IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MATTATHIAS SCHWARTZ, Plaintiff, v. DEPARTMENT OF DEFENSE, et al., Defendants.	Civil No. 15-cv-7077

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND/OR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

This case concerns a Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") request submitted by journalist Mattathias Schwartz ("Plaintiff"), seeking the release of records that describe the government's rules for monitoring, interrupting and censoring proceedings of the Military Commissions at Guantánamo Bay, and the means by which it implements these rules. None of the defendants produced any records illustrating the means by which any authority outside the courtrooms can monitor and interrupt the audio transmissions to the public or the standards applied when the proceedings are closed.

The public and press are only permitted to observe Guantánamo courtroom proceedings in an enclosed space behind soundproof glass. The audio feed into the space is on a forty-second delay, in order to prevent inadvertent disclosure of classified information. A courtroom security officer sits next to the presiding judge, and when he pushes a button the audio feed is immediately killed; all sound from the courtroom to the press and public is stopped. Pressing the button also triggers a flashing red warning light to alert the courtroom participants that the proceeding has been closed.

It was initially understood that only the court security officer, with the permission of the presiding judge, could kill the audio feed through physically pressing the button located within the courtroom. Bloch-Wehba Decl. ¶ 3, Ex. A at 136. On January 28, 2013, however, the audio feed was killed without any action by the court security officer and without any permission from the presiding judge. *Id.* at 135. The presiding judge immediately made clear his intent to determine who outside the courtroom had the technical ability to censor the proceedings without his authority or approval.

To this day, the public does not know who closed the Guantánamo proceedings. The public also remains in the dark about the rules that govern control of the audio feed: what instructions are given to the Office of Military Commissions ("OMC"), presiding officers, courtroom security personnel, or any other entities or individuals with the technical capacity to terminate the audio feed. These are issues of constitutional significance, because the public has a qualified First Amendment right of access to proceedings of the military commissions at Guantánamo.

Consequently, in March 2015, plaintiff, a national security reporter who writes for *The New Yorker*, *The Intercept* and other outlets, submitted FOIA requests to the Department of Defense ("DoD"), the Central Intelligence Agency ("CIA") and the Office of the Director of National Intelligence ("ODNI") (collectively, "Defendants" or "the government"), in order to seek disclosure of the rules that govern the electronic closure of the Commissions' public proceedings, the identities of those who are able to close them, and the training they receive. After this lawsuit was filed, DoD produced 437 pages of records from the Guantánamo military commissions. CIA produced three documents containing classification guidance about "what may not be said" before the military commissions. ODNI produced no responsive records. In support of their Motion for Summary Judgment, defendants now assert that they have fulfilled their statutory obligations to search for and locate responsive records and have justified their invocation of FOIA's exemptions to withhold information. The government's declarations, however, are inadequate to support summary judgment on either issue. Each defendant's search was selective, narrow and unreasonable, and each declarant failed to give adequate details to justify the manner in which the search was conducted. Likewise, neither DoD nor CIA have

justified their invocations of FOIA's exemptions, instead relying on conclusory, broad assertions in order to demonstrate that they have lawfully withheld responsive records and information.

These failings foreclose summary judgment in favor of the defendants. For the reasons set forth herein, Plaintiff respectfully urges the Court to enter summary judgment and/or partial summary judgment in his favor.

BACKGROUND

A. Plaintiff's FOIA Requests

In a letter dated March 9, 2015, Mr. Schwartz filed FOIA requests with CIA and DoD. Plaintiff's Combined Statement of Material Facts as to which there is no Genuine Issue and Response to Defendants' Statement of Material Facts ("SMF") ¶¶ 11, 30. The next day Mr. Schwartz filed a substantially similar FOIA request with the ODNI. SMF ¶ 1. These narrowly-focused requests each sought:

(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 classification 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.

Hudson Decl. ¶ 11; Herrington Decl. ¶ 4; Wilson Decl. ¶ 5. Mr. Schwartz sought a public interest fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii), because disclosure is "likely to contribute significantly to the public understanding of the operations or activities of the U.S. Government

and is not primarily in the commercial interest of the requester." Compl. ¶ 17 (citing 32 C.F.R. § 1700.2(h)(4)). Mr. Schwartz also sought a limitation of fees as "a representative of the news media," *Id.* ¶ 18 (citing 5 U.S.C. § 552 (a)(4)(A)(ii)(II); 32 C.F.R. § 1700.6(h)(i)), who is "actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." *Id.* (citing 32 C.F.R. § 1700.2(h)(4)). Finally, Mr. Schwartz sought expedited processing pursuant to 5 U.S.C. § 552(6)(E), as he is seeking these records in order to bring light to an ongoing news story of substantial public interest, and requested justification and explanation for all denials by reference to the specific exemptions of the Act, pursuant to 32 C.F.R. § 1700.8(c)(1). *Id.* ¶ 19.

ODNI's Response

After ODNI failed to timely respond to his March 10, 2015 request, Mr. Schwartz appealed its constructive denial by letter dated April 22, 2015. SMF ¶ 1. In a letter dated May 14, 2015, ODNI responded that it had not received the plaintiff's March 10, 2015 request, and indicated that it would process the appeal as an initial request. Hudson Decl. ¶ 12 n.2. ODNI denied the plaintiff's request for expedited processing and did not address the fee waiver requests. Compl. ¶ 30; Ans. ¶ 30. In July 2015, ODNI indicated that it had initiated a search for responsive records, but ODNI ultimately found no records responsive to plaintiff's request. SMF ¶¶ 6, 10.

DoD's Response

In a letter dated March 12, 2015, DoD acknowledged receipt of Plaintiff's FOIA request. Herrington Decl. ¶ 7. On August 14, 2015, DoD issued a final response indicating that it had found 98 pages of responsive documents and disclosed them with redactions pursuant to Exemptions (b)(4) (confidential business information), (b)(6) (personal privacy) and (b)(7)(A) (law enforcement). SMF ¶¶ 11–16.

By letter dated October 13, 2015, plaintiff appealed the DoD's final response. Herrington Decl. ¶ 8. Plaintiff objected that DoD had failed to conduct an adequate search and appealed DoD's redaction of information from the documents provided. *Id*. After DoD failed to resolve plaintiff's appeal, plaintiff filed his Complaint on December 11, 2015. ECF No. 1.

On April 25, 2016, after an initial conference, this Court ordered DoD to engage in an additional, expedited search for documents. Initial Conference Order, ECF No. 13. After a post-litigation search, DoD produced 437 additional pages of responsive material on June 24, 2016. SMF ¶ 21.

CIA's Response

In a letter dated March 23, 2015, CIA denied plaintiff's request for expedited processing but did not address the fee waiver requests. SMF ¶ 31. By letter dated April 7, 2015, CIA informed Mr. Schwartz that CIA was not the repository of records responsive to his second and third requests. SMF ¶ 32. By letter dated April 22, 2015, plaintiff administratively appealed CIA's denial of expedited processing and CIA's constructive denial of his request due to its failure to respond within the statutory time limit. SMF ¶ 33. In a letter dated May 21, 2015, CIA acknowledged receipt of the appeal and stated that it "accepted" plaintiff's appeal regarding Item 1 of the FOIA request, but it did not address Items 2 or 3. Compl. ¶ 27; Ans. ¶ 27. CIA again denied plaintiff's request for expedited processing and did not address the fee waiver requests. *Id.*

On June 29, 2016, CIA produced three documents with redactions that it said were responsive to Item 1 of the FOIA request. *See* SMF ¶ 41. With respect to the second and third requests, CIA stated that it could neither confirm nor deny the existence of any responsive records. SMF ¶ 55. This lawsuit followed on December 11, 2015.

On August 30, 2016, plaintiff agreed to narrow the list of the redactions in CIA responses that are at issue in this lawsuit. Defs.' Mot. for Summ. J. at 1 n.2. In response, CIA agreed to disclose some of the redacted information at issue and reproduced the documents on September 30, 2016, with fewer redactions. Shiner Decl. ¶ 7.

B. Procedural Posture

Plaintiff filed this lawsuit on December 11, 2015. Compl., ECF No. 1. Defendants filed their Answer on April 8, 2016. ECF No. 9. This Court initially ordered defendants to produce responsive documents by June 24, 2016, along with declarations describing each agency's search for responsive records. Initial Conference Order, ECF No. 13. Defendants DoD, NSA, FBI and ODNI completed their processing and productions by the Court's deadline; defendant CIA sought a five-day extension, with plaintiff's consent. Letter Motion for Extension, ECF No. 14. CIA completed its processing and production of records on June 29, 2016. The court directed the parties to submit requests for a pre-motion conference by July 5, 2016. Initial Conference Order, ECF No. 13. Plaintiff sought, with defendants' consent, a ten-day extension of the time for the parties to file requests for a pre-motion conference. Letter Motion for Extension, ECF No. 15. The parties worked jointly to narrow the issues still in contention. The parties filed a request for a pre-motion conference on July 15, 2016. Joint Pre-Motion Letter, ECF No. 17. The court set out a schedule for parties to brief this case on July 28, 2016. Defendants sought, with plaintiff's consent, a seven-day extension to file their motion for summary judgment. Defs.' Consent Motion for Extension of Time, ECF No. 20. The defendants filed their motion for summary judgment on September 30, 2016. ECF No. 21.

