UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS,
Plaintiff,
v.
DEPARTMENT OF DEFENSE AND ITS COMPONENTS DEFENSE INTELLIGENCE AGENCY AND UNITED STATES SOUTHERN COMMAND; DEPARTMENT OF JUSTICE AND ITS COMPONENTS FEDERAL BUREAU OF INVESTIGATION AND EXECUTIVE OFFICE OF UNITED STATES ATTORNEYS; AND CENTRAL INTELLIGENCE AGENCY,
Defendants.

No. 12 Civ. 0135 (NRB)
ECF Case

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF THE GOVERNMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendants the United States Department of Defense ("DoD"), and its components the Defense Intelligence Agency ("DIA") and the United States Southern Command ("SouthCom"); the United States Department of Justice ("DOJ"), and its component the Federal Bureau of Investigation ("FBI"); and the Central Intelligence Agency ("CIA") (collectively, the "Government"), by their attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submit this memorandum opposing Plaintiff's motion for partial summary judgment and in support of their cross-motion for summary judgment in the above-captioned case, which arises under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

In this action, the Center for Constitutional Rights ("CCR" or "Plaintiff") seeks the release of classified images of Mohammed al Qahtani, a detainee held by the United States at Guantanamo Bay, Cuba, taken over a period of several years between 2002 and 2005. These images, which were found by DoD and the FBI after a thorough search of their files, are contained in fifty-six separate videotapes and six individual photographs.

As set forth in detail below, and in the Government's declarations in support of this motion, Plaintiff's requested relief should be denied for multiple reasons. First, the Department of Defense has determined that public disclosure of these images reasonably could be expected to result in serious damage to the national security of the United States. Accordingly, all of these classified records are exempt from disclosure under FOIA Exemption 1. Furthermore, fifty-three of the fifty-six videotapes are part of an active and open law enforcement investigation (the "FBI Videotapes") and are therefore also exempt from disclosure under FOIA Exemption 7(A). In addition, because al Qahtani has a significant and well-established privacy interest in his own images, all of these records are also exempt from disclosure under FOIA Exemption 6, and, in

the case of the FBI Videotapes, FOIA Exemption 7(C). Finally, to the extent any of the responsive records contain images of DoD personnel, those images are specifically exempted from disclosure by statute under Exemption 3, and are also covered by Exemptions 6 and 7(C).

In addition, the Central Intelligence Agency ("CIA") has neither confirmed nor denied the existence of videotapes and/or other audio or visual recordings of al Qahtani; this is known as a *Glomar* response.[1] The mere fact of the existence or non-existence of such records would reveal CIA intelligence methods and is currently and properly classified. Whether or not the CIA in fact has any responsive records is therefore exempt from disclosure under FOIA Exemptions 1 and 3, and the CIA's *Glomar* response is proper.

Accordingly, the Court should deny Plaintiff's motion and grant the Government's cross-motion for summary judgment in its entirety.

FACTUAL BACKGROUND

A. The FOIA Requests

On March 4, 2010, CCR sent FOIA requests to DoD, DIA, SouthCom, DOJ, FBI, and CIA seeking: videotapes of al Qahtani made between February 13, 2002, and November 30, 2005; photographs of al Qahtani made between February 13, 2002, and November 30, 2005; and any other audio or visual records of al Qahtani made between February 13, 2002, and November 30, 2005. *See* Declaration of Rear Admiral David B. Woods, dated June 12, 2012 ("Woods Decl.") ¶ 5; Declaration of Alesia Williams, dated June 4, 2012 ("Williams Decl.") ¶ 5;

[1] The term "*Glomar* response" arises from the CIA's successful defense of its refusal to confirm or deny the existence of records regarding a ship named the *Hughes Glomar Explorer* in *Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976).

Declaration of David M. Hardy, dated June 4, 2012 ("First Hardy Decl.") ¶ 5; Declaration of Elizabeth Anne Culver, dated May 2, 2012 ("Culver Decl.") ¶ 9. [2]

B. Responsive Records Identified and FOIA Exemptions Asserted By DoD and DOJ

Within DoD, the Joint Task Force – Guantanamo ("JTF-GTMO"), the Defense Criminal Investigative Task Force ("CITF"), and DIA all conducted thorough searches for responsive records. Within DOJ, the FBI and the Civil Division also conducted comprehensive searches for responsive records. As a result of these searches, DoD and DOJ collectively identified the following records responsive to CCR's FOIA Requests: 53 FBI videotapes (the "FBI Videotapes"), one videotape containing two segments depicting two separate forced cell extractions (the "FCE Videotape"), two videotapes depicting intelligence debriefings (the "Debriefing Videotapes"), and six photographs. *See* Woods Decl. ¶¶ 9, 11, 12, 14; First Hardy Decl. ¶¶ 28, 29. The FBI Videotapes depict al Qahtani in his cell, as well as his interaction with DoD personnel, at Guantanamo Bay, Cuba, between August 2002 and November 2002. First Hardy Decl. ¶ 29. The FCE Videotape shows two instances, at least one of which is from September 8, 2004, in which a team of DoD personnel began and successfully completed the forcible extraction of al Qahtani from his cell, after he refused to come out of his cell for a random cell search. *See* Woods Decl. ¶ 11; Declaration of Mark H. Herrington, dated July 5, 2012 ("Herrington Decl.") ¶ 5. The Debriefing Videotapes "document intelligence debriefings of Al Qahtani" in July 2002 and April 2004, and are described in greater detail in the classified declaration of Mark Herrington, which was submitted to this Court *ex parte* and *in camera*. *See generally* Declaration of Mark H. Herrington, dated December 20, 2012 ("Classified Herrington Decl."). Four of the photographs are forward facing mug shots of al Qahtani, three from 2002

[2] The Woods, Williams, Culver, and First Hardy Declarations describe the administrative process in detail. The facts of the administrative process are not in dispute.

and one from 2005; two of the photographs are profile photographs of al Qahtani from 2002. *See* Woods Decl. ¶¶ 9, 12; Herrington Decl. ¶ 4.

DoD determined that all of the responsive records, including the FBI Videotapes, the FCE Videotape, the Debriefing Videotapes, and the photographs (collectively, the "Withheld Videotapes and Photographs") are currently and properly classified by DoD, and have been withheld in full pursuant to FOIA exemption 1. *See* Woods Decl. ¶ 29, Declaration of Major General Karl R. Horst, dated December 12, 2012 ("Horst Decl.") ¶ 17; Declaration of William K. Lietzau, dated December 20, 2012 ("Lietzau Decl.") ¶ 4; Classified Herrington Decl. In addition, the FBI determined that the FBI Videotapes, which are located in an active investigative file originating in the FBI's Miami Field Office, are part of a currently open and active law enforcement investigation and therefore also withheld in full pursuant to FOIA Exemption 7(A). *See* First Hardy Decl. ¶¶ 29, 34-37; Declaration of David M. Hardy, dated December 12, 2012 ("Second Hardy Decl.") ¶ 2. The Government also concluded that al Qahtani has a significant and well-established privacy interest in all of the Withheld Videotapes and Photographs, and therefore all of these records have been withheld in full pursuant to FOIA Exemption 6, which protects privacy interests in all records held by the Government, and as to the FBI Videotapes, pursuant to FOIA Exemption 7(C), which protects privacy interest in law enforcement records specifically. *See* Woods Decl. ¶ 33; Lietzau Decl. ¶¶ 9-10. Lastly, the Government determined that, to the extent that any of the Withheld Videotapes and Photographs contain images of DoD personnel, any images of those personnel are exempt from disclosure under FOIA Exemption 3, pursuant to 10 U.S.C. §130b, as well as FOIA Exemption 6 and, in the case of the FBI Videotapes, FOIA Exemption 7(C). *See* Woods Decl. ¶¶ 31-34. A chart listing the Withheld

Videotapes and Photographs, and the exemptions the Government is relying on to withhold them, is set forth in the Addendum to this memorandum.

C. The CIA Response

On March 24, 2010, the CIA issued a *Glomar* response to CCR's FOIA request, explaining that the CIA could neither confirm nor deny whether or not it had any responsive records because the "fact of the existence or nonexistence of requested records is currently and properly classified," as well as specifically exempted from disclosure by statute. Culver Decl. ¶ 10. CCR appealed administratively, and on August 17, 2011, the CIA denied CCR's appeal. *Id.* ¶¶ 11, 13.

D. Procedural Background

On January 9, 2012, CCR filed a complaint, naming as defendants DoD, and its components DIA and SouthCom; DOJ, and its components FBI and EOUSA; and the CIA. EOUSA has been voluntarily dismissed from this case. *See* Docket No. 11. Pursuant to an agreement between the parties, in May and June 2012, the remaining defendant agencies each provided declarations detailing the searches they conducted and identifying the responsive records they found, as well as describing the basis for withholding the responsive records, or, in the case of the CIA, describing the basis for its *Glomar* response.

