IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MATTATHIAS SCHWARTZ,	)	
	)	
Plaintiff,	)	
v.	)	Civil No. 15-cv-7077 (ARR)
	)	
DEPARTMENT OF DEFENSE, *et al.*,	)	
	)	
Defendants.	)	
____________________________________	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff in this Freedom of Information Act ("FOIA") action, Mattathias Schwartz, seeks records from the Department of Defense ("DoD"), the Central Intelligence Agency ("CIA"), and Office of the Director of National Intelligence ("ODNI") regarding records related to procedures, staffing and budget used by the ongoing military commissions occurring at the U.S. Naval Base at Guantanamo Bay, Cuba. Complaint ¶ 1 (D.E. 1). DoD and CIA have reviewed, processed and provided to Plaintiff the requested documents with minimal redactions. *See* Declaration of Mark H. Herrington, Associate Deputy General Counsel in the Office of General Counsel of the United States Department of Defense ("Herrington Decl.") ¶¶ 15-16 (attached hereto as Exhibit A); Declaration of Antoinette B. Shiner, Information Review Officer for the Litigation Information Review Office at the CIA. ("Shiner Decl.") ¶¶ 6-18 (attached hereto as Exhibit B). In making these redactions, the CIA and DoD withheld limited information pursuant to exemptions applicable to classified national security information, personally identifying information, commercial or financial information, law enforcement information and national security information protected from disclosure by statute. ODNI has reviewed and processed Plaintiff's FOIA request, and despite an in depth search and consultation with subject matter experts, ODNI did not locate any records responsive to Plaintiff's FOIA request. *See* Declaration of Jennifer L. Hudson, Director of the Information Management Division for the ODNI ("Hudson Decl.") ¶¶ 13-16 (attached hereto as Exhibit C). Since the DoD and CIA's invocation of exemptions was necessary and proper, and since ODNI, as well as CIA and DoD, performed adequate searches for responsive records, Defendants are entitled to summary judgment on Plaintiff's FOIA claim.[2]

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[2] By agreement of the parties, Plaintiff has agreed to challenge only certain redactions taken by DoD and CIA. A chart identifying the specific challenged redactions is attached hereto as Exhibit D.

BACKGROUND

I. PLAINTIFF'S FOIA REQUEST AND DEFENDANTS' RESPONSE

Plaintiff served a FOIA request upon CIA, DoD and ODNI seeking information regarding certain aspects of military commissions being conducted at the United States Naval Base at Guantanamo Bay. Specifically, Plaintiff's request had three parts:

> (1) Records sufficient to disclose any and all guidance that has been given to the Office of Military Commissions, presiding officers, counsel, or any other person(s) in the courtroom about what may not be said in open public sessions or included in written submissions in prosecutions before the military commissions at the Guantanamo Bay Naval Station;
>
> (2) Records sufficient to disclose the means by which any original classifying authority can monitor or interrupt the 40-second delayed audio-video transmission of military commission proceedings to prevent the public disclosure of classified information or other information of the kinds covered by Rule 506 of the Military Commission Rules of Evidence; and
>
> (3) Records sufficient to disclose the number of security officers assigned to the military commissions, including security officers detailed to the specific defense teams, together with the duties and authorities of those security officers, the total annual cost of those security officers, and any instructions or training provided to those officers.

Complaint at ¶ 16.

A. CIA's Response

Plaintiff served his FOIA request on the CIA on March 9, 2015. *See* Declaration of Mary E. Wilson, Acting Information Review Officer for the Litigation Review Office at the CIA ("Wilson Decl.") ¶ 5 (attached hereto as Exhibit E). The CIA responded in a March 23, 2015 letter acknowledging receipt of the request and denying Plaintiff's request for expedited processing. *Id.* ¶ 6. On April 7, 2015, CIA informed Plaintiff that as to his second and third request, CIA was not the repository of those records and that the information is properly sought from the Department of Defense. *Id.* On April 22, 2015, Plaintiff administratively appealed

CIA's denial of his request for expedited processing and the constructive denial of his request for CIA's failure to respond to the request within the statutory time limit. *Id.* ¶ 7. On May 21, 2015, the CIA accepted Plaintiff's appeal as to the first part of his request, but also informed Plaintiff that his petition for expedited processing was reconsidered and did not meet the FOIA standard for and expedited appeal, and thus, the prior denial was affirmed. *Id.* ¶ 8.

On June 29, 2016, CIA ultimately produced three documents responsive to Request No. 1, "guidance that has been given to the Office of Military Commissions . . . about what may not be said in open public sessions or included in written submissions in prosecutions before the military commissions at the Guantanamo Bay Naval Station." In its review of these documents, CIA made every effort to release as much information as possible, and, as a result, the documents are produced with very minimal redactions. The CIA determined that some information in the three documents could not be publicly released as the information is exempt from disclosure under FOIA Exemption (b)(3) or both FOIA Exemption (b)(1) and (b)(3). Shiner Decl. ¶¶ 6-18. CIA redacted those three documents and produced them to Plaintiff.

On August 30, 2016, Plaintiff provided Defendants with a list of redactions by the CIA it would seek to challenge. *Id.* ¶ 7. CIA professionals reviewed that list of challenges, and after consulting with subject matter experts, it was determined that additional information in the three documents was no longer classified or otherwise exempt from disclosure under FOIA. *Id.* CIA removed many of the redactions challenged by Plaintiff and reproduced the documents on September 30, 2016. *Id.* As a result of the reprocessing, only two documents remain at issue with redactions. *Id.* The remaining documents at issue are labeled C06579389 and C06579390. C06579389 is an undated four page document titled "Classification Guidance for CIA High Value Detainee Information." *Id.* ¶ 8. C06579390 is a six page documents, dated September 23,

2011, and is titled "Classification Guidance for Central Intelligence Agency Rendition, Detention, and Interrogation Program Information." *Id.* These documents were prepared to provide classification guidance to court security officers, "who are often asked to advise others or opine on the classification of information related to the CIA's former Rendition, Detention, and Interrogation Program. *Id.*

With respect to the second and third part of Plaintiff's FOIA request, notwithstanding CIA's initial response that CIA is not the proper repository of the records for other government agencies, upon the supplemental review, CIA determined that it can neither confirm nor deny the existence of records responsive to requests two and three, as to do so would itself reveal a classified fact – "whether and to what extent the CIA is involved in the administration of information security procedures." Wilson Decl. ¶11; Shiner Decl. ¶¶ 19-24.

