UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE; CENTRAL INTELLIGENCE AGENCY; DEPARTMENT OF STATE; DEPARTMENT OF JUSTICE,

Defendants.

ECF Case

09 Civ. 8071 (BSJ) (FM)

OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION FOR PARTIAL SUMMARY JUDGMENT ON BEHALF OF THE CENTRAL INTELLIGENCE AGENCY AND THE DEPARTMENT OF DEFENSE

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PRELIMINARY STATEMENT

Defendants the Central Intelligence Agency and the Department of Defense, by their attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submit this opposition to Plaintiffs' cross-motion for partial summary judgment and reply memorandum in further support of their motion for partial summary judgment in this action brought under the Freedom of Information Act, 5 U.S.C. § 552.[1] Although the Government has adequately supported CIA's *Glomar* response and DoD's withholding in its initial submissions, it herewith is submitting two additional declarations in further support of its position. First, CIA has provided a second declaration from Wendy Hilton, the Information Review Officer for detainee-related matters ("Supp. Hilton Decl."), which reiterates CIA's position that it can neither confirm nor deny the existence or non-existence of the requested records without risking serious damage to the national security and disclosing intelligence sources and methods, and which provides additional detail regarding categories 6 and 10 of Plaintiffs' FOIA Request — the only categories that remain now that Plaintiffs have abandoned the other eight categories they initially sought from CIA. Second, DoD has submitted a new declaration from Major General Michael T. Flynn ("Flynn Decl."), the Director of Intelligence for the International Security Assistance Force and the United States Army Forces–Afghanistan, further detailing the reasoning behind DoD's withholdings.

This Court should grant the Government's motion for partial summary judgment and deny Plaintiffs' cross-motion.

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[1] This memorandum uses defined terms and abbreviations that were defined in the Government's opening brief. In addition, the Government's opening brief is cited as "Gov. Br.," Plaintiffs' opposition and cross-motion is cited as "ACLU Br.," and the declarations of Melissa Goodman and Jonathan Hafetz attached thereto are cited as "Goodman Decl." and "Hafetz Decl.," respectively.

ARGUMENT

I. GOVERNMENT ASSERTIONS OF NATIONAL SECURITY ARE ENTITLED TO SUBSTANTIAL DEFERENCE

As an initial matter applicable to most or all of Plaintiffs' specific objections, the Court should reject Plaintiffs' contentions to the extent they question the *bona fides* of the Government's declarations, or question the national security judgments set forth in those declarations. The Government is entitled to summary judgment based on agency declarations when "the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted" by contrary evidence or evidence of bad faith. *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009) (internal quotation marks omitted). The agency's justification "is sufficient if it appears logical or plausible." *Id.; see also Wilson v. CIA*, 586 F.3d 171, 185-86 (2d Cir. 2009) ("[T]he court's task is . . . simply to ensure that its reasons for classification are rational and plausible ones." (internal quotation marks omitted)); *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (the "court should not conduct a more detailed inquiry to test the agency's judgment").

Agency determinations are entitled to particular deference in the context of national security, which lies within the "unique" competence of the executive. *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978); *see also Azmy v. U.S. Dep't of Defense*, 562 F. Supp. 2d 590, 597 (S.D.N.Y. 2008) (agencies have "unique insights" in area of national security). As the Second Circuit has recently stated, it "is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies regarding . . . national security." *Wilner*, 592 F.3d at 76 (internal quotation marks omitted).

Plaintiffs now ask the Court to "second-guess" CIA's and DoD's decisions, objecting

that CIA and DoD have presented insufficiently "specific[]" or excessively "vague" analyses of the national security risks present here. *See* ACLU Br. at 5, 13. Contrary to Plaintiffs' contentions, however, in FOIA cases "the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *see also Wilner*, 592 F.3d at 76 ("[W]e have consistently deferred to executive affidavits predicting harm to the national security." (internal quotation marks omitted)); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) (disapproving the district court's use of "its own calculus" of whether harm would result from disclosure). This judicial restraint is especially warranted here now that the Government has submitted additional declarations providing as much additional detail as can be provided in an unclassified setting.[2]

II. CIA HAS FULLY JUSTIFIED ITS *GLOMAR* RESPONSE

The Court should grant summary judgment upholding the CIA's *Glomar* response — and deny Plaintiffs' cross-motion — because any other response to Plaintiffs' FOIA request would reveal classified information that reasonably could be expected to cause serious damage to the national security, and would reveal information about the CIA's intelligence sources and methods that is protected from disclosure by statute. The initial declaration of Wendy Hilton fully justified CIA's *Glomar* response,[3] and Plaintiffs have now withdrawn their demand that

[2] Should the Court believe it to be necessary, the Government can provide supplemental *classified* declarations — which it would submit *ex parte* and *in camera* — to further substantiate its decisions.

