UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR PARTIAL SUMMARY JUDGMENT BY THE DEPARTMENT OF JUSTICE AND THE CENTRAL INTELLIGENCE AGENCY

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Stipulation and Order Between Plaintiffs and the Central Intelligence Agency Regarding Procedures for Adjudicating Summary Judgment Motions, dated April 21, 2008, attached to the Hilton Declaration as Exhibit B	April Stipulation

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Declaration of Mark A. Bradley, dated November 13, 2008	Bradley Declaration, or Bradley Decl.
Declaration of Wendy Hilton, dated November 14, 2008	Hilton Declaration, or Hilton Decl.
Declaration of Ralph S. DiMaio, dated April 21, 2008, submitted previously in support of the CIA's April Moving Brief	First DiMaio Declaration, or First DiMaio Decl.
Second Declaration of Ralph S. DiMaio, dated September 4, 2008, submitted previously in support of the CIA September Opposition Memorandum	Second DiMaio Declaration, or Second DiMaio Decl.

LIST OF ABBREVIATIONS

Entities:

Amnesty International USA, Inc.	Amnesty International
Central Intelligence Agency	CIA
Center for Constitutional Rights	CCR
Department of Homeland Security	DHS
Department of Justice	Justice, or DOJ
Foreign Intelligence Surveillance Court	FISC
Office of Intelligence and Policy Review	OIPR
Washington Square Legal Services	WSLS

***FOIA Requests*:**

Request Submitted Under the Freedom of Information Act, dated December 21, 2004, attached as Exhibit A to the Bradley Declaration	CCR Request
Request Submitted Under the Freedom of Information Act for Records Concerning Detainees, including "Ghost Detainees/Prisoners," "Unregistered Detainees/Prisoners," and "CIA Detainees/Prisoners," dated April 25, 2006, attached as Exhibit B to the Bradley Declaration	First Amnesty Request
Request Submitted Under the Freedom of Information Act for Records Concerning Ghost Detainee Memoranda, Department of Defense Detainee Reporting, Reports to Certain U.N. Committees, and the Draft Convention on Enforced Disappearance, dated April 25, 2006, attached as Exhibit C to the Bradley Declaration	Second Amnesty Request
Request Under the Freedom of Information Act for Specific Records Concerning Information on Secret Detention and Rendition, dated December 28, 2007, attached as Exhibit A to the Hilton Declaration	Supplementary CIA FOIA Request

Defendants DOJ[1] and the CIA (collectively, "Defendants" or the "Government"), respectfully submit this memorandum of law in support of their motion for partial summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

This motion for partial summary judgment concerns four separate requests under the Freedom of Information Act ("FOIA") by plaintiffs Amnesty International, WSLS, and CCR (collectively, "Plaintiffs"). The Government's previous motions on behalf of DHS and the CIA have addressed the first three requests. Plaintiffs' fourth, 17-category request was filed with the CIA during the pendency of this action, and became a subject of this litigation via Plaintiffs' amendment of their complaint on June 6, 2008. On September 24, 2008, in response to a request filed by the United States on behalf of a criminal prosecution team, this Court stayed the CIA's response to certain categories of Plaintiffs' fourth FOIA request. The Government now moves on behalf of a former component of DOJ – OIPR – with respect to the first three requests, and on behalf of the CIA with respect to those portions of the fourth request that were not stayed by the Court. Simply put, OIPR and the CIA have fulfilled their obligations under FOIA as to these matters.

First, both OIPR and CIA have issued a *Glomar* response, neither confirming nor denying the existence of records responsive to certain portions of Plaintiffs' FOIA requests. *See infra* Part II. It is well established that an agency may refuse to confirm or deny the existence of responsive records to protect any information that is exempt under FOIA. *See infra* Part II.A. OIPR issued a *Glomar* response with respect to the existence or non-existence of records in its operations files responsive to two of Plaintiffs' initial FOIA requests. OIPR's operations files relate primarily to

[1] For the Court's convenience, a list of court filings and declarations cited throughout this memorandum, as well as a list of the abbreviations used herein, are included on pages viii through ix.

classified electronic surveillance approved by the FISC, and disclosing the persons or groups mentioned in such files would reveal targets, witnesses, sources, or other subjects of interest that would reflect the nature of an intelligence investigation. OIPR could not respond to Plaintiffs' requests for records relating to those persons the Government has secretly detained (whether named or unnamed) without revealing classified information, which is exempt under FOIA Exemption 1, *i.e.*, whether or not the persons described in the requests appeared within OIPR's operations files. To reveal such information could harm the national security by disclosing how OIPR has deployed its resources in intelligence investigations. Accordingly, here, as in past cases affirmed by other courts, OIPR properly refused to confirm or deny the existence of any responsive records within its operations files. *See infra* Part II.B.1.

Likewise, the CIA has issued a *Glomar* response with respect to the existence or non-existence of records responsive to Categories 3 through 10 and 15 through 17 of the fourth request. Those categories seek records reflecting purported undisclosed intelligence operations and foreign information-sharing by the CIA (Categories 3-4 and 15-17), as well as records reflecting the alleged application of specific interrogation procedures to particular persons in CIA custody (Categories 5-10). The CIA properly issued a *Glomar* response to these reports because merely acknowledging the existence or non-existence of any such records would reveal classified information, which is protected by FOIA Exemption 1, *see infra* Part II.B.2., and disclose intelligence sources and methods, which is protected by FOIA Exemption 3, *see infra* Part II.C.

With respect to those requests and systems of records for which OIPR and the CIA were not obliged to issue a *Glomar* response, and which were not stayed by order of this Court, both OIPR and the CIA conducted thorough and adequate searches for responsive records. *See infra* Part III.

OIPR conducted a thorough and adequate search of its non-operations files, and found no responsive records. *See infra* Part III.A. The CIA conducted a thorough and adequate search for any remaining records for which it was required to search, and found no records responsive to Categories 2 and 14 of Plaintiffs' fourth request, and 49 records responsive to Category 12. *See infra* Part III.B.

Those 49 records, however, are classified intelligence cables, and the Government has properly withheld this information pursuant to FOIA Exemptions 1, 2, and 3. The Government has previously submitted two memoranda in this litigation explaining in detail why such information is exempt from disclosure under Exemptions 1 and 3. In particular, disclosure of information within the cables could reveal, among other things, intelligence activities, sources, and methods related to the CIA's Terrorist Detention and Interrogation ("TDI") program, including classified details regarding CIA interrogation techniques and the intelligence information The CIA has gained from interrogations, as well as covert CIA field installations, secret cryptonyms and psuedonyms, and classified dissemination markings. Here, as explained in the CIA's previous motion, FOIA does not require that the Government disclose such information at the expense of national security. *See infra* Part IV. Furthermore, the CIA has carefully reviewed all 49 cables, taking into account the limited official disclosures that have been made regarding the subject matter of these cables, and determined that there is no reasonably segregable, non-exempt information in the withheld cables. *See infra* Part V.

For these reasons, the Court should enter partial summary judgment against the Plaintiffs, hold that OIPR satisfied all of its FOIA obligations to Plaintiffs, and hold that the CIA satisfied all of its FOIA obligations to Plaintiffs regarding their fourth request, excepting those portions of the request to which the CIA's response has been stayed by this Court.

BACKGROUND

A. OIPR

1. The Initial Three FOIA Requests

Plaintiffs have served three separate FOIA requests upon OIPR, each of which was previously described in the CIA April Moving Memorandum at pages 2 through 4.

First, Plaintiff CCR served OIPR with a FOIA request dated December 21, 2004, requesting "records relating to the identity of, transport and location(s) of, authority over, and treatment of all unregistered, CIA, and 'ghost' Detainees interdicted, interrogated, and detained by any agency or department of the United States." *See* CCR Request at 3-6, Bradley Decl., Ex. A.

Second, Plaintiffs Amnesty International and WSLS submitted two FOIA requests to OIPR by letters dated April 25, 2006. *See* Bradley Decl. ¶¶ 6-7. The first is entitled "Request . . for Records Concerning Detainees, including 'Ghost Detainees/Prisoners,' 'Unregistered Detainees/Prisoners,' and 'CIA Detainees/Prisoners.'" *See* First Amnesty Request, Bradley Decl., Ex. B. The First Amnesty Request is similar to the CCR Request, and is the subject of this Court's June 19, 2008 opinion. *See Amnesty Int'l USA v. CIA*, No. 07 Civ. 5435 (LAP), 2008 WL 2519908 (S.D.N.Y. June 19, 2008). Like the CCR Request, the First Amnesty Request seeks records "referencing the concept of 'secret detention.'" *Id.* at *13. The second request from Amnesty International and WSLS seeks records relating to particular memoranda and reports. *See* Second Amnesty Request, Bradley Decl., Ex. C.

OIPR received the CCR Request on December 23, 2004, and the First and Second Amnesty Requests on April 26, 2006, and completed its search for responsive records prior to its absorption into DOJ's National Security Division ("NSD"), which was created on October 2, 2006.

See Bradley Decl. ¶ 1.[2] When OIPR was still a separate component of DOJ, it maintained three general categories of records: (1) policy records, including legal advice to government agencies relating to surveillance activities and physical search activites, and records regarding congressional inquires and reports; (2) litigation records; and (3) operations records before the FISC under the Foreign Intelligence Surveillance Act ("FISA"), including applications for authority to conduct electronic surveillance, physical searches, and penregister and trap and trace surveillance. *See id* ¶ 8.

2. OIPR's Search for Records Responsive to the Secret Detention Requests

As an initial matter, OIPR can neither confirm nor deny the existence within OIPR's operations files of records responsive to the CCR Request and the First Amnesty Request (collectively, the "Secret Detention Requests") because the fact of the existence or non-existence of such responsive records is itself classified. *See* Bradley Decl. ¶ 17. The reasons for classification are discussed in further detail in Part II.B. *infra*.