B. DoD's Response

Plaintiff sent its FOIA request to DoD's Office of the Secretary of Defense("OSD")/Joint Staff ("JS") FOIA office. Herrington Decl. ¶ 4. OSD/JS tasked the Office of Military Commissions Convening Authority to conduct a search for responsive records as that office falls under OSD. *Id.* ¶ 8. That initial search resulted in the release of 98 pages of material on August 14, 2015 with minimal redactions pursuant to Exemptions (b)(4) and 7(F). *Id.* Plaintiff appealed this initial response on October 13, 2015. *Id.*

Pursuant to this Court's Order, OSD/JS engaged in an additional search for documents responsive to Plaintiff's FOIA request. *See Id.* ¶ 10; ECF No. 13. As a result of this investigation, OSD/JS released 437 pages of documents to Plaintiff almost in full, with minimal redactions for names of junior personnel pursuant to FOIA Exemption 6. *Id.*

C. ODNI's Response

ODNI first received notice of Plaintiff's FOIA request in a letter dated April 22, 2015.[3] Hudson Decl. ¶ 11. ODNI then sent Plaintiff an email acknowledging receipt of the request on May 14, 2015. *Id.* ¶ 12. In June and July 2015, ODNI tasked components reasonably believed to have potentially responsive documents to conduct a search responsive to Plaintiff's FOIA request. *Id.* ¶¶ 14, 15. Potentially responsive documents were gathered from those components within ODIN. *Id.* After consultation with subject matter experts both within and outside ODNI, it was determined that none of the gathered documents were responsive to Plaintiff's FOIA request .

II. STATUTORY BACKGROUND AND STANDARD OF REVIEW

The Freedom of Information Act, 5 U.S.C. § 552, generally mandates disclosure, upon request, of government records held by an agency of the Federal Government, except to the extent such records are protected from disclosure by one of nine exemptions. *Milner v. Dep't of the Navy*, 562 U.S. 562, 563-566 (2011). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (internal citation omitted). At the same time, Congress recognized "that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused." *FBI v. Abramson*, 456 U.S. 615, 621 (1982); *see also* 5 U.S.C. § 552(b). While these exemptions are to be "narrowly construed," *Abramson*, 456 U.S. at 630 (citation omitted), courts must not

[3] Plaintiff's April 22, 2015 letter was styled as an appeal based on Plaintiff's representation that an initial request was sent to ODNI on March 10, 2015, however the April 22 correspondence was the first received by ODNI, so it was treated as an initial request. Hudson Decl. ¶ 11, n.2.

fail to give them "meaningful reach and application," *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). The FOIA thus represents "a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." *Id.* (quoting H.R. Rep. No. 89-1497, pt. 3 at 6, as reprinted in 1966 U.S.C.C.A.N. 2418, 2423 (1966)).

Courts generally resolve FOIA actions through summary judgment. *See Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011) ("[T]he vast majority of FOIA cases can be resolved on summary judgment."). Summary judgment is proper for an agency when its affidavits "'describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 746 F.3d 1082, 1088 (D.C. Cir. 2014) (internal citations omitted). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (internal citation omitted).

ARGUMENT

I. ODNI, DOD AND CIA CONDUCTED REASONABLE AND ADEQUATE SEARCHES TO LOCATE RECORDS RESPONSIVE TO PLAINTIFF'S FOIA REQUEST.

An agency can show that it has discharged its obligations under FOIA and is entitled to summary judgment by submitting declarations that are "relatively detailed and non-conclusory . . . submitted in good faith," *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 488–89 (2d Cir. 1999) (citation omitted), that show the agency's search was adequate by "supplying facts indicating that the agency has conducted a thorough search." *Carney v. U.S. Dep't of Justice,* 19

F.3d 807, 812 (2d Cir.1994) (citation omitted); *see also* 5 U.S.C. § 552(a)(4)(B). A thorough search is one that is "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (internal quotations omitted). Failure to uncover a responsive document does not render the search inadequate, the issue to be determined is whether "the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant ...." *Grand Cent. P'ship, Inc.,* 166 F.3d at 489 (citation omitted); *see also Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) ("the issue to be resolved is not whether there might exist any . . . documents possibly responsive to the request, but rather whether the search for those documents was adequate.") (quoting *Weisberg*, 745 F.2d at 1485). In evaluating the adequacy of a search, courts recognize that agency affidavits "accorded a presumption of good faith . . . [which] cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *Grand Cent. P'ship, Inc.*, at 489 (2d Cir. 1999) (citing *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991); *see also Ground Saucer Watch v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)) (noting that agency affidavits "enjoy a presumption of good faith, which will withstand purely speculative claims about the existence and discoverability of other documents.") (citation omitted). Declarations should be "sufficiently detailed," but "the standard, however, is not meticulous documentation of the details of an epic search." *Texas Indep. Producers Legal Action Ass'n v. IRS*, 605 F. Supp. 538, 547 (D.D.C. 1984) (quotation omitted), *aff'd in part and rev'd in part,* 802 F.2d 1483 (table) (D.C. Cir. 1986). Rather, an agency must establish the adequacy of its searches by showing "that the agency made a good faith effort to search for the requested documents, using methods reasonably calculated to produce documents responsive to the FOIA request." *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 496–97 (S.D.N.Y. 2010)

(citation omitted); *see also Texas Indep. Producers Legal Action Ass'n,* 605 F. Supp. at 547 ("the agency need only provide affidavits explaining in reasonable detail the scope and method of the search, in absence of countervailing evidence."); *Zemansky*, 767 F.2d at 571 ("In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith.") (quoting *Weisberg*, 745 F.2d at 1485). Further, agencies are not required to search every record system, they need only submit an affidavit which sets forth "'why a search of other some record systems, but not others, would lead to the discovery of responsive documents.'" *See Amnesty Int'l USA,* 728 F. Supp. 2d at 97, citing *Oglesby v. U.S. Dep't of Army,* 920 F.2d 57, 68 (D.C.Cir.1990).

A. ODNI Search for Responsive Records.

The declaration submitted by ODNI establishes that it conducted a search that was reasonably calculated to discover all responsive documents. Upon receipt of the FOIA, personnel within ODNI's Information Management Division ("IMD") determined that the components within ODMI most likely to possess responsive documents were the Office of General Counsel ("ODMI OGC") and Office of Policy and Strategy ("P&S"). *Id.* ¶ 13. On June 10, 2015, the attorney within ODNI OGC primarily responsible for conducting liaison with the OMC and the person within ODNI OGC to possess potentially responsive records was tasked with searching his personal drive in electronic folders entitled "AAA_Military Commissions." *Id.* ¶ 14. This attorney also searched folders entitled "Military Commissions" in the shared drives of his work computer in order to locate documents that might have predated his assignment to the military commissions account. *Id.* The ODNI OGC attorney reviewed every document in the "AAA_Military Commissions" folders, as well as every document in the "Military Commissions" folders as part of the search for potentially responsive records. *Id.* No

records were located responsive to parts two and three of Plaintiff's FOIA request. *Id.* Documents potentially responsive to part one of Plaintiff's FOIA request were forwarded to IMD for review. *Id.* After consultation with subject matter experts both within and outside ODNI, IMD determined that none of these records were responsive to the request. *Id.*

On July 16, 2015, IMD sent an email informing P&S of Plaintiff's FOIA request and directed P&S to conduct a search of its holdings for potentially responsive documents. *Id.* ¶ 15. Individuals within P&S responsible for detainee affairs searched files entitled "Guantanamo Detainees EO 13492 and EO 13567 Current" utilizing search terms "40 second," "forty second" and "security officers." *Id.* Potentially responsive documents were forwarded by P&S to IMD. After consultation with subject matter experts both within and outside ODNI, IMD determined that none of the documents were responsive to Plaintiff's Request. *Id.*

The ODNI declaration thus demonstrates that ODNI searched those offices likely to possess documents responsive to the FOIA requests, and that they used methods which can be reasonably expected to produce the information requested. Accordingly, ODNI has satisfied its burden to demonstrate the adequacy of its search as a matter of law. *See Amnesty Int'l USA,* 728 F. Supp. 2d at 496–97.