[3] Plaintiffs cite *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007), for the proposition that Ms. Hilton's original declaration did not provide "reasonably specific detail" in support of CIA's *Glomar* response, *see* ACLU Br. at 15, but the cases are wholly distinguishable. The CIA's affidavit in *Morley* contained only one sentence alluding to a *Glomar* response, and did not provide specific examples or detail the danger to intelligence sources and methods that

CIA process eight of the ten categories of records in their original request. *See* ACLU Br. at 13 n.7 ("withdraw[ing] Requests #1-5 [and] 7-9"). Moreover, Ms. Hilton's supplemental declaration augments CIA's initial showing by tailoring the explanations more narrowly to Plaintiffs' arguments concerning Requests 6 and 10, which seek, respectively, "[a]ll records . . . pertaining to the rendition and/or transfer of individuals captured outside Afghanistan to Bagram" (Request 6) and "[a]ll records . . . pertaining to the treatment of and conditions of confinement for prisoners detained at Bagram" (Request 10), *see* FOIA Request at 4, 6.

As the declarations make clear, requiring CIA even to "merely process[]" Plaintiffs' remaining two categories of requests, *see* ACLU Br. at 15, would reveal intelligence sources and methods, and would reveal classified information that reasonably could be expected to cause serious damage to the national security — at a minimum, disclosing whether or not the CIA has "rendered" terrorism suspects to Bagram from outside Afghanistan and whether or not it maintains an association with or intelligence interest in Bagram detainees. *See* Points II.A.1, II.B.1, *infra*. The declarations also establish that there have been no prior official disclosures of the information at issue, contrary to Plaintiffs' claim. *See* Point II.A.2, *infra.*

Furthermore, there is no basis for Plaintiffs' argument that CIA lacks the necessary statutory authority to invoke the National Security Act of 1947, as amended, 50 U.S.C. § 401 *et seq.* (the "NSA"), and the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 403-4 *et seq.* (the "CIA Act"), to justify its *Glomar* response. *See* Point II.B.2, *infra.*

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would result from the agency's processing the request. *See* 508 F.3d at 1125. Here, Ms. Hilton's declarations provide an expansively detailed explanation of CIA's need for a *Glomar* response and the damage to national security and intelligence sources and methods that would result from the agency having to process Plaintiffs' requests.

A. CIA Has Justified Its Invocation of FOIA Exemption 1

1. "Merely Processing" the Remaining Requests Would Reveal Classified Information Disclosure of Which Is Reasonably Likely to Cause Serious Harm to National Security

CIA's declarations explain that any response to Plaintiffs' remaining two requests, other than a *Glomar* response, would reveal whether CIA maintains an association with or intelligence interest in the detainees at Bagram. *See* Hilton Decl. ¶¶ 11-22, 31-33, 42-43; Supp. Hilton Decl. ¶¶ 5, 7. This information is exempt from disclosure under Exemption 1 because it is classified and, if made public, could reasonably be expected to cause serious damage to national security. *See* Gov. Br. at 9-13. The declarations make clear that responding to Request 6 ("rendition" to Bagram) would reveal whether CIA was involved or not in a specific intelligence activity regarding a specific group of individuals. *See* Supp. Hilton Decl. ¶ 5. Ms. Hilton makes clear that such a revelation could provide hostile groups with information concerning the reach and limitations of CIA's intelligence monitoring and involvement in the capture and transfer of individuals detained at Bagram. *See id.* Moreover, such a revelation risks disclosing CIA's liaison and/or foreign government relationship(s) or lack thereof, implicating U.S. foreign relations. *See id.* ¶ 6. Similarly, responding to Plaintiffs' Request 10 (conditions of confinement at Bagram) would reveal whether CIA maintains an intelligence interest in the Bagram detainees; and if CIA were to confirm the non-existence of responsive records, it would acknowledge a possible gap in its intelligence-gathering efforts. *See id.* ¶ 7.

In the past, foreign intelligence services and hostile groups, like al-Qaida, have identified public disclosures similar to the disclosures sought in this case, and have adjusted their tactics and/or operations accordingly. *See id.*; *see also, e.g.*, *Larson v. Dep't of State*, No. 02-1937, 2005 WL 3276303, at *12 (D.D.C. Aug. 10, 2005), *aff'd*, 565 F.3d 857 (D.C. Cir. 2009). Here,

the Government has determined that disclosure could provide hostile groups with information to use against the CIA and would potentially implicate U.S. foreign relations, such that it reasonably could be expected to cause serious damage to national security. *See* Hilton Decl. ¶¶ 11-22, 31-48; Supp. Hilton Decl. ¶¶ 4-8. This Court must give "substantial weight" to this conclusion. *See Wilner*, 592 F.3d at 73; *cf. Halperin*, 629 F.2d at 149 (deference due even though "any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent").