On July 18, 2012, the Court issued an Order staying summary judgment briefing in this case pending the outcome of a motion filed by al Qahtani in his *habeas* action in the United States District Court for the District of Columbia, seeking a modification of the applicable protective orders governing access to and use of classified information in that case, to permit his counsel to file a classified declaration containing some of that information in this case. *See*

Docket No. 13. The Government opposed al Qahtani's motion, and on August 30, 2012, the court in *Al Qahtani v.Obama*, No. 05 Civ. 1971 (RMC) (D.D.C.), denied al Qahtani's motion.[3]

[3] Despite multiple court orders prohibiting CCR from disclosing the classified information that it has been given access to in al Qahtani's *habeas* proceeding, as well as the recent order denying CCR's motion to modify those protective orders, all of which prohibit CCR from submitting a classified declaration in this case, CCR persists in urging this Court to "consider a sealed submission from Plaintiff's counsel" in this case. Pl. Br. at 14. This request should be denied. As the District of Columbia *Al Qahtani* court noted, "courts owe deference to the Government's national security judgments" and are "unwilling to give any weight to a FOIA requester's personal views regarding the propriety of classification or the national security harm that would result from the release of classified information." *Al Qahtani v. Obama*, 05 Civ 1971 (RMC) (D.D.C. Aug. 30, 2012) (Docket No. 284), Order at 2, Exhibit A to the Declaration of Emily E. Daughtry, dated December 21, 2012 ("Daughtry Decl."). Similarly, the Second Circuit has made clear that "a court must accord substantial weight to the agency's affidavits," and that "an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009).

It would be unprecedented to allow a non-Government attorney to use classified national security information that he or she had obtained for a limited purpose under a protective order in an unrelated *habeas* proceeding in another court in order to submit a declaration in a FOIA case. The two cases cited by plaintiff are inapposite. In *ACLU v. DOD*, 09 Civ. 8071 (BSJ) (S.D.N.Y. Mar. 20, 2012) (Docket No. 106), Daughtry Decl., Exhibit B, the plaintiff was resisting the return of a classified document that that had been inadvertently disclosed to it in the very same FOIA case. In that case, although the ACLU was permitted to oppose DoD's motion for a ruling that the inadvertently disclosed document was properly classified, ACLU was specifically ordered not to cite the classified document or to make any direct comparisons of the document with any other documents. *Id.* at 4. Indeed, the ACLU made every attempt to make its arguments on the public record, and it was over ACLU's objections that the Court allowed DoD to redact portions of its brief and sealed the ACLU's brief indefinitely, after deferring to DoD's judgment as to the proper classification of the document and the harm to national security that could reasonably be expected to occur should the document be released. *Id.* at 5, 17. Meanwhile, in *El Badrawi v. DHS*, 596 F. Supp. 2d. 389 (D. Conn. 2009), plaintiff did not submit a classified declaration, and CCR itself notes that the court denied plaintiff's request for access to the classified material submitted by the Government. See Pl's Br. at 13; *see also ACLU v. DOD*, 09 Civ. 8071 (BSJ) (S.D.N.Y. Jan. 23, 2012)(Docket No. 102)(denying counsel access to classified FOIA declaration), Daughtry Decl., Exhibit C to the Daughtry Decl.. Furthermore, as set forth in detail in the Government's submission in al Qahtani's *habeas* case, CCR's request implicates serious separation of powers concerns because the Government, which owns the classified material and is constitutionally responsible for its protection, has not authorized the proposed disclosure. *See* Respondents' Opposition To Petitioner's Motion For a Limited Modification of Protective Orders, *Al Qahtani v. Obama*, 05 Civ 1971 (RMC) (D.D.C.) (Docket No. 276), Daughtry Decl., Exhibit D.

On October 3, 2012, CCR filed a motion for partial summary judgment with respect to DoD and the FBI, but not with respect to the CIA's *Glomar* response. The Government now opposes that motion, and cross-moves for summary judgment on behalf of all defendants.

ARGUMENT

I. LEGAL STANDARDS FOR SUMMARY JUDGMENT IN FOIA ACTIONS

The Freedom of Information Act, 5 U.S.C. § 552, represents a balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 89-1497, 89th Cong., 2d Sess. 6 (1966)). Thus, while FOIA requires disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the public interest," *CIA v. Sims*, 471 U.S. 159, 166-167 (1985), and mandates that records need not be disclosed if "the documents fall within [the] enumerated exemptions," *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001) (citations omitted). *See also John Doe Agency*, 493 U.S. at 152 (FOIA exemptions are "intended to have meaningful reach and application").

Most FOIA actions are resolved by summary judgment. *See, e.g., Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, "[a]ffidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) (footnote omitted).[4] An agency's

[4] Although not all courts require the government to prove the adequacy of its search, *Carney* states that, at least generally under FOIA, "the defending agency has the burden of showing that its search was adequate. . . ." 19 F. 3d at 812. Here, CCR has not challenged the adequacy of the agencies' searches, such that this question may not be at issue. *See*

declarations in support of its determination are "accorded a presumption of good faith." *Id.* (quotation marks omitted).[5]

With respect to requests for release of classified documents relating to national security matters, the courts recognize "the uniquely executive purview of national security" and "the relative competencies of the executive and judiciary," and, accordingly, "have consistently deferred to executive affidavits predicting harm to the national security." *Wilner*, 592 F.3d at 76 (quotation marks omitted); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (courts "must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record" (quotation marks omitted)). In other words, while the standard of review for an agency's withholding of documents is *de novo*, the judiciary accords "substantial weight" to agencies' affidavits regarding national security. *Wilner*, 592 F.3d at 73; *accord Diamond v. FBI*, 707 F.2d 75, 79 (2d Cir. 1983); *Ass'n of Retired R.R. Workers, Inc. v. U.S.R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987) ("de novo review in FOIA cases is not everywhere alike."). Accordingly, in FOIA cases involving matters of national security, "the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate

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Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment, dated October 3, 2012 ("Pl. Br.") at 6-7, 40. At any rate, the agencies have described in detail and demonstrated the thoroughness and adequacy of their respective searches. *See* Woods Decl. ¶¶ 8-13, Herrington Decl. ¶¶ 7-10, Williams Decl. ¶¶ 8-10, First Hardy Decl. ¶¶ 28-31, Kovakis Decl. ¶¶ 4-10. Because this showing appears uncontested, we do not further address the searches' adequacy in this memorandum, but we reserve the right to do so if CCR belatedly challenges the search.

[5] The Government has not submitted a counterstatement to Plaintiff's Local Rule 56.1 statement, nor its own Local Rule 56.1 statement, as "the general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment" and a Local Rule 56.1 statement "would be meaningless." *Ferguson v. FBI*, No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), *aff 'd*, 83 F.3d 41 (2d Cir. 1996); *NYT v. DOJ*, -- F. Supp. 2d --, 2002 WL 1869396, at *3 (S.D.N.Y. May 17, 2012) (noting Local Civil Rule 56.1 statement not required in FOIA actions in this Circuit).

the principle of affording substantial weight to the expert opinion of the agency." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980).

For these reasons, in deferring to executive affidavits concerning national security matters, courts "have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003); *accord Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (reaffirming "deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security"); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990). Indeed, absent evidence of bad faith, where a court has enough information to understand why an agency classified information, it should not second-guess the agency's facially reasonable decisions. *See Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) ("courts have little expertise in either international diplomacy or counterintelligence operations"). Indeed, the D.C. Circuit has held that this deference is due not only when the Government invokes Exemption 1, but also when the Government invokes Exemption 7(A) where, as here, the records at issue are part of a law enforcement investigation that implicates national security issues. *See Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927-928 ("Just as we have deferred to the executive when it invokes FOIA Exemptions 1 and 3, we owe the same deference under Exemption 7(A) in appropriate cases.").

Ultimately, in the national security context, "an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.'" *Wilner*, 592 F.3d at 73 (quoting *Larson*, 565 F.3d at 862); *accord Wolf*, 473 F.3d at 374-75. In this case, the Government has submitted detailed declarations explaining the basis for the classification and the withholding of the Withheld Videotapes and Photographs, pursuant to Exemptions 1, 7(A), 3, and 6 and 7(C). Additionally, the Government has explained in detail the basis for the CIA's *Glomar* response.

These explanations are not only logical and plausible—which is all they need be in order for the Government to be entitled to summary judgment—but also compelling and persuasive.[6] Accordingly, the Court should deny Plaintiff's motion and award summary judgment for the Government.