B. DOD Search for Responsive Records.

The declaration submitted by DoD establishes that it conducted a search that was reasonably calculated to discover all responsive documents. Upon receiving the FOIA request that is the subject of this lawsuit, DoD followed its standard procedures. Herrington Decl. ¶ 8, 10. OSD/JS tasked the Office of Military Commissions Convening Authority to conduct a search for responsive records as that office falls under OSD. *Id.* ¶ 8. That initial search resulted in the release of 98 pages of material on August 14, 2015. *Id.* This initial release included a

sensitive compartmented information nondisclosure agreement and a standard nondisclosure agreement responsive to part one of the FOIA request. *Id.* ¶ 9. In response to part 3, Plaintiff was provided a PowerPoint slide presentation of a 2014 annual security refresher training for the Washington Headquarter Services, Office of Special Security, which is responsible for all security requirements for the OMC. *Id.* That document contains minor redactions, including redacting the names of junior personnel pursuant to FOIA Exemption (b)(6). *Id.* Information regarding threat assessments and physical opening and closing procedures for the Office of Special Security were also redacted pursuant to FOIA Exemption 7(F) Plaintiff to avoid physical harm to the members of the office. *Id.* Plaintiff also received a contract with SRA International, dated June 10, 2014. *Id.* The contract detailed the responsibilities of the Court Security Officers and the Defense Security officers and provided information regarding the overall cost of the contract. *Id.* Specific itemization of costs was redacted pursuant to FOIA Exemption 4, as the pricing specifics would cause SRA International competitive harm. *Id.* The Office of Military Commissions Convening Authority did not locate any records responsive to part 2 of Plaintiff's FOIA request. *Id*

Pursuant to this Court's Order, OSD/JS engaged in an additional search for documents responsive to Plaintiff's FOIA request. *See Id.* ¶ 10; ECF No. 13. Mark Herrington, Associate Deputy General Counsel in the DoD OGC, who is responsible for overseeing FOIA litigation involving DoD, oversaw and coordinated the supplemental search for OSD/JS. Herrington Decl. ¶ 10. Mr. Herrington spoke with individuals within OSD OGC, OMC generally, and persons within the Convening Authority and Prosecutor's Office, as those were the offices determined most likely to have records responsive to Plaintiff's FOIA request. *Id.* Those conversations included discussing the incident in January 2013 regarding the 40 second delay referenced in

Plaintiff's FOIA request and general conversations about security officers, including how classified material is handled at the Military Commissions. *Id.* The people Mr. Herrington spoke with were intimately familiar with the Military Commissions as well as the particular proceeding in January 2013 with the 40 second delay. These people had personal knowledge of documents containing responsive information and the locations of that information within their office files. *Id.* As a result of this investigation, OSD/JS released 437 pages of documents to Plaintiff almost in full, with minimal redactions for names of junior personnel pursuant to FOIA Exemption 6. *Id.*

Regarding part one of Plaintiff's FOIA request, Plaintiff was provided a Government motion for protective order dated April 26, 2012 and the current protective orders in the three ongoing military commissions. *Id.* ¶ 11. These documents explain in detail the procedures for handling classified materials and the roles and responsibilities of CSOs and DSOs. *Id.* As to part two of Plaintiff's FOIA request, OSD/JS released 95 pages of transcripts of the January 13, 2013 proceeding mentioned in the request. *Id.* ¶ 12. OSD/JS also released a Government response to a defense motion dated February 7, 2013, and 168 pages of transcripts regarding a hearing on that motion. *Id.* ¶ 13. The hearing includes testimony regarding the courtroom audio-video equipment and the government motion includes a declaration from the Closed Circuit TV and Courtroom Technical Program manager at Guantanamo Bay Naval Station. *Id.* As to part 3 of Plaintiff's FOIA request, Mr. Herrington's declaration provides specific information to answer Plaintiffs questions about the numbers and costs of commission and defense security officers, including the combined annual salary of the two CSO's and the combined salaries of the seven DSO under contract with SRA International. *Id.* ¶ 14.

Mr. Herrington's declaration thus demonstrates that DoD searched those offices likely to possess documents responsive to the FOIA requests, and that DoD used methods which can be reasonably expected to produce the information requested. Accordingly, DoD has satisfied its burden to demonstrate the adequacy of its search as a matter of law. *See Amnesty Int'l USA,* 728 F. Supp. 2d at 496–97.

C. CIA Search for Responsive Records.

The declaration submitted by CIA establishes that it conducted a search that was reasonably calculated to discover all responsive documents. Information Management Services ("IMS") is the component within the CIA that serves as the reception point for all FOIA requests. Wilson Decl. ¶ 9. IMS worked with the CIA Office of General Counsel ("OGC") to develop search strategies in response to the first part of plaintiff's FOIA request. *Id*. IMS staff are experienced with the record holdings of particular offices within CIA and the methods for retrieving responsive records from those systems. *Id*. As part of its preparation to conduct a search for responsive records, IMS and OGC consulted with CIA officials with knowledge of the CIA's contact with the Office of Military Commissions ("OMC") and CIA's record-keeping practices in order to determine all locations reasonably likely to possess records responsive to the first part of Plaintiff's FOIA request. *Id*. The Office of Detainee Litigation ("ODL") was identified as the likely repository for the records requested by Plaintiff.[4] *Id*.

CIA's ODL is the entity responsible for handling all coordination between the CIA and the OMC in connection with the ongoing military commissions at Guantanamo Bay. *Id*. at ¶ 10. Therefore, IMS formally tasked ODL to conduct a search for responsive records. *Id*. ODL professionals, including attorneys familiar with ODL's records and systems, conducted a

[4] IMS did not task or search any other offices within CIA because it was determined that no other offices were likely to maintain responsive records. Wilson Decl. ¶ 10.

thorough and diligent search reasonably calculated to locate records responsive to the first part of Plaintiff's FOIA request. *Id.* The search of ODL systems included paper and electronic records and was guided by ODL's knowledge of specific databases and/or files that were likely to contain responsive records. *Id.*[5]

The CIA declaration thus demonstrates that CIA searched those offices likely to possess documents responsive to the FOIA requests, and that CIA used methods which can be reasonably expected to produce the information requested.[6] Accordingly, CIA has satisfied its burden to demonstrate the adequacy of its search as a matter of law. *See Amnesty Int'l USA,* 728 F. Supp. 2d at 496–97.