Nor is there merit to Plaintiffs' argument that "merely processing" their request will not cause any harm, because "CIA is free to withhold such information . . . during the production process." ACLU Br. at 24-25; *see also id.* at 15. As Ms. Hilton explains, "merely processing" Plaintiffs' request would reveal the existence or non-existence of the requested records, which would in turn, at a minimum, disclose whether or not CIA maintains an association with or intelligence interest in the detainees at Bagram and would disclose information about CIA's relationship(s) or lack of relationship(s) with liaison and/or foreign governments. *See* Supp. Hilton Decl. ¶¶ 4-8. This information is classified and would potentially damage national security if disclosed. *Id.* In addition, such a disclosure would be particularly significant in light of DoD's recent release of the names of detainees at Bagram. *See* Barnea Decl., Ex. C (Bagram detainee list). As these names are now publicly known, any information CIA provides could be used to draw conclusions about the CIA's association or lack thereof with particular individuals. *Cf. Am. Friends Serv. Comm. v. Dep't of Defense*, 831 F.2d 441, 444-45 (3d Cir. 1987) (certain "information harmless in itself might be harmful when disclosed in context"); *Halperin*, 629 F.2d at 150 ("[E]ach individual piece of intelligence information . . . may aid in piecing together other bits of information even when the individual piece is not of obvious importance").

Additionally, if the CIA were to confirm the existence of responsive records, the processing of any responsive records would likely require disclosure of additional classified information, even if the records themselves were exempt from disclosure. *See generally Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) (requiring agencies to prepare an itemized index of withheld documents to facilitate judicial review); *Edmonds Inst. v. U.S. Dep't of the Interior*, 383 F. Supp. 2d 105, 109 (D.D.C. 2005) (*Vaughn* index requires description of each document "sufficient to allow" its exemption to be tested). Therefore, "merely processing" the request reasonably could be expected to cause serious damage to national security.

2. There Have Been No Official Disclosures of the Information at Issue

Plaintiffs have failed to corroborate their claim that CIA's Exemption 1 argument "is contradicted by volumes of contrary evidence that show that the CIA's [alleged] rendition or transfer of suspected terrorists to U.S. military custody at Bagram, and its interrogation of prisoners there, is publicly-acknowledged and well-known." ACLU Br. at 15. Although Plaintiffs attach voluminous exhibits to their papers, not one constitutes an "official disclosure" that invalidates CIA's *Glomar* response. Further, they misstate the relevant standard. The question is not whether information is allegedly "publicly-acknowledged and well known," but whether the specific information at issue has been officially disclosed by the CIA or another authorized Executive Branch official. *See infra*. In this case, there has been no such official disclosure. *See* Supp. Hilton Decl. ¶¶ 10-14; Hilton Decl. ¶ 11.

In affirming the withholding of classified material on topics that have received extensive publicity, the Second Circuit has explained that "anything short of [an official] disclosure necessarily preserves some increment of doubt regarding the reliability of the publicly available information." *Wilson*, 586 F.3d at 195. These "lingering doubts" "maintain[] the secrecy of CIA

sources and methods" and preserve "the options of deniability and professed ignorance that remain important niceties of international relations." *Id.* Thus, just as "the law will not infer official disclosure . . . from . . . widespread public discussion of a classified matter" or "statements made by a person not authorized to speak for the Agency," *id.* at 186-87, so too will such publicity or statements be insufficient to undermine the CIA's predictions of harm from official confirmation or denial, *see id.* at 195; *see also Wilner*, 592 F.3d at 70 ("[T]he fact that the [program's] existence has been made public reinforces the government's continuing stance that it is necessary to keep confidential the details of the program's operations and scope.").

Accordingly, "[a] strict test applies to claims of official disclosure. Classified information . . . is deemed to have been officially disclosed only if it (1) '[is] as specific as the information previously released,' (2) 'match[es] the information previously disclosed,' and (3) was 'made public through an official and documented disclosure.'" *Wilson*, 586 F.3d at 186 (quoting *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)). Plaintiffs have not met this "strict test."

a) Most of the Sources Cited by Plaintiffs are Not Official Sources

Plaintiffs fail to recognize the "critical difference between official and unofficial disclosures" of information. *Fitzgibbon*, 911 F.2d at 765. The vast majority of the prior "disclosures" that Plaintiffs identify are not by CIA or by any other Executive Branch authority above CIA; they are therefore immaterial. As the Second Circuit recently explained:

> As a practical matter, foreign governments can often ignore unofficial disclosures of CIA activities that might be viewed as embarrassing or harmful to their interests. They cannot, however, so easily cast a blind eye on official disclosures made by the CIA itself, and they may, in fact, feel compelled to retaliate. Mindful of this reality, the law will not infer official disclosure of information classified by the CIA from (1) widespread public discussion of a classified matter; (2) statements made by a person not authorized to speak for the Agency; or (3) release of information by another agency, or even by Congress.

Wilson, 586 F.3d at 186-87 (citations omitted); *see, e.g.*, *Rubin v. CIA*, No. 01 Civ. 2274, 2001 WL 1537706, at *5 (S.D.N.Y. Dec. 3, 2001) (private publication was not evidence of official disclosure and did not invalidate agency's *Glomar* position).