OIPR's search for records, outside of its operations files, did not turn up any responsive records. OIPR's FOIA Coordinator began the component's search by consulting with the head of OIPR, the Counsel for Intelligence Policy, to determine which files within OIPR might reasonably be likely to contain responsive records, based on Counsel's knowledge and familiarity with the records and activities of OIPR and personnel within the component. *See id.* ¶ 9. The Counsel for Intelligence Policy decided that each member of the senior management should be tasked with the search for records responsive to the Secret Detention Requests – excluding any operations files –

[2] OIPR's resources, and those of the Criminal Division's former Counterterrorism and Counterespionage Sections, were consolidated into the NSD. *See id.* ¶ 1.

because senior management would be most likely to have responsive records, if any existed. *See id.*

The OIPR senior management was comprised of employees holding the following positions: the Counsel for Intelligence Policy, the Deputy Counsel for Intelligence Policy, the Deputy Counsel for Operations, the Deputy Counsel for Litigation, Assistant Counsels, and the Chief of Staff. *Id.* ¶ 10. Each of these employees received a copy of the Secret Detention Requests and personally conducted a search of his or her files, including his or her electronic communications (*i.e.*, e-mail), for any records responsive to the requests. *Id.* These searches included searches of both classified and unclassified files. *Id.* The employees found no responsive records. *Id.* ¶ 11.

In addition, and in an abundance of caution, OIPR FOIA personnel conducted a separate search of the office's policy files, which consist only of records regarding legal advice (on surveillance and physical searches) and regarding Congressional action. *See id.* ¶ 12. FOIA personnel queried the policy files, which are stored electronically, with search terms drawn from the Secret Detention Requests, including "unregistered detainee," "CIA detainee," "ghost detainee," and "detainee reporting." *Id.* No responsive records were found. *Id.* ¶ 13.

OIPR FOIA personnel did not conduct a separate search of any litigation files. *See id.* ¶ 14. In general, OIPR searches its litigation files when a request pertains to a particular criminal, civil, or administrative matter in which OIPR had been involved. *Id.* Here, neither of the Secret Detention Requests referenced any particular criminal prosecution, civil case, or administrative matter in which OIPR had been involved. *Id.* Moreover, OIPR FOIA personnel who had substantive knowledge of the contents of the litigation records were not aware of any litigation files pertaining to the subject matter of the Secret Detention Requests. *Id.*

3. OIPR's Search for Records Responsive to the Second Amnesty Request

The Deputy Counsel for Intelligence Policy reviewed the Second Amnesty Request and determined that there was no reasonable likelihood that any OIPR files would contain any responsive records. *See id.* ¶ 16. In his position as a member of OIPR's senior management, the Deputy Counsel would have been aware of the office's involvement in the matters referenced in the request if the office had in fact been involved with such matters. *Id.* As the Deputy Counsel was not aware of any such involvement, OIPR determined that it did not have responsive records. *See id.*

B. The CIA

1. The Supplementary CIA FOIA Request

By letter dated December 28, 2007, Plaintiffs submitted a fourth FOIA request to the CIA. *See* Supplementary CIA FOIA Request, Hilton Decl., Ex. A. That request seeks the following 17 specific alleged records or categories of records:

Category 1:	A spring 2004 report by the CIA's Office of the Inspector General ("OIG") regarding "the CIA's compliance with the Convention Against Torture";
Category 2:	"The list of 'erroneous renditions' compiled by the CIA's OIG";
Categories 3-4:	Two documents sent from the CIA to the Royal Canadian Mounted Police Criminal Intelligence Directorate on October 3, 2002, and November 5, 2002, respectively, regarding Maher Arar;
Categories 5-10:	CIA cables regarding the use of a slap, an attention shake, and sleep deprivation on detainees Abu Zubaydah ("Zubaydah") and Khalid Sheik Mohammed ("KSM");
Categories 11-12:	CIA cables regarding the use of waterboarding on detainees Zubaydah and KSM;

Categories 13:	Certain video tapes, audio tapes, and transcripts of materials related to interrogations of detainees;
Category 14:	The September 13, 2007 notification from CIA to the United States Attorney for the Eastern District of Virginia that "the CIA had obtained a video tape of an interrogation of one or more detainees";
Category 15:	Certain documents regarding Mohamed Farag Ahmad Bashmilah provided by the CIA to the US Embassy in Sana'a, Yemen; and
Categories 16-17:	Certain documents regarding Mohamed Farag Ahmad Bashmilah and Salah Nasser Salim Ali provided by the US Government to the Government of Yemen.

Id. at 2-5.

2. The CIA's Response to Categories 1, 11 and 13

Two of this Court's Orders affected the CIA's response to the Supplementary CIA FOIA Request. First, the CIA did not conduct a new search in response to Category 1, in accordance with the April Stipulation. *See* April Stipulation, First DiMaio Decl., Ex. H. That Stipulation and Order excludes from this case "the CIA's withholding of records that have been or are currently being litigated in *American Civil Liberties Union v. Dep't of Defense*, No. 04 Civ. 4151 (AKH) ["*ACLU*"]." April Stipulation ¶ 1. Although the CIA does not agree with Plaintiffs' characterization of the document requested by category 1, the CIA has determined that it is a CIA Office of the Inspector General ("OIG") Special Review report regarding counterterrorism detention and interrogation activities, dated May 7, 2004,[3] which is currently being litigated in *ACLU*. *See* Hilton Decl. ¶ 12. Accordingly, the CIA's response to Category 1 is not before this Court.

[3] In *ACLU*, the CIA released a redacted version of this report, which is currently available on the ACLU's website at http://www.aclu.org/torturefoia/released/052708/052708_Special_Review.pdf.

Additionally, in accordance with this Court's order of September 24, 2008, the CIA has not yet conducted a search of Categories 11 and 13. *See* Memorandum and Order, dated September 24, 2008 (Docket No. 109). That order stayed CIA's search for, review of, and processing of Categories 11 and 13 until December 31, 2008.

3. The CIA's Glomar Response to Categories 3-10, and 15-17

As discussed in more detail in Part II.C. of this memorandum, the CIA can neither confirm nor deny the existence of records described in Categories 3-4, Categories 5-10, and Categories 15-17 because the fact of the existence or non-existence of these records is itself classified. *See* Hilton Declaration ¶ 18; *infra* at 19-27. Accordingly, the CIA did not conduct a search for records within these categories.

4. The CIA's Search for Records Responsive to Categories 2, 12, and 14

Lastly, the CIA searched for records responsive to Categories 2, 12, and 14. It did not find any records responsive to Categories 2 and 14, but identified 49 records responsive to Category 12.

Category 2 requested a list of "erroneous renditions" compiled by the CIA's OIG. In order to determine whether any such document exists, the CIA officers responsible for this FOIA search consulted with the Deputy Assistant Inspector General for Investigations within the OIG. *See* Hilton Decl. ¶ 16. At the time the search was conducted, this individual was responsible for overseeing all investigations conducted by the OIG and had detailed knowledge of the content of OIG investigations files, in particular those files relating to the investigation of matters regarding the CIA's TDI program. *Id.* After reviewing Category 2 of the Supplementary CIA FOIA Request, the

Deputy Assistant Inspector General stated that "no such document exists." *Id.* Accordingly, there are no records responsive to Category 2. *Id.*

Similarly, Category 14 requested the CIA's September 13, 2007 notification to the United States Attorney for the Eastern District of Virginia, in the context of the criminal prosecution *United States v. Zacharias Moussaoui*, that the CIA had "obtained a video tape of an interrogation of one or more detainees." Supplementary CIA FOIA Request at 4. CIA officers responsible for this search consulted with the attorneys in the Office of General Counsel who were familiar with the CIA's involvement in the *Moussaoui* case. *See* Hilton Decl. ¶ 17. Those attorneys stated there was no such written notification; rather the notification was made telephonically. *Id.* Accordingly, there are no records responsive to Category 14. *Id.*

Finally, in order to locate the records requested in Category 12, CIA information management professionals searched an electronic database of cables concerning KSM maintained by the National Clandestine Service ("NCS"), using search terms reasonably calculated to retrieve all responsive records, including the terms "waterboard," "water," and "other variations of the term 'waterboard'." *See id.* ¶ 42.[4] The search located 49 classified intelligence cables between CIA headquarters and the CIA field, ranging between 1 and 15 pages each. *See* Hilton Decl. ¶ 43. The

[4] As explained in the Hilton Declaration: "[o]perational cables, such as those requested in Category 12, are typically exempt from FOIA search obligations pursuant to the CIA Information Act, 50 U.S.C. § 431. However, this operational files exemption has exceptions, including files containing information that is the specific subject matter of certain investigations, including those conducted by the Department of Justice and the CIA OIG. 50 U.S.C. § 431(c)(3). In this instance, the CIA determined that the subject matter of records requested in Category 12 was within the scope of such investigations, and therefore searched for responsive documents." Hilton Decl. ¶ 15 n. 3.

CIA has withheld all 49 cables in their entirety pursuant to 5 U.S.C. § 552 (b)(1), (b)(2), and (b)(3). *Id.*

ARGUMENT

I. SUMMARY JUDGMENT STANDARDS IN FOIA CASES

The proper standards for summary judgment in FOIA cases were set forth in this Court's previous opinion in this case, *see Amnesty Int'l USA*, 2008 WL 2519908, at *8, and the CIA's April Moving Memo, *see* CIA Apr. Moving Mem. at 7-9.

II. DEFENDANTS PROPERLY DECLINED TO CONFIRM OR DENY THE EXISTENCE OF CERTAIN REQUESTED RECORDS

OIPR and the CIA properly refused to confirm or deny the existence of certain requested records. This type of response to a FOIA request is known as a "*Glomar* response," named after the CIA's successful defense of its refusal to confirm or deny the existence of records regarding a ship named the *Glomar Explorer* in *Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976). In refusing to confirm or deny the existence of the requested information, both OIPR and the CIA properly relied upon FOIA Exemption 1, 5 U.S.C. § 552(b)(1), and the CIA further properly relied upon FOIA Exemption 3, 5 U.S.C. § 552(b)(3).

A. Agencies May Protect Exempt Information by Declining To Confirm or Deny the Existence of Requested Records

It is well established that 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); *see also Cozen O'Connor v. U.S. Dep't of Treas.*, No. 05-4332, 2008 WL 3271154, at *24 (E.D. Pa. Aug. 7, 2008) ("Where acknowledging that specific records exist would reveal

exempt information, an agency may make a Glomar response . . . ."). In other words, a *Glomar* response is appropriate whenever "to confirm or deny the existence of records . . . would cause harm cognizable under a FOIA exception." *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982).