II. DOD AND CIA PROPERLY ASSERTED EXEMPTIONS TO REDACT INFORMATION PROTECTED FROM DISCLOSURE.

A. DoD Properly Redacted Information Pursuant to Exemption 7(F) to Protect From Disclosure Information That Could Reasonably Be Expected to Endanger the Live or Physical Safety of Particular DoD Employees.

Under Exemption 7(F), the DoD redacted very limited information within one document, a 61 page power point slide presentation of a 2014 annual security refresher training for the Washington Headquarters Services, Office of Special Security, which is responsible for all security requirements for the OMC. *See* Herrington Decl. ¶ 9. Exemption 7(F) protects from disclosure information that "could reasonably be expected to endanger the life or physical safety

[5] As noted above, with respect to the second and third part of Plaintiff's FOIA request, CIA determined that it can neither confirm nor deny the existence of records responsive to requests two and three, as to do so would itself reveal a classified fact. Wilson Decl. ¶11; Shiner Decl. ¶¶ 19-24.

[6] One record is currently under seal, Wilson Decl. ¶ 10 n.2, and, therefore, is not subject to this Court's jurisdiction because it has not been improperly withheld by the CIA. Agencies are not permitted to disclose information that a court has enjoined them from disclosing. *See GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 386 (1980) (recognizing that a court order removes any "discretion for the agency to exercise," and that "[t]he concerns underlying the [FOIA] are inapplicable" in that event because the agency cannot be said to have "improperly" withheld records).

of any individual." 5 U.S.C. § 552(b)(7)(F). "While courts generally have applied Exemption 7(F) to protect law enforcement personnel or other specified third parties . . . reasonably at risk of harm." *see Amuso v. U.S. Dep't of Justice*, 600 F. Supp. 2d 78, 101 (D.D.C. 2009) (quoting *Long v. U.S. Dep't of Justice*, 450 F.Supp.2d 42, 79 (D.D.C. 2006)), it is also necessary for an agency to "identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 543 F.3d 59, 71 (2d Cir. 2008), *vacated on other grounds*, 558 U.S. 1042 (2009). An agency can meet the burden of identifying an "individual" by methods other than the exact name of an individual. *Id.* at 67-68. For example, "individuals" can be identified "as family members or coworkers of a named individual, or some similarly small and specific group." *Id.*

In reviewing matters under Exemption 7(F), "courts may inquire 'whether there is some nexus between disclosure and possible harm.'" *Amuso*, 600 F. Supp. 2d at 101 (quoting *Linn v. U.S. Dep't of Justice*, No. 92-1406, 1995 WL 631847, at *8 (D.D.C. Aug. 22, 1995)). "Within limits, the Court defers to the agency's assessment of danger." *Garcia v. U.S. Dep't of Justice*, 181 F.Supp.2d 356, 378 (S.D.N.Y.2002) (citing *Linn,* 1995 WL 631847, at *9 (D.D.C. Aug. 22, 1995).

DoD has asserted this exemption to protect DoD employees because these individuals may be subject to physical attacks or other threats to their lives if the redacted information is revealed. Herrington Decl. ¶ 16. DoD took minor redactions to withhold information disclosed at a security refresher briefing which discussed reminders of security procedures and the need for operational security awareness by personnel in the office. *Id.* ¶¶ 9, 16. Disclosure of either the information regarding what DoD believed to be a threat to the Washington, D.C. area Facility or

the procedures used by the Office of Special Security to open and close the facility could allow third parties to exploit this information which could result in the physical harm to a specific and limited group of DoD employees – members of the Office of Special Security. *Id.* ¶ 16.

For example, "releasing the exact procedures for gaining entry into the physical space of the office would aid a potential assailant to know whether they require a key card, a retinal scan, a combination code, a finger print scan, voice recognition, etc." *Id.* Redaction of this information insures the safety of the physical space for the Office of Special Security, which, in turn, prevents compromising the physical safety of the personnel in the Office of Special Security. *Id.* The limited redactions taken by DoD to protect the safety of these employees cannot be outweighed by any interest Plaintiff has in this information. Exemption 7(F) should be applied to protect the physical safety of these identified individuals. *See ACLU* 543 F.3d at571; *see also Adionser v. U.S. Dep't of Justice*, 33 F. Supp. 3d 23, 28 (D.D.C. 2014) (holding that exemption was properly applied to protect physical safety of special agents, law enforcement officers, government employees, and confidential sources).

B. DoD Properly Asserted Exemption 4 to Protect Confidential Commercial Information.

FOIA Exemption (4) protects records from disclosure that contain "commercial or financial information obtained from a person" that is "privileged or confidential." 5 U.S.C. § 552(b)(4). To fall within the exemption, records must contain information that is (1) commercial or financial in character, (2) obtained from a person, and (3) privileged or confidential. Courts have recognized that the terms "commercial" and "financial" information should be given their "ordinary meanings" and merely require that the submitter has a "commercial interest" in the records. *Pub. Citizen Health Research Gp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (citing *Washington Post Co. v. Dep't of Health & Human Servs*., 690 F.2d 252, 266 (D.C. Cir.1982) and

Bd. of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392, 403 (D.C. Cir.1980)); *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978) ("'Commercial' surely means pertaining or relating to or dealing with commerce.").

Information is "confidential" for purposes of Exemption 4 if the information would have the effect either "(1) of impairing the government's ability to obtain information-necessary information-in the future, or (2) of causing substantial harm to the competitive position of the person from whom the information was obtained." *Nadler v. FDIC*, 92 F.3d 93, 96 (2d Cir. 1996) (citation omitted); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994), *overruled on other grounds by Animal Legal Def. Fund v. FDA*, No. 13-17131m 2016 WL 4578362, at *1 (9th Cir. Sept. 2, 2016); *Acumenics Research & Tech. v. U.S. Dep't of Justice*, 843 F.2d 800, 807 (4th Cir. 1988). This test recognizes that Exemption 4 protects both the government's interest in the continued availability and reliability of information from third parties, as well as the submitter's interests in the confidentiality of commercial or financial information. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 877-79 (D.C. Cir. 1992).

In this case, DoD withheld certain information to protect financial information provided by a DoD contractor, namely SRA International's pricing structure. Herrington Decl. ¶ 14. As an initial matter, DoD provided a full and complete response to Plaintiff's request in item three for "the total annual cost of those security officers . . ." by stating that the overall annual cost for the DSO's under contract with SRA international is roughly $1,500,000. *Id.* at 15. It is unnecessary to provide an exact cost or breakdown of the expenses for these DSO's as it was not requested by the Plaintiff's FOIA.