In this case, the vast majority of the sources that Plaintiffs cite to support their argument for prior disclosure are not official sources. Most commonly, Plaintiffs cite news articles. *See* Goodman Decl. ¶¶ 4(c), 6(a), 9(a), (b), 10(a), (b), (c), 14(g), 15(a), 22(a), (b), (c), 23(c), 29, 34(a)-(f), (h), 37(e)-(g), 40(a)-(j). However, even widespread discussion of a topic in the media does not create an official disclosure. *See Afshar v. Dep't of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983) ("[E]ven if a fact . . . is the subject of widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to . . . national security."); *Hoch v. CIA*, No. 88-5422, 1990 WL 102740, at *1 (D.C. Cir. July 20, 1990) (without official confirmation, "clear precedent establishes that courts will not compel [an agency] to disclose information even though it has been the subject of media reports and speculation"). Equally unavailing are Plaintiffs' citation of statements in reports of non-governmental organizations such as the International Committee of the Red Cross, the Center for Human Rights & Global Justice, and Human Rights Watch. *See* Goodman Decl. ¶¶ 19, 20(a), (b), 21(a), 25, 34(g), 35, 36, 37(a)-(c), 39(a), (b). Such reports are plainly not official disclosures. *See, e.g.*, *Am. Civil Liberties Union v. Dep't of Defense*, 664 F. Supp. 2d 72, 77 (D.D.C. 2009) (finding ACLU's reliance on Red Cross report to be "misplaced" because "[t]his report does not constitute an official disclosure by the government").

Furthermore, Plaintiffs cite numerous statements by governmental entities other than CIA — such as Congress and the Departments of State or Defense — to support their argument that there has been prior disclosure of the requested information. *See* Goodman Decl. ¶¶ 12(e)-(g),

(j), 14(a), (c)-(e), 15(b), 16(a)-(b), 17(a)-(b), 18, 23(f), 24(f)-(j), (m), 28(a)-(h), 30(a)-(c), 31(a)-(c), 32(a), (b), 38(a)-(d). Apart from the fact that most, if not all, of these statements do not actually relate to the information at issue here, statements by such sources cannot in any circumstance constitute an official disclosure of CIA activities. *See, e.g., Talbot v. CIA*, 578 F. Supp. 2d 24, 29 (D.D.C. 2008) ("[T]he official disclosure must have been made by the agency from which the information is being sought." (internal quotation marks omitted)). For example, Plaintiffs cite a purported statement by Representative Mike Rogers of Michigan, regarding his asserted observation of CIA personnel at Bagram. ACLU Br. at 22.[4] The law, however, is clear that an official disclosure cannot be based on "release of information . . . by Congress." *Wilson*, 586 F.3d at 186; *see also Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999); *Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 628 (S.D.N.Y. 1996), *aff'd*, 128 F.3d 788 (2d Cir. 1997).

Finally, Plaintiffs also cite statements by individuals who are not authorized to speak on behalf of the CIA, such as *former* CIA officials. *See* Goodman Decl. ¶¶ 7, 12(h). But a "former employee's public disclosure of classified information cannot be deemed an official act of the Agency," and thus cannot constitute "an official disclosure of information." *Wilson*, 586 F.3d at 189 (internal quotation marks omitted).

In sum, while Plaintiffs attach voluminous documents to their declaration, the vast majority of these documents are simply not relevant to the Exemption 1 analysis.

b) None of the Arguably Official Sources Cited by Plaintiffs Is Sufficiently Specific or Matches Plaintiffs' FOIA Requests

Where Plaintiffs do cite CIA and high-ranking Executive Branch sources, they fail to

[4] Not only is this statement unofficial because it comes from a member of Congress, as opposed to the CIA or another authorized Executive Branch official, but the purported statement by Representative Rogers quoted by Plaintiffs is taken from a media source, and the particular language Plaintiffs cite in their brief in quotation marks is not even directly attributed to Representative Rogers as a quotation in the news article. *See* Goodman Decl., Ex. BX.

meet the other two prongs of the official disclosure test — that the disclosed information must "match" the withheld information and that it must be as specific as the information requested. Here, the CIA sources cited by Plaintiffs primarily contain general background information regarding CIA's alleged activities in the war against terrorism and the alleged activities of other governmental agencies. *See, e.g.*, Goodman Decl. ¶¶ 3(a)-(g), 5(a)-(g), 12(a)-(d), 13, 14(b), (f), 23(a), (d), (e), 24(a), (d), (e), (k), (*l*). Such non-specific statements are far from an official disclosure of the information at issue here. *See Wilson*, 586 F.3d at 186; *Am. Civil Liberties Union*, 664 F. Supp. 2d at 77 ("[T]he fact that the government disclosed general information . . . does not require full disclosure of aspects of the program that remain classified."); *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993) ("[A]n agency official does not waive FOIA Exemption 1 by publicly discussing the general subject matter"). Significantly, the two sections of Plaintiffs' declaration that purport to specifically connect CIA to Bagram, entitled "CIA Detention Facility at Bagram" and "Allegations of CIA Abuse at Bagram," are supported by *no citations to authorized sources whatsoever*. *See* Goodman Decl. ¶¶ 34-40.