ARGUMENT

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

In moving for summary judgment, the government asserts that declarations submitted by ODNI, DoD and CIA establish that each of these agencies conducted a search "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Far from meeting their statutory burden, each of the declarations submitted by these defendants is facially inadequate and fails to establish that the searches undertaken were reasonable.

A. Defendant Agencies Have the Burden to Prove They Conducted a Search Reasonably Calculated to Uncover All Responsive Documents.

FOIA requires government agencies to conduct a reasonable search for requested records and defending agencies have the burden of showing that their search was adequate. *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). An adequate search requires "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir.1990) ("*Oglesby I*"). An agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Id*.

To prevail at the summary judgment stage, a defendant agency must demonstrate "beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg*, 705 F.2d at 1351. In order to demonstrate that their search was adequate under the law, agencies may supply "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search." *Carney*, 19 F.3d at 812. These

affidavits or declarations must be "relatively detailed and non-conclusory and must be submitted in good faith." *Goland v. CIA,* 607 F.2d 339, 352 (D.C. Cir. 1978) (internal quotations omitted).

In order to meet this burden, an agency declaration must specifically describe which files were searched and present the "search terms and the type of search performed." *Oglesby I*, 920 F.2d at 68. It is "impossible to evaluate the adequacy of an electronic search for records without knowing what search terms have been used." *Nat'l Day Laborer Org. Network v. U.S. Immig. & Customs Enf't Agency*, 877 F. Supp. 2d 87, 106 (S.D.N.Y. 2012). In addition, it is insufficient to merely state the search terms used: "[t]he method in which they are combined and deployed is central to the inquiry." *Id.* at 107 (quoting *Families for Freedom v. U.S. Customs & Border Prot.*, 837 F. Supp. 2d 331, 335 (S.D.N.Y. 2011)).

Agencies must also show that the search covered all locations where responsive records were reasonably likely to be found. FOIA requires agencies to "search all locations 'likely' to contain such documents . . . 'most likely' is not the relevant metric." *DiBacco v. U.S. Army*, 795 F.3d 178, 190 (D.C. Cir. 2015) (quoting *Oglesby I*, 920 F.2d at 68). In order to meet this burden, declarations must "describe at least generally the structure of the agency's file system" to show that searching any other system would be "unlikely to disclose additional relevant information." *Nat'l Day Laborer*, 877 F. Supp. 2d at 96 (internal quotation omitted). Agency declarations must also provide a "detailed explanation of why further searches would be unreasonably burdensome." *Goland*, 607 F.2d at 353. The agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested . . . . At the very least, [the agency is] required to explain in its affidavit that no other record system was likely to produce responsive documents." *Oglesby I*, 920 F.2d at 68.

B. Defendants Failed to Establish that They Conducted a Reasonable and Adequate Search to Locate Records Responsive to Plaintiff's FOIA Request.

Each of the defendants has failed to sufficiently describe its searches and failed to demonstrate that its searches were adequate. The declarants proffer only nominal assertions with scant detail about the scope and method of their searches, and they supply minimal justification regarding the offices and records systems that they chose to search. Defendants' declarations fail to "set forth with a reasonable degree of detail the function and structure of the offices tasked, the nature of the databases searched and the various search protocols employed." *Amnesty Int'l USA v. C.I.A.,* No. 07 CIV. 5435 (LAP), 2008 WL 2519908, at *11 (S.D.N.Y. June 19, 2008). Indeed, to the extent that the declarations supply any facts regarding the search, those facts tend to establish that the agencies affirmatively failed to search locations where responsive records were likely to be found.

These insufficiencies foreclose summary judgment for the defendants. Accordingly, the government's motion for summary judgment with respect to the adequacy of defendants' searches should be denied and each defendant should be required to conduct additional searches curing the defects, produce any additionally located documents, and submit declarations describing the further searches with sufficient specificity to allow the Court to assess their adequacy.

1. ODNI

The search described in ODNI's declaration has three key defects.

First, ODNI offers no justification for its determination that the only components within its Information Management Division ("IMD") "most likely" to possess responsive documents were the Office of General Counsel ("OGC") and Office of Policy and Strategy ("P&S"). Hudson Decl. ¶ 13. Under FOIA, the agency is required not only to identify the locations it

searched, but also to justify its decision to search those locations and, if applicable, not others. *Oglesby I*, 920 F.2d at 68 ("[T]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested."). Yet ODNI not only offers no rationale for its decision to search only OGC and P&S, it also utterly fails to supply any information regarding the functions of OGC or P&S that would tend to support this decision. Nor does the Hudson Declaration offer any reasoning whatsoever as to why other potentially relevant offices in ODNI, such as the National Counterintelligence & Security Center ("NCSC"), were not searched.[1]

Second, the only two offices that were asked to search for responsive documents each conducted unreasonably narrow searches. With respect to OGC, just one attorney was asked for records as the person "most likely to possess potentially responsive records." Hudson Decl. ¶ 14. But "'most likely' is not the relevant metric;" FOIA requires agencies to "search all locations 'likely' to contain . . . documents." *DiBacco*, 795 F.3d at 190 (quoting *Oglesby I*, 920 F.2d at 68). The search appears to have been rendered still further insufficient when that single OGC attorney searched only two folders, one entitled "AAA_Military Commissions" and the other "Military Commissions." Hudson Decl. ¶ 14.

Even assuming that such a narrow search *could* be justified, ODNI failed to do so here. The Hudson Declaration provides no explanation to justify restricting the search to these two folders, rather than searching office files or e-mails, for example. Nor does ODNI provide information related to the context of these two folders within the general "structure of the

[1] The NCSC may house responsive records related to its mission of providing "effective leadership and support to the counterintelligence and security activities of the US Intelligence Community, the US Government, and US private sector entities who are at risk of intelligence collection or attack by foreign adversaries." *What We Do*, Nat'l Counterintelligence and Sec. Ctr., https://www.dni.gov/index.php/about/organization/office-of-the-national-counterintelligence-executive-what-we-do.

agency's file system" in order to show that searching any other system would be "unlikely to disclose additional relevant information." *Nat'l Day Laborer*, 877 F. Supp. 2d at 96. It is undisclosed how many documents are in these folders or how many of them are relevant to audio and video transmissions of the Guantánamo military commissions. Without providing greater context and details about the scope and methods of the search, ODNI offers little basis for an assessment of the adequacy of the search, as required by FOIA.

Nor was the very limited search conducted by P&S "reasonably calculated to uncover all relevant documents." *Weisberg*, 705 F.2d at 1351. The narrow P&S search used only the highly restrictive search terms "40 second," "forty second," and "security officers" in searching a limited set of files entitled "Guantanamo Detainees EO 13492 and EO 13567 Current." Hudson Decl. ¶ 15. Given the scope of the plaintiff's FOIA request, using such limited terms was not reasonably calculated to uncover responsive records and likely excluded responsive records.

"Security officers" is an implausibly narrow search term given Plaintiff's FOIA request, which was directed at the broader inquiry of monitoring the transmission of Guantánamo military commission proceedings. Likewise, it was unreasonable to rely on the search terms "40 second" and "forty second" to turn up documents pertaining to Mr. Schwartz's request for records reflecting the "means by which any original classification authority can *monitor* or *interrupt* the 40-second delayed audio-video transmission of military commission proceedings." Hudson Decl. ¶ 11 (emphasis added). The use of such narrow search terms renders the P&S search inadequate to reasonably locate responsive records.

Third, ODNI's declaration does not provide adequate detail about the searches or a sufficient justification for the manner in which they were conducted. *Nat'l Day Laborer*, 877 F. Supp. 2d at 107. It is not apparent whether P&S ran searches with the individual search terms or

whether they were used in conjunction. Depending on how the search was run, P&S may have omitted entire categories of potentially relevant records. The failure to supply any detail regarding the *method* of the P&S search further renders it impossible to assess the adequacy of the P&S search.

ODNI also failed to provide a "detailed explanation of why further searches would be unreasonably burdensome." *Goland*, 607 F.2d at 353. ODNI did not explain why further searches with broader search terms could not have been applied by P&S, or why the OGC attorney could not have searched other potentially relevant folders. The agency also failed to explain why searching other components likely to possess responsive records—components including the NCSC—would be burdensome. As part of this failure to meet its burden, ODNI's declaration did not elaborate on the structure of the agency's file system in order to show that further searches would be unlikely to locate responsive records. *See Nat'l Day Laborer*, 877 F. Supp. 2d at 96.

For these reasons, ODNI should be ordered to conduct a proper search that includes a wider search of ODNI's offices and employs reasonable search terms and methods, and to submit a declaration that adequately describes and justifies the scope and method of the search it conducts.

2. DoD

The declaration submitted by DoD likewise fails to establish that it conducted a search that was reasonably calculated to discover all responsive documents. DoD's initial search was conducted by the Office of Military Commissions Convening Authority, which was tasked by the Office of the Secretary of Defense ("OSD")/Joint Staff ("JS"). This initial search resulted in the initial production to Mr. Schwartz of 98 pages of responsive records. Herrington Decl. ¶ 9. After this Court ordered DoD to conduct another search, ECF No. 13, DoD's declarant, Mark

Herrington, spoke with individuals within the offices he determined were "most likely" to have responsive records. Herrington Decl. ¶ 10. That second search resulted in the production of 437 additional pages of responsive records. Defendants' SMF ¶ 21.