Accordingly, courts have repeatedly upheld *Glomar* responses where, as here, confirming or denying the existence of a record would reveal classified information in contravention of FOIA Exemption 1, or disclose statutorily protected information in contravention of FOIA Exemption 3. *See, e.g.*, *Weberman v. NSA*, 668 F.2d 676, 677-78 (2d Cir. 1982) (Exemptions 1 and 3); *Wilner v. NSA*, No. 07 Civ. 3883 (DLC), 2008 WL 2567765, at *4-5 (S.D.N.Y. June 25, 2008) (Exemption 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.2d 788 (2d Cir. 1997); *Daily Orange Corp. v. CIA*, 532 F. Supp. 122, 124 (N.D.N.Y. 1982) (Exemption 1); *Sirota v. CIA*, No. 80 Civ. 2050 (GLG),1981 WL 158804, at *2-4 (S.D.N.Y. Sept. 18, 1981) (Exemptions 1 and 3).

B. OIPR and the CIA Properly Declined to Confirm or Deny the Existence of Certain Requested Records Pursuant to Exemption 1

Both OIPR and the CIA issued *Glomar* responses justified by Exemption 1. Exemption 1 protects from disclosure information: (1) specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy; and (2) in fact properly classified pursuant to an executive order. *See* 5 U.S.C. § 552 (b)(1); *see also* CIA April Moving Br. at 16-19. Exemption 1 thus "'establishes a specific exemption for defense and foreign policy secrets, and delegates to the President the power to establish the scope of that exemption by executive order.'" *Wilner*, 2008 WL 2567765, at *3 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 737 (D.C. Cir. 1981)).

The relevant executive order is Executive Order ("E.O.") 12958. *See* E.O. 12958, as amended by E.O. 13292, 68 Fed. Reg. 15315, 15315 (March 25, 2003).[5] Pursuant to E.O. 12958, an agency may classify certain categories of information, including "foreign government information," E.O. 12958, § 1.4(b), "intelligence activities . . . [and], intelligence sources or methods," *id.* § 1.4 (c), and "foreign relations or foreign activities of the United States," *id.* § 1.4(d), when the appropriate classification authority "determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to national security," *id.* § 1.1(a)(4). Further, "the Executive Order specifically countenances the Glomar Response," *Wilner*, 2008 WL 2567765, at *3, providing that an agency may "refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors," E.O. 12958, § 3.6(a). Moreover, this Court must accord substantial weight to agency classification determinations. *See* CIA April Moving Mem. at 8; CIA Sept. Opp. Mem. at 2-3; *see also Doherty v. DOJ*, 775 F.2d 49, 52 (2d Cir. 1985).

1. OIPR's Operations Files

OIPR properly issued a *Glomar* response, justified by Exemption 1, to the Secret Detention Requests with respect to information within OIPR's operations files. OIPR's operations files consist of records relating to foreign intelligence, counterintelligence, and international terrorism investigations. *See* Bradley Decl. ¶ 21. Both the Secret Detention Requests seek records relating to those persons secretly detained by the United States, including by the CIA. *See* CCR Request at

[5] E.O. 12958 was amended by E.O. 13292, effective March 25, 2003. *See* E.O. 12958, *reprinted as amended* in 50 U.S.C. § 435 note at 91 (Supp. 2004); *see also* E.O. 13292, 68 Fed. Reg. 15315 (March 25, 2003). All citations herein to E.O. 12958 are to the executive order as amended by E.O. 13292.

3-6; First Amnesty Request at 2. OIPR's refusal to confirm or deny the existence of operations files relating to those persons secretly detained by the United States was entirely proper because confirming or denying the existence of such files reasonably could be expected to damage national security and is therefore properly classified. *See* Bradley Decl. ¶ 22, 32.

Mark A. Bradley, the former Deputy Counsel for Intelligence Policy at OIPR, has submitted a declaration explaining why such information is classified. *See* Bradley Decl. ¶¶ 1-2.[6] Mr. Bradley possesses original classification authority. *See id.* ¶ 17. Therefore, Mr. Bradley is "authorized to conduct classification reviews and to make original classification decisions." *Id.* Mr. Bradley has determined, on the basis of his experience and authority as a classification official, that "information regarding the existence or non-existence of OIPR operations files responsive to the Secret Detention Requests is properly classified at the SECRET level." *Id.*

As a general matter, DOJ cannot disclose the existence of OIPR "operations files pertaining to particular individuals or groups of individuals without disclosing classified information." *Id.* ¶ 23. "Particular individuals or groups of individuals appearing in such files may include targets, witnesses, sources, and other subjects of interest that reflect the nature of such investigations." *Id.* Thus, the confirmation that particular individuals or groups of individuals appeared in OIPR's operations "would disclose that persons within the scope of the request were pertinent to the approval of one or more specific uses of the investigatory techniques employed by OIPR (*e.g.*, electronic surveillance, physical search, and other foreign intelligence, foreign counterintelligence, and international terrorism investigations authorized by the FISC)." *Id.* ¶ 24.

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[6] Mr. Bradley presently serves as the Acting Chief of the Oversight Section within the Office of Intelligence ("OI") of the NSD. *Id.* ¶ 1.

Such disclosures "would be recognized and exploited for the immense intelligence and counterintelligence value they would yield to trained intelligence analysts, such as those employed by hostile intelligence services." *Id.* For instance, if OIPR routinely confirmed the existence of responsive information in OIPR operations files, such confirmations would "provide trained intelligence analysts with individual pieces of information that could be compiled into a catalog of, *inter alia*, FISA activities, overseas electronic surveillance, and physical searches." *Id.* "This information could be used by a hostile intelligence service to deploy counterintelligence assets against the U.S. Government more effectively, increasing the risk that U.S. intelligence collection would be neutralized or impaired." *Id. Cf.* First DiMaio Decl. ¶ 106 ("To disclose the existence (or non-existence) of a particular intelligence collection activity would reveal U.S. intelligence needs, priorities, and capabilities to a foreign intelligence service or hostile organization seeking to take advantage of any national security weakness.").

Conversely, the "disclosure of the *nonexistence* of information within OIPR's operations files relating to particular individuals or groups of individuals" could confirm that "OIPR did not maintain operations files relating to any particular individual or group of individuals," and "that OIPR had *not* prepared an application under the FISA relating to particular intelligence interests." Bradley Decl. ¶ 25. Through such a request or series of requests, "a hostile intelligence service or international terrorist organization could easily and surreptitiously assess the extent of the U.S. Government's awareness of its activities, as well as whether OIPR-employed investigatory techniques were being used in connection with particular targets, witnesses, sources, or other subjects of interest." *Id.* Thus, "[i]f OIPR were to indicate routinely that it does not maintain

responsive records, these responses would also be of immense value to trained intelligence analysts and foreign powers." *Id.*

Accordingly, OIPR maintains a consistent approach of issuing *Glomar* responses to all requests for operations files regarding particular individuals or groups of individuals. *See id.* ¶¶ 28-29. Consistency is essential because "[i]f OIPR denied that it maintains responsive information only in cases in which it in fact does not, while refusing to confirm or deny that it maintains responsive information only in those instances in which it does maintain such information, every refusal to confirm or deny would be a tacit admission that OIPR in fact has responsive information in that case." *Id.* ¶ 27. For example, "[s]ince September 11, 2001, OIPR has received approximately 600 FOIA requests, many of which have sought information in OIPR's operations files relating to particular individuals or groups of individuals." *Id.* ¶ 29. OIPR has consistently issued a *Glomar* response to these requests. *Id.*

Here, in accordance with its universal approach, OIPR properly issued a *Glomar* response to the Secret Detention Requests. Both requests relate to a particular group of individuals whom the requesters refer to as "ghost detainees," "secret detainees," "unregistered detainees," or "CIA detainees." *Id.* ¶ 30. Mr. Bradley has justified OIPR's *Glomar* response pursuant to Exemption 1 by explaining that confirmation of the existence or non-existence of records responsive to the Secret Detention Requests would (1) reveal information about intelligence activities, sources, or methods, and (2) reasonably "could be expected to result in serious damage to the national security." E.O. 12958, § 1.1(a)(4); Bradley Decl. ¶¶ 21-22, 30-31.

Mr. Bradley has explained that OIPR's operations files "consist of records relating to applications for electronic surveillance, physical search, and other foreign intelligence, foreign

counterintelligence, and international terrorism investigations authorized by the FISC pursuant to the FISA, and other applicable executive orders governing foreign intelligence." *See* Bradley Decl. ¶ 21. Accordingly, information about OIPR's operations files (*i.e.*, records reflecting the use of certain OIPR-specific investigatory techniques in particular intelligence investigations) concerns "intelligence activities (including special activities), intelligence sources or methods, or cryptology" within the meaning of § 1.4(c) of E.O. 12958. *See* Bradley Decl. ¶ 21-22; *see also* E.O. 12958 § 1.4(c). Therefore, confirming the existence or non-existence of OIPR operations files responsive to Plaintiffs' requests would reveal information concerning intelligence activities, sources, and methods. *See* Bradley Decl. ¶ 21.

Mr. Bradley has also explained why, as with requests relating to other individuals and groups of individuals, "OIPR could neither confirm nor deny whether it has information within its operations files related to the particular group of individuals described in the Secret Detention Requests without disclosing information that reasonably could be expected to cause serious damage to the national security of the United States." *Id.*¶ 30. In that regard, Mr. Bradley has explained:

> [I]f OIPR disclosed that responsive records existed – assuming, *arguendo*, that they did exist – OIPR would reveal information regarding its intelligence interests (*e.g.*, individuals within the class of persons described in the requests) and that investigatory techniques particular to OIPR had been used to obtain intelligence information. If, by contrast, OIPR disclosed that no responsive records existed – assuming, *arguendo*, none did exist – OIPR would reveal that the Government had not used particular techniques to focus on intelligence or terrorism activities involving particular intelligence interests (*e.g.*, individuals within the class of persons described in the requests). Moreover, if no records responsive to the Secret Detention Requests exist within OIPR's operations files, OIPR's acknowledgment of that fact in this case would cause any OIPR *Glomar* response in other cases to be seen as tantamount to a confirmation that responsive records existed; such a response would thus undermine OIPR's consistent approach to requests for information within its operations files regarding individuals and groups.