Of the sources cited by Plaintiffs that are actually CIA or high-ranking Executive Branch sources, not one discloses specific information that matches the information that would be disclosed if the CIA processed the remaining two categories of Plaintiffs' FOIA request. In order for publicly disclosed information to waive an agency's withholding:

> [A] plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld. Prior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure. The insistence on exactitude recognizes the Government's vital interest in information relating to national security and foreign affairs.

Wolf, 473 F.3d at 378 (citations and internal quotation marks omitted, and emphasis in original).

None of the official statements cited by Plaintiffs comes close to meeting this standard.

In their papers, Plaintiffs cite a number of CIA and high-level Executive Branch sources for a variety of information.[5] But none of these official statements discloses the existence or non-existence of particular records. *See id.* at 379 ("The CIA's official acknowledgment waiver relates only to the existence or nonexistence of the [particular] records . . . disclosed by [the Director's] testimony," "but not any others."); *Wilner*, 592 F.3d at 70 ("An agency only loses its ability to provide a *Glomar* response when the existence or nonexistence of the particular records covered by the *Glomar* response has been officially and publicly disclosed."). Moreover, none of these sources matches the information that would be disclosed if the CIA processed Plaintiffs' request. These sources do not disclose whether or not CIA has conducted "renditions" to Bagram or whether or not CIA has an intelligence association with detainees at Bagram. *See, e.g.*, *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 60 (D.C. Cir. 2003) (FOIA plaintiff must show that previous disclosure duplicates the specificity of withheld material to establish waiver of exemptions; CIA's prior disclosure of some intelligence methods employed does not waive use of exemptions for all such methods).

The closest Plaintiffs come to an official disclosure[6] that would help them — which still

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[5] Plaintiffs cite CIA and high-level Executive Branch sources in support of the following propositions: the CIA has had a role in fighting terrorism and conducting the war in Afghanistan since September 11, 2001 (Goodman Decl. ¶ 3); CIA agents have died in Afghanistan (*id.* ¶ 4); CIA plays some role in capturing and detaining individuals in Afghanistan (*id.* ¶ 5); CIA has stations and/or forward operating bases in Afghanistan (*id.* ¶ 6); CIA has a rendition program (*id.* ¶ 12); CIA has transferred some individuals to military custody (*id.* ¶ 14); CIA has interrogated suspected terrorists abroad (*id.* ¶¶ 23, 24); CIA has interrogated suspected terrorists in Afghanistan (*id.* ¶ 26); and CIA will continue to interrogate suspected terrorists and combatants (*id.* ¶ 27). While some of these statements may well be from official sources, not one of them matches with any specificity the information that would be disclosed if the CIA processed Plaintiffs' FOIA Requests 6 and 10.

[6] The other official sources cited in Plaintiffs' brief are even weaker and less specific matches to the information they seek, and thus they cannot constitute official disclosures that

falls well wide of the mark — is a remark made by then-DNI J. Michael McConnell in response to a question at a symposium. *See* ACLU Br. at 20-21. According to a transcript of the remarks, Mr. McConnell stated that in "Kabul or Balad or Bagram or Baghdad . . . You don't know one from the other — FBI, CIA, NSA, NGA. And they all are moving and grooving."[7] This statement does not meet the "strict test" for official disclosure for three reasons.

First, former-DNI McConnell's comment does not explicitly state that the CIA is operating at Bagram; rather it, says only that some combination of the four agencies named are operating at each of the four locations he mentions, though it may be hard to tell "one from the other." Second, even if his statement did explicitly acknowledge a CIA presence at "Bagram," the reference to Bagram is not specific to the detention facility (the former Bagram Theater Internment Facility, now known as the Detention Facility in Parwan), which is just one component of a large military base at Bagram Airfield. *See* Public Affairs Off., Joint Task Force 435, *U.S. Unveils New Era of Detention Operations in Afghanistan*, 19-10-1 Military Police 23 (Spring 2010), *available at* http://www.wood.army.mil/MPBULLETIN/pdfs/Spring%202010/Detention%20Operations.pdf. Third, this statement does not disclose any information that would reveal whether or not the CIA has any association with detainees at Bagram or has ever conducted "renditions" to Bagram. Accordingly, this statement does not duplicate the

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would waive Exemption 1 either.

[7] This off-hand remark was the only reference to Bagram or Afghanistan during a lengthy speech about potential security challenges that America might face in the year 2025. *See* Transcript, *Director of National Intelligence Mike McConnell Delivers Remarks at the USGIF GEOINT Symposium*, 2008 WL 4757537 (F.D.C.H.) (CQ Transcriptions, Mar. 30, 2008). According to the transcript of the remarks, Mr. McConnell said: "By the way, it is very easy at the bottom. If you go to Kabul or Balad or Bagram or Baghdad, a room about the size of this stage, it is filled with people. You don't know one from the other — FBI, CIA, NSA, NGA. And they all are moving and grooving. They have an expectation of sharing. They have an expectation of having access. And they all are doing an incredible job. . . . (Laughter)." *Id.*

information that would be disclosed if the CIA processed Plaintiffs' requests. Equally importantly, this statement does not officially disclose the existence or nonexistence of any *record* that would be responsive to the Plaintiffs remaining FOIA requests. *See* Goodman Decl., Ex. V; Supp. Hilton Decl. ¶ 14 n.5; *Wilner*, 592 F.3d at 70. Therefore, this source cannot constitute a relevant official disclosure.