II. THE WITHHELD VIDEOTAPES AND PHOTOGRAPHS ARE EXEMPT FROM DISCLOSURE UNDER FOIA EXEMPTION 1

Exemption 1 provides that FOIA's disclosure mandate does not apply to matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). As noted, under Exemption 1, courts owe "special deference . . . to agency affidavits on national security matters," and "[l]ittle proof or explanation is required beyond a plausible assertion that information is properly classified." *Morley v. CIA*, 508 F.3d 1108, 1124, 1126 (D.C. Cir. 2007). Because assessment of harm to national security is entrusted to the Executive Branch rather than courts, "the government's burden is a light one," "searching judicial review" is inappropriate, and "plausible" and "logical"

[6] Plaintiff has asked the Court to review the Withheld Videotapes and Photographs *in camera*. *See, e.g.*, Pl. Br., at 40. In FOIA cases, "[i]n camera review is considered the exception, not the rule." *ACLU v. ODNI*, No. 10 Civ. 4419 (RJS), 2011 WL 5563520, at *12, n.9 (S.D.N.Y. Nov. 15, 2011). Here, the Government's declarations, which are entitled to substantial deference, provide the Court with sufficient information to evaluate the basis for the Government's withholdings even without *in camera* review. *See Larson*, 565 F.3d at 870 (noting that "when an agency meets its burden by means of affidavits, *in camera* review is neither necessary nor appropriate"). Furthermore, the burden on the Court to review over 50 videotapes would be substantial. *See Donovan v. FBI*, 806 F.2d 55, 59 (2d Cir. 1986) ("Most often, *in camera* inspection has been found to be appropriate when only a small number of documents are to be examined."). Finally, "[i]*n camera* inspection is particularly a last resort in 'national security' situations like this case," and "a court should not resort to it routinely on the theory that 'it can't hurt.'" *Id.* (internal quotation marks omitted) (citing *Weissman v. CIA*, 565 F.2d 692, 697 (D.C.Cir. 1977) and *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978)).

government arguments for nondisclosure will be sustained. *ACLU v. DOD*, 628 F.3d 612, 624 (D.C. Cir. 2011); *Amnesty Int'l v. CIA*, 728 F. Supp. 2d 479, 508 (S.D.N.Y. 2010) (deferring to executive declarations predicting harm to national security).

The current standard for classification is set forth in Executive Order 13,526. Section 1.1 of that order lists four requirements for the classification of national security information. Three requirements are procedural: an "original classification authority" must classify the information; the information must be "owned by, produced by or for, or [] under the control of the United States Government;" and an original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and be "able to identify or describe the damage." E.O. 13,526, § 1.1(a)(1), (a)(2), (a)(4). The substantive requirement is that the information must fall within one or more of eight protected categories of information listed in Section 1.4 of the order. *See id.* § 1.1(a)(3).

The DoD has submitted four declarations in this case, one of which has been submitted for the Court's review *ex parte* and *in camera*, explaining the basis for the proper classification of the Withheld Videotapes and Photographs in accordance with Section 1.1 of E.O. 13,526. Rear Admiral Woods, an original classification authority, has explained that all images of al Qahtani are currently and properly classified at the SECRET level and were originally "classified by the Deputy Secretary of Defense, who exercised original classification authority pursuant to EO 13,526." Woods Decl. ¶ 29. Major General Horst and Deputy Assistant Secretary of Defense Lietzau, both also original classification authorities, have also affirmed that the Withheld Videotapes and Photographs are properly classified. Horst Decl. ¶ 17 ("I have concluded that the Withheld Videotapes and Photographs must remain classified at the Secret level"); Lietzau Decl. ¶ 4 ("All of these photographs and videos of al Qahtani are properly

classified in their entirety at the SECRET level under Executive Order 13,526."). Admiral Woods also affirms that this information is owned by, produced by or for, or is under the control of the United States Government. Woods Decl. ¶ 29. Furthermore, DoD explains that the information in the Withheld Videotapes and Photographs falls within three of the eight protected categories of information set forth in Section 1.4 of Executive Order 13,526: the information pertains to "military plans, weapons systems, or operations," *see* Section 1.4(a); "intelligence activities (including covert action), intelligence sources or methods, or cryptology," *see* Section 1.4(c); and "foreign relations or foreign activities of the United States," *see* Section 1.4(d). *See* Woods Decl. ¶ 29; Horst Decl. ¶ 8; Lietzau Decl. ¶ 6.

Each of the DoD declarants sets forth separate and independent reasons that the Withheld Videotapes and Photographs must remain classified in their entirety, describing the serious harms to national security that could reasonably be expected to result from their release. General Horst, who is responsible for the oversight of 200,000 U.S. military personnel deployed in Iraq, Afghanistan, and the surrounding region, explains that their release could reasonably be expected to harm national security by endangering the lives and physical safety both of U.S. military personnel, diplomats and aid workers serving in Afghanistan and elsewhere, and Afghan civilians, police, military personnel, and government officials. Horst Decl. ¶¶ 1, 10. In addition, General Horst explains that the release of the Withheld Videotapes and Photographs could aid in the "recruitment and financing of extremists and insurgent groups" and negatively affect security conditions throughout the United States Central Command's area of responsibility, which includes "many areas that are very volatile" in the Middle East and Central Asia. *Id.* ¶¶ 10, 13. General Horst explains that his conclusions are based in part on the harm to national security that resulted in the past due to the intensely negative response in that region to the release of

photographs and information about detainees held by the United States. *Id.* ¶ 11. The result has been "not only strained relationships between the U.S. and foreign governments," but the "deaths and injury of U.S. and [international] service members." Horst Decl. ¶ 12.

General Horst notes that the release of the Withheld Videotapes and Photographs could be used to "foment anti-American sentiment in the region," particularly the FCE Videotape "because of its depiction of forcible guard and detainee interaction." Horst Decl. ¶ 14. Additionally, General Horst details the risk that released portions of videos and photographs could be manipulated by extremist groups "so as to be used as recruiting material to attract new members to join the insurgency." *Id*. 15. Such a reaction to the Withheld Videotapes and Photographs "could reasonably be expected to adversely impact the political, military and civil efforts of the United States by fueling civil unrest, endanger the lives of U.S. and Coalition forces, and provide a recruiting tool for insurgent and violent extremist groups thereby destabilizing partner nations." Horst Decl. ¶ 18.[7]

[7] The Protected National Security Documents Act of 2009 (Section 565 of the Department of Homeland Security Appropriations Act, 2010 (Pub.L. 111-83)) exempts under the FOIA certain records where the Secretary of Defense certifies that disclosure of the records would "endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." The Protected National Security Documents Act of 2009, § 565(d)(1). The records encompassed within the provision include "photographs" and "video tapes" created between September 11, 2001, and January 22, 2009, that "relate[] to the treatment of individuals engaged, captured, or detained after September 11, 2001, by Armed Forces of the United States in operations outside of the United States." *Id.*, § 565(c)(1)(B),(c)(2). Such certifications expire after three years and may be renewed. *Id.*, § 565(d)(2).

To date, the Secretary of Defense has certified only one set of protected documents under this provision, *See* Certification of Robert M. Gates in *ACLU v. DOD*, 543 F.3d 59 (2d Cir. 2008), vacated, 130 S. Ct. 777 (2009). In that case, the district court found that the Secretary's certification was proper and shielded the records at issue from disclosure under the FOIA. *ACLU v. DOD*, No. 04 Civ. 4151 (AKH)(S.D.N.Y.), Transcript of Oral Argument at 29 (July 20, 2011) (Docket No. 474), Daughtry Decl., Exhibit E.

Because the video-recordings and photographs at issue in this case relate to detainee treatment, they meet the statutory definition of "protected documents," and therefore, if they are certified by the Secretary of Defense, they would be exempt under FOIA Exemption 3. Because

Two federal courts in the District of Columbia have recently upheld the Government's withholding of videotapes and photographs pursuant to FOIA Exemption 1 under precisely such an assertion of harm to national security. *See ICB v. DOD*, No. 08-1063, 2012 WL 6019294 (D.D.C. Dec. 4, 2012); *Judicial Watch v. DOD*, 857 F. Supp. 2d 44 (D.D.C. 2012). In *ICB*, the court found General Horst's declaration that FCE videotapes of a JTF-GTMO detainee could be used as "propaganda and to incite a public reaction" and thereby "put[] U.S. military forces and its allies at increased risk" to be "plausible explanations of harm" that "merit substantial weight." *ICB*, 2012 WL 6019294, at * 5-6. Similarly, in *Judicial Watch*, the court upheld the CIA's withholding of photographs and/or video recordings of Osama bin Laden as classified based on CIA's declaration that "release of any one of the records reasonably could be expected to inflame tensions among overseas populations that include al-Qa'ida members or sympathizers, encourage propaganda by various terrorist groups or other entities hostile to the United States, or lead to retaliatory attacks against the United States homeland or United States citizens, officials, or other government personnel traveling or living abroad." *Judicial Watch*, 857 F. Supp. 2d at 61. Meanwhile, although the Second Circuit once previously rejected the Government's assertion that Exemption 7(F) bars the disclosure of detainee photos on the grounds such release could reasonably be expected to incite violence against U.S. troops in Iraq and Afghanistan, the court noted that the reason it was not inclined to construe Exemption 7(F) broadly to cover this asserted harm was that FOIA provides—but the Government there did not invoke— a "separate exemption specifically tailored to the national security context" for such "matter[s] of national security." *ACLU v. DOD*, 543 F.3d 59, 72 (2d Cir. 2008) (citing Exemption 1). Here, DoD has

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DoD treats such certification as a last resort, the Secretary has not certified the records at issue in this case. DoD reserves the right to pursue certification and, in the event of such a certification, to withhold the documents pursuant to Exemption 3 if the Court finds that the Withheld Videotapes and Photographs are not exempt pursuant to Exemptions 1, 7(A), or 6 and 7(C).

invoked that very exemption for reasons of national security—with all the corresponding safeguards of the Executive Order on classification duly incorporated—contrary to the facts of *ACLU v. DOD*. *See id*. Accordingly, General Horst's declaration alone provides a sufficient basis to withhold all of the videotapes and photographs at issue in this case pursuant to Exemption 1. *Cf. Judicial Watch*, 857 F. Supp. 2d at 48 ("A picture may be worth a thousand words. And perhaps moving pictures bear an even higher value. Yet, in this case, verbal descriptions of the death and burial of Osama Bin Laden will have to suffice, for this Court will not order the release of anything more.").