Id. ¶ 31. For all these reasons, OIPR properly determined that information regarding the existence or non-existence of OIPR operations file responsive to the CCR Request or the First Amnesty Request is therefore properly classified at the SECRET level. *Id.* ¶ 32.

Precedent supports OIPR's *Glomar* response. In *Marrera v. DOJ*, 622 F. Supp. 51 (D.D.C. 1985), for instance, the district court approved a *Glomar* assertion by OIPR where a requester sought information within, *inter alia*, OIPR's operations files concerning a particular individual. *See id.* at 52-54. The court held "that OIPR's refusal to confirm or deny the existence of FISA records pertaining to [a] particular plaintiff [was] justified in the interests of national security as part of an overall policy . . . with respect to *all* FISA FOIA requests." *Id.* at 53-54. In support of its conclusion, the *Marrera* court cited *Gardels v. CIA*, 689 F.2d 1100, 1104-06 (D.C. Cir. 1982). *See Marrera*, 662 F. Supp. at 54. In *Gardels*, the D.C. Court of Appeals reasoned that the CIA, when faced with more than a hundred related FOIA requests, "could properly decide to treat all such requests uniformly and apply a consistent rule of judgment to all the requests, nationwide." *Gardels*, 689 F.2d at 1105-06.

Here, in accordance with *Marrera*, OIPR properly issued a *Glomar* response to the Secret Detention Requests. Those requests reference a limited group of individuals (*i.e.*, secret detainees apprehended since September 11, 2001), some of whose names have already been officially acknowledged by the Government, *see* Hilton Decl. ¶ 72. The names of other potential members of this group have been the subject of public speculation. Since September 11, 2001, OIPR has received hundreds of FOIA requests for information about individuals or groups of individuals within its operations files, and has taken a consistent approach by uniformly issuing *Glomar* responses. *See* Bradley Decl. ¶ 29. OIPR's consistent approach is a "reasonable and logical reaction

to the mass of separate requests," *Gardels*, 689 F.2d at 1106, which comports with the holding in *Marrera*, as well as the reasoning set forth by the D.C. Circuit in *Gardels*.

The fact that the names of certain secret detainees are known, while the names of others may be currently unknown, does not detract from OIPR's need to protect the secrecy of OIPR intelligence interests (*e.g.*, whether those interests include any individuals within the class of persons described in the requests) and whether investigatory techniques particular to OIPR had been used to obtain related intelligence information. *See* Bradley Decl. ¶ 31. *Cf. Schwarz v. U.S. Dept. of Treas.*, 131 F. Supp. 2d 142, 144, 149-150 (D.D.C. 2000) (upholding OIPR *Glomar* response to records about, *inter alia*, named and unnamed individuals, including members of the Church of Scientology, unknown Nazi conspirators, and alleged and unnamed prosecutors. Only by employing a consistent *Glomar* policy, may OIPR preclude any inferences about the Government's classified operations and intelligence interests. *See id.*; *see also Bassouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004) (holding that Government may properly protect against disclosure of the existence of information that would reveal Government's intelligence interests), discussed *infra* at Part II.B.2.

Accordingly, OIPR has properly refused to confirm or deny the existence of records in its operational files responsive to the Secret Detention Requests.

2. The CIA's Response to Categories 3-10 and 15-17

Like OIPR, the CIA also properly issued a *Glomar* response, warranted under Exemption 1, to Categories 3-10 and 15-17 of the Supplementary CIA FOIA Request. *See* Hilton Decl. ¶¶ 18, 21-41. These categories seek records relating to: (1) the purported sharing between the CIA and the Government of Canada of information regarding a particular individual, Maher Arar, *see* Supplementary CIA Request at 2-3 (Categories 3-4); (2) the alleged use of specified interrogation

techniques on specified individuals, *see id.* at 3-4 (Categories 5-10); and (3) the alleged involvement of CIA and the Government of Yemen in the detention of two specified individuals, *see id.* at 4-5 (Categories 15-17). The CIA's *Glomar* response to these categories was entirely proper because confirming or denying the existence of such files reasonably could be expected to damage national security and is therefore classified. *See* Hilton Decl. ¶ 24.

Wendy M. Hilton, an Associate Information Review Officer for the National Clandestine Service at the CIA, has submitted a declaration explaining why such information is classified. *See* Hilton Decl. ¶¶ 21-41. Ms. Hilton possesses original classification authority. *See id.* ¶ 10. Therefore, Ms. Hilton is "authorized to conduct classification reviews and to make original classification decisions." *Id.* Ms. Hilton has determined, on the basis of her experience and authority as a classification official, that information regarding the existence or non-existence of records responsive to categories 3-10 and 15-17 of the Supplementary CIA FOIA Request "is properly classified at or above the SECRET level." *Id.* ¶ 24; *see also id.* ¶¶ 26-41.

As a general matter, "in certain cases a response that does not confirm or deny the existence of responsive records is necessary to safeguard intelligence sources and methods, as well as U.S. foreign relations." *Id.* ¶ 22. As Ms. Hilton has explained:

> For instance, consider a clandestine intelligence activity in which the CIA had participated but not acknowledged its interest or involvement. If a FOIA request asked for records regarding the CIA's involvement in that intelligence activity, the CIA's acknowledgment of responsive records would reveal that the CIA had in fact participated in the intelligence activity. If a FOIA request asked for records regarding the intelligence activity generally, the CIA's acknowledgment of responsive records would reveal that the CIA at a minimum had an interest in the intelligence activity. Conversely, if the CIA had not participated in the intelligence activity but had purposefully not confirmed this fact, revealing the lack of responsive records to such FOIA requests would reveal that the CIA had not participated or did not have an interest in the activity.

Id. In such cases, "whether or not records exist could reveal substantive information." *Id.*

Moreover, "[i]n order for a *Glomar* response to be credible and effective, the CIA must use it with every requester seeking such records, including in those instances where the CIA does not actually hold responsive records." *Id.* ¶ 23. In particular:

> If the CIA were to give a *Glomar* response only when it possessed responsive records, and inform requesters when it has no records, the *Glomar* response would effectively be an admission of records. Because the CIA will not provide a "no records" response when it actually does have records, the only means by which the CIA can protect intelligence sources and methods and intelligence activities in such cases is to routinely issue a *Glomar* response to requesters seeking information on a matter that the CIA has not acknowledged.

Id. Accordingly, "in cases in which a request is made for information regarding a matter that has not been acknowledged by the CIA, the CIA must respond to requests for CIA records in a consistent manner." *Id.*

Here, for each request for which the CIA issued a *Glomar* response, Ms. Hilton has justified that response by explaining both that confirmation of the existence or non-existence of records: (1) "would necessarily reveal information regarding intelligence sources and methods and intelligence activities that is properly classified," *id.* ¶ 24; and, (2) "could reasonably be expected to cause at least serious damage to the national security."[7] *Id.; see also* E.O. 12958, § 1.1(a)(4). The first

[7] In the Supplementary CIA FOIA Request, Plaintiffs cite to purported acknowledgments relating to each requested item. Those citations, however, do not alter the applicability of Exemption 1. *See* Supplementary CIA FOIA Request at 2-5. As the Second Circuit has stated, "the application of Exemption 1 is generally unaffected by whether the information has entered the realm of general knowledge. A limited exception is permitted only where the government has *officially* disclosed the specific information the requester seeks." *Halpern*, 181 F.3d at 294 (emphasis added). Here, the request cites alleged statements by foreign governments and a former CIA employee. *See* Supplementary CIA FOIA Request at 2-5. Neither type of statement constitutes an official disclosure. *See* Hilton Decl. ¶¶ 30, 34, 41. Statements by foreign governments are obviously not disclosures by the United States, much less by the CIA. *See, e.g.*, *Frogune v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (holding that CIA is not "required either to

section below discusses the CIA's response to Categories 3-4 and 15-17, and the second section discusses the CIA's response to Categories 5-10.

a. Categories 3-4 and 15-17

With respect to Categories 3 and 4, "the CIA has never acknowledged whether or not it had any involvement in the detention and removal of Mr. Arar, much less whether it received and responded to a request for information regarding Mr. Arar from the Canadian government." Hilton Decl. ¶¶ 26, 30. Accordingly, "[i]f the CIA were to provide anything other than a *Glomar* response to these two Categories, it would be forced to acknowledge, at a minimum, (1) whether the CIA had an intelligence interest in Mr. Arar; and (2) whether it exchanged intelligence information regarding Mr. Arar with the Canadian government." *Id.* Ms. Hilton has explained that, "[t]his would reveal information regarding intelligence sources and methods and intelligence activities," within the meaning of § 1.4(c) of E.O. 12958. *Id.* ¶¶ 26, 29.

Ms. Hilton has also explained how the CIA's confirmation of whether or not it had an intelligence interest in Mr. Arar could reasonably be expected to cause damage to the national security:

> Whether the CIA had an intelligence interest in Mr. Arar and gathered information on him would reveal the intelligence gathering interests and capabilities of the CIA. . . . If the CIA were required to confirm or deny whether it gathered information about a specific individual, it would reveal whether it had an interest in that person related to the CIA's ongoing intelligence gathering function and the CIA's capabilities regarding such a collection. Such revelations would provide foreign intelligence services or other hostile entities with information concerning the reach

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confirm or deny statements made by another agency"). Likewise, "[o]fficials no longer serving with an executive branch department cannot continue to disclose official agency policy." *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 422 (2d Cir. 1989); *see also Phillippi v. CIA*, 655 F.2d at 1330-31 (statements by former CIA director did not constitute an official acknowledgment).

> of the CIA's intelligence monitoring. It may also provide insight into the sources for the intelligence information that the CIA collected on the specific individual.

Id. ¶ 27; *see also* First DiMaio Decl. ¶¶ 106-108.