DoD's second search remained overly narrow and not reasonably calculated to locate all responsive records. First, Herrington appears to have hand-selected the individuals he thought "most likely" to possess responsive records. Herrington Decl. ¶ 10. As noted above, "most likely" is not the standard that should be employed in a reasonable and adequate search. *DiBacco*, 795 F.3d at 190. Moreover, without any detail regarding which individuals and which offices conducted the post-litigation search for responsive records, it is impossible to assess whether Herrington's selections were reasonable or sufficient.

Even assuming that the unidentified individuals with whom Herrington spoke were likely to possess the records Mr. Schwartz seeks, the Herrington Declaration is insufficient to meet DoD's burden because it supplies no particularized information whatsoever concerning the scope, method or design of DoD's search. Herrington names four distinct offices—OSD OGC, the Office of Military Commissions, the Convening Authority and Prosecutor's office—but does not specify how many individuals in each office he spoke to, how many files they searched, what search terms were used, or which of the four offices ultimately located responsive documents. Rather, Herrington avers only that he had conversations with "individuals," based on "personal knowledge of documents containing responsive information and their location within their office files," and that he obtained responsive records through those conversations. Herrington Decl. ¶ 10. Nor does Herrington supply any information concerning the "structure of the agency's file system" that would tend to explain the method or scope of DoD's post-litigation search. *Nat'l Day Laborer*, 877 F. Supp. 2d at 96.

To the extent the Herrington Declaration provides any useful information at all concerning DoD's post-litigation search, that information only tends to suggest that the DoD's search was *inadequate* as a matter of law and that summary judgment for Plaintiff is therefore proper. Based on the facts gleaned from the Herrington Declaration, DoD's post-litigation search appears to have been accomplished through arbitrary selections of files and records systems that were calculated to avoid responsive documents. For example, DoD appears not to have searched its email or other correspondence systems, which were likely to include correspondence among the offices Herrington identified regarding the January 28, 2013 incident, Judge Pohl's subsequent inquiry into that incident, and any subsequent changes to any guidance documents concerning audio-video transmission from Guantánamo as a result of that incident. *See* SMF ¶¶ 65–67. In light of the scant information DoD supplied concerning the scope and method of its search, it is hardly surprising that the agency likewise failed to provide a "detailed explanation of why further searches would be unreasonably burdensome." *Goland*, 607 F.2d at 353.

For these reasons, DoD also failed to establish that it conducted an adequate search reasonably calculated to locate responsive records. The Court should order DoD to conduct a proper search that includes a wider search of DoD's offices and employs reasonable search terms and methods, as well as submit a declaration that adequately describes and justifies the scope and method of the search it conducts.

3. CIA

The declaration submitted by CIA similarly falls short, simply offering a number of entirely conclusory statements to support its claim that an adequate search was conducted.

First, the declaration states that ODL professionals "conducted a thorough and diligent search that was reasonably calculated to locate" any responsive records. Wilson Decl. ¶ 10. But

the agency does not identify what file systems were examined, or what search terms were used. This lack of even minimal detail provides no basis for ascertaining whether the search was reasonably calculated to turn up responsive records, as FOIA requires.

There are further reasons for finding that the CIA search was insufficient. The "thorough and diligent" search it conducted in 2016, after this lawsuit was filed, failed to locate an unquestionably responsive record—a 2015 classification guidance document, which CIA issued after the Executive Summary of the Senate Select Committee on Intelligence Report ("SSCI Report") was declassified. This 2015 classification guidance was disclosed by CIA in July 2015 in response to another FOIA request, submitted by OpenTheGovernment and appears to supersede the guidance documents later produced to Mr. Schwartz. SMF ¶ 71–72. This "positive indication[]" of material overlooked by CIA confirms the inadequacy of the agency's search. *Valencia-Lucena v. U.S. Coast Guard, FOIA/PA Records Mgmt.*, 180 F.3d 321, 327 (D.C. Cir. 1999)

While CIA's failure to locate a specific record does not alone render its search inadequate, *see Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003), the absence of detail in the agency's declaration, coupled with its unexplained failure to produce a record that it had unquestionably located in the same time frame that Mr. Schwartz's request was pending, strongly indicates that the agency overlooked responsive records. As a matter of law, an agency "must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C.Cir.1998).

Second, the CIA declaration states that no other offices were searched "because it was determined that there were no other offices that were likely to maintain responsive records."

Wilson Decl. ¶ 10. This statement fails to provide a "detailed explanation of why further searches would be unreasonably burdensome" but instead circularly asserts that no other offices were searched because no other offices were determined to warrant a search. *Goland*, 607 F.2d at 353. Such conclusory statements are insufficient to meet the agency's burden to demonstrate that it conducted an adequate search.

For these reasons, CIA failed to establish that it conducted an adequate search reasonably calculated to locate responsive records. The Court should order CIA to conduct a proper search that includes a wider search of CIA's offices and employs reasonable search terms and methods. The Court should further order CIA to submit a declaration that adequately describes and justifies the scope and method of the search it conducts.

II. THE DEFENDANTS HAVE IMPROPERLY WITHHELD INFORMATION UNDER EXEMPTIONS 1, 3, 4 AND 7(F).

The 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." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "Although Congress enumerated nine exemptions from the disclosure requirement, 'these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.'" *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (internal citation omitted). Because "FOIA strongly favors a policy of disclosure," all statutory exemptions to FOIA must be "narrowly construed." *Brennan Ctr. for Justice v. U.S. Dep't of Justice*, 697 F.3d 184, 194 (2d Cir. 2012). Further, courts must resolve all doubts as to the applicability of exemptions "in favor of disclosure." *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 173 (2d Cir. 2014).

In FOIA litigation, "the agency alone possesses knowledge of the precise content of documents withheld," so the agency's affidavit must "strive to correct, however, imperfectly, the asymmetrical distribution of knowledge that characterizes [this] litigation." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987) (footnote omitted). At the very least, this involves "demonstrating [the] applicability of the exemptions invoked as to *each document or segment withheld*." *Id*. at 224 (footnote omitted). Ultimately, an agency must create "as complete a public record as is possible" that enables the court and the plaintiff to test its justifications for withholding. *Phillippi v. C.I.A.*, 546 F.2d 1009, 1013 & n.12 (D.C. Cir. 1976). "[T]he good faith presumption that attaches to agency affidavits only applies when accompanied by reasonably detailed explanations of why material was withheld. Absent a sufficiently specific explanation from an agency, a court's *de novo* review is not possible and the adversary process envisioned in FOIA litigation cannot function." *Halpern v. F.B.I.*, 181 F.3d 279, 295 (2d Cir. 1999). "[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not . . . carry the government's burden." *Larson v. U.S. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009) (internal citation omitted). Additionally, "an agency's response must logically fit the particular facts and circumstances of the case—a response so vague that it suits every case would fail for any number of reasons." *Id.* at 868 (internal citation omitted).

Just as the government failed to provide reasonably detailed descriptions of its searches for responsive records, it also fails to provide reasonably detailed explanations for any of its claimed exemptions. Although plaintiff agreed to limit the redactions he is challenging so that only a few remain at issue, the government's justifications on summary judgment remain conclusory, overly vague and sweeping, in violation of FOIA's requirement of a reasonably detailed explanation. To accept such justifications for these withholdings "would constitute an

abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review." *King*, 830 F.2d at 219 (quoting *Allen v. C.I.A.*, 636 F.2d 1287, 1293 (D.C. Cir. 1980)). Ultimately, the information is not properly withheld under Exemptions 7(F), 4, 1 or 3.

A. The Government Fails to Justify Its Redactions Under Exemption 7(F).

DoD invoked Exemption 7(F) in support of its withholding of seven full pages of a "Security Refresher" PowerPoint presentation. Herrington Decl. ¶ 9. To justify a withholding under exemption 7(F), the government must prove both that the withheld information was "compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7) and that release of the information "could reasonably be expected to endanger the life or physical safety of any individual." *Id.* § 552(b)(7)(F). The Herrington Declaration does not present facts sufficient to support either part of the Exemption 7(F) test.

1. The government fails to prove that the redacted information was compiled for law enforcement purposes.

It is the government's burden to prove that information was compiled for law enforcement purposes. *Ferguson v. F.B.I.*, 957 F.2d 1059, 1070 (2d Cir. 1992). To meet this threshold obligation, the government must show that the redacted records are related "to the enforcement of federal laws or to the maintenance of national security" such that the agency can identify "a particular individual or a particular incident as the object of its investigation and the connection between that individual or incident and a possible security risk or violation of federal law." *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982); *see also Jefferson v. U.S. Dep't of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002) ("[T]he focus is on how and under what circumstances the requested files were compiled, and 'whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding.'").

To establish that the Security Refresher PowerPoint was "compiled for law enforcement purposes," the Herrington declaration offers only that "[t]he definition of Law Enforcement Purposes is broad and includes national security information." Herrington Decl. ¶ 16. While some national security material can fall under Exemption 7, this purely conclusory statement fails to provide the sort of justification required by FOIA. The government's brief says even less, failing even to mention this threshold requirement of Exemption 7, much less explain how the withheld material relates to the exemption. Without any explanation that moves beyond "merely recit[ing] standards," *King*, 830 F.2d at 224, the government has not met its threshold burden to show that the withheld information was compiled for law enforcement purposes.