Deputy Assistant Secretary of Defense Lietzau, who is "responsible for developing policy recommendations and coordinating policy guidance relating to individuals captured or detained by DoD," has submitted a declaration that, even if it were standing alone, would independently establish the applicability of Exemption 1, outlining several additional harms to national security that could reasonably be expected to result from the release of the Withheld Videotapes and Photographs. Lietzau Decl. ¶ 1. Among these, he notes that public release of videotapes and photographs of DoD detainees could provide "a means for detainees to communicate outside of approved channels," including through coded messages, potentially to "al-Qaeda and associated enemy forces." *Id*. ¶ 7(a). Second, Mr. Lietzau explains that public release of the Withheld Videotapes and Photographs "would also raise serious questions by U.S. allies and partners and others in the international community as to whether the United States is acting in accordance with its longstanding policy to protect detainees from public curiosity, consistent with the Geneva Conventions," which "prohibit the release of imagery of individually identifiable detainees without a legitimate purpose." *Id.* ¶ 7(b). Not only would this "undermine[] our diplomatic and military relationships with allies and partners," it "could affect the practice of

other states in this regard, which could, in turn, dilute protections afforded U.S. service personnel in future conflicts." *Id.* Third, Mr. Lietzau notes that the release of the FCE Videotape could harm national security by "encouraging disruptive and potentially more violent behavior" by DoD detainees "simply to confirm their continued resistance to the United States in the ongoing armed conflict . . . in the hope that such resistance would result in forced cell extractions that would be recorded by video and released to the public." *Id.* ¶ 8(a). This, in turn, would "result in more opportunity for injury to both detainees and military personnel."[8] *Id.* By presenting these and other considerations, Mr. Lietzau's declaration independently justifies withholding pursuant to Exemption 1, because he provides a logical and plausible explanation of harm to national security that release of the Withheld Videotapes and Photographs would cause. *See Wilner*, 592 F.3d at 73*; ICB*, 2012 WL 6019294, at *6 (concluding that identical arguments set forth by DoD were "plausible, non-conclusory" reasons why FCE videos of GTMO detainees were properly withheld under Exemption 1); *cf. Zander v. DOJ*, No. 10 Civ. 2000, 2012 WL 2336244, at *4 (D.D.C. June 20, 2012)(finding Bureau of Prisons video of inmate's forcible removal from prison cell withholdable pursuant to Exemption 7(F)).

Admiral Woods provides still another reason that the release of the Withheld Videotapes and Photographs would cause serious damage to the national security. The Government's release of any detainee's image is likely to "make it substantially less likely that the detainee will cooperate and provide information in the future" because such release could provide "the appearance of cooperation with the United States" (regardless of whether the detainee actually cooperated), which could lead to reprisals or retribution against the detainee and/or his family. Woods Decl. ¶¶ 24, 25. "[T]he cooperation of human intelligence sources . . . is [] indispensable

[8] Admiral Woods also notes that release of the FCE Videotape "could result in the development of tactics and procedures to thwart the actions of the FCE, thereby placing the safety and welfare of the members in jeopardy." Woods Decl. ¶ 28.

. . . in the fight against terroris[m]," and the public release of detainee images by the United States will "undoubtedly have a chilling effect on human intelligence collection efforts at JTF-GTMO and elsewhere." *Id.* ¶ 25. While Plaintiff claims that al Qahtani does not fear reprisals and wants his image released, the fact is that in order to protect against this harm to national security, "the policy to classify images of current and former detainees must be consistently applied." *Id.* ¶ 27. If DoD classified only those images of detainees cooperating with the United States, "such a practice would frustrate the purpose of the policy by revealing whether a particular detainee was cooperative." *Id.* In addition, the release of images of al Qahtani would seriously damage the Government's credibility with current intelligence sources, and "undermine our ability to provide assurances of confidentiality to future human intelligence sources." *Id.* Other courts in this district have upheld the withholding of photographs of DoD detainees at Guantanamo Bay pursuant to Exemption 1 for the very reasons articulated by Admiral Woods. *See AP v. DOD*, 462 F. Supp. 2d 573, 576 (S.D.N.Y. 2006); *Azmy v. DOD*, 562 F. Supp. 2d 590, 600 (S.D.N.Y. 2008).

Finally, the Classified Herrington Declaration, and associated materials, provide further information regarding damage to national security that could reasonably be expected to result from disclosure of the Debriefing Videos. Because this information is classified, it cannot be disclosed on the public record, and accordingly is being provided to the Court *ex parte* and *in camera*.

For all of these reasons, the arguments Plaintiff raises in opposition to the classification of the Withheld Videotapes and Photographs are unavailing. In essence, Plaintiff argues that DoD should be required to release these particular videotapes and photographs because some photographs of other DoD detainees, and certain information about forced cell extractions, have

been released. This contention fails because an agency's refusal to release classified information "is generally unaffected by whether the information has entered the realm of public knowledge." *Halpern v. FBI*, 181 F.3d 279, 294 (2d Cir. 1999). The "limited exception" to this rule is "where the government has officially disclosed the specific information the requester seeks." *Id.* In order to prevail on such an argument, "[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 v. CIA*, 586 F.3d 171, 186-187 (2d Cir. 2009) (quotation marks and brackets omitted); *see also Wolf*, 473 F.3d at 378. CCR does not argue, nor could it, that any of the Withheld Videotapes and Photographs are as specific as, and match exactly, other information that DoD has already released through an official and documented disclosure.

Lastly, although Plaintiff speculates that the Withheld Videotapes and Photographs "may depict illegal conduct, evidence of mistreatment, or may otherwise be embarrassing to DOD," Pl. Br. at 23, Admiral Woods has specifically affirmed that the information at issue "has not been classified to conceal violations of law, . . . prevent embarrassment to a person, organization, or agency. . . or prevent or delay the release of information that does not require protection in the interest of national security." Woods Decl. ¶ 30.

Where, as here, the Government has satisfied the conditions for classification under E.O. 13,526, such classified information is exempt from disclosure pursuant to Exemption 1. *See, e.g.*, *ACLU v. DOD*, 752 F. Supp. 2d 361, 371 (S.D.N.Y. 2010) (records properly withheld under Exemption 1 where Government demonstrated withheld information logically falls within Exemption 1); *ICB*, 2012 WL 6019294, at *6-7 (FCE videotapes of JTF-GTMO detainees

properly withheld under Exemption 1); *AP*, 462 F. Supp. 2d at 576 (photographs of JTF-GTMO detainees properly withheld under Exemption 1); *Azmy*, 562 F. Supp. 2d at 600 (same).

III. THE 53 FBI VIDEOTAPES ARE EXEMPT FROM DISCLOSURE UNDER FOIA EXEMPTION 7(A)

The FBI properly withheld the FBI Videotapes in their entirety as independently protected by Exemption 7(A), which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). An investigatory record "must meet two criteria to fall within Exemption 7(A): first, it must be compiled for law enforcement purposes, and second, its release must interfere with enforcement proceedings." *Edmonds v. FBI*, 272 F. Supp. 2d 35, 54 (D.D. C. 2003).

The FBI Videotapes satisfy each of these requirements. First, the FBI Videotapes were compiled for law enforcement purposes. *Id.* The FBI is a federal law enforcement agency charged with, among other things, "identify[ing] the killers of September 11 and [] prevent[ing] further terrorist attacks." First Hardy Decl. ¶ 34. According to the FBI, the FBI videotapes were "made between August 2002 and November 2002 while Mohammed al Qahtani was under FBI investigation for his suspected role in the terrorist attacks of September 11, 2001 as a precursor to an enforcement action—whether domestic criminal charges or trial by U.S. military authority—against him and/or any co-conspirators." *Id.* The FBI Videotapes remain "in an open FBI investigative file as evidence pending disposition of any charges brought against al Qahtani and/or co-conspirators of the September 11, 2001 attacks before a Military Commission empowered by the Military Commissions Act of 2009." *Id.* Accordingly, the FBI Videotapes easily meet the threshold requirement for Exemption 7(A) and were compiled for law

enforcement purposes. *See Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926 (claim of law enforcement purpose by agency specializing in law enforcement entitled to deference).