Likewise, "[w]hether the CIA exchanged intelligence information with the Canadian government regarding Mr. Arar similarly would disclose information regarding the CIA's relationship with a foreign liaison," which would "reveal information regarding the CIA"s intelligence sources." Hilton Decl. ¶ 28. As discussed at length in the First DiMaio Declaration, intelligence sources and methods, within the meaning of §1.4(c) of E.O. 12958, include such foreign liaison information. *See* First DiMaio Decl. ¶¶ 65-75, 98-99. Ms. Hilton has described the damage to national security that reasonably could be expected to occur should this information be disclosed. In particular,

> [i]f the CIA were to confirm that communications responsive to the two categories in Plaintiffs' FOIA request exist, the CIA would confirm an intelligence sharing relationship with the Canadian intelligence services and that such sharing had taken place in this instance. Such a confirmation would provide to foreign intelligence services and other hostile entities valuable information regarding the extent of the CIA's liaison relationships generally and in this specific instance. Similarly, a denial of responsive communications would provide such entities with the same type of information, specifically, that the reach of the CIA's liaison relationships did not extend to this instance.

Hilton Decl. ¶ 28; *see also* First DiMaio Decl. ¶¶ 65-75, 98-99. For all of these reasons, CIA properly determined that the existence or non-existence of records responsive to Categories 3 and 4 is therefore properly classified. *See* Hilton Decl. ¶ 29.

Similarly, Ms. Hilton has concluded that CIA must issue a *Glomar* response to Plaintiffs' request for records responsive to Categories 15 through 17, which include purported communications regarding the alleged capture, transfer, and/or detention of Mohamed Farag Ahmad Bashmilah as well as files purportedly provided to the Government of Yemen by the United States

regarding both Bashmilah and another individual, Salah Nasser Salim Ali. *See* Supplementary CIA FOIA Request at 4-5; *see also* Hilton Decl. ¶ 36. Ms. Hilton explains that "[t]he CIA cannot confirm or deny the existence of records responsive to these requests" because:

> [t]o do so would require the CIA to specifically confirm or deny several facts: whether the CIA was involved or had an interest in the capture, transfer, and detention of Bashmilah; whether the CIA communicated with the U.S. Embassy in Yemen on this matter; whether Bashmilah was ever in U.S. custody; whether Bashmilah was transferred from the custody of the U.S. Government to the Government of Yemen; whether the U.S. Government was in communication with the Government of Yemen regarding the custody transfer of Bashmilah; whether the CIA and/or the U.S. Government generally had collected information on Bashmilah and Ali; and whether the U.S. Government shared such information on these two individuals with the Government of Yemen.

Id.

The CIA has not officially confirmed or denied any of these allegations. *See id.* ¶ 37. "To the extent that the CIA engages in these activities, its involvement would be classified and would constitute intelligence sources and methods and intelligence activities of the CIA." *Id.* As described in the First DiMaio Declaration, foreign intelligence relationships are a type of intelligence method within the meaning of § 1.4(c) of E.O. 12958, *see also* First DiMaio Decl. ¶¶ 65-73, 75, *cf. id.* 122-125, and therefore, "[d]isclosure of any information sharing or coordination between the CIA and the Government of Yemen would disclose a CIA liaison relationship, which would reveal information regarding the CIA's intelligence sources and methods," Hilton Decl. ¶ 38. Additionally, "disclosing whether the CIA gathered intelligence information on specific individuals such as Bashmilah and Ali would reveal information regarding intelligence methods and intelligence activities." *Id.* ¶ 39; *see also* First DiMaio Decl. ¶¶ 106-108. Furthermore, confirmation or denial of the CIA's involvement in the capture, transfer and/or detention of Bashmilah and Ali in connection with the TDI would reveal information about intelligence activities. *See* Hilton Decl.

¶ 39.

Ms. Hilton has also described the damage to the national security that could reasonably be expected to result from the confirmation or denial of records responsive to these requests, including, "provid[ing] to foreign intelligence services and other hostile entities valuable information regarding the extent of the CIA's liaison relationships generally and with respect to these individuals," *id.* ¶ 38, as well as "information concerning the reach of the CIA's intelligence monitoring," *id.* ¶ 39. *See also* First DiMaio Decl. ¶¶ 72-73, 75, 77. Furthermore, it could provide "insight into the sources for the intelligence information that the CIA collected on [a] specific individual." *See Hilton* ¶ 39. For these reasons, disclosure of the existence or non-existence of records responsive to Categories 15 through 17 is properly classified. *Id.* ¶ 40.

Each of the CIA's *Glomar* responses to these Categories is thus fully justified by the Hilton declaration. Moreover, each response comports with applicable precedents. For instance, the CIA's refusal to confirm or deny the existence of records responsive to Categories 3 and 4 (*i.e*, records relating to an alleged intelligence interest in Mr. Arar), and Categories 15 through 17 (*i.e.*, records relating to an alleged intelligence interest in Messrs. Bashmilah and Ali), is consistent with *Marrera* and *Schwarz*, cited above, which accord with the general proposition that an intelligence agency may properly refuse to confirm or deny the existence of records to protect against the disclosure of information that could reveal the agency's intelligence interests. *See supra* at 11-12.

That proposition is discussed at length in *Bassouni v. CIA*, 392 F.3d 244, 246 (7th Cir. 2004). There, the Seventh Circuit held that disclosures about how an intelligence agency "deploy[s] its resources [or] what subjects it is investigating" are inherently dangerous – as such information "could be useful to both [foreign] nations and terrorists" and, once disclosed, is equally "available

to North Korea's secret policy and Iran's counterintelligence service too" – and that intelligence agencies must maintain a consistent response to requests for such information. *Id.* The court explained:

> There are two risks in disclosing when the request is harmless . . . and keeping silent when the CIA sees a danger. The first risk is that whoever makes the decision on behalf of the CIA may miss some clue that foreign intelligence services would catch, and thus inadvertently reveal secrets. The second risk is that people would draw an inference from disparate treatment: if, for example, the CIA opens its files most of the time and asserts the state-secrets privilege only when the information concerns a subject under investigation or one of its agents, then the very fact of asserting the exemption reveals that the request has identified a classified subject or source. When a pattern of responses itself reveals classified information, the only way to keep secrets is to maintain silence uniformly.

Id. at 246. The CIA's protection of sources and methods is supported by a host of other cases. *See, e.g., Wolf v. CIA*, 473 F.3d 370, 375-77 (D.C. Cir. 2007) (holding CIA properly issued *Glomar* response to FOIA request seeking any records relating to a specified foreign national); *Weberman*, 668 F.2d at 677-78 (holding NSA properly issued *Glomar* response to FOIA request seeking NSA's alleged intercept of telegram sent from Jack Ruby's brother to Cuba); *Pipko v. CIA*, 312 F. Supp. 2d 669, 677 (D.N.J. 2004) (holding CIA properly issued *Glomar* response to FOIA request seeking records relating to requester); *Nayed v. INS*, Civ. A. No. 91-805 SSH, 1993 WL 524541, at *2 (D.D.C. Nov. 29, 1993) (holding CIA properly issued *Glomar* response where confirmation or denial of information requested would "be an admission of the identity of a CIA intelligence interest"); *accord Arabian Shield Develop. Co. v. CIA*, No. 3-98-CV-0624-BD, 1999 WL 118796, at *3 (N.D. Tex. Feb. 26, 1999) (holding CIA properly refused to confirm or deny, under Exemption 1, whether it "collected intelligence regarding specific individuals or corporations").[8]

[8] The CIA's *Glomar* response in this case is also consistent with other cases in which courts have approved of agencies' refusals to confirm or deny particular communications or

Accordingly, here, the CIA has properly refused to confirm or deny the existence of records responsive to Categories 3 and 4 and Categories 15-17. To confirm or deny the existence of records could reveal, *inter alia*, whether and how the Government has deployed its resources in investigating particular individuals (*e.g.*, Arar, Bashmilah and Ali). *See* Hilton Decl. ¶ 27, 39; *see also* First DiMaio Decl. ¶¶ 106-107. Moreover, employing a consistent *Glomar* policy regarding allegations about particular individuals that the CIA has never officially confirmed or denied, precludes any inferences about the CIA's classified operations and intelligence interests. *See* Hilton Decl. ¶ 23.

b. Categories 5-10

With respect to Categories 5 through 10, each of which seeks "documents regarding the use of a specific interrogation technique on a specific individual," *id.* ¶ 31, Ms. Hilton has concluded that "[a]nything other than a *Glomar* response would confirm that the CIA did or did not use the specified interrogation techniques and that they were or were not used on the specific individuals included in Plaintiffs' request." *Id.* Such a disclosure "would reveal significant information regarding the CIA's intelligence methods and intelligence activities: specifically, details regarding the CIA's detention and interrogation program and the use of certain interrogation methods." *Id.* ¶ 31; *see also* First DiMaio Decl. ¶¶ 111-118.

Ms. Hilton also describes the damage to the national security that could reasonably be expected to result from such disclosures. In particular, Ms. Hilton explains that "the CIA's detention and interrogation program has produced intelligence that disrupted terrorist plots and led to the capture and questioning of senior al Qaeda operatives," and therefore that "[d]isclosure of the

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relationships with foreign entities. *See, e.g., Earth Pledge Foundation*, 988 F. Supp. at 627 (holding that CIA properly issued *Glomar* response to FOIA request, where response could confirm or deny whether CIA had certain foreign contacts).

interrogation methods that the CIA does and does not use would lessen the effectiveness of this critical program." Hilton Decl. ¶ 32. "[D]isclosure of the CIA's interrogation methods would permit al Qaeda and other terrorists to engage more effectively in counter-interrogation training," rendering the CIA's interrogations less effective and "result[ing] in the collection of less valuable intelligence." *Id.*; *see also* DiMaio Decl. ¶¶ 118-121. Accordingly, the CIA properly determined that the existence or non-existence of records responsive to Categories 5 through 10 is classified. Hilton Decl. ¶ 33.