Furthermore, release of the exact cost or breakdown is confidential and properly redacted pursuant to Exemption 4. The particular line the particular line-item pricing structure of SRA International could cause competitive harm for SRA as it could provide advantageous information to its competitors. *Id.* Furthermore, if DoD were to release this type of pricing and financial information it could harm the Government by "limiting the number of qualified companies that bid on contracts because they fear that their pricing structure will be released and that information will be used to undercut them in both government and private sector contracts." *Id.* As the redacted information protects both the government's interest in the continued availability and reliability of information from third parties, as well as the submitter's interests in the confidentiality of commercial or financial information, it was properly redacted pursuant to Exemption 4.

C. CIA Properly Asserted Exemption (b)(1) to Redact Classified Information.

All of the challenged withholdings are exempt from disclosure under exemption (b)(1). The CIA has invoked exemption (b)(1) to protect information properly classified pursuant to Executive Order 13526. This exemption protects records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." See 5 U.S.C. § 552(b)(1). Exemption (b)(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." *Military Audit Project v. Casey*, 656 F.2d 724, 737 (D.C. Cir. 1981). An agency can demonstrate that it has properly withheld information under exemption (b)(1) if it establishes that it has met the requirements of the applicable Executive Order. Substantively, the agency must show that the information at issue logically falls within

the exemption, *i.e.*, the Executive Order authorizes the classification of the information at issue. Procedurally, the agency must demonstrate that it followed the proper procedures in classifying the information. *See Salisbury v. United States*, 690 F.2d 966, 970-73 (D.C. Cir. 1982); *Military Audit Project*, 656 F.2d at 737-38. An agency that demonstrates substantive and procedural compliance with an applicable Executive Order is entitled to summary judgment. *See Abbotts v. Nuclear Regulatory Comm'n*, 766 F.2d 604, 606-08 (D.C. Cir. 1985). Here that order is Executive Order No. 13526. Under Section 1.1(a) of that order, information may be classified if:

> (1) an original classification authority is classifying the information;
>
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
>
> (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
>
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

Classified National Security Information, 75 Fed. Reg. 707, 707 (Dec. 29, 2009) ("Executive Order No. 13526"). As demonstrated by the Shiner Declaration, these conditions are met by the information the government continues to withhold from the three partially redacted documents. *See Judicial Watch v. U.S. Dep't of Def.*, 715 F.3d 937, 940 (D.C. Cir. 2013) ("Agencies may establish the applicability of Exemption 1 by affidavit (or declaration).").

1. An Original Classification Authority Has Properly Classified the Information Withheld as Exempt Under (b)(1).

Ms. Shiner has original classification authority and has determined that the challenged information withheld here pursuant to (b)(1) is properly classified. Section 1.3(a) of Executive Order 13526 provides that the authority to classify information "may be exercised . . . [by]

United States Government officials delegated this authority pursuant to [Section 1.3(c)]." *Id.* Section 1.3(c)(2) provides that "'Top Secret' original classification authority may be delegated only by the President, the Vice President, or an agency head or official designated pursuant to [Section 1.3(a)(2)]." 75 Fed. Reg. at 708. *See* Shiner Decl. ¶ 3 ("I am a senior CIA official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order 13526, 75 Fed. Reg. 707 (Jan. 5, 2010), reprinted in 50 U.S.C. § 3161 note ("E.O. 13526")). As to all (b)(1) withholdings challenged by Plaintiff, Ms. Shiner has examined the underlying information and determined that it is currently and properly classified under Executive Order 13526. *See* Shiner Decl. ¶ 10 ("Consistent with Section 1.1(a) of E.O. 13526 . . . I have determined that the redacted information is currently and properly classified and therefore exempt from disclosure pursuant to Exemption (b)(1)."); *see also* Shiner Decl. ¶¶ 11-15. Thus, condition (1) of Executive Order 13526 is satisfied here.

2. *All of the Information Withheld Pursuant to Exemption (b)(1) is Government Information.*

The second condition of Executive Order 13526 is also met by the challenged (b)(1) withholdings. *See* 75 Fed. Reg. at 707 (requiring that information originally classified under Executive Order 13526 be "owned by, produced by or for, or [be] under the control of the United States Government"). The United States government owns or controls the information that has been withheld from Plaintiff. *See* Shiner Decl. ¶ 10 (stating "[t]he information at issue is owned by, produced by or for, or under the control of the United States government . . ."); *see also id.* ¶

10, n.4 (affirming that the procedural standards for classification pursuant to Section 1.1(a) of E.O. 13526 have been satisfied in this case).

3. All of the Challenged (b)(1) Withholdings Are Within a Category Identified in Section 1.4 of Executive Order No. 13526.

The challenged (b)(1) withholdings satisfy the third condition of Executive Order 13526. *See* 75 Fed. Reg. at 707 (requiring that information originally classified under this order be within a category identified in Section 1.4). Section 1.4's categories include information concerning "intelligence activities (including covert action), [or] intelligence sources or methods." *Id.* at 709. The information whose withholding Plaintiff challenges concerns those subjects. *See* Shiner Decl. ¶ 10. The CIA withholdings pursuant to (b)(1) relate to aspects of CIA's Rendition, Detention, and Interrogation ("RDI") program "that remain classified after the public release of the Executive Summary of the Senate Select Committee on the Intelligence's Study of the Central Intelligence Agency's Detention and Interrogation Program (the "SSCI Report").[7] Shiner Decl. ¶ 14. Such information clearly satisfies the substantive requirements of Executive Order 13526. *See id.* ¶ 14 (explaining that "the intelligence activities, sources and methods at issue and the harm that would be occasioned by their disclosure . . . includes: (1) intelligence activities, sources, and methods relevant to the capture, transfer and interrogation of detainees, and (2) information relating to foreign governments.").

4. The Unauthorized Disclosure of the Information Withheld Pursuant to Exemption (b)(1) Could Damage National Security.

Notwithstanding that the government has declassified certain information related to the RDI program via the SSCI Report, other information continues to be properly classified. That information consists of previously undisclosed and classified information that if disclosed could

[7] The Executive Summary of the SSCI Report was declassified and released with redactions in December 2014. Shiner Decl. ¶ 14, n. 5.

be expected to cause serious damage to the national security of the United States. *See, e.g.*, Shiner Decl. ¶¶ 14-15. The D.C. Circuit has recognized that "[m]inor details of intelligence information may reveal more information than their apparent insignificance suggests because, much like a piece of jigsaw puzzle, each detail may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself." *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009) (citations omitted); *ACLU v. Department of Justice*, 681 F.3d 61, 71 (2d Cir. 2012) (same); *see also Shapiro*, 37 F. Supp. 3d at 25; *ACLU v. CIA*, 892 F. Supp. 2d 234, 247 (D.D.C. 2012). Thus, the government's declassification of certain information concerning the RDI program does not suggest anything about the harm that could result from the disclosure of the previously undisclosed, classified information at issue in this case.