The FBI Videotapes also meet the second requirement of Exemption 7(A), namely that the release of information "could reasonably be expected to interfere with enforcement proceedings." *See* 5 U.S.C. § 552(b)(7)(A). Plaintiff acknowledges that Exemption 7(A) permits the categorical withholding of records. Pl. Br. at 32; *see also N.L.R.B v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978)("generic determinations of likely interference" with law enforcement proceedings permitted under Exemption 7(A)). This means that "the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding. Rather, federal courts may make generic determinations that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings." *Radcliffe v. IRS*, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008), *aff'd*, 328 Fed. Appx. 699 (2d Cir. May 27, 2009). Accordingly, there is no requirement that FBI describe "the content of the tapes in[] segregable portions, and explain[] how each portion is reasonably likely to interfere with enforcement proceedings." Pl. Br. at 33. Here, the FBI Videotapes are what the FBI terms "evidentiary/investigative materials," as distinguished from administrative materials and public source information. Second Hardy Decl. ¶ 4. After a review of each individual videotape, the FBI placed each of the 53 videotapes at issue into "the evidentiary/investigative functional category." *Id.* ¶ 5.

The FBI declarations explain that, as a category of investigative records, the FBI Videotapes are an "integral part" of its counterterrorism investigative efforts in the wake of the September 11 attacks, and that until the Government closes these matters, the release of the FBI

Videotapes would "compromis[e] this and other related terrorism, counterterrorism, and national security investigations." First Hardy Decl. ¶ 16, Second Hardy Decl. ¶ 5. Courts have upheld Exemption 7(A) assertions in similar circumstances. *See Azmy*, 562 F. Supp. 2d at 605 (upholding DoD's assertion of Exemption 7(A) where Government's ongoing September 11 terrorism investigations likely to lead to enforcement proceedings and disclosure would interfere with those investigations). In particular, among the national security concerns raised by the release of such investigative records, the FBI has stated that their release could lead to "[t]he alteration of plans and activities by overseas individuals associated with terrorist groups once they learn the details of their colleague's detention in U.S. government custody, thereby thwarting ongoing investigative efforts." First Hardy Decl. ¶ 16. The FBI further elaborated that the release of the FBI Videotapes "would undermine the effectiveness of ongoing FBI investigations by providing al Qahtani and other subjects of investigation with access to materials that could be analyzed and then used to circumvent investigative efforts by revealing the nature and direction of investigations; divulging evidentiary details that could be employed by al Qahtani, other detainees, or other subjects of FBI investigations to intimidate prospective witnesses; diluting the value of the videotapes as a source to corroborate investigative facts and witness statements; and damaging the FBI's ability to obtain further information of investigative value, to include the cooperation of other detainees or witnesses in the ongoing FBI terrorism, counterterrorism, and national security investigations." Second Hardy Decl. ¶ 6(a). These are precisely the types of harms that courts have recognized as a basis for withholding records under Exemption 7(A). *See, e.g., ACLU of Michigan v. FBI*, No. 11-13154, 2012 WL 4513626, at * 8 (E.D. Mich. Sept. 30, 2012) (release of records could lead to intimidation and impede ability to corroborate witness statements); *Owens v. DOJ*, No. 04-1701 (JDB), 2007 WL 778980, at * 8

(D.D.C. March 9, 2007) (release of records could divulge government's investigative strategy); *Dow Jones & Co. v. DOJ*, 880 F. Supp. 145, 150 (S.D.N.Y. 1995) (release of statements by interviewees could hamper ability to "elicit untainted testimony"); *Dickerson v. DOJ*, 992 F.2d 1426, 1433 (6th Cir. 1993) (release of records could lead to intimidation and impede ability to corroborate witness statements).

In addition to the harm to the FBI's ongoing counterterrorism and national security investigations that would result from the release of the FBI Videotapes, the FBI explains that the videotapes are being considered by the Office of the Chief Prosecutor of Military Commissions ("OCP") as part of the OCP's active consideration of whether to criminally charge al Qahtani and/or his co-conspirators before a Military Commission at Guantanamo Bay. First Hardy Decl. ¶ 34. Accordingly, the FBI Videotapes are potentially relevant evidence in any subsequent Military Commission proceedings. *Id.* The FBI has explained that "the very nature of the videotapes as evidence in prospective Military Commission proceedings provides a rational nexus between premature release and interference with such proceedings." Second Hardy Decl. ¶ 6(b). The FBI has laid out in detail the ways in which the release of the FBI Videotapes could reasonably be expected to interfere with a Military Commission proceeding, including the very decision to bring criminal charges in the first place. For example, their release "would divulge potential government theories and case strategies, and dilute the value of the tapes as a corroborative tool of investigative facts to render prosecution decisions." *Id.* Should a decision be made to bring charges against al Qahtani and/or any of his co-conspirators, the FBI has further elaborated that the release of the FBI Videotapes could lead to "(a) manipulation of evidence in advance of trial by Military Commission, (b) undue influence of prospective members of the Military Commission who may hear the case, (b) *[sic]* undue prejudice to the

United States case generated by an early release to the public which could be employed to depict an incomplete picture of events surrounding the detention and questioning of detainee al Qahtani, (c) undue prejudice to the United States case by providing defense counsel for detainees facing trial by Military Commission with information that may not otherwise be discoverable, and (d) prematurely revealing the focus of the Government's ongoing investigation of those responsible for the September 11, 2001 attacks." First Hardy Decl. ¶ 37. The FBI has further elaborated that premature release "would limit the evidentiary value of the material in the prosecution case in chief and would practically eliminate the government's ability to effectively use such evidence to rebut defense allegations, corroborate facts or testimony at trial, or impeach witness testimony." Second Hardy Decl. ¶ 6(c). As the FBI points out, this "will allow defendants and others to tailor their testimony to be consistent with the content of the videotapes." *Id.*

Courts routinely uphold assertions of Exemption 7(A) in light of concerns like those raised by the FBI here; indeed, particularly where a criminal proceeding has not yet occurred, "[o]ne of the primary purposes of exemption 7 was to prevent 'harm [to] the Government's case in court' . . . by not allowing litigants earlier or greater access to agency investigatory files than they would otherwise have. . . ." *Barney v. IRS*, 618 F.2d 1268, 1273 (8th Cir. 1980) (quoting *Robbins Tire*, 437 U.S. at 224-25 (1978)); *see also Robbins Tire*, 437 U.S. at 232 (Exemption 7(A) applies "whenever the Government's case in court . . . would be harmed by the premature release of evidence or information.").

The cases cited and arguments advanced by Plaintiff in opposing the FBI's assertion of Exemption 7(A) are unavailing. For example, Plaintiff cites *Lions Raisins, Inc. v. USDA*, 354 F.3d 1072, 1085 (9th Cir. 2004), to support its argument that there would be no danger that evidence could be manipulated in advance of trial by Military Commission. But in *Lions*

Raisins, the plaintiff already had copies of the very records it sought under FOIA, and simply wanted another copy of an original document. *Id.* Such a limited request self-evidently would have much less impact on any investigation than would release of 53 never-disclosed videotapes from an active investigatory file. Additionally, plaintiff argues that there is no risk that "the government's strategy will be revealed when counsel have already viewed the requested tapes and seek only to make them publicly available." Pl. Br. at 29. But al Qahtani's *habeas* counsel has only viewed a subset of the FBI Videotapes, *see Al Qahtani v. Obama*, 05-1971 (RMC) (D.D.C.), Memorandum Opinion and Order, dated September 18, 2009, Daughtry Decl., Exhibit F, and the "disclosure of a few pieces of information in no way lessens the government's argument that complete disclosure would provide a composite picture of its investigation and have negative effects on the investigation." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 930-931. Plaintiff also complains that the FBI's descriptions of harm purportedly do not explain how disclosure of the FBI Videotapes "would, in some particular discernible way, disrupt, impede, or otherwise harm the enforcement proceeding," as required by *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989). Pl. Br. at 26, 30. But this is simply not true. In *North*, Oliver North, the plaintiff in the FOIA action, had already been indicted on criminal charges, and had submitted a FOIA request for documents that he was also seeking through discovery in his criminal case. In North's FOIA case, however, the Government did not make *any* assertion "that disclosure of the information North seeks can reasonably be expected to harm the government's case in court or impede its investigation," relying instead on arguments related to orders regarding the timing of document productions that had been issued in the criminal case. *Id.* at 1098. By contrast, here the FBI has not only made such an assertion, it has provided a detailed explanation of the ways

in which disclosure could both impede its investigation and harm the Government's case in court.