The CIA's issuance of a *Glomar* response to Categories 5 through 10 comports with Judge Hellerstein's opinion in *ACLU v. DOD*, 389 F. Supp. 2d 547 (S.D.N.Y.), *motion to reconsider denied by* 396 F. Supp. 2d 459 (S.D.N.Y. 2005), *denying motion for relief from judgment*, 406 F. Supp. 2d 330 (S.D.N.Y. 2005). In *ACLU*, the plaintiffs sought, among other things, "a DOJ memorandum specifying interrogation methods that the CIA may use against top Al-Qaeda members." 389 F. Supp. 2d. at 557. There, like here, CIA issued a *Glomar* response. *Id.* The CIA explained that merely "'acknowledging that the CIA sought legal opinions or authorizations addressing specific interrogation and detention activities is itself classified because the answer provides information about the types of intelligence methods and activities that are available to the CIA or may be of interest to the CIA.'" *Id.* at 563 (quoting CIA declaration). The court agreed and held that courts must defer to "[t]he agency's arguments that it should not be required officially to acknowledge the precise 'intelligence activities' or 'methods' it employs or considers." *Id.* at 565. Here, Plaintiffs seek a confirmation or denial that the CIA used particular techniques on particular terrorist suspects, and, in accordance with *ACLU*, this information is properly classified.

C. The CIA's Decision Not to Confirm or Deny the Existence Of Such Records is Further Justified by FOIA Exemption 3

The CIA's *Glomar* assertion in response to Supplementary CIA FOIA Request is also independently justified under FOIA Exemption 3.[9] To qualify for exclusion under Exemption 3, the Government must show that "(1) the statute invoked qualifies as an exemption 3 withholding statute, and (2) the materials withheld fall within that statute's scope." *A Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994). In this case, the National Security Act (the "NSA") provides the statutory basis for the CIA's refusal to confirm or deny the existence of the records that Plaintiffs request. *See* Hilton Decl. ¶ 25, 29, 33, 40; *see also* CIA April Moving Mem. at 9-16.

The parties have previously briefed the CIA's invocation of the NSA under Exemption 3, and CIA hereby incorporates its prior memoranda by reference. *See* CIA April Moving Mem. at 9-16; CIA Sept. Opp. Mem. at 6-12. As explained in detail in those memoranda, to establish that the information at issue falls within the scope of the NSA, the CIA must demonstrate that answering the request could reasonably be expected to lead to the unauthorized disclosure of intelligence sources or methods. *See* CIA April Moving Mem. at 11-12 (citing cases); *see also Gardels*, 689 F.2d at 1103 (reciting standard in *Glomar* context); *Sirota*, 1981 WL 158804, at *2 (same).

As is also set forth in more detail in those briefs, the CIA's judgment as to the likelihood that an unauthorized disclosure of intelligence sources and methods would result from responding to a FOIA request is entitled to substantial deference. *See* CIA April Moving Mem. at 11-12 (citing

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[9] If this Court determines that the CIA's *Glomar* response is justified by Exemption 1, it need not decide whether the response is also justified by Exemption 3; likewise, if the Court determines that the response is justified by Exemption 3, the Court need not consider whether the response is also justified by Exemption 1. *See, e.g.*, *Wolf*, 473 F.3d at 375; *Wilner*, 2008 WL 2566765, at *4 ("Defendants need only proffer one legitimate basis for invoking the Glomar Response in order to succeed on their motion for summary judgment.").

cases); *see also Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992) (stating, in *Glomar* context, that Congress granted "the CIA a near-blanket FOIA exemption"); *Arabian Shield*, 1999 WL 118796, at *4 (stating, in *Glomar* context, that the CIA's determination of what would "lead to the unauthorized disclosure of intelligence sources and methods" is "almost unassailable"); *ACLU*, 389 F. Supp. 2d at 565 (stating, in *Glomar* context, that "there is small scope for judicial evaluation in this area").

Notably, in the *Glomar* context as elsewhere, the CIA's mandate to protect intelligence sources and methods under the NSA is broader than its ability to classify information in accordance with E. O. 12958. *See Assasination. Arch. & Research Ctr. v. CIA*, 334 F.3d 55, 58 n.3 (D.C. Cir. 2003); *Hunt*, 981 F.2d at 1118. Unlike § 1.1(a)(4) of E.O. 12958, the NSA does not require a determination that the disclosure of information would be expected to result in damage to national security. *Compare* E.O. 12958, § 1.1(a)(4) *with* 50 U.S.C.A. § 403-1(i)(1). Furthermore, the NSA does not require the CIA to identify or explain the damage to intelligence sources and methods, as is required by §1.1(a)(4) of E.O. 12958. *Compare* 50 U.S.C.A. § 403-1(i)(1) *with* E.O. 12958 1.1(a)(4). Rather, the CIA "need show only that confirming or denying the existence of the requested agency files could reasonably be expected to result in disclosing this information." *Sirota*, 1981 WL 158804, at *2.

Here, the CIA has amply met its burden of establishing that the confirmation or denial of the existence of records responsive to Categories 3-4, 5-10, and 15-17, could reasonably be expected to result in the unauthorized disclosure of intelligence sources or methods.

As set forth in detail above in the context of Exemption 1, Ms. Hilton describes the types of sources and methods that would be revealed if the CIA were to confirm or deny that it had records

responsive to Categories 3-4 and 15-17. *See supra* at 9-11; *see also* Hilton Decl. ¶¶ 26-29, 36-40. These sources and methods – which would be revealed from, *inter alia*, disclosing whether CIA has had an interest in particular individuals, and whether CIA had particular contacts with foreign entities – are protected from disclosure by the NSA. *See, e.g.*, *Wolf*, 473 F.3d at 377-78 (finding Exemption 3 satisfied where requester sought confirmation or denial of existence of records regarding a particular foreign national); *Hunt*, 981 F.2d at 1118-21 (finding Exemption 3 satisfied where requester sought confirmation or denial of existence of records regarding murdered Iranian national); *see also CIA v. Sims*, 471 U.S. 159, 176-77 (1985) ("Disclosure of the subject matter of the Agency's . . . inquiries may compromise the Agency's ability to gather intelligence . . .."); *Fitzgibbon*, 911 F.2d at 762-63 (holding Exemption 3 protected disclosure of even "nonsensitive" "contacts between CIA and foreign officials"); *Rubin v. CIA*, No. 01 Civ. 2274 (DLC), 2001 WL 1537706, at *4 (S.D.N.Y. Dec. 3, 2001) (Exemption 3 satisfied where confirmation or denial of existence of documents would disclose "whether the CIA has a current or past covert interest in a specific individual"). *Cf. Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1129, 1131, 1136 (N.D. Cal. 2008) (dismissing case by plaintiffs, including Bashmilah, who claimed the United States "unlawfully apprehended, transported, imprisoned, [and] interrogated" them, because such "'allegations' of covert U.S. military or CIA operations in foreign countries against foreign nationals [are] clearly a subject matter which is a state secret"). Exemption 3 thus justifies the CIA's *Glomar* responses to Categories 3-4 and 15-17.

Likewise, also as set forth above in the context of Exemption 1, Ms. Hilton describes the types of sources and methods that would be revealed if the CIA were to confirm or deny that it had records responsive to Categories 5-10. *See supra* at 9-11; *see also* Hilton Decl. ¶¶ 31-33. The very

information sought by Categories 5 through 10 is confirmation of the CIA's intelligence methods. If the CIA were to confirm that it had records responsive to any of Categories 5 through 10, the CIA would reveal precisely how particular intelligence methods were – or were not – used on particular persons. *See* Hilton Decl. ¶ 31. The CIA's confirmation that it did not have records responsive to any of those items would reveal that certain intelligence methods were not used on particular individuals. *Id.* Either result would disclose the CIA's methods. *See* First DiMaio Decl. ¶¶ 77, 98-99.

Accordingly, Exemption 3 permits a *Glomar* response to Categories 5 through 10, in order to prevent the disclosure of the CIA's interrogation methods and how it deployed them in particular situations. *See, e.g.*, *Fitzgibbon*, 911 F.2d at 763 (holding Exemption 3 protects against disclosure of even "methods that might be generally known – such as physical surveillance, or interviewing, or examination of airline manifests"); *Miller v. Casey*, 730 F.2d 773, 778 (D.C. Cir. 1984) (holding Exemption 3 protects against "an official confirmation that the CIA participated in covert action" where confirmation "would reveal how the CIA has deployed its resources in the past"); *Blazy v. Tenet*, 979 F. Supp. 10, 23 (D.D.C. 1997) (holding requester's CIA polygraph "constitute[s] intelligence methods" protected from disclosure under Exemption 3).

III. DEFENDANTS CONDUCTED ADEQUATE SEARCHES

Both OIPR and the CIA conducted adequate searches for records responsive to Plaintiffs' FOIA requests.[10] An agency's search, including its decisions about which offices and databases to

[10] The adequacy of the CIA's search for records responsive to the First and Second Amnesty Requests and the CCR Request are the subject of briefing previously submitted to this Court. *See* CIA April Moving Mem. at 39-40. The instant memorandum addresses the adequacy of CIA's search with respect to the Supplementary CIA FOIA Request.

search, "will be considered adequate if it was reasonably calculated to uncover all relevant documents." *Amnesty Int'l USA*, 2008 WL 2519908, at *9; *see also Kidd v. DOJ*, 362 F. Supp. 2d 291, 295 (D.D.C. 2005) (search adequate where agency shows "good faith effort to search for the records requested, and that its methods were reasonably expected to produce the information requested"). A reasonable search will encompass those systems of records the agency reasonably believes likely to contain responsive documents; FOIA does not require an agency to search each and every one of its records systems. *See Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Furthermore, "reasonableness must be evaluated in the context of each particular request." *Amnesty Int'l USA*, 2008 WL 2519908, at *9. Where agency personnel familiar with the agency's operations know the agency does not have responsive records, a reasonable search may not require the review of any files at all. *See Amnesty Int'l USA*, 2008 WL 2519908, at *11("FOIA does not demand a search that would be futile"); *Am.-Arab Anti-Discrimination Comm v. DHS*, 516 F. Supp. 2d 83, 88 (D.D.C. 2007) ("a search [that] would be futile [] is unnecessary").

Once an agency submits a search declaration setting forth facts that indicate that a reasonable search was conducted, the agency is entitled to a presumption of good faith. To establish the sufficiency of its search, "such declarations must be relatively detailed and non-conclusory." *Amnesty Int'l USA*, 2008 WL 2519908, at *8 (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)) (internal quotation marks omitted); *see also Kidd*, 362 F. Supp. 2d at 295 (declarations sufficient where they "explain in reasonable detail the scope and method of the search conducted"). The presumption of good faith afforded to such declarations "cannot be rebutted by purely speculative claims about the existence and discoverability of documents." *Grand Central P'ship v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (quotation marks omitted).