Worse, the government's limited discussion of the withheld material suggests that it could not have been compiled for law enforcement purposes within the meaning of Exemption 7. While the Second Circuit has not formally addressed the bounds of Exemption 7's threshold requirement, it has acknowledged that not all national security information can be said to have been compiled for law enforcement purposes. *See Am. Civil Liberties Union v. U.S. Dep't of Def.*, 543 F.3d 59, 74 (2d Cir. 2008), *vacated on other grounds*, 558 U.S. 1042 (2009) (distinguishing between "information generated from national security operations" that is connected or unconnected to law enforcement). It has also taken a dim view of using Exemption 7 to circumvent the traditional classification process in matters of national security. *Id.* at 73 (holding that the existence of separate exemptions for national security "severely undercuts" a broad construction of Exemption 7(F) and warning that Exemption 7 should not be used "as an alternative classification mechanism entirely lacking in executive safeguards and standards for classification.").

Here, the government attempts to incorporate what is essentially standard office building security measures for its civilian employees into Exemption 7(F)'s limited national security ambit. *See* Herrington Decl. ¶ 16 ("This briefing is a reminder of security procedures and the need for operational security awareness by personnel in the office."). In contrast, the few cases that have applied Exemption 7(F) to withhold national security information outside of the investigatory context typically involve direct connections to law enforcement plans to deter and respond to acts of terrorism. *See, e.g.*, *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 777 F.3d 518, 523 (D.C. Cir. 2015) (withholding emergency protocol for law enforcement's disruption of wireless networks to deter the wireless triggering of radio-activated explosives); *Moorefield v. U.S. Secret Service*, 611 F.2d 1021, 1024 (5th Cir. 1980) (applying Exemption 7(F) to records compiled to assist the Secret Service in protecting the President). This case is entirely dissimilar. The government has withheld information that applies to civilian employees completely outside of any law enforcement context. The government's conclusory reference to "national security" is factually dubious and legally insufficient under Exemption 7.

2. The government fails to prove that the redacted information could reasonably be expected to endanger the life or physical safety of any individual.

The government is equally vague and conclusory in attempting to justify the withholding of information relating to building security and threat assessments on the basis that disclosure could reasonably be expected to endanger the life or physical safety of any individual. *See* Herrington Decl. ¶ 16 (release of nonclassified information could "allo[w] persons with nefarious intent valuable information that could compromise the personnel's physical security"); Defs.' Mot. for Summ. J. at 14–15 (disclosure might "allow third parties to exploit this information which could result in the physical harm to . . . members of the Office of Special Security").

Looking beyond its vague, attenuated statements, the government has failed to establish a "nexus between disclosure and possible harm." *Amuso v. U.S. Dep't of Justice*, 600 F. Supp. 2d 78, 101 (D.D.C. 2009). They offer just one example of how disclosing the information may create a risk: "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." Herrington Decl. ¶ 16. This generalized hypothesis is inadequate to justify nondisclosure. There is no plausible nexus between the disclosure of documents discussing *visible* security features of the Washington Headquarter Service and the creation of a physical threat to personal safety. Indeed, the information the government says it needs to withhold concerns measures that would be ascertainable by any visitor to the building. *See Raher v. Fed. Bureau of Prisons*, No. CV-09-526-ST, 2011 WL 2014875, at *10 (D. Or. May 24, 2011) (holding that disclosure of internal procedures would not create a plausible security risk, because any "visitor . . . is able to observe staffing patterns and certain institution operations"). More broadly, the government's perceived threat to building security would require "an additional and unlikely chain of events." *Am. Civil Liberties Union v. U.S. Dep't of Homeland Sec.*, 973 F. Supp. 2d 306, 315 (S.D.N.Y. 2013). It defies reason that knowing whether a building is accessed by optical scanner, key card or some other method would be a reasonable "but for" cause of a credible threat.

The government has described the information it seeks to withhold only in broad, general terms of building access and "threat assessments." Defs.' Mot. for Summ. J. at 10. As a result, it is unclear to Plaintiff whether all of the redacted material in this document relates to building access or if other subjects are addressed. Regardless, the government's total failure to connect its redactions to law enforcement purposes, as well as its reliance on conclusory statements and

an isolated, non-global example to justify the threat of disclosing this information, fall far short of the justification required.

B. The Government Fails to Justify Its Redactions Under Exemption 4.

To justify withholding information under Exemption 4, the government must show that "(1) The information for which exemption is sought must be a 'trade secret[]' or 'commercial or financial' in character, (2) it must be 'obtained from a person,'; and (3) it must be 'privileged or confidential.'" *Nadler v. F.D.I.C.*, 92 F.3d 93, 95 (2d Cir. 1996) (citing 5 U.S.C. § 552(b)(4) (2012)). Plaintiff does not dispute that the redacted information is commercial or financial in character, or that the information has been obtained from a person. As a result, the only question at issue is whether the withheld information is "privileged or confidential."

Agency determinations that information should be withheld via Exemption 4 receive no deference. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys*., 601 F.3d 143, 147 (2d Cir. 2010). The justifications given must "militat[e] against disclosure" for Exemption 4 to hold. *Wash. Post Co. v. U.S. Dep't of Health & Human Servs*., 865 F.2d 320, 327 (D.C. Cir. 1989); *see also Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 41 (D.D.C. 1997) ("The public, including competitors who lost the business to the winning bidder, is entitled to know just how and why a government agency decided to spend public funds as it did; to be assured that the competition was fair; and, indeed, even to learn how to be more effective competitors in the future.").

The government has produced a 33-page contract with SRA International but has withheld the itemization of the costs within the contract and the salaries of the individual commission and defense security officers. The government fails to meet its burden of proving that this information is "privileged" or "confidential" under Exemption 4. Herrington Decl. ¶ 15. Mr. Schwartz seeks this information because it will tend to reveal the manner in which taxpayer

money is expended to support the military commissions. No proper justification exists for refusing to disclose it.

Under the Second Circuit test for Exemption 4, "information to be confidential must 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*, 92 F.3d at 96. Here, the government has provided the combined salary of two commission security officers ($260,000) and seven defense security officers ($1,500,000), but withholds the salary division between these officers because (1) it could "understandably cause [SRA International] competitive harm" and (2) could limit the number of qualified bids the government receives on future contracts. Herrington Decl. ¶ 15. Neither explanation justifies withholding the information under Exemption 4.

The government's concern that disclosing salary information will inhibit its ability to obtain qualified bids in the future is insufficient for several reasons. First, the government's justification is general, conclusory and entirely devoid of factual support. Herrington Decl. ¶ 15 ("[T]he release of this type of financial information could harm the Government generally 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."). Courts in this circuit require factual support for such claims, and have rejected explanations with even more detail than the government's threadbare statement. *See Intellectual Prop. Watch v. U.S. Trade Rep.*, 134 F. Supp. 3d 726, 745 (S.D.N.Y. 2015) (rejecting government affidavit that reported industry views that disclosure would inhibit future bidding as insufficiently detailed); *Nat'l Resources Def. Council v. U.S. Dep't of Interior*, 36 F. Supp. 3d 384, 406 (S.D.N.Y. 2014) ("*NRDC*"). In *NRDC*, for example, the government

provided multiple governmental and mining industry affidavits containing assertions that industry-members would be reluctant to provide information if they knew it would be made public; the court found the affidavits insufficient and their allegations too "blurry and unsubstantiated" to meet the government's burden to show that disclosure of mining companies' information "would enable competitors to undercut the companies." 36 F. Supp. 3d at 403–04. The government has done even less in this case. It has failed to provide a single industry affidavit and its own statement does not even speculate beyond the legal standard.

As a matter of logic, it is unlikely that disclosure of nine employees' salaries will impair the government's ability to obtain bids on multi-million dollar contracts in the future. Numerous courts have found that the benefits from contracting with the federal government render it "unlikely that an agency's future contracting ability will suffer impairment due to disclosure of price information." *Ctr. for Pub. Integrity v. Dep't of Energy*, 191 F. Supp. 2d 187, 196 (D.D.C. 2002). Indeed, "disclosure of prices charged to the government is a cost of doing business with the government." *Racal-Milgo Gov't Sys., Inc. v. Small Bus. Admin.*, 559 F. Supp. 4, 6 (D.D.C. 1981). This is especially true here, where Plaintiff requests information relating to the salaries of nine employees, which is a small fraction of the overall cost of the contract.

Nor has the government justified its proposition that SRA International will suffer substantial competitive injury. To prove substantial competitive harm, the government must establish that the person who submitted the information "faces both (1) actual competition and (2) a likelihood of substantial competitive injury if the information were released." *Plumbers & Gasfitters Local Union No. 1 v. U.S. Dep't of the Interior*, No. 10-CV-4882 CBA, 2011 WL 5117577, at *3 (E.D.N.Y. Oct. 26, 2011) (quoting *Inner City Press v. Bd. of Governors*, 380 F. Supp. 2d 211, 219 (S.D.N.Y. 2005), *aff'd* 463 F.3d 239 (2d Cir. 2006)); *NRDC*, 36 F. Supp. 3d at

402. The government has not mentioned either standard, but instead simply restated the confidentiality requirement. Herrington Decl. ¶ 15 (disclosure could "understandably cause [SRA International] competitive harm"). These "conclusory and generalized allegations of substantial competitive harm . . . are unacceptable and cannot support" withholding information under Exemption 4. *Pub. Citizen Health Research Grp. v. Food & Drug Admin*., 704 F.2d 1280, 1291 (D.C. Cir. 1983); *see also Detention Watch Network v. U.S. Immigration & Customs Enf't*, No. 14 CIV. 583 (LGS), 2016 WL 3926451, at *7 (S.D.N.Y. July 14, 2016) ("Disclosure of pricing information, in particular, is consistent with the purposes of FOIA.").