Moreover, when, as here, the Government raises national security concerns in support of its withholdings pursuant to Exemption 7(A), the Executive's views are entitled to deference. *See Ctr. for Nat'l Security Studies*, 331 F.3d at 928 (deferring to DOJ's assertion of harm to national security under Exemption 7(A) and "reject[ing] any attempt to artificially limit the long-recognized deference to the executive on national security issues" to withholdings under Exemptions 1 and 3); *see also American-Arab Anti-Discrimination Committee v. DHS*, 516 F. Supp. 2d 83, 89-90 (D.D.C. 2007)(deferring to Government's judgment regarding harm to national security that would result from release of information in Exemption 7(A) case); *Edmonds*, 272 F. Supp. 2d at 55 (same). These cases belie Plaintiff's assertion that recognizing the need for such judicial deference is an improper "means to bypass the procedures and safeguards embodied in the government's classification authority." Pl. Br. at 31. Plaintiff's reference to *ACLU v. DOD*, 543 F.3d at 72 (Pl. Br. at 31) is inapposite as that case addressed the scope and reach of Exemption 7(F), not 7(A). *See ACLU v. DOD*, 543 F.3d at 71-74. Indeed, the court in *ACLU* distinguished the D.C. Circuit's opinion affirming withholding in *Center for National Security Studies* by noting that *Center for National Security Studies* relied solely on Exemption 7(A) to affirm the Government's withholdings. 543 F.3d at 81, n.13. Contrary to plaintiff's contention, deference to the executive regarding harm to national security in Exemption 7(A) cases is simply acknowledgement that "[i]t is within the role of the executive to acquire and exercise the expertise of protecting national security," and "[i]t is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role." *Ctr. for Nat'l Security Studies*, 331 F.3d at 932. For these reasons, the Government's

assertion of Exemption 7(A), which is amply supported even without taking principles of deference into account, is further strengthened by the deference due in this quintessential national security context. The Court thus should grant summary judgment for the FBI as to the 53 FBI Videotapes.

IV. IMAGES OF DOD PERSONNEL ARE EXEMPT FROM DISCLOSURE UNDER FOIA EXEMPTION 3

Any images of DoD personnel that appear in any of the Withheld Videotapes are also exempt from disclosure under FOIA Exemption 3. Under Exemption 3, matters "specifically exempted from disclosure" by certain statutes need not be disclosed. 5 U.S.C. § 552(b)(3). In examining an Exemption 3 claim, a court determines whether the claimed statute is an exemption statute under FOIA and whether the withheld material satisfies the criteria for the exemption statute. *Wilner*, 592 F.3d at 72.

Here, the statute at issue is 10 U.S.C. § 130b, which, "notwithstanding section 552 of title 5," authorizes "to be withheld from disclosure to the public personally identifying information regarding (1) any member of the armed forces assigned to an overseas unit, a sensitive unit, or a routinely deployable unit; and (2) any employee of the Department of Defense . . . whose duty station is with any such unit." This statute indisputably qualifies as an Exemption 3 statute. Its plain language explicitly overrides FOIA and authorizes nondisclosure of covered records, and it also has been recognized by courts as an exemption statute under FOIA. *See Hiken v. DOD*, 521 F. Supp. 2d 1047, 1062 (N.D. Cal. 2007).

Furthermore, any images of DoD personnel that appear in any of the Withheld Videotapes satisfy the criteria for withholding specified in 10 U.S.C. § 130b. Even Plaintiff agrees that images of DoD personnel are generally exempt from disclosure under this provision, but proposes an exception "to the extent the images depict conduct for the person's involvement

has already been officially acknowledged." Pl. Br. at 39. However, there is no legal basis for such an exception under Exemption 3. Rather, as the Second Circuit has explained, "'Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.'" *Wilner*, 592 F.3d at 72 (quoting *Ass'n. of Retired R.R. Workers*, 830 F.2d at 336); *see also Krikorian*, 984 F.2d 461, 465 (D.C. Cir. 1993). Thus, a court should "not closely scrutinize the contents of a withheld document; instead, [it should] determine only whether there is a relevant statute and whether the document falls within that statute." *Krikorian*, 984 F.2d at 465.

As explained in the Woods Declaration, "all personnel operating at JTF-GTMO are personnel assigned to an overseas unit." Woods Decl. ¶ 31. Furthermore, defendants have established that images of such DoD personnel are included on the FBI Videotapes, *see* First Hardy Decl. ¶ 29, and the FCE Videotapes include DoD personnel who "are clearly depicted in the videotape, and are required to identify their position in the squad and the action they will take when performing the FCE." Wood Decl. ¶ 32. In addition, to the extent any DoD personnel appear in the Debriefing Videotapes, such personnel would also be "personnel assigned to an overseas unit." Woods Decl. ¶ 31. Accordingly, any DoD personnel appearing on the Withheld Videotapes are within the statute's coverage, and any images of such DoD personnel are exempt from disclosure under FOIA Exemption 3.

V. THE WITHHELD VIDEOTAPES AND PHOTOGRAPHS ARE ALSO EXEMPT FROM DISCLOSURE UNDER FOIA EXEMPTION 6, AND THE 53 FBI VIDEOTAPES AND PHOTOGRAPHS ARE EXEMPT FROM DISCLOSURE UNDER FOIA EXEMPTION 7(C)

The Withheld Videotapes and Photographs are also exempt from disclosure in their entirety under Exemption 6, and the 53 FBI Videotapes are also exempt under Exemption 7C.

Exemption 6 exempts from disclosure information from personnel, medical, or other similar files that "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C), which applies only to information contained in law enforcement records, "is more protective of privacy than Exemption 6, because [Exemption 7(C)] applies to any disclosure that 'could reasonably be expected to constitute' an invasion of privacy that is 'unwarranted.'" *Associated Press v. DOJ*, No. 06 Civ. 1758, 2007 WL 737476 at *4 (S.D.N.Y. Mar. 7, 2007). In determining if personal information is exempt from disclosure under these provisions, the Court must balance the public's need for this information against the individual's privacy interest. *See Wood v. FBI*, 432 F.3d 78, 86 (2d Cir. 2005); *see also Sherman v. Dep't of the Army*, 244 F.3d 357, 361 n.6 (5th Cir. 2001) ("[T]he manner in which courts analyze the applicability of exemption 7(C) is the same as that used with respect to exemption 6."). "The privacy side of the balancing test is broad and encompasses all interests involving the individual's control of information concerning his or her person." *Wood*, 432 F.3d at 88 (quotation marks omitted).

Although Ms. Babcock, al Qahtani's *habeas* counsel, has submitted a declaration attesting that al Qahtani "wishes to have all photos, videotapes, and other recordings of him released," Declaration of Sandra Babcock, dated October 2, 2012, ¶ 4, DoD policy "regarding privacy interest waivers does not allow for third parties to attest to the wishes of the individual." Lietzau Decl. ¶ 11. Significantly, as noted by Mr. Lietzau, DoD "allows for communication between habeas counsel and the detainees and has in no way hindered Plaintiff from seeking an express waiver of privacy interests from Mr. al-Qahtani." *Id.*[9]

[9] However, even if CCR were to submit "an appropriate and unambiguous declaration by Mr. al Qahtani waiving his privacy interest in this case," the Withheld Videotapes and Photographs would still be properly withheld in full pursuant to Exemptions 1 and 7(A), as set forth above. Lietzau Decl. ¶ 11.

Al Qahtani has "a privacy interest in not having [] photographic or videotaped images . . . that reflect the circumstances of his detention at JTF-GTMO or . . . that depict his personal activities inside of his cell" released to the public. Woods Decl. ¶ 33. Indeed, the Second Circuit has specifically held that detainees held at Guantanamo Bay have privacy interest in personally "identifying information" in Government records. *AP v. DOD*, 554 F.3d 274, 286 (2d. Cir. 2009). With respect to photographs of detainees, relevant and longstanding DoD policies are a principal source for determining the nature of the privacy interests at issue. As explained by Mr. Lietzau, DoD has established a policy, in conjunction with the International Committee of the Red Cross ("ICRC"), that would allow for the release of certain detainee images that is consistent with both "detainee privacy and the principles of the Geneva Conventions to protect detainees against public curiosity." *Id.* ¶ 10. This policy allows detainees to elect to have the ICRC take photographs of them and "provide them to appropriate family members of the detainee's choosing," thus permitting "detainees to exercise significant control over the appropriate release and distribution of their images." *Id.* As relevant to this case, al Qahtani has not allowed the ICRC to take photographs of him, and FOIA should not be used as an "end-run" around this established process. *Id.*

While the Government may have already released certain information about al Qahtani, Pl. Br. at 36, his privacy interest in the Withheld Videotapes and Photographs is greater because the disclosure of photographs and videotapes is more invasive and enduring. *See Times Picayune Publ'g Corp. v. DOJ*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999) ("[A] picture is worth a thousand words. For that reason, a mug shot's stigmatizing effect can last well beyond the actual criminal proceedings.") Furthermore, to the extent that "images of al Qahtani are already in the public domain," Pl. Br. at 36, that fact is inapposite. FOIA's privacy exemptions protect

information about an individual that is already in the public record, but that, like the Withheld Videotapes and Photographs, is "intended for or restricted to the use of a particular person or group or class of persons" and is "not freely available to the public." *DOJ v. Reporters Comm.*, 489 U.S. 749, 763-64 (1989); *cf. Wilson v. CIA*, 586 F.3d 171, 186-187 (2d Cir. 2009) (upholding withholding of information pursuant to Exemption 1 where information was not made public through "an official and documented disclosure.").