B. CIA Has Justified Its Invocation of FOIA Exemption 3

1. Any Response to Plaintiffs' Remaining Requests Other Than a Glomar Response Would Reveal CIA Intelligence Sources and Methods

The CIA declarations make clear that CIA cannot process Plaintiffs' remaining requests without revealing its intelligence sources and methods, which are independently protected by Exemption 3. *See* Hilton Decl. ¶¶ 44-47; Supp. Hilton Decl. ¶¶ 3-9. They explain that CIA is not just seeking to prevent disclosure of its intelligence sources and methods as a general matter, but the use and/or application of these sources and methods in particular circumstances or locations. *See* Supp. Hilton Decl. ¶ 8. Only in this manner can the CIA keep hostile groups, like al-Qaida, guessing as to what intelligence sources and methods it employs in specific situations. *See id.* The preservation of such ambiguity limits the ability of hostile groups to counter CIA's operations. *See id.*

Accordingly, Plaintiffs' argument that some the CIA's general methods "have been acknowledged" previously, ACLU Br. at 28, is irrelevant. While the Government may have acknowledged the detention and transfer of particular terrorism suspects, no authorized CIA or other Executive Branch official has acknowledged that CIA does or does not transfer individuals from outside Afghanistan to Bagram or that CIA does or does not have an intelligence association with the detainees at Bagram. *See* Hilton Decl. ¶ 11, 48; Supp. Hilton Decl. ¶¶ 3, 5, 10-14; *see also Am. Civil Liberties Union*, 664 F. Supp. 2d at 77 ("[T]he fact that the government

disclosed general information on its interrogation program does not require full disclosure of aspects of the program that remain classified."); *Fitzgibbon*, 911 F.2d at 766 (that some information is publicly available "does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods, and operations"); *Schoenman v. FBI*, No. 04-2202 (CKK), 2009 WL 763065, at *25 (D.D.C. Mar. 19, 2009) (rejecting the argument "the CIA may only protect information concerning unknown intelligence methods," and noting that "the CIA may refrain from disclosing the fact that it uses even the simplest of intelligence gathering methods"). Because the specific information sought has not been acknowledged, and because "merely processing" Plaintiffs' remaining requests would reveal intelligence sources and methods that are protected by statute, CIA's *Glomar* response is justified by FOIA Exemption 3.[8]

2. CIA Properly Invoked the NSA and the CIA Act

There is no basis for Plaintiffs argument that CIA's Exemption 3 claim is "procedurally defective," because the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638 (2004), transferred the authority to protect "intelligence sources and methods" from the Director of Central Intelligence ("DCI") to the Director of National Intelligence ("DNI"), and that CIA must thus provide a declaration from the DNI himself. *See* ACLU Br. at 27. This argument is belied by decades of established precedent under the CIA Act of 1949 and the National Security Act of 1947, undisturbed by the IRTPA, that these statutes do not impose restrictions regarding the identity or position of the supporting declarant within the relevant agency.

[8] Plaintiffs argue that the case law does not support this conclusion. *See, e.g.*, ACLU Br. at 29. However, courts routinely find that revealing whether or not CIA operates at a particular location or has an intelligence interest in a certain group of people at that location would reveal intelligence sources and methods. *See, e.g.*, *Earth Pledge*, 988 F. Supp. at 627-28 (disclosure of a CIA field station would compromise intelligence gathering methods; disclosure of CIA's relationship with dissidents would reveal a protected source).

Put simply, FOIA does not require that a *Glomar* response be justified by any particular official within the Government. Rather, to justify an Exemption 3 withholding, an agency need show only that: (1) it relies on a statute of exemption under FOIA; and (2) the withheld material satisfies the criteria of the exemption statute. *See CIA v. Sims*, 471 U.S. 159, 167 (1985); *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994); *cf. Lardner v. DOJ*, Civ. A. 03-0180, 2005 WL 758267 at *7-9 (D.D.C. Mar. 31, 2005) (Exemption 5 withholdings turn only on the content or nature of the record withheld, and not on the official who raises the exemption, as Congress could not have intended to "shift a substantial portion of FOIA responsibilities onto the shoulders of senior agency officials"). And CIA's *Glomar* response is justified under the NSA and the CIA Act. *See* Gov. Br. at 14-15.