As with government impairment, courts in this Circuit have rejected more detailed showings than that in the Herrington Declaration as insufficient. *See, e.g.*, *Plumbers*, 2011 WL 5117577, at *3-4; *Detention Watch Network*, 2016 WL 3926451, at *5. For example, this Court in *Plumbers* considered Exemption 4 redactions supported by two affidavits from company executives that discussed the components of their contract bid and how disclosing the "hours worked" column on payroll forms would enable competitors to predict their future bids. This Court held that these affidavits were insufficient to establish competitive harm because the company had already disclosed its gross labor costs. 2011 WL 5117577, at *3. Similarly, in *Detention Watch*, the Southern District of New York found that multiple declarations providing "speculative explanations and conclusory statements about the competitive nature of the industry" and the ease with which competitors could "reverse-engineer pricing information from . . . unit prices" were insufficient to meet the competitive harm burden. 2016 WL 3926451, at *5-7.

In this case, the government has done even less. Like *Plumbers*, it concerns disclosure of specific labor information when total labor cost has been disclosed. Unlike *Plumbers* or

Detention Watch, however, the government has not provided a scintilla of information detailing the nature of SRA International's competitive environment, how the competitive injury will exceed "minor" harm, how competitive harm is likely following disclosure, or even whether actual competition exists. Indeed, it has not procured an affidavit from the company itself. Further, because the plaintiff is requesting a relatively small amount of pricing information, it is unlikely that the government could ever show the requisite level of *substantial* competitive harm. Critically, "minor" disadvantages flowing from disclosure "cannot overcome the disclosure mandate of FOIA." *Wash. Post Co.*, 865 F. Supp. at 327.

Finally, the government argues that it can redact from a responsive record information that was not specifically sought in plaintiff's FOIA. *See generally* Herrington Decl. ¶ 14 (noting that the salaries were provided in response to the DoD's search); Defs.' Mot. For Summ. J. at 16 ("It is unnecessary to provide an exact cost or breakdown of the expenses . . . as it was not requested by the Plaintiff's FOIA."). The claim is baseless. Nothing in FOIA permits the government to redact non-exempt parts of a responsive document simply because they are nonresponsive. To the contrary, "an agency must disclose agency records to any person under § 552(a), unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b)." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989) (internal quotations omitted). Further, these exemptions are to be "narrowly construed." *Brennan Ctr.*, 697 F.3d at 194. Because non-responsiveness is not one of the nine enumerated exemptions to FOIA, the government cannot affirmatively redact a responsive document simply because parts of it do not relate to a FOIA request. *See Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016) ("[I]f the government identifies a record as responsive to a FOIA request, can the government nonetheless redact particular

information within the responsive record on the basis that the information is non-responsive? We find no authority in the statute for the government to do so.").

C. The Government Fails to Justify Its Redactions Under Exemptions 1 and 3.

The government equally fails to meet its burden of justifying with reasonable specificity its redactions under Exemptions 1 and 3. The government may invoke Exemption 1 only to withhold records that have been "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). For information to be "properly classified," it must be (1) classified by an "original classification authority"; (2) be "owned by, produced by or for, or [be] under the control of the United States Government"; (3) fall within one of eight specified categories of information; and (4) be deemed to "reasonably . . . be expected to result in damage to national security" by the original classification authority. Exec. Order No. 13,526, 75 Fed. Reg. 707, 707 (Dec. 29, 2009).

The government can invoke Exemption 3 to withhold records that are "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (2012). Here, CIA asserts Exemption 3 via the National Security Act of 1947, which enables the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." Shiner Decl. ¶ 17 (citing 50 U.S.C. §3024(i)(1) (2012)). Under Exemption 3 and the NSA statute, information is properly withheld only if the agency "describe[s] the intelligence activity involved, and . . . show[s] why disclosure of requested materials could reveal the nature of that activity." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 985 (9th Cir. 2009) (quoting *Hayden v. Nat'l Sec. Agency*, 608 F.2d 1381, 1391 (D.C. Cir. 1979)).

Agency affidavits concerning classification decisions are accorded "substantial weight." *Doherty v. U.S. Dept. of Justice*, 775 F.2d 49, 52 (2d Cir. 1985). An agency invoking

Exemptions 1 or 3 must provide an explanation that is both "logical" and "plausible." *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 119 (2d Cir. 2014). This degree of deference "by no means gives an agency carte blanche to redact or otherwise withhold responsive information without a valid and thorough affidavit." *Lawyers Comm. for Human Rights v. I.N.S.*, 721 F. Supp. 552, 561 (S.D.N.Y. 1989). Government affidavits do not justify summary judgment if they are "controverted by contrary evidence in the record or by evidence of agency bad faith." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009) (citation omitted). Summary judgment on the basis of government affidavits that are "conclusory, merely recit[e] standards, or . . . too vague or sweeping" is inappropriate. *King*, 830 F.2d at 224.

As they relate to the present case, both exemptions primarily turn on whether disclosure of any of the challenged redactions would reveal intelligence methods and sources. The government's explanations are implausible and contradicted by contravening evidence. Additionally, the government's use of Exemption 1 is independently improper, because it has not met its burden of establishing a plausible risk to national security.

1. The government fails to prove with sufficient detail that disclosure would reveal intelligence methods and sources.

The government has failed to meet its burden to show that disclosure would reveal intelligence sources and methods, because CIA's explanation is both insufficiently detailed and implausible. When the government invokes Exemption 1, it "must submit itemized descriptions of the context out of which *specific redactions* are made." *Halpern*, 181 F.3d at 294 (emphasis added); *see also Am. Civil Liberties Union v. Dir. of Nat. Intelligence*, No. 10 CIV. 4419 RJS, 2011 WL 5563520, at *4 (S.D.N.Y. Nov. 15, 2011) (requiring *in camera* review after the agency failed to give "contextual description of the *specific redactions* made" to documents) (emphasis

added). And these descriptions must logically and plausibly establish that the withheld information is properly classified. *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d at 119.

Of the four documents responsive to plaintiff's request, CIA states, in a footnote, that it withheld one record in full because it "is currently under seal." Shiner Decl. ¶ 6 n.2. As an initial matter, the government has not demonstrated "that the court issued the seal with the intent to prohibit [disclosure] so long as the seal remains in effect." *Morgan v. U.S. Dep't of Justice*, 923 F.2d 195, 198 (D.C. Cir. 1991). The government must produce some evidence, such as the actual sealing order, court transcripts, or formal clarification from that court, to meet this burden. *Id*. The government must also provide "general information (for example: length, date, author and brief description of each document)" to identify the information it is withholding. *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1180 (D.C. Cir. 1996) ("*Oglesby II*"). The government's burden is clearly not met where its "declaration say[s] only that the records are sealed, and therefore withheld, pursuant to a court sealing order." *Jennings v. F.B.I.*, No. 03-1651, 2004 U.S. Dist. LEXIS 31951, *20-21 (D.D.C. May 6, 2004).

The other three documents contain dozens of redactions, five of which plaintiff challenges. *See* Defs.' Mot. for Summ. J., Ex. D. CIA's single justification for these redactions is that the information "*primarily* relates" to aspects of the RDI program that remain classified, and that the information "*includes*" intelligence operations and information regarding foreign governments. Shiner Decl. ¶ 14 (emphasis added). CIA never states whether its factual justification applies to all of the information withheld under Exemptions 1 and 3; indeed, to the extent this language suggests that only portions of the withheld material are exempt, CIA may well have failed to disclose all "reasonably segregable portion[s]" of these records. 5 U.S.C. §

552(b). Moreover, CIA's vague and conclusory showing renders it impossible for the plaintiff—and for this Court—to determine whether CIA has met its burden to justify its withholdings.

Likewise, CIA relies on one explanation for all of its redactions instead of providing "particularized descriptions of the context surrounding *each of the individual redactions*." *Halpern*, 181 F.3d at 294 (emphasis added). A single, broad explanation is insufficient to justify nondisclosure. *El Badrawi v. Dep't of Homeland Sec.*, 583 F. Supp. 2d 285, 310 (D. Conn. 2008) (quoting *Morley v. C.I.A.*, 508 F.3d 1108, 1122 (D.C. Cir. 2007) ("[C]ategorical description[s] of redactions . . . [are] clearly inadequate."). Beyond this shortcoming, the government's categorical explanation is particularly unhelpful in facilitating court review. It is unclear if a given redaction relates to CIA's activities, sources, methods, interactions with foreign governments or some combination of these explanations.

The deficiencies of this approach are clear when examined in the context of the government's withholdings. For example, despite its explanation that the redacted information "primarily relates" to CIA's RDI program, Shiner Decl. ¶ 14, CIA has withheld an entire bullet point that is under the subject heading "Other Classified Information *Not* Relating to the RDI Program." Bloch-Wehba Decl. ¶ 10, Ex. G (emphasis added). For an affidavit to be sufficiently detailed, a court should be able to evaluate FOIA exemptions "without having to pull the contextual information out of the redacted documents for itself." *Halpern*, 181 F.3d at 294. Here, even pulling contextual information out of redacted documents is unhelpful. Indeed, it raises additional questions regarding the adequacy of the government's explanation.