The fourth condition of information classified pursuant to Executive Order 13526 requires, as here, that "the original classification authority determine [] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." 75 Fed. Reg. at 707. Recognizing that national security is a uniquely executive purview, courts typically defer to such an agency determination and must accord "substantial weight and deference" to agency affidavits concerning classified information. *ACLU v. Dep't of Justice*, 681 F.3d at 71; *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987); *see also Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) ("[I]n the FOIA context, we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review."); *Weissman v. CIA*, 565 F.2d 692, 697 (D.C. Cir. 1977) ("Few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information."); *see also Halperin v. CIA*,

629 F.2d 144, 148 (D.C. Cir. 1980) ("Judges . . . lack the expertise necessary to second-guess [] agency opinions in the typical national security FOIA case").

Indeed, "[t]his is necessarily a region for forecasts in which informed judgment as to potential future harm should be respected." *Gardels v. CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982); *see also Abdeljabbar v. Bureau of Alcohol, Tobacco & Firearms*, No. 13-0330, 2014 WL 6478794, at *7 (D.D.C. Nov. 20, 2014) (noting that "the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [e]ffects might occur as a result of a particular classified record" (quoting *Center for Nat'l Sec. Studies*, 331 F.3d at 927)). Ultimately, "[t]he test is not whether the court personally agrees in full with the [agency's] evaluation of the danger - rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the [agency] is expert and given by Congress a special role." *Gardels*, 689 F.2d at 1105). A court must defer to the expertise of agencies involved in national security and foreign policy, particularly to those agencies' articulations and predictive judgments of potential harm to national security. *See, e.g., Larson*, 565 F.3d at 865; *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999); *Fitzgibbon* v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990). Thus, the Court should defer here to Ms. Shiner's assessments of the likely repercussions to the national security from disclosure of the information the government continues to withhold pursuant to exemption (b)(1).

In her declaration, Ms. Shiner identifies several harms that would attend the unauthorized disclosure of the minor redactions in the documents produced to Plaintiff. Indeed, as explained in the Shiner Declaration:

> . . . if the CIA released the information related to foreign governments, those government may be less willing and able to assist the CIA in the future –

> and the CIA's breach of trust may affect the willingness of potential future sources or entities to assist the CIA. Additionally, if the CIA disclosed particular activities, sources, or methods, they would become less effective and their continued use by the CIA would be jeopardized.

Shiner Decl. ¶ 15. Because the Court should defer to such predictions of harm, (*Center for Nat'l Sec. Studies*, 331 F.3d at 927), the government's withholdings of CIA RDI information pursuant to (b)(1) should be upheld.

D. CIA Properly Asserted Exemption (b)(3) to Redact Classified Information

Exemption 3 protects from disclosure information that is protected by a separate statute, provided that such statute "(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(2016); *see also A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994). The "purpose of Exemption 3 [is] to assure that Congress, not the agency, makes the basic nondisclosure decision. . ." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987).

Following the Supreme Court's decision in *CIA v. Sims*, 471 U.S. 159 (1985), courts apply a two-pronged inquiry when evaluating an agency's invocation of Exemption 3. *See id.* at 167-68. First, the court must determine whether the statute qualifies as an exempting statute under Exemption 3. Second, the court decides whether the withheld material falls within the scope of that exempting statute. *See id.*

The CIA relies on section 102A(i)(1) of the National Security Act of 1947 (the "Act"), which requires that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1) (2015); *see also* Shiner Decl. ¶ 17. This statute vests the intelligence community with "'very broad authority to protect all

sources of intelligence information from disclosure.'" *ACLU v. U.S. Dep't of Justice*, 681 F.3d at 73 (quoting *Sims*, 471 U.S. at 168-69). The Act is an exempting statute for the purposes of Exemption 3, so the CIA has satisfied the first of *Sims*' two requirements. *See, e.g.*, *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 72 (2d Cir. 2009); *ACLU v. U.S. Dep't of Justice*, 681 F.3d 72-73; *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 618-19 (D.C. Cir. 2011); *see also Leopold v. CIA*, 106 F. Supp. 3d 51, 57 (D.D.C. 2015) (applying section 102(A)(i)(1) to the CIA).

Sims' second requirement is also satisfied here, as the information redacted by the CIA falls comfortably within the expansive scope of section 102A(i)(1)'s protection of "intelligence sources and methods." The Supreme Court has recognized the "broad sweep of [section 102A(i)(1)'s] statutory language," as well as the lack of any "limiting language." *Sims*, 471 U.S. at 169; *see also id.* at 169-70 ("Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence. The plain statutory language is not to be ignored."). The breadth of section 102(A)(i)(1), as interpreted by the D.C. Circuit, was recently summarized:

> The D.C. Circuit has interpreted this provision broadly, holding that material is properly withheld under the Act if it "*relates* to intelligence sources and methods," or "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." Courts have also recognized that the Act's protection of sources and methods is a "near-blanket FOIA exemption," which includes the "power to withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source [or method]." This is so because in the intelligence context "bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself." The Supreme Court has also warned that "it is the responsibility of the [intelligence community], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process."

Leopold, 106 F. Supp. 3d at 57-58 (internal citations and altercations in original omitted). Indeed, the mandate to withhold information pursuant to the National Security Act is broader than the authority to withhold information pursuant to FOIA Exemption 1 and Executive Order 13,526. *Cf. Gardels*, 689 F.2d at 1107. This is so because unlike section 1.1(a)(4) of E.O. 13,526, the National Security Act does not require the CIA to determine that the disclosure of the information would be expected to result in damage to national security. *Compare* 50 U.S.C. § 3024(i)(1), *with* E.O. 13,526 § 1.1(a)(4).

As evident from the description, the CIA withholdings constitute intelligence sources and methods and their disclosure therefore is prohibited by Section 102A(i)(1). Shiner Decl. ¶ 14 (explaining that the redacted information relates to: "(1) intelligence activities, sources, and methods relevant to the capture, transfer and interrogation of detainees, and (2) information relating to foreign governments."); *see also id.* ¶ 15. Because Section 102A(i)(1) affords absolute protection to "information pertaining to intelligence sources and methods used by the [Intelligence Community] as a whole," the CIA intelligence sources and methods withheld from Plaintiff also are within the scope of this (b)(3) statute. Thus, the government appropriately invoked exemption (b)(3) to protect the CIA withholdings from disclosure.

III. THE CIA PROPERLY ASSERTED A *GLOMAR* RESPONSE TO THE SECOND AND THIRD ITEMS OF PLAINTIFF'S FOIA REQUEST.

A. The Freedom of Information Act and *Glomar* Responses.

As a manifestation of that balance, FOIA mandates disclosure of agency records unless the requested information falls within one of nine enumerated exemptions. *See* 5 U.S.C. § 552(b). Two such exemptions are relevant to this case. Exemption 1 exempts from disclosure materials properly classified as "secret in the interest of national defense or foreign policy," *id.*

§ 552(b)(1), and Exemption 3 shields from release materials that are "specifically exempted from disclosure by statute," *id.* § 552(b)(3).

