, was not at all ambiguous. Rather, it was deliberately crafted to smoke out whether the CIA had "specific documents [Plaintiffs] believed to be in the CIA's possession," First Stipulation at 1, including the list described in detail in their request, and succeeded in revealing that no such list can be found. As this Court has held, where, as here, a requestor makes a strategic decision to narrow the terms of a FOIA request, it cannot later complain that the agency should have read the request more broadly than it was explicitly framed. *Amnesty*, 2008 WL 2519908 at *13.

C. Categories 11 and 12 of the Specific FOIA Request

Plaintiffs' challenge to the adequacy of CIA's search for Categories 11 and 12 likewise fails. Plaintiffs do not criticize the method by which CIA identified and retrieved responsive records, *i.e.*, by a targeted search of electronic cable databases. Instead, without citing a single case, Plaintiffs insist that "common sense" and "simple arithmetic" dictate that additional cables responsive to Category 12 "should exist." Pl. Br. at 55. Their assumptions about the logistics of covert operations are, of course, wholly speculative. Moreover, the number of cables found is irrelevant, as the law is well established that "the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Iturralde*, 315 F.3d at 315; *see also, e.g.*, *James v. U.S. Customs and Border Protection*, 549 F. Supp. 2d 1, 8 (D.D.C. 2008). This challenge therefore fails as well.

CONCLUSION

For the foregoing reasons, the Court should deny the Plaintiffs' motion for partial summary judgment, and grant the CIA's motion for summary judgment.

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Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: /s/ Jeannette A. Vargas
JEANNETTE A. VARGAS
BRIAN M. FELDMAN
EMILY DAUGHTRY
Assistant United States Attorneys
86 Chambers Street, 3rd floor
New York, N.Y. 10007
Tel.: (212) 637-2678/2777/1579