A. OIPR's Search of its Non-Operations Files Was Reasonably Calculated to Find Responsive Documents

Here, OIPR conducted a thorough search of its non-operations files that was reasonably calculated to find all documents responsive to Plaintiffs' first three FOIA requests. With respect to the first two requests, the head of OIPR, based on his knowledge and familiarity with the records and activities of OIPR, determined that any non-operational records responsive to the Secret Detention Requests would most likely be found in the files of senior management officials. *See* Bradley Decl. ¶ 9. Accordingly, OIPR reasonably decided to focus its search on the personal files of the individuals comprising OIPR senior management, providing a copy of the two FOIA requests to and tasking each individual with searching his or her classified and unclassified files, including e-mail files. *See id.* ¶ 10. Despite the lack of responsive records in this "mostly likely place responsive documents would be located," *Schrecker v. DOJ*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002), in an abundance of caution, OIPR FOIA personnel also conducted an electronic search of OIPR's electronically stored policy files, using search terms drawn from the FOIA requests themselves. *See* Bradley Decl. ¶ 12. OIPR found no records. *Id.* ¶ 13.

OIPR FOIA personnel who had substantive knowledge of the contents of OIPR's litigation files were not aware of any litigation files pertaining to secret detention. Thus, OIPR FOIA personnel did not search litigation files for records responsive to the Secret Detention Requests, as they had no reasonable basis to believe that any such records would be found there. *See id.* ¶ 14. As to the Second Amnesty Request, FOIA personnel consulted with Mr. Bradley who explained that, as a member of OIPR's senior management, he would have been aware of OIPR's involvement in any of the reports or matters referenced in the request. *See id.* ¶ 16. As Mr. Bradley was not aware of any such involvement, OIPR reasonably decided not to conduct a search of its files, as "FOIA

does not demand a search that would be futile." *Amnesty Int'l USA*, 2008 WL 2519908, at *11 (finding DHS searches adequate in similar situation); *Am.-Arab Anti-Discrimination Comm*, 516 F. Supp. 2d at 88.

Because Mr. Bradley's declaration describes in a detailed and non-conclusory fashion the reasons OIPR chose to search or not to search its three systems of records, *see* Bradley Decl. ¶¶ 9, 12, 14, 16, the function and structure of those systems, *see id.* ¶ 8, and the search protocols employed, *see id.* ¶ ¶ 10, 12, 14, 16, OIPR has demonstrated the adequacy of its search "in the manner required by FOIA." *Amnesty Int'l USA*, 2008 WL 2519908, at *11.

B. The CIA's Search Was Reasonably Calculated to Find the Specific Documents Requested in Categories 2, 14, and 12

The CIA's search also was reasonably calculated to uncover all documents set forth in Categories 2, 14, and 12 of the Supplementary CIA FOIA Request. In response to this request for very specific documents, as explained in detail in the Hilton Declaration, the CIA reasonably conducted a targeted search of those offices and records systems most likely to have them. *See* Hilton Decl. ¶¶ 16-17, 42.

With respect to the CIA's searches for documents responsive to Categories 2 and 14, the CIA consulted with those individuals most likely to know where to find such documents, if such documents existed. For the "list of 'erroneous renditions' compiled by the CIA OIG" (Category 2), Ms. Hilton explains that CIA officers conducting the FOIA search consulted directly with the Deputy Assistant Inspector General for Investigations, who has detailed knowledge of OIG's investigations of matters related to the TDI program, for assistance locating the document. *Id.* ¶ 16. For the "13 September 2007 notification" to the U.S. Attorney for the Eastern District of Virginia (Category 14), Ms. Hilton explains that CIA officers consulted directly with CIA attorneys who

were familiar with CIA's involvement in the *Moussaoui* case for assistance locating the document. *Id.* ¶ 17. In both instances, the individuals queried told the IMS professionals that, based on their specific substantive knowledge of the subject matter of the requested records as well as their familiarity with the contents of the relevant CIA files, the specific documents described in Categories 2 and 14 did not exist. *Id.* ¶¶ 16-17. Once it was clear that these documents did not exist, the CIA reasonably decided not to conduct a further search of its files, as it would be futile.

With respect to the CIA's search for "the cables . . . discussing and/or approving the use of waterboarding on [KSM]" (Category 12), the CIA also searched precisely that place where the documents were most likely to be located. The search consisted first of identifying the proper system of records to search, in this case a "database of cables maintained by the NCS that was designed to aggregate all CIA cables concerning [KSM] during the time of his detention and interrogation, among other individuals," and then running electronic searches using the search terms "waterboard," "water," and "other variations of the term 'waterboard'." Hilton Decl. ¶ 42. The database searched was the database most likely to contain responsive records because it included "*all* CIA cables concerning [KSM]" in the relevant time period. *Id.* (emphasis added). Given that Category 12 requested such a particular type of document – cables – on such a particular, narrow subject – the use of the waterboard on KSM – the CIA has fulfilled its search obligations with its targeted query of this particular database. *See Schrecker v. DOJ*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (search adequate where agency "reasonably chose to search the most likely place responsive documents would be located"). Furthermore, CIA officers conducting the search, in consultation with NCS employees, "determined that it was not likely that any other files would contain additional responsive records." Hilton Decl. ¶ 42. Ms. Hilton's description of this search, which includes "the

nature of the database searched and the various search protocols employed," is "relatively detailed and non-conclusory in the manner required by FOIA." *Amnesty Int'l USA*, 2008 WL 2519908, at *11.

In sum, OIPR and CIA conducted more than adequate searches by searching in good faith precisely those offices and systems of records that they reasonably believed were most likely to contain responsive records. *See* Bradley Decl. ¶ 31, Hilton Decl. ¶¶ 16-17, 42**;** *Schrecker*, 217 F.Supp. 2d at 35; *Oglesby*, 920 F.2d at 68. In the absence of any evidence of bad faith, the Court should find that OIPR and the CIA satisfied their search obligations under FOIA. *See Grand Central P'ship*, 166 F. 3d at 489.

IV. THE CIA PROPERLY WITHHELD ALL CABLES RESPONSIVE TO CATEGORY 12 PURSUANT TO EXEMPTIONS 1, 2, AND 3

The CIA's search for records responsive to Category 12 of the Supplementary CIA FOIA Request uncovered 49 classified intelligence cables. As described below, the CIA properly invoked FOIA exemptions 3 and 1 to withhold all 49 documents in full because the information in the cables is in fact properly classified and, if disclosed, would reveal intelligence sources and methods. The CIA also properly invoked FOIA exemption 2 to withhold those portions of the 49 cables that comprise internal, clerical information, the release of which holds no public interest.

A. Exemptions 3 and 1

The CIA has withheld in full all 49 records responsive to Category 12, pursuant to FOIA Exemptions 3 and 1. All 49 records are classified intelligence cables between CIA headquarters and the CIA field. *See* Hilton Decl. ¶ 43. All 49 records contain detailed information regarding the TDI program, which, if disclosed, would reveal intelligence activities, sources, and methods. *See id.* ¶ 53. In response to Plaintiffs' first three FOIA requests, the CIA also withheld in full numerous

classified intelligence cables pursuant to Exemptions 3 and 1, and explained the basis for those withholdings with respect to a representative sample of 42 cables in the First and Second DiMaio Declarations, the CIA April Moving Memorandum and the CIA September Opposition Memorandum.[11] The CIA is withholding the 49 cables responsive to Category 12 for the same reasons that the CIA withheld numerous intelligence cables responsive to Plaintiffs' first three FOIA requests, and Ms. Hilton has incorporated by reference the First and Second DiMaio Declarations in full into her own declaration submitted in support of this motion. *See* Hilton Decl. ¶ 3. Because CIA's arguments with respect to the application of Exemptions 3 and 1 to these 49 cables are the same as CIA's arguments with respect to the application of Exemptions 3 and 1 to the 42 withheld cables in the CIA April Moving Memorandum and CIA September Opposition Memorandum, the CIA hereby incorporates by reference in full the legal arguments in the CIA April Moving Memorandum, Sections II and III, and the CIA September Opposition Memorandum, Sections IA, IC, and ID.

Both Exemption 3 and Exemption 1 independently authorize withholding of the cables in this case. As explained in the CIA April Moving Memorandum, both the NSA and the CIA Act are exempting statutes within the meaning of Exemption 3, *see* CIA April Moving Mem. at 9-11 (citing cases), Hilton Decl. ¶ 82, and, as explained above, the CIA's ability to protect information under the NSA Act pursuant to Exemption 3 is broader than the CIA's ability to protect information pursuant to Exemption 1, *see supra* at 30. In particular, to establish that the information at issue in these 49

[11] Pursuant to the Stipulation, the CIA sorted records responsive to the first three FOIA requests into several categories, including cables. From those categories, the parties agreed that the CIA would provide *Vaughn* descriptions of a representative sample of 250 records, 42 of which were cables. *See* Stipulation ¶¶ 7-10.

cables falls within the scope of the NSA and the CIA Act, the CIA must simply demonstrate that the release of the requested information could reasonably be expected to cause the unauthorized disclosure of intelligence sources and methods. *See* CIA April Moving Mem. at 11-12 (citing cases); *supra* at 30 (citing additional cases). In making such a showing, the CIA has broad discretion to define "intelligence sources and methods" and to determine what would constitute an unauthorized disclosure of such sources and methods. *See Sims*, 471 U.S. at 169-174; *see also* CIA April Moving Mem. at 11-13 (citing cases).