Finally, CIA's explanation that the information "primarily relates to aspects of the CIA's [RDI] program," Shiner Decl. ¶ 14, is conclusory and insufficient to support any of the redactions. Large swaths of CIA's RDI program have been declassified by the publication of the

SSCI Report. *See* Bloch-Wehba Decl. ¶ 13, Ex. J. The SSCI Report disclosed specific information regarding CIA's activities and methods, as well as foreign government participation, in the RDI program. *Id*. For example, the SSCI Report found, "To encourage governments to clandestinely host CIA detention sites, or to increase support for existing sites, the CIA provided millions of dollars in cash payments to foreign government officials." *Id.* at 11. The only effort that CIA makes to distinguish the redacted information from publicly known information is that the redactions "remain classified." Shiner Decl. ¶ 14. This distinguishing explanation simply restates the legal standard and fails to provide the "statements of fact supporting [] conclusory allegations" that the Second Circuit requires. *Peltier v. F.B.I.*, No. 03-CV-905S, 2005 WL 735964, at *10 (W.D.N.Y. March 31, 2005) (citing *Halpern*, 181 F.3d).

Even according the government's affidavits all due deference, the government's explanation for its redactions under Exemption 1 and Exemption 3 is not sufficiently specific to warrant summary judgment in favor of nondisclosure. Courts in this Circuit have rejected such explanations that simply parrot statutory standards, such as that information "remains classified," without providing enough detail on the substance of the redactions. *E.g.*, *El Badrawi*, 583 F. Supp. 2d at 314 (holding an explanation that disclosure of intelligence sources and methods would "hinder the [government's] ability to obtain such information in the future and damage relations with the government" to be insufficiently detailed); *Lawyers Comm. for Human Rights*, 721 F. Supp. at 567 (holding CIA's explanation that withheld information relates to "activities of foreign groups" was insufficiently detailed). In the present case, the government has supplied only a conclusory legal standard in support of its withholdings. Accordingly, it is insufficiently detailed.

Other publicly available information also suggests that CIA has redacted previously disclosed information. Bloch-Wehba Decl. ¶¶ 8–9, Exs. E, F. As the government recognizes, CIA's RDI program has already been publicly acknowledged and a large amount of information regarding CIA's methods within the program has been disclosed. Shiner Decl. ¶ 14 n.5; *see also* Bloch-Wehba Decl. ¶ 13, Ex. J. For example, in its 2015 Classification Guidelines for the RDI program, approved for release to OpenTheGovernment, CIA disclosed that High Value Detainees' ("HVD") allegations of torture were declassified unless they "reveal the identities . . . of . . . any foreign intelligence service involvement in the HVDs' capture, rendition, detention, or interrogation." Bloch-Wehba Decl. ¶ 9, Ex. F at 4. The 2011 Classification Guidelines produced to Plaintiff contain a nearly identical statement, but it appears that the terms "intelligence service" and "interrogation" have been redacted. Bloch-Wehba Decl. ¶ 10, Ex. G at 11. This information was not only previously disclosed by CIA in a separate FOIA response, but is also included in the SSCI Report. Bloch-Wehba Decl. ¶ 13, Ex. J at 11 (recognizing the involvement of "foreign intelligence services" in the RDI Program). The government's assertions that it went "line-by-line" to find non-exempt information and that the redacted information remains classified after the SSCI report are both directly "controverted by . . . contrary evidence." *Wilner*, 592 F.3d at 73. This evidence refutes the government's assurance that it has "conducted a page-by-page, line-by-line review of the three records and . . . determined that there is no additional segregable, non-exempt information that can be released." Shiner Decl. ¶ 15.

When CIA's insufficiently detailed explanation is combined with the public knowledge surrounding the RDI program and the evidence that some redactions plainly do not involve classified information, it is clear that the government has failed to meet its burden.

2. The government's claim under Exemption 1 is independently improper because the link to security risk is neither logical nor plausible.

The government asserts that disclosure would pose a risk of harm to national security, but that risk it describes is neither logical nor plausible. While the government is entitled to deference in this area, courts must independently assess the plausibility of an agency's asserted risk to national security as a basis for classification. If the claim of a threat is not at least logical and plausible, the government cannot properly assert Exemption 1. *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d at 119 (finding that disclosure of pure legal analysis could not plausibly damage national security); *Am. Civil Liberties Union v. C.I.A.*, 710 F.3d 422, 430 (D.C. Cir. 2013) (finding that CIA's alleged harm to national security was neither logical nor plausible after extensive disclosures).

As an initial matter, CIA's misguided assertion of the mosaic theory to elide the significance of the disclosure of the SSCI Report, *see* Defs.' Mot. for Summ. J. at 21, does not mitigate the agency's duty under Exec. Order 13,526. *See Am. Civil Liberties Union v. Dep't. of Justice.*, 681 F.3d 61, 71 (2d Cir. 2012) ("[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.") (quotation omitted). The mosaic theory simply enables agencies to analyze the consequences of disclosure "in light of other available or potentially available records or information." *Shapiro v. U.S. Dep't of Justice*, 153 F. Supp. 3d 253, 274–74 (D.D.C. 2016). It does not permit agencies to withhold records not otherwise exempt under FOIA. *See id.*; *Raimondo v. F.B.I.*, No. 13-cv-02295-JSC, 2016 WL 2642038, at *10 (N.D. Cal. May 10, 2016) (rejecting the mosaic defense because of public knowledge of the FBI's numbering system). Moreover, courts still must assess the plausibility of the asserted risk

of danger when the mosaic theory is asserted. *See Am. Civil Liberties Union v. U.S. Dep't of Homeland Sec*., 973 F. Supp. 2d at 315 (rejecting defendant's mosaic theory for being implausible). As previously noted, the government does not offer any explanation at all as to why the redacted information properly "remain[s] classified" after the SSCI Report. Shiner Decl. ¶ 14. Merely asserting the legal standards behind the mosaic theory, without giving context specific to this case, does not meet the government's burden.

Both of the government's asserted harms are facially implausible. First, it warns that the disclosure of information regarding foreign government information may reduce the willingness of governments and other sources to work with CIA in the future. Shiner Decl. ¶ 15. This harm ignores the reality that foreign government involvement in nearly all aspects of the RDI program is well known. *See, e.g.*, Bloch-Wehba Decl. ¶ 13, Ex. J at 11 ("The psychologists carried out inherently governmental functions, such as acting as liaison between the CIA and *foreign intelligence services*, assessing the effectiveness of the interrogation program, and participating in the *interrogation of detainees in held in foreign government custody*.") (emphases added). Indeed, the media has covered the extensive involvement of specific foreign governments in the RDI program. *See, e.g.*, Bloch-Wehba Decl. ¶ 11, Ex. H. As such, it is implausible that producing information "related to foreign governments" will render governments less likely to cooperate any more than the SSCI report or the media's subsequent analyses already have. Because the government fails to provide even a generalized explanation of the types of information that remain classified, its nexus between the explanation and harm to foreign governments fails.

CIA's second harm, that the disclosure of CIA activities, sources or methods would render those methods less effective in the future and jeopardize their continued use, Shiner Decl.

¶ 15, is similarly hollow because the RDI program has been shut down, its methods are no longer in use, and details about the program have been disclosed and are the subject of intense public discussion. SMF ¶¶ 68, 71–72, 75. As such, it is implausible that national security will be harmed by the diminished effectiveness of a program that has been both terminated and publically discussed.

III. CIA IMPROPERLY INVOKES *GLOMAR*.

CIA seeks summary judgment on the grounds that responding to parts two and three of plaintiff's FOIA request would compromise information properly protected from disclosure under Exemptions 1 and 3. Defs.' Mot. for Summ. J. at 28–29. In particular, CIA contends that disclosing whether it possesses responsive records related to the disruption of audio-visual communications and the assignment of security officers to the military commissions is an "intelligence activity" or an "intelligence source or method" within the meaning of Exec. Order 13,526 and protected under Exemption 1. *Id.* at 29. CIA also asserts that disclosure of such information is an "intelligence source or method" within the meaning of Section 102A(i)(1) of the National Security Act of 1947, which is a withholding statute for the purposes of Exemption 3. *Id.* at 32.

A. The Government Mischaracterizes its Burden and the Court's Deference in the FOIA Context

In certain exceptional circumstances, "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 (quoting *Minier v. C.I.A.*, 88 F.3d 796, 800 (9th Cir. 1996)). A *Glomar* response, as it is commonly called,[2] does not substantially

[2] The name comes from *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), where a court upheld the CIA's refusal to admit or deny the existence of the requested records pertaining to a cold war research vessel, "the Hughes Glomar Explorer."

change the agency's burden or the court's standard of review. "In determining whether the existence of records *vel non* fits a FOIA exemption, courts apply the general exemption review standards established in non-*Glomar* cases." *Wolf v. C.I.A.*, 473 F.3d 370, 374 (D.C. Cir. 2007); *Wilner,* 592 F.3d at 68. The burden remains "on the agency to demonstrate, not the requester to disprove, that the materials sought . . . have not been improperly withheld." *Tax Analysts*, 492 U.S. at 142 n.3 (1989); 5 U.S.C. § 552(a)(4)(B). And it remains "the responsibility of the federal courts to conduct *de novo* review of an agency decision to withhold records requested pursuant to FOIA." *Am. Civil Liberties Union v. Office of the Dir. Of Nat'l Intelligence*, 2011 WL 5563520 at *3 (citing *A. Michael's Piano Inc. v. Fed. Trade Comm.*, 18 F.3d 138, 143 (2d Cir. 1994)).