Plaintiffs' claim that the IRTPA eliminated the CIA's authority to invoke the NSA and CIA Act in the context of this litigation is meritless. While the IRTPA transferred the ultimate duty to protect intelligence sources and methods from the DCI (the former head of the intelligence community) to the DNI (the current head of the intelligence community), it does not follow that the CIA was thereby stripped of its ability to shield its own intelligence sources and methods from disclosure in FOIA cases. The CIA Act remains in effect and provides that CIA "shall be exempted from" the provisions of any law "which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 403g; *cf. Goland v. CIA*, 607 F.2d 339, 351 (D.C. Cir. 1978) (intelligence sources and methods are "functions" of CIA within the meaning of the CIA Act, and thus exempt from disclosure pursuant to Exemption 3). The fact that one of the purposes of this exemption is to "further to implement" the DNI's responsibility to protect intelligence sources and methods does not mean that the CIA is stripped of its authority to invoke its

enabling statute in order to protect its organization and functions from public disclosure. *See, e.g.*, *James Madison Project v. CIA*, 607 F. Supp. 2d 109, 125 (D.D.C. 2009) ("[T]he CIA Act authorizes the [CIA] to withhold information . . . ." (citing 50 U.S.C. § 403g)).

Furthermore, CIA retains the ability to invoke the NSA to protect its intelligence sources and methods. *See, e.g.*, Exec. Order No. 12,333, § 1.6(d) (Dec. 4, 1981) (as amended post-IRPTA) (reprinted in 50 U.S.C. § 401 note) (requiring that the CIA Director the "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the [DNI]"). When the ultimate responsibility to protect intelligence information rested with the DCI, other intelligence community agencies routinely invoked the NSA to withhold such information in FOIA cases. *See, e.g.*, *Krikorian v. Dep't of State*, 984 F.2d 461 (D.C. Cir. 1993) (State Department invokes NSA); *Larson*, 2005 WL 3276303, at *19 (National Security Agency invokes NSA). Nothing in the text or legislative history of the IRTPA suggests that, in transferring the ultimate responsibility from the DCI to the DNI, Congress intended to depart from this longstanding FOIA practice by barring the CIA or other members of the intelligence community from invoking the NSA.

The NSA does not require the DNI to personally submit a declaration to support an agency's *Glomar* response. Plaintiffs argue that the NSA provision stating that the DNI "may only delegate a duty or authority given [to] the [DNI] under [50 U.S.C. § 403-1(i)] to the Principal Deputy Director of National Intelligence," 50 U.S.C. § 403-1(i)(3), precludes the CIA from invoking the NSA. *See* ACLU Br. at 27-28. But this argument misconstrues the DNI's role. Under the amended NSA, the DNI has extremely high-level responsibilities involving intelligence policy and oversight: The statute lists the DNI's duties to include serving as the head of the intelligence community, acting as principal advisor to the President on intelligence matters

related to national security, and overseeing and directing the implementation of the National Intelligence Program. *See* 50 U.S.C. § 403(b); *see also id.* § 403-1 (DNI's other high-level responsibilities). Given the nature of the DNI's role, Congress could not possibly have intended for the DNI to be personally responsible for invoking the NSA to protect intelligence sources and methods in every civil and criminal case involving each agency within the intelligence community. Rather, just as the DNI is not required to participate personally in operational decisions within his areas of statutory responsibility, the DNI's duty to protect intelligence sources and methods is a high-level responsibility to implement general measures to ensure that members of the intelligence community prevent unauthorized disclosure of such information.[9]

Finally, nothing in the amended NSA suggests that the IRTPA effectively overturned the Supreme Court's holding in *Sims*, 471 U.S. at 169, that the NSA confers "sweeping power" to protect intelligence sources and methods. While the IRTPA transferred the ultimate authority to protect intelligence sources and methods from the DCI to the DNI, Congress left unchanged the language concerning the scope of this authority.[10] Congress therefore is presumed to have adopted the Supreme Court's interpretation of the NSA in *Sims*. *See Int'l Cablevision, Inc. v. Sykes*, 75 F.3d 123, 131 (2d Cir. 1996). Accordingly, the CIA Act and the amended NSA continue to afford the same broad powers to protect intelligence sources and methods. *See, e.g.*,

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[9] This is consistent with the way courts viewed the NSA prior to the IRTPA, as the CIA was not required to submit a declaration from the DCI in order to invoke the protections of the NSA. *See Assassination Archives*, 334 F.3d at 56-58 (relying on Information Review Officer's declaration in considering whether the CIA had properly invoked NSA protections in responding to FOIA request); *accord Pipko v. CIA*, 312 F. Supp. 2d 669, 677-79 (D.N.J. 2004); *Aranha v. CIA*, No. 99 Civ. 8644 (JSM), 2000 WL 1505988, at *1 (S.D.N.Y. Oct. 6, 2000).

[10] *Compare* 50 U.S.C. § 403-1(i)(1) ("The [DNI] shall protect intelligence sources and methods from unauthorized disclosure . . . ."), *with* 50 U.S.C. § 403-3(c)(7) (Supp. III 2000) ("[T]he [DCI] shall . . . protect intelligence sources and methods from unauthorized disclosure . . . .").

James Madison Project, 607 F. Supp. 2d. at 126-27 (CIA declaration justifies Exemption 3 withholding under CIA Act and NSA); *Schoenman v. FBI*, No. 04-2202 (CKK), 2009 WL 763065, at *24-25 (D.D.C. Mar. 19, 2009) (same).