Here, Ms. Hilton makes clear that the release of information in the 49 cables would disclose a wide range of CIA intelligence sources and methods in the context of the CIA's highly classified TDI program. *See* Hilton Decl. ¶¶ 54-67. These sources and methods are contained in specific operational details about the TDI program, which are "replete throughout the 49 responsive documents." *Id.* ¶ 57. The types of classified operational details include the substance of KSM's interrogation, including "the manner in which the waterboard was used, any other interrogation techniques that were used, the questions [KSM] was asked during interrogations, and the statements that [KSM] made during his interrogations." *Id.* ¶ 58. Ms. Hilton explains that such statements are "protected as human intelligence source information," and that the 49 cables also include "information gathered from other human intelligence sources." *Id.* ¶ 64. Release of the 49 cables would also disclose information that would reveal covert CIA installations abroad, *see id.* ¶¶ 70-71, the use of cryptonyms and pseudonyms, *see id.* ¶¶ 72-76, and the use of dissemination control markings, *see id.* ¶¶ 77-80. Intelligence cables, such as these, plainly fall within the protections of the NSA and CIA Act, *see* CIA April Moving Mem. at 14-15 (citing cases), Hilton Decl. ¶¶ 83-86, and the CIA's determination that their disclosure would reveal information regarding these particular

sources and methods is entitled to substantial weight, *see*, *e.g.*, *Wolf*, 473 F.3d at 374. Ms. Hilton has described with reasonable specificity the intelligence sources and methods that are discussed in the cables, demonstrating a logical connection between the information in the documents and the CIA's decision to withhold that information from Plaintiffs under Exemption 3.[12] Accordingly, the CIA properly withheld the 49 cables under Exemption 3.

The CIA has also properly withheld these cables pursuant to Exemption 1. As described in the CIA April Moving Mem., and in Part II.B. above, Exemption 1 permits the withholding of, *inter alia*, national security information properly classified under E.O. 12958. *See* 5 U.S.C. § 552(b)(1); *see also* CIA April Moving Memorandum at 16 (citing cases); *supra* at 12-13. Here, Ms. Hilton's declaration establishes that E.O. 12958 authorized the classification of the information in these 49 cables and that such information is in fact properly classified pursuant to the criterion set forth in Section 1.1 of the Executive Order. *See* Hilton Decl., ¶ 52.

First, Ms. Hilton is an original classifying authority who has determined that the information contained within the 49 cables pertaining to the various intelligence activities, sources, and methods, she describes in Section IV.A.2 of her declaration is properly classified at the CONFIDENTIAL, SECRET and TOP SECRET levels. *Compare* Hilton Decl. ¶ 33 *with* E.O. 12958 § 1.1(a)(1). Furthermore, all 49 documents contain information that is within a Sensitive Compartmented Information program, to enhance its protection from unauthorized disclosure. *See* Hilton Decl., ¶¶ 46, 59; *see also* First DiMaio Decl., ¶¶ 114-116. Second, Ms. Hilton affirms that this information is owned by, was produced by, and is under the control of the U.S. Government. *Compare* Hilton

[12] The CIA also invokes the CIA Act as justification for its withholding of information regarding the organization, functions, and official titles of CIA personnel. *See* Hilton Decl. ¶ 85-86.

Decl. ¶ 47 *with* E.O. 12958 § 1.1(a)(2). Third, Ms. Hilton's declaration establishes that the 49 cables contain information relating to intelligence activities, intelligence sources, or intelligence methods, which is one of the protected categories of information set forth in Section 1.4 of E.O. 12958. *Compare* Hilton Decl. ¶ 48; *with* E.O. 12958, § 1.1(a)(3). In particular, as discussed above in the context of Exemption 3, Ms. Hilton extensively describes the intelligence sources and methods that are reflected in the 49 cables. *See* Hilton Decl. at ¶¶ 53-80. Just as the information in the cables falls within the scope of intelligence sources and methods protected from disclosure under the NSA and CIA Act, so too is it properly classified under Section 1.4 of E.O. 12958. *See id.* Moreover, the information that would reveal these intelligence sources and methods is all information related to the CIA's TDI program, which is also properly classified under Section 1.4 of E.O. 12958 as an intelligence activity.

Fourth, Ms. Hilton details at great length the damage to national security that reasonably could be expected to result from the unauthorized disclosure of the classified information contained in the 49 cables.[13] *Compare* Hilton Decl. ¶¶ 55-80 *with* E.O. 12958 § 1.1(a)(4). For example, Ms. Hilton explains that unauthorized disclosure of details regarding the TDI, which are contained in these cables, is "reasonably likely to degrade the CIA's ability to effectively question terrorist detainees and elicit information necessary to protect the American people," *id.* ¶ 59, including by undermining the CIA's cooperation with foreign governments, *id.* ¶ 60, and allowing terrorists to

[13] Ms. Hilton has also affirmed that she has reviewed the 49 cables and determined that they are properly marked in accordance with Section 1.6 of the Executive Order, *see* Hilton Decl., ¶ 51, and, moreover, that the information withheld pursuant to Exemption 1 was not classified for an improper purpose, *i.e.*, "in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security," *id.* ¶ 50. *See* E.O. 12958, § 1.1(a)(6).

more effectively train to resist specific interrogation methods and lines of questioning, *id.*, ¶ 61, which in turn could prevent the CIA from obtaining vital information that could disrupt future terrorist attacks. *Id.*; *see also* First DiMaio Decl. ¶¶ 118-127. Because the withheld cables include specific questions asked during interrogations, the disclosure of these cables could also "allow other terrorists to make judgments about the intelligence capabilities of the CIA and to anticipate the type of questioning they might undergo." Hilton Decl. ¶ 62. Because the withheld cables include intelligence information gained during interrogations that is currently used by the Government to conduct counterterrorism operations and pursue known terrorists, the disclosure of these cables would render that information "no longer [] useful in counterterrorism efforts." *Id.* ¶ 63.

Where, as here, the CIA has satisfied the conditions of Section 1.1 of E.O. 12958, courts have repeatedly endorsed the CIA's classification of its intelligence sources and methods. *See* CIA April Moving Memorandum, pp. 19-20 (citing cases). Accordingly, the CIA has properly withheld the 49 cables under both Exemption 3 and Exemption 1.[14]

B. Exemption 2

Exemption 2 applies to, among other things, "those rules and practices that affect the internal workings of an agency[,] and, therefore, would be of no genuine public interest." *Massey v. FBI*, 3 F.3d 620, 622 (2d Cir. 1993) (quotation marks omitted). Each of the 49 withheld cables "contains approximately half a page or more of routing and dissemination information at the beginning and end, as well as cable handling and administrative notations." Hilton Decl. ¶ 43. The CIA has invoked Exemption 2 to withhold this "cable routing information, dissemination information,

[14] If the Court decides that the CIA properly withheld the cables under Exemption 3, it need not consider Exemption 1; and, likewise, if the Court determines that the CIA properly withheld the cables under Exemption 1, it need not consider Exemption 3. *Cf. supra* n.10.

handling notations, and other administrative notations on all of the 49 responsive documents." *Id.* ¶ 81. The information withheld pursuant to this exemption is "internal, clerical information," the release of which holds no public interest. *Id.* Accordingly, the CIA has properly withheld materials pursuant to Exemption 2. *See* CIA April Moving Mem. at 39, (citing cases).

V. THERE IS NO REASONABLY SEGREGABLE NON-EXEMPT INFORMATION WITHIN THE WITHHELD CABLES

FOIA requires an agency to disclose "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt." 5 U.S.C. § 552 (b). An agency has no obligation, however, to segregate non-exempt material that is so "inextricably intertwined" with exempt material that its disclosure would "leave only essentially meaningless words and phrases." *Nuefeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981), *abrogated on other grounds by the Church of Scientology of Calif. v. IRS*, 792 F. 2d 153 (D.C. Cir. 1986); *see also Nat'l Sec. Archive Fund v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005) (holding that no reasonable segregable information exists where "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words"). Nor must an agency segregate nonexempt material 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." *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979); *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977) ("a court may decline to order an agency to commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content").

Here, there is no reasonably segregable non-exempt information within the withheld cables.

See Hilton Decl. ¶ 88. The 49 cables at issue are all responsive to Category 12, which requests "cables. . . discussing and/or approving the use of waterboarding on [KSM]." *See* Supplementary CIA FOIA Request at 4. As discussed above, all 49 cables have been withheld in full because they contain classified national security information. *See supra* Part IV. Ms. Hilton "conducted a line-by-line review of all the documents at issue to identify any meaningful, reasonably segregable, non-exempt portions of the documents." Hilton Decl. ¶ 88. Her review of each of the 49 cables demonstrated that "any non-exempt information is so inextricably intertwined with the exempt information that there are no meaningful, reasonably segregable, non-exempt portions of information that can be released." *Id.*

In performing her line-by-line segregability review, Ms. Hilton was careful to take into account the CIA's official acknowledgments. *See* Hilton Decl. ¶ 68; *see also supra* n.8. In particular, Ms. Hilton recognized that "limited official disclosures [] have been made regarding the [TDI] Program," Hilton Decl. ¶ 68, including the fact that KSM was detained in a program operated by the CIA, *id.* ¶ 56, and the fact that "the waterboard technique was used during the interrogation of [KSM]," *id.* ¶ 58. With the exception of limited official disclosures such as these, however, all remaining details of the TDI Program remain classified, *see id.* ¶ 57-58, including where detainees have been held, details regarding their confinement, and intelligence gained from interrogations, among others, *see id.*, ¶ 57. Indeed, while the CIA has acknowledged the use of the waterboard technique on KSM, the acknowledgment "is limited to that specific fact alone." *Id.* ¶ 58. As Ms. Hilton has explained, "[t]he acknowledgment does not diminish the importance of protecting the additional details and substance of KSM's interrogation, including the manner in which the waterboard was used, any other interrogation techniques that were used, the questions KSM was

asked during the interrogation, and the statements that KSM made during his interrogation. All of this information remains classified." *Id.* In her line-by-line review of the cables, Ms. Hilton found that "any information that is no longer classified is so inextricably intertwined with classified information contained within the documents that has never been officially acknowledged that there are no meaningful, reasonably segregable, unclassified portions of the documents that can be released." *Id.* ¶ 68. Furthermore, "any information that is no longer protected from disclosure under the NSA or CIA Act is so inextricably intertwined with information that is protected within the documents that there are no meaningful, reasonably segregable, unprotected portions of the documents that can be released." *Id.* ¶ 87. Accordingly, none of the cables contain reasonably segregable information, even in light of the limited official disclosures by the CIA. *See id.* ¶¶ 68, 87-88.

The CIA therefore properly withheld the cables in their entirety.

CONCLUSION

For the foregoing reasons, the Court should grant the Government's motion for partial summary judgment.

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