In balancing the public interest in disclosure against a subject's privacy interest, courts have recognized that "the public interest properly factors into both sides of the balance." *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 865 n.22 (D.C. Cir. 1981). While there may be some legitimate public interest in disclosure of the Withheld Videotapes and Photographs, there is also compelling public interest against disclosure, *i.e.*, that public release of photographs of individual detainees at Guantanamo would encourage foreign governments or enemies detaining U.S. service members to publicly release photographs of those service members. *See* Declaration of Richard B. Jackson, dated May 11, 2006 ("Jackson Decl.") ¶ 5, attached to Lietzau Decl. as Attachment C. Such publication "would significantly undermine the ability of the United States to reasonably object to such activities," *id.* ¶ 17, and thus "would have a deleterious effect on the U.S. Government's ability to protect U.S. service members from similar treatment in the future," *id.* ¶ 18. When balancing al Qahtani's privacy interests and the public interest against disclosure against whatever other aspects of the public interest favor disclosure, the balance tips decidedly against disclosure.

Additionally, any DoD employees appearing in the Withheld Videotapes and Photographs "have a strong interest in not having their identities publicly disclosed, as they or their families may face retaliation arising from their performance of their official functions."

Woods Decl. ¶ 33; *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993) ("individuals, including government employees and officials, have privacy interests in the dissemination of their names."). Plaintiff agrees that images of DoD personnel are withholdable under Exemption 6 and 7(C), but wrongly asserts that these protections do not apply "to the extent the images depict conduct for which the person's involvement has already been officially acknowledged." Pl. Br. at 38. As noted above, *see supra* at 29, FOIA's privacy exemptions also protect information about an individual that is already in the public record, where the documents in question, here the Withheld Videotapes and Photographs, are "intended for or restricted to the use of a particular person or group or class of persons" and are "not freely available to the public." *Reporters Comm.*, 489 U.S. 763-64.

VI. THE CIA PROPERLY DECLINED TO CONFIRM OR DENY THE EXISTENCE OF RECORDS RESPONSIVE TO THE FOIA REQUEST

The CIA is entitled to summary judgment upholding its *Glomar* response; indeed, CCR's motion for partial summary judgment does not even challenge the CIA's response.

Agencies responding to FOIA requests "may issue a 'Glomar Response,' that is, refuse to confirm or deny the existence of certain records, if the FOIA exemption would itself preclude the acknowledgment of such documents." *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). Indeed, "[t]he *Glomar* doctrine is well settled as a proper response to a FOIA request because it is the only way in which an agency may assert that a particular FOIA statutory exemption covers the 'existence or nonexistence of the requested records' in a case in which a plaintiff seeks such records." *Wilner*, 592 F.3d at 68 (quoting *Phillippi*, 546 F.2d at 1012). The Second Circuit has explained:

> To properly employ the *Glomar* response to a FOIA request, an agency must tether its refusal to respond to one of the nine FOIA exemptions — in other words, a government agency may refuse to confirm or deny the existence of

> certain records if the FOIA exemption would itself preclude the acknowledgment of such documents. An agency resisting disclosure of the requested records has the burden of proving the applicability of an exemption. The agency may meet its burden by submitting a detailed affidavit showing that the information logically falls within the claimed exemptions.

Id. (internal quotation marks, ellipsis, emphasis, and citations omitted). Thus, "when the Agency's position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the Agency's refusal." *Wolf*, 473 F.3d at 374 n.4 (internal quotation marks omitted). As with FOIA responses more generally, "[i]n evaluating an agency's *Glomar* response, a court must accord substantial weight to the agency's affidavits, provided that the justifications for nondisclosure are not controverted by contrary evidence in the record or by evidence of bad faith." *Wilner*, 592 F.3d at 68 (internal quotation marks and ellipsis omitted).

Courts in this Circuit have repeatedly upheld *Glomar* responses where, as here, confirming or denying the existence of a record would either reveal classified information protected by FOIA Exemption 1 or disclose information protected by statute that is protected by FOIA Exemption 3. *See, e.g.*, *id.* (Exemption 3); *Weberman v. NSA*, 668 F.2d 676, 677-78 (2d Cir. 1982) (Exemptions 1 and 3); *ACLU v. DOD*, 752 F. Supp. 2d 361 (Exemption 1); *Amnesty Int'l USA*, 728 F. Supp. 2d 479 (Exemptions 1 and 3); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 627-28 (S.D.N.Y. 1996) (Exemptions 1 and 3), *aff'd*, 128 F.3d 788 (2d Cir. 1997); *Daily Orange Corp. v. CIA*, 532 F. Supp. 122, 124 (N.D.N.Y. 1982) (Exemption 1). Here, the CIA has submitted a detailed declaration that explains why the fact of the existence or nonexistence of the requested records is exempt from disclosure pursuant to FOIA Exemptions 1 and 3, each of which independently justifies the agency's *Glomar* response. *See generally* Culver Decl.

1. The CIA's Decision Not to Confirm or Deny the Existence of Responsive Records Is Justified by Exemption 1

The CIA's *Glomar* response is justified by Exemption 1. As noted above, Exemption 1 protects from disclosure information that is: (A) specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy, and (B) [is] in fact properly classified pursuant to an executive order. *See* 5 U.S.C. § 552(b)(1). As explained above, Executive Order 13,526 governs the classification of national security information, and in fact "specifically countenances the Glomar Response." *Wilner*, 592 F.3d at 71; *see* E.O. 13,526 (instructing the CIA to "refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.").

Here, the fact of the existence or non-existence of records responsive to the FOIA Request is "properly classified at the SECRET level, meaning that the disclosure of the existence or non-existence of such records could reasonably be expected to cause serious damage to the national security." Culver Decl. ¶ 32. As noted in Part II of this memorandum, an agency can demonstrate that it has properly withheld information under Exemption 1 if it establishes that it has met the classification requirements of Executive Order 13,526. And, as described above, courts must accord "substantial weight" to an agency's affidavits justifying classification. *See, e.g., Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *see also Weissman*, 565 F.2d at 697.

The Culver Declaration thoroughly describes why the existence or nonexistence of responsive records is a properly classified fact that meets the procedural grounds for classification. *See* Culver Decl. ¶¶ 3, 6, 18. Ms. Culver's declaration also establishes that the fact of the existence or non-existence of the requested records clearly falls within the categories

of information set forth in Section 1.4 of Executive Order 13,526, in particular information concerning "intelligence activities and intelligence sources or methods," per Section 1.4(c), and "foreign relations or foreign activities of the United States," per Section 1.4(d). *See id.*[10]

Additionally, the Culver Declaration affirms that confirming or denying the existence of the requested information reasonably could be expected to result in serious damage to the national security by revealing properly classified intelligence activities and methods. *Id.* ¶¶ 34-39, 47-50. For example, any response other than a *Glomar* response would reveal whether or not the CIA had a classified intelligence interest in al Qahtani, the depth and scope of that interest, and whether or not the CIA had participated in monitoring or interrogating al Qahtani at Guantanamo Bay. *Id.* ¶¶ 36, 45, 47.

More specifically, an affirmative response could damage national security by alerting al Qahtani's past associates and foreign intelligence services that CIA intelligence methods had been applied against him, which in turn "could lead those persons and [] intelligence services to take countermeasures to avoid detection by the CIA, for example, by hiding behavior that they believe caused the CIA to be interested in al Qahtani." *Id.* ¶ 37. This, in turn, could frustrate CIA's ability to monitor the behavior of al Qahtani's past associates and collect intelligence. *Id.* A negative response could provide valuable insights into how the CIA was and was not allocating its resources, and could highlight a possible intelligence gap. *Id.* ¶¶ 38, 48. Moreover, the CIA must consistently apply a *Glomar* response to any requests for CIA information regarding any detainees at Guantanamo Bay, as anything other than a *Glomar* response would identify those detainees in which CIA maintained an intelligence interest and

[10] In addition, the declaration affirms that the information has not been classified in order to conceal violations of law, or inefficiency, administrative error; to prevent embarrassment to a person, organization or agency; to restrain competition; or prevent or delay the release of information that does not require protection in the interest of national security. *Id.* ¶ 20.

those in which it has no such interest. This could lead hostile groups to "attempt to emulate the attributes of those detainees in hopes of similarly avoiding CIA detection." *Id.* ¶ 39; *see also ACLU*, 752 F. Supp. 2d at 368 (anything other than *Glomar* response to request for records pertaining to individuals at Bagram would enable terrorist organization to circumvent CIA's monitoring efforts); *Wolf*, 473 F.3d at 376-377 ("[E]ither confirming or denying an Agency interest in a foreign national reasonably could damage sources and methods by revealing CIA priorities, thereby providing foreign intelligence sources with a starting point for applying countermeasures against the CIA and thus wasting Agency resources.").