Normally, "agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information." *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011). But that general rule admits a key exception, *see id.*, which applies in this case. It is well-established that "'an agency may refuse to confirm or deny the existence of records where to answer . . . would cause harm cognizable under an FOIA exception.'" *Wilner*, 592 F.3d at 68 (quoting *Gardels*, 689 F.2d at 1103). "Such an agency response is known as a *Glomar* response and is proper if the fact of the existence or nonexistence of agency records falls within a FOIA exemption."[8] *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). "The agency must demonstrate that acknowledging the mere existence of responsive records would disclose exempt information." *Elec. Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012).[9]

"To properly employ the *Glomar* response to a FOIA request, an agency must 'tether' its refusal to respond to one of the nine FOIA exemptions - in other words, 'a government agency may ... refuse to confirm or deny the existence of certain records ... if the FOIA exemption would itself preclude the acknowledgment of such documents.'" *Wilner,* 592 F.3d at 68 (citations omitted). An agency's explanatory burden for a *Glomar* response is not demanding. "Ultimately, an agency's justification for invoking a FOIA exemption is

[8] The term "Glomar" came from the case *Phillippi v. CIA*, 546 F.2d 1009, 1013-14 (D.C. Cir. 1976), where the CIA upheld the CIA's use of the "neither confirm nor deny" response to a FOIA request for records concerning the CIA's reported contacts with the media regarding a ship called the "Hughes Glomar Explorer."

[9] Executive Order 13,526 also provides authority for a *Glomar* response. *See* E.O. 13,526 § 3.6(a) (stating that in response to a FOIA request "[a]n 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.")

sufficient if it appears logical or plausible." *Id.* at 73 (quoting *Larson*, 565 F.3d at 862). That said, the *Glomar* doctrine is not without limits, and a "plaintiff can overcome a *Glomar* response by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records, since that is the purportedly exempt information that a *Glomar* response is designed to protect." *ACLU v. CIA* ("*ACLU*"), 710 F.3d 422, 427 (D.C. Cir. 2013). A plaintiff bringing a so-called "official acknowledgement" challenge "must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Id.* (quoting *Wolf*, 473 F.3d at 378).

"In reviewing an agency's *Glomar* response, th[e] Court exercises caution when the information requested 'implicates national security, a uniquely executive purview.'" *Elec. Privacy Info. Ctr.*, 678 F.3d at 931 (quoting *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 926-27 (D.C. Cir. 2003)). While courts review de novo an agency's withholding of information pursuant to a FOIA request, "de novo review in FOIA cases is not everywhere alike." *Ass'n of Retired R.R. Workers, Inc.*, 830 F.2d at 336. Although de novo review calls for "an objective, independent judicial determination," courts nonetheless must defer to an agency's determination in the national security context, acknowledging that "the executive ha[s] unique insights into what adverse [e]ffects might occur as a result of public disclosure of a particular classified record." *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (citations omitted).

Accordingly, courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927; *see also Larson*, 565 F.3d at 865 ("Today we reaffirm our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national

security.”). “[I]n the national security context,” therefore, “the reviewing court must give ‘substantial weight’” to agency declarations. *ACLU v. U.S. Dep’t of Justice*, 265 F. Supp. 2d at 27 (quoting *King*, 830 F.2d at 217); *see Frugone*, 169 F.3d at 775 (stating that because “courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA’s facially reasonable concerns” about the harm that disclosure could cause to national security); *Fitzgibbon*, 911 at 766 (holding that the district court erred in “perform[ing] its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure”). In according such deference, “a reviewing court must take into account . . . that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm.” *Wolf*, 473 F.3d at 374 (citation omitted).

B. Summary Judgment in *Glomar* Cases.

“In *Glomar* cases, courts may grant summary judgment on the basis of agency affidavits that contain ‘reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.’” *Elec. Privacy Info. Ctr.*, 678 F.3d at 931 (quoting *Gardels*, 689 F.2d at 1105). If a *Glomar* response is appropriate, “the agency need not conduct any search for responsive documents or perform any analysis to identify segregable portions of such documents.” *People for the Ethical Treatment of Animals v. Nat’l Inst. of Health, Dep’t of Health & Human Servs.*, 745 F.3d 535, 540 (D.C. Cir. 2014).

Because the CIA has complied with its obligations under FOIA, it is entitled to summary judgment on Plaintiff’s request. “Proper invocation of, and affidavit support for, *either* Exemption [1 or 3] *standing alone*, may justify the CIA’s *Glomar* response.” *Wolf*, 473 F.3d at

375 (emphasis added). Here, the CIA's response satisfies both exemptions. Nor can Plaintiff bear his burden of showing that any exception to the *Glomar* doctrine applies; as relevant here, there has been no official acknowledgement of the classified intelligence information he seeks.

C. The CIA's *Glomar* Response Was Proper Under FOIA Exemption 1.

The mere confirmation or denial of responsive records would itself reveal a classified fact – whether and to what extent the CIA is involved in the administration of information security procedures for the Military Commissions at Guantanamo Bay. Accordingly the CIA's *Glomar* response was appropriate under Exemption 1. The scope and application of Exemption 1 is discussed at length above, *supra* at § III. D., and based on that scope the CIA has determined that CIA involvement in the administration of information security procedures for the Military Commissions at Guantanamo Bay is currently and properly classified under the four criteria set out in Executive Order 13,526. Shiner Decl. ¶ 3, 19-24.

First, the Declarant, Ms. Shiner, "hold[s] original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order 13,526. . ." Shiner Decl. ¶ 3; E.O. 13,526 § 1.1(a)(1). Second, the "information at issue is owned by, produced by or for, or under the control of the United States government . . ." sought "information is owned by, produced by or for, or is under the control of the United States Government." Shiner Decl. ¶ 10; *see also* E.O. 13,526 § 1.1(a)(2). Additionally, Ms. Shiner confirmed that the procedural standards for classification pursuant to Section 1.1(a) of E.O. 13526 have been satisfied in this case. Shiner Decl. ¶ 10, n.4. Third, Ms. Shiner avers that the information falls into one of the eight categories of information set out in the Executive Order, E.O. 13,526 § 1.1(3), specifically, that it falls into section 1.4(c), which covers "intelligence activities" and "intelligence sources or methods." *See id.* ¶ 24; *see also* E.O. 13,526 § 1.1(3).

Fourth, and most importantly, Ms. Shiner has determined that the responding to parts two and three of Plaintiff's FOIA request "reasonably could be expected to cause damage to the national security." Shiner Decl. ¶ 24; *see also* E.O. 13,526 § 1.1(a)(4). The danger manifests in several ways. As the Declarant explains regarding part 2 of Plaintiffs' FOIA request:

> If the CIA were to confirm the existence of records responsive to part two, such confirmation could indicate, among other things, that the CIA has previously interrupted the 40-second delayed audio-video transmission of military commission proceedings. An adversary could use that information to identify areas of concern to the CIA. On the other hand, if the CIA were to respond by admitting that it did not have records responsive to part two of the request, it could suggest that the CIA does not have the ability to monitor or interrupt the audio-video transmission of proceedings, which could cause participants to disregard the rules regarding the communication of CIA-related information in open court.