It is true that "in the context of national security concerns, courts 'must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'" *Wolf*, 473 F.3d at 374 (quoting *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984)). Nevertheless, "deference is not equivalent to acquiescence," *Campbell*, 164 F.3d at 30, and courts must not "relinquish[] their independent responsibility" to review an agency's withholdings even in the national security context. *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987). An agency's affidavits must still "contain reasonable specificity of detail rather than merely conclusory statements" and must not be "called into question by contradictory evidence in the record." *Gardels v. C.I.A.*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (quoting *Halperin v. C.I.A.*, 629 F.2d 144, 148 (D.C. Cir. 1980)). Furthermore, an agency's justification for *Glomar* cannot be considered sufficient if does not appear "logical" or "plausible." *Wolf*, 473 F.3d at 374–375. Because of the "strong presumption in favor of disclosure" in FOIA cases, *Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 283 (2d Cir. 2009), a *Glomar* refusal to

disclose can only be justified in "unusual circumstances, and only by a particularly persuasive affidavit." *N.Y. Times Co*, 756 F.3d at 122 (quoting *Am. Civil Liberties Union v. C.I.A.*, 710 F.3d at 433).

CIA's *Glomar* response in this case is defended by an affidavit that is overly vague, sweeping and conclusory. The description of the harms posed by disclosure are both illogical and implausible. They are called into question by prior official acknowledgments and publicly disclosed information, and fail to establish that the information at issue can even be described as an "intelligence source or method." CIA's *Glomar* response is entirely improper and the court should compel it to respond to parts two and three of the plaintiff's FOIA request.

B. CIA's Affidavit Relies on Vague and Conclusory Statements.

CIA cannot meet its burden under *Glomar* with "conclusory affidavits that merely recite statutory standards, or are overly vague or sweeping." *Larson*, 565 F.3d at 864. Its "response must logically fit the particular facts and circumstances of the case" and cannot be "so vague that it suits every case." *Id.* at 868. Not only must justifications for withholding "logically fit" the circumstances, they must themselves be "logical" and "plausible." *Wolf*, 473 F.3d at 374–375. CIA's affidavit accomplishes none of these objectives. Its *Glomar* response under Exemptions 1 and 3 should be rejected, and the court should order CIA to respond to parts two and three of the plaintiff's FOIA request.

The *Glomar* section of the Shiner Declaration addresses the particular facts and circumstances of the plaintiff's FOIA request in only two paragraphs. One directly quotes the plaintiff's FOIA request and briefly explains CIA's response to the plaintiff prior to invoking *Glomar*. Shiner Decl. ¶ 19. The other follows four paragraphs describing the general application of *Glomar* to generic CIA "intelligence activities." *Id.* ¶¶ 20–23. In these paragraphs, CIA lists all of the potential ways its information may be exempt from FOIA because of its mission to

collect intelligence. *Id*. ¶ 20. It describes the potential harm that acknowledging the existence or non-existence of a hypothetical "clandestine technology" might cause. *Id*. ¶ 21. It explains why adversaries may be interested in various CIA disclosures and how CIA strives to be consistent in its assertion of *Glomar*. *Id*. ¶¶ 22–23. These paragraphs fit the dictionary definition of reciting statutory standards and providing a justification that is "so vague it suits every case." *Larson*, 565 F.3d at 864, 868.

To the extent CIA addresses the particular facts of this case at all, it does so by relying on conclusory statements, which misconstrue the plaintiff's FOIA request and require the court to infer harm by analogy. Shiner Decl. ¶ 24. First, CIA alleges that disclosing whether it has the ability to disrupt audio-visual transmissions will necessarily disclose that it has done so in the past. *Id*. But plaintiff's FOIA request does not ask CIA to disclose whether it has disrupted transmissions. Compl. Ex. E., ECF. No. 1-12. (requesting "records sufficient to disclose the *means* by which *any* original classification authority can monitor or interrupt"). Nor does plaintiff's FOIA require CIA to verify that it is the only classification authority with this ability. CIA provides no supporting evidence for why the court should conclude that the plaintiff's FOIA request imposes an obligation to answer questions not posed.

If CIA confirms that it has records responsive to plaintiff's request, the agency claims, "an adversary could use [the fact that CIA can disrupt transmissions] to identify areas of concern to the CIA." Shiner Decl. ¶ 24. But the agency fails to explain with any specificity how this might happen. Shiner might mean that an adversary could infer, from contextual clues, that a given *topic of discussion* in the courtroom is an "area of concern." But when the transmission of the proceedings is interrupted, those outside the courtroom have no way to identify the information they are not hearing because they are prevented from hearing it, and no way to

identify the classification authority, whom they cannot see. Because plaintiff has not asked CIA to confirm that it is the *only* agency that is able to interrupt the transmission, if CIA discloses that it possesses responsive records, the status quo remains unchanged: adversaries would have no way of knowing that CIA caused a specific interruption or, indeed, any interruption.

CIA then argues that the absence of responsive records would suggest that it lacks the ability to disrupt transmissions, and that knowledge of this would cause participants in the military commissions to disregard the rules about CIA information in court. Shiner Decl. ¶ 24. During the course of this litigation, however, CIA has released documents confirming that it does provide guidance to DoD's court security officers about certain CIA-classified information, which must be protected in court. Bloch-Wehba Decl. ¶ 10, Ex. G. Taken at its word, CIA suggests that the only obstacle preventing participants at the military commissions from disclosing CIA-classified information in court (and thereby violating court rules) is the mistaken belief that CIA can interrupt transmissions. Assuming that participants in the military commissions know what information CIA has classified, there is no reason why CIA must rely on its fictional ability to censor proceedings in order to protect that information; there is no logical reason why CIA would create an index of classified information for court use but rely on a sleight of hand to protect that information. This scenario assumes that DoD court security officers are ineffective and place sensitive information at risk. It makes no sense.

Finally, CIA alleges that confirming the existence of records responsive to part three of the plaintiff's FOIA request could reveal a role for CIA in the assignment of security officers to the military commissions and its relationship to the Office of Military Commissions. Shiner Decl. ¶ 24. CIA claims that this fact should be classified, but does not specify how its involvement in a judicial proceeding would properly be considered an "intelligence source or

method" or how disclosure of its involvement in protecting classified information at the Guantánamo commissions would cause harm to CIA's "intelligence source[s] or method[s]." Shiner's conclusory statement that disclosure will reveal information and that the information will cause harm is not sufficient to meet the agency's burden under *Glomar*.

CIA's affidavit relies on conclusory statements. The harms it asserts are neither logical nor plausible. The court should order CIA to respond to parts two and three of the plaintiff's FOIA request.

C. CIA Seeks to Protect Publicly Available Information.

A *Glomar* response is appropriate if an agency demonstrates that answering a plaintiff's FOIA request could "reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." *Halperin*, 629 F.2d at 147. An agency is "precluded from making a *Glomar* response if the existence or nonexistence of the specific records sought by the FOIA request has been the subject of an official public acknowledgment." *Wilner*, 592 F.3d at 70. Likewise, public disclosures by the government "have appreciable probative value in determining, under the record as a whole, whether the justifications set forth in CIA's declaration are logical and plausible." *Florez v. C.I.A.*, 829 F.3d 178, 184–85 (2d Cir. 2016).

CIA's *Glomar* response is improper because it attempts to protect information that has already been officially recognized and publicly disclosed. First, military commission officials have admitted that classification authorities have the ability to remotely monitor proceedings. Second, CIA has admitted and multiple government officials have confirmed that CIA is one of these classification authorities. Bloch-Wehba Decl. ¶¶ 10, 12, Exs. G, I. Whether CIA possesses responsive documents on how classification authorities may remotely monitor proceedings is, in light of these public disclosures, not a properly classified fact. Third, commission officials acknowledged that one or more classification authorities previously had the ability to disrupt

audio-visual transmissions to the press gallery. Fourth, CIA has openly acknowledged its interest in and ability to disrupt audio-visual communications. At a minimum, these acknowledgments undermine CIA's assertion that the *Glomar* response is essential to protect "areas of concern to the CIA." Shiner Decl. ¶ 24; *see also Florez*, 829 F.3d at 184 (finding that publicly available evidence is "germane to the CIA's asserted rationale for asserting a *Glomar* response"). For all these reasons, the court should reject CIA's *Glomar* response under both Exemptions 1 and 3.