Moreover, Ms. Culver affirms that acknowledging the existence or non-existence of records responsive to Plaintiff's FOIA request reasonably could be expected to result in serious damage to the national security because it could harm U.S. foreign relations. *See* Culver Decl. ¶¶ 40-42. For the CIA to respond to Plaintiff's request for videotapes of photographs of al Qahtani, for example, could be seen as a confirmation of CIA's involvement in interrogating al Qahtani, who is a Saudi national. *Id.* ¶ 42. This "could raise questions with the Saudi Government or with other countries about whether the CIA is interrogating citizens of their countries who are detained at Guantanamo Bay, which in turn could cause those countries to respond in ways that would damage U.S. national interests." *Id.*

In sum, the Culver declaration explains in detail why the existence or nonexistence of CIA records responsive to the Plaintiff's request for videotapes and photographs of al Qahtani is a properly classified fact, the disclosure of which reasonably could be expected to cause serious damage to the national security. The Court must accord substantial weight to the CIA's declaration. *See Wilner*, 592 F.3d at 76 ("Recognizing the relative competencies of the executive and judiciary, . . . it is bad law and bad policy to second-guess the predictive judgments made by

the government's intelligence agencies." (internal quotation marks and citation omitted)). Accordingly, CIA's *Glomar* response is justified under Exemption 1. *See, e.g.*, *ACLU*, 752 F. Supp. 2d at 368 (upholding CIA *Glomar* response to FOIA request seeking records related to Bagram detainees); *Amnesty Int'l USA*, 728 F. Supp. 2d at 513 (upholding CIA *Glomar* response to FOIA for records related to detention of a particular individual); *Wolf*, 473 F.3d at 375-77 (upholding CIA *Glomar* response to FOIA request seeking records relating to a specified foreign national).

2. The CIA's Decision Not to Confirm or Deny the Existence of Responsive Records Also Is Justified by Exemption 3

The CIA's *Glomar* response is also justified by Exemption 3. Under Exemption 3, matters "specifically exempted from disclosure" by certain statutes need not be disclosed. 5 U.S.C. § 552(b)(3). In examining an Exemption 3 claim, a court determines whether the claimed statute is an exemption statute under FOIA and whether the withheld material satisfies the criteria for the exemption statute. *See Sims*, 471 U.S. at 167; *Wilner*, 592 F.3d at 72.

Here, both Section 102A(i)(1) the National Security Act of 1947, as amended, 50 U.S.C. § 403-1(i)(1) (the "NSA"),[11] and Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403g (the "CIA Act"),[12] both of which prevent the unauthorized disclosure

[11] The NSA provides that the Director of National Intelligence ("DNI") "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1) (enacted as part of the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, § 1011, 118 Stat. 3638, 3644 (2004)). Courts have recognized that not just the DNI, but also the CIA and other members of the intelligence community, may rely upon the amended NSA to withhold records under FOIA. *See, e.g.*, *Larson*, 565 F.3d at 862-63, 865.

[12] Section 6 of the CIA Act provides that, "in the interests of the security of the foreign intelligence activities of the United States and in order further to implement . . . the Director of National Intelligence['s] . . . responsib[ility] for protecting intelligence sources and methods from unauthorized disclosure," the CIA shall be exempted from the provisions of any law that "require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 403g (codified as amended by IRTPA, Pub. L. No. 108-458, §§ 1071(b)(1)(A), 1072(b), 118 Stat. at 3690-93).

of intelligence sources and methods, support the applicability of FOIA Exemption 3 to CIA's refusal to confirm or deny the existence of records responsive to Plaintiff's FOIA request. *See* Culver Decl. ¶¶ 22-24. It is well established that both of these statutes are exempting statutes within the meaning of Exemption 3. *See, e.g.*, *Sims*, 471 U.S. at 167-68 (NSA); *Baker v. CIA*, 580 F.2d 664, 667 (D.C. Cir. 1978) (CIA Act); *Amnesty Int'l USA*, 728 F. Supp. 2d at 501 (NSA and CIA Act); *N.Y. Times Co. v. U.S. Dep't of Def.*, 499 F. Supp. 2d 501, 512 (S.D.N.Y. 2007) (NSA); *Earth Pledge Found.*, 988 F. Supp. at 627 (CIA Act and NSA). Moreover, to support its claim that information may be withheld pursuant to Exemption 3, the Government need not show that there would be any harm to national security from disclosure, only that the withheld information falls within the purview of the exemption statute. *See Larson*, 565 F.3d at 868.

Thus, the only remaining question is whether affirming or denying the existence of responsive records "can 'reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods.'" *Wolf v. CIA*, 357 F. Supp. 2d 112, 117 (D.D.C. 2004) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982)), *aff'd in part and rev'd in part*, 473 F.3d 370 (D.C. Cir. 2007). As the Supreme Court held in *Sims*, CIA's discretion in determining what would constitute an unauthorized disclosure of intelligence sources and methods is "very broad." *Sims*, 471 U.S. at 168-70; *see also Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992) (describing CIA's discretion to withhold information under Exemption 3 as "a near-blanket FOIA exemption").

One of the CIA's primary functions is to "collect intelligence through human sources and by other appropriate means." *Id.* § 403-4a(d)(1); *see also* Exec. Order No. 12,333, § 1.7(a) (Dec. 4, 1981) (reproduced as amended at 50 U.S.C. § 401 note) (setting forth intelligence-related functions of CIA). Accordingly, the CIA Act protects information that would reveal the functions of the CIA, including the collection of foreign intelligence through intelligence sources and methods, similar to what is protected by the NSA.

In *Sims*, the Supreme Court gave a broad reading to "intelligence sources and methods" under the NSA. 471 U.S. at 169-74. The Supreme Court held that "[t]he plain meaning of the statutory language, as well as the legislative history of the National Security Act, . . . indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure," *id.* at 168-69, and the Court rejected "any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence." *Id.* Further, the Court observed, Congress "simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence." *Id.* at 169-70.

Similarly, the CIA Act exempts from disclosure information relating to CIA's core function: foreign intelligence collection through its intelligence sources and methods. *See Goland v. CIA*, 607 F.2d 339, 351 (D.C. Cir. 1978) (holding that intelligence sources and methods are "functions" of the CIA within the meaning of the CIA Act, and thus exempt from disclosure pursuant to Exemption 3); *Makky v. Chertoff*, 489 F. Supp. 2d 421, 442 (D.N.J. 2007) (CIA Act permits CIA to "decline[] to state whether there are any documents in its possession responsive to [a plaintiff's] request, as doing so could reveal intelligence methods and activities, or the names and locations of internal CIA components").

Here, the CIA has amply met its burden of demonstrating that the confirmation or denial of the existence of responsive records could reasonably be expected to result in the unauthorized disclosure of intelligence sources and methods. *See* Culver Decl. ¶¶ 43-50. Ms. Culver's declaration specifically affirms that "confirming or denying the existence or non-existence of responsive records would reveal intelligence methods, as well as core functions of the CIA." *Id.*

¶ 7. Her declaration further explains, among other things, that intelligence methods "include the CIA's selection of targets for intelligence collection," *id.* ¶ 45, and that acknowledging the existence or nonexistence of responsive records would expose whether or not CIA maintained an intelligence interest in al Qahtani, as well as the breadth and scope of any such interest. *See id.* ¶¶ 36, 45, 47.

Thus, the CIA has amply established that any disclosure beyond its *Glomar* response would reveal intelligence sources and methods, and so is exempted pursuant to Exemption 3 by virtue of the NSA and the CIA Act.

CONCLUSION

For the reasons stated herein, Plaintiff's motion for partial summary judgment should be denied, and the Government's cross-motion for summary judgment should be granted in its entirety.

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Respectfully submitted,

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ADDENDUM

Records	Exemption 1	Exemption 3	Exemption 7(A)	Exemption 6	Exemption 7C
FBI Videotapes	**X**	**DoD personnel**	**X**	**X**	**X**
FCE Videotape	**X**	**DoD personnel**		**X**	
Debriefing Videotapes	**X**	**DoD personnel**		**X**	
Photographs	**X**			**X**	