Id. ¶ 24. The Declarant goes on to explain the harms associated with part 3 of Plaintiff's FOIA request:

> With respect to part three, if the CIA were to confirm the existence of responsive records, such confirmation could reveal CIA's role, if any, in the assignment of security officers to the military commissions and its relationship to the Office of Military Commissions.

Id.

The CIA Declarant's reasoning is consistent with that of the Supreme Court, which has explained that disclosing "[t]he inquiries pursued by the [CIA] can often tell our adversaries something that is of value to them." *Sims*, 471 U.S. at 177; *see also id.* at 178 ("In this context, the very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.'") (quoting *Halperin*, 629 F.2d at 150). Indeed, in *Sims*, the Supreme Court was concerned that "disclosure of the fact that the Agency subscribes to an obscure but publicly available Eastern European technical journal"

would unacceptably hinder intelligence activities, because adversaries could determine the "general nature" of Agency interests in developing new intelligence techniques. *Id.* at 177. Judged against that undemanding standard, it is certainly "logical or plausible" to conclude that disclosing classified information about whether the CIA has the capability to interrupt the military commission audio video feed or whether CIA has security officers assigned to the military commissions would reveal information about the intelligence priorities, capabilities, and interests of the Agency. *See Judicial Watch*, 715 F.3d at 941 (citation omitted).

To conclude, Ms. Shiner has explained how revealing information responsive to parts 2 and 3 of the FOIA request would harm national security. As the D.C. Circuit has held, the key issue in an Exemption 1 *Glomar* claim is whether the affidavit "plausibly explains the danger" to national security if the agency confirms or denies the existence of the materials in question. *Wolf*, 473 F.3d at 375. If it does, "the existence of records *vel non* is properly classified under [the Executive Order] and justifies the Agency's invocation of Exemption 1." *Id.* at 375-76; *see also Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) ("Moreover, in the FOIA context, we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review."). Here, it is plausible to believe that revealing detailed, classified information about the CIA's monitoring capabilities as well as its involvement with the ongoing military commissions and any relationship with the Office of Military Commissions would allow its adversaries to infer information about the Agency's priorities and capabilities. And so long as the CIA's assertions are "logical and plausible"– as they are here –, the Agency's *Glomar* response must be upheld. *See ACLU v. U.S. Dep't of* Justice, 681 F. 3d at 71.

D. The CIA's Glomar Response Was Also Independently Proper Under FOIA Exemption 3.

The CIA has also properly asserted FOIA Exemption 3 in support of its *Glomar* response. *See Larson*, 565 F.3d at 862-63 (Exemption 3 is sufficient to justify an agency's *Glomar* response). This exemption bars from disclosure information that Congress has required by statute to be "withheld from the public." 5 U.S.C. § 552(b)(3). Here, the National Security Act of 1947 prohibits the Agency from confirming or denying the existence of the information Plaintiff seeks. The scope and application of Exemption 3 is discussed above, *supra* at § III. E., and based on that scope, the CIA relies on section 102A(i)(1) of the National Security Act of 1947, which requires that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1); *see also* Shiner Decl. ¶ 17. This statute vests the intelligence community with "'very broad authority to protect all sources of intelligence information from disclosure.'" *ACLU v. U.S. Dep't of Justice*, 681 F.3d at 73 (quoting *Sims*, 471 U.S. at 168-69). The Act is an exempting statute for the purposes of Exemption 3, so the CIA has satisfied the first of *Sims*' two requirements. *See, e.g.*, *Wilner*, 592 F.3d at 72; *ACLU v. U.S. Dep't of Justice*, 681 F.3d 72-73; *ACLU v. U.S. Dep't of Def.*, 628 F.3d at 619; *see also Leopold*, 106 F. Supp. 3d at 57 (D.D.C. 2015) (applying section 102(A)(i)(1) to the CIA).

Sims' second requirement is also satisfied here, as the CIA's *Glomar* response falls comfortably within the expansive scope of section 102A(i)(1)'s protection of "intelligence sources and methods." The Supreme Court has recognized the "broad sweep of [section 102A(i)(1)'s] statutory language," as well as the lack of any "limiting language." *Sims*, 471 U.S. at 169; *see also id.* at 169-70 ("Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its

statutory duties with respect to foreign intelligence. The plain statutory language is not to be ignored."). As noted previously, the mandate to withhold information pursuant to the National Security Act is broader than the authority to withhold information pursuant to FOIA Exemption 1 and Executive Order 13,526 because unlike section 1.1(a)(4) of E.O. 13,526, the National Security Act does not require the CIA to determine that the disclosure of the information would be expected to result in damage to national security. *Compare* 50 U.S.C. § 3024(i)(1), *with* E.O. 13,526 § 1.1(a)(4).

Revealing classified CIA activities and capabilities or relationships to the Office of Military Commissions– including the existence or non-existence of those facts – reveals information on "intelligence sources and methods" that Congress has exempted from disclosure. As Ms. Shiner's declaration states, "because confirming or denying the existence or nonexistence of records revealing classified CIA activities or relationships to the Office of Military Commissions would reveal information that concerns intelligence sources and methods," this is exactly the information which the National Security Act is designed to protect." Shiner Decl. ¶ 24; *see also id.* ¶¶ 16-18. Indeed, as explained in more depth in the Exemption 1 section, information responsive to parts 2 and 3 of Plaintiff's FOIA request "would reveal sensitive information about the CIA's activities, sources, and methods . . ." *Id.* ¶ 24; *see also Int'l Counsel Bureau v. CIA*, 774 F. Supp. 2d 262, 274 (D.D.C. 2011) (concluding that the same discussion of harms to intelligence sources used to support an Exemption 1 claim also support an Exemption 3 claim).

Accordingly, CIA has concluded that a Glomar response is the only appropriate response to effectively protect the national security." *Id.* ¶ 24. The information sought by plaintiff – information which represents "CIA's activities, sources, and methods," *id.*, – falls squarely

within the scope of the DNI's protective mandate under the National Security Act of 1947. The fact of the existence or nonexistence records responsive to Plaintiffs' requests is, therefore, properly exempt from disclosure pursuant to FOIA exemption (b)(3).

IV. DOD AND CIA RELEASED ALL REASONABLY SEGREGABLE INFORMATION.

The FOIA requires agencies to release "any reasonably segregable portion of a record . . . after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Consistent with this obligation, the DoD and CIA provided Plaintiffs with as much non-exempt information as possible without compromising the interests in nondisclosure of information protected by the FOIA. Herrington Decl. ¶ 18; Shiner Decl. ¶ 15. Neither DoD nor CIA withheld responsive documents in full and with respect to the minor redactions taken in the documents produced to Plaintiff, DoD and CIA identified and released all reasonably segregable, non-exempt portions of those documents. *See* Herrington Decl. ¶ 18; Shiner Decl. ¶ 15.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment for defendants.

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Respectfully submitted,

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