1. Military Commission officials have acknowledged that classification authorities can monitor proceedings.

During pretrial proceedings on February 12, 2013, Maurice Elkins, the courtroom's director of technology, testified that classification authorities have the ability to monitor proceedings from outside the courtroom should any classified information be inadvertently disclosed. Bloch-Wehba Decl. ¶ 7, Ex. D at 350. Indeed, DoD produced to Plaintiff an unclassified transcript of the hearing in which Mr. Elkins testified to Plaintiff after its post-litigation search. *Id*. In that hearing, Mr. Elkins confirmed that "pregated" audio feeds from the GTMO war court were going to the court reporter, the interpreters, and the Original Classification Authority ("OCA"). *Id.*

2. The government has acknowledged that CIA is a classification authority.

Officials have repeatedly and publicly acknowledged that some of the information that the participants in the military commissions are prohibited from discussing in court pertains to CIA's enhanced interrogation techniques and CIA black sites. Bloch-Wehba Decl. ¶ 12, Ex. I. Indeed, the documents released by CIA during the course of this litigation acknowledge that it is providing guidance to DoD about "classified information controlled by CIA." Bloch-Wehba Decl. ¶ 10, Ex. G at 1. Therefore, the government cannot (and does not) dispute that CIA is an

original classification authority for information at issue in the military commissions. If CIA is an original classification authority, the agency must have been offered the same opportunity to remotely monitor the proceedings as all other classification authorities.

Part two of the plaintiff's FOIA request seeks "records sufficient to disclose the means by which *any* original classification authority can *monitor* . . . the 40-second delayed audio-video transmission of military commission proceedings." Compl. Ex. E, ECF No. 1-12. "[T]he CIA did not justify its *Glomar* response by contending that it was necessary to prevent disclosing whether or not [any] United States" agency has the ability to monitor the audio transmissions, only "whether the CIA itself was involved." *Am. Civil Liberties Union v. C.I.A.*, 710 F.3d at 428. Rather, CIA has averred that confirming that it possesses responsive records could indicate "that the CIA has previously interrupted the 40-second delayed audio-video transmission of military commission proceedings." Shiner Decl. ¶ 24 (emphasis added). Yet CIA "has proffered no reason to believe that disclosing whether it has *any documents at all* . . . will reveal whether the Agency itself" monitors audio transmissions. *Am. Civil Liberties Union v. C.I.A.*, 710 F.3d at 428. (emphasis added). The question then "is whether it is 'logical or plausible' . . . for the CIA to contend that it would reveal something not already officially acknowledged to say that the Agency," as a classification authority, has no knowledge of how to monitor audio transmissions in the military commissions. *Id.* at 429. (quoting *Wolf*, 473 F.3d at 375). "Given the extent of the official statements on the subject," the answer must be no. *Id.*

3. Officials have acknowledged that one or more classification authorities had the ability to censor the feed.

On January 28, 2013, Judge Pohl publicly stated that the broadcast of the audio feed into the press gallery was not cut by him, but by a classification authority outside of the courtroom. Bloch-Wehba Decl. ¶ 4, Ex. A at 135. Judge Pohl later said that classification authorities would

no longer have the ability to remotely interrupt the audio feed to the press gallery, further indicating that one or more of them possessed such an ability at some time during the military commission. Bloch-Wehba Decl. ¶ 6, Ex. C at 203–04.

4. CIA has officially acknowledged an interest in and ability to infiltrate and control audio-visual transmissions remotely.

CIA has publicly acknowledged that it has an interest in and the ability to remotely infiltrate audio and visual systems in order to listen and observe subjects of interest. It has also acknowledged that it can remotely control such systems. During the March 2012 summit for In-Q-Tel,[3] then CIA Director David Petraeus called household appliances that respond to audio and visual cues "transformational…particularly to their effect on clandestine tradecraft." Ex. K at 1. He also said, "items of interest will be located, identified, monitored, and remotely controlled through technologies such as radio-frequency identification, sensor networks, tiny embedded servers, and energy harvesters." *Id*. at 2. These statements show an acute and long-standing interest in infiltrating and then controlling systems collecting audio and visual information. Moreover, Director Petraeus acknowledged that CIA has several ways to remotely control audio-visual systems to which it gains access. Furthermore, he openly admitted that these technologies play an important role in CIA's intelligence gathering activities.

Part two of the plaintiff's FOIA request seeks records disclosing the means by which a classification authority can interrupt the audio-video transmissions. Compl. Ex. E, ECF No. 1-12. Plaintiff does not, as CIA suggests, ask the agency to confirm that it has previously interrupted a transmission, nor that it *alone* possesses the ability to interrupt audio-visual transmissions. Shiner Decl. ¶ 24. Therefore, the harms alleged by CIA do not logically follow

[3] In-Q-Tel is a not-for-profit corporation whose purpose is to provide CIA and other intelligence agencies with cutting edge technologies (https://www.iqt.org).

disclosure of the existence or non-existence of responsive records. Since CIA has publicly acknowledged an intelligence interest in remotely monitoring and controlling audio-visual systems, disclosure of the existence of responsive records would not, in itself, tend to reveal any secret regarding CIA's general interest in audio-visual systems. Conversely, disclosure of the non-existence of responsive records would not lead any adversaries to conclude that CIA does not possess this technology generally.

"The danger of *Glomar* responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory." *Am. Civil Liberties Union v. U.S. Dep't of Defense*, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005). CIA's arguments in this case perfectly illustrate this tendency. The information that it seeks to protect has already been officially acknowledged and is publicly available.

D. CIA's Involvement in the Military Commissions and Its Relationship to OMC is Not an "Intelligence Source or Method."

As the previous section illustrates, CIA's role as a classification authority in the military commissions is widely known and officially acknowledged. To the extent that CIA's involvement in the military commissions exceeds its role as a classification authority, its activities and relationships are not "intelligence activit[ies]" or "intelligence source[s] or method[s]" within the meaning of Exec. Order 13,526 or the National Security Act of 1947.

The National Security Act of 1947 does not define "intelligence sources and methods" and the phrase "received very little treatment in the congressional debates" at its passage. *Navasky v. C.I.A.*, 499 F. Supp. 269, 274 (S.D.N.Y. 1980) (citing the Church Committee Report[4]

[4] The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities is often called the "Church Committee."

at 138–139). "The Church Committee defines 'intelligence' as 'the product resulting from the collection, collation, evaluation, analysis, integration, and interpretation of all collected information.'" *Id.* (quotation omitted). When CIA seeks to withhold information," it "bears the burden of justifying nondisclosure" and must demonstrate that the information it seeks to withhold "logically fall[s] into the categories of 'intelligence sources and methods.'" *Id.* The appointment of security officers at a judicial proceeding does not involve the collection, collation, evaluation, analysis, integration or interpretation of information.

Moreover, CIA's authority to withhold information as an "intelligence activity" or "intelligence source and method" does extend to activities that are properly under the authority of another agency. For example, it does not extend to "police, subpoena, law-enforcement powers, or internal-security functions." *Weissman v. C.I.A.*, 565 F.2d 692, 695 (D.C. Cir. 1977) (quoting 50 U.S.C. § 403(d)(3)). The legislative history of the National Security Act confirms that Congress "denied the Agency police or internal-security functions" to guard against CIA overreach and to avoid creating a conflict with other agencies. *Id.* These proceedings are under the statutory authority of DoD. If CIA involves itself in tasks that Congress intended DoD to perform, these fall outside of the activities provided for in the National Security Act of 1947.

The objective of part three of the plaintiff's request is to learn more information about the number and cost, as well as duties, authorities, instructions and training of security officers assigned to military commissions. Compl. Ex. E, ECF No. 1-12. These officers are involved in a judicial proceeding, not intelligence-gathering. As such, most, if not all, of the records sought do not involve intelligence sources or methods, but only basic information about the structure of the military commissions. To the extent that some documents may properly involve "intelligence sources and methods," portions of those documents may exempt from disclosure.

But Congress did not intend the phrase "intelligence sources and methods" to provide CIA with a blanket justification for a *Glomar* response. The court should order CIA to fulfill its obligation to search for responsive records and to either release responsive records or explain in greater detail why they should be withheld.

IV. FOIA COMPELS THE RELEASE OF SEGREGABLE INFORMATION FROM THE RESPONSIVE RECORD CIA WITHHELD IN FULL

FOIA requires an agency to produce "any reasonably segregable portion of a record" that is not exempt. 5 U.S.C. § 552(b). As an initial matter, the government's claim that neither CIA nor DoD withheld any records in full is inaccurate. CIA withheld one record in full that it alleged was "under seal." Wilson Decl. ¶ 10 n.2. Without access to any information about the scope of the sealing order, it is impossible to know whether CIA was in fact obligated to withhold the entire document, or only portions thereof. *Morgan*, 923 F.2d at 199 ("[O]nly those sealing orders intended to operate as the functional equivalent of an injunction prohibiting disclosure can justify an agency's decision to withhold records that do not fall within one of the specific FOIA exemptions."). Moreover, both CIA and DoD have offered only "conclusory assertion[s]" that they have met their burden to release all segregable information. *Campbell*, 164 F.3d at 31; *see also* Herrington Decl. ¶ 18; Shiner Decl. ¶ 15. Because this showing is inadequate, the Court should require CIA to either release all segregable nonexempt portions of the record it withheld in full or demonstrate that the sealing order prohibits disclosure.

CONCLUSION

For the foregoing reasons, the Court should deny defendants' Motion for Summary Judgment and should enter summary judgment and/or partial summary judgment in favor of plaintiff as to (1) the inadequacy of the government's search for records responsive to plaintiff's

FOIA Request; (2) the government's improper withholding of responsive records, in whole and in part, from plaintiff; and (3) the government's *Glomar* response.

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Respectfully submitted,

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