III. DoD HAS FULLY JUSTIFIED ITS WITHHOLDING OF THE REDACTED PORTIONS OF THE DETAINEE LIST

DoD's withholding of the redacted portions of the detainee list pursuant to Exemptions 1 and 2 is fully supported by the three declarations the agency has submitted. Plaintiffs do not contest the Government's explanation of the requirements for withholding classified or other information pursuant to these exemptions. *See* Gov. Br. at 9-10, 22. While Plaintiffs object that DoD has provided insufficient detail and that certain prior disclosures render the withholdings inappropriate, DoD's withholdings under Exemption 1 are appropriate for three reasons: each of the columns of the detainee list (except the full ISN) is properly classified on its own, *see* Point III.A.1, *infra*; the information in the withheld columns, as a whole, comprises a mosaic of information that is properly classified, *see* Point III.A.2, *infra*; and none of the small-scale official releases of certain pieces of information regarding particular detainees undermines DoD's determination that the aggregate batch information on the detainee list remains classified, *see* Point III.A.3, *infra*. Furthermore, DoD has provided further detail in support of its determination that the full ISN is properly withheld under Exemption 2. *See* Point III.B, *infra*.

A. DoD Has Properly Withheld Certain Columns Under Exemption 1

1. DoD Has Adequately Justified Its Withholdings of Each of the Relevant Columns on the Detainee List

As set forth in the Government's opening brief, DoD has withheld five columns in the detainee list under Exemption 1: the detainees' citizenships, capture dates, capture locations, the circumstances of their captures, and the number of days they had each been detained as of the

date of the report. In its initial brief, the Government cited a declaration from Major General Jay W. Hood, Chief of Staff of the U.S. Central Command (which is responsible for Bagram), which explained that the withheld information fell into three categories of classifiable information under Section 1.4 of Executive Order 12,958, as amended:[11] Section 1.4(a), which permits the classification of "military plans, weapons systems, or operations"; Section 1.4(c), which permits the classification of "intelligence activities (including special activities), intelligence sources or methods, or cryptology," recognizing that the disclosure of intelligence activities and sources can cause harm to national security; and Section 1.4(g), which permits the classification of "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protections services relating to the national security, which includes defense against transnational terrorism." Hood Decl. ¶ 5.

Plaintiffs assert that Major General Hood did not sufficiently explain how *each* column of withheld information ties specifically to one or more of these categories. *See* ACLU Br. at 5-7. While the Government believes that Major General Hood's declaration was sufficient to support its withholdings, DoD now submits a supplemental declaration from Major General Flynn — who serves as the chief of intelligence for U.S. operations in Afghanistan — which goes into further detail as to why each of these categories of information is properly classified:

Detainee citizenships: Major General Flynn explains that revealing the detainees' citizenships would impact military plans and intelligence. *See* Flynn Decl. ¶ 5 (citing Exec. Order 12,958, § 1.4(a), (c)). For example, "[t]he release of [the] detainee[s'] citizenship[s] could

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[11] In the Government's initial brief, it noted that Executive Order 12,958 was reproduced, as amended, in a note to 50 U.S.C. § 435. In light of President Obama's new executive order governing classification of information, which does not take effect until June 2010, this note has now been removed. The relevant operative language for the order can still be found at Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003).

cause damage to future military plans, operations, and detainee operations by influencing various segments of the population." *Id.* "For example, if the citizenship information revealed that a large number of detainees were from a particular country or countries, this information, when combined with the other information, could assist the enemy in predicting the direction of our future military operations which may target areas heavy with this citizenship demographic." *Id.* In addition, "detainee movement operations could be impacted as these detainees are released to their country or countries of citizenship." *Id.* Furthermore, such a release "could hinder future intelligence collection efforts by revealing sources, methodology, and ultimately levels of cooperation/opposition" by detainees. *Id.* Revealing the detainees' citizenships also could harm national interests because it "could put [the detainees] in greater jeopardy for retaliation when repatriated." *Id.* Further, explicit acknowledgment of the detainees' nationalities "could negatively influence diplomatic relations with . . . the country or countries of which such detainees are citizens." *Id.*

Capture dates: Similarly, Major General Flynn explains why release of the detainees' capture dates would impact military plans and intelligence and could harm U.S. interests. *See id.* ¶ 6 (citing Exec. Order 12,958, § 1.4(a), (c)). Such a release "could assist persons hostile to the United States in establishing a chronological pattern or identifying operational strategies which could be used to assist them in hiding or evading future intelligence gathering efforts, and anticipating counterterrorism efforts." *Id.* He also notes that "[w]ith resources currently available . . . , the capture dates could provide enemies of the United States with critical intelligence" that "coupled with the place and the circumstances of those captures, could reveal too much concerning [U.S.] military special operating procedures (SOPs) and secret rules of engagement." *Id.* Furthermore, a release of the capture dates "could provide [hostile]

organizations with insights into past and current strategies and tactics in military operations that le[d] to capture of the enemy," which, in turn, "might allow individuals of intelligence interest to anticipate and immunize themselves from such procedures." *Id.*

Capture locations: Major General Flynn next explains why release of the detainees' capture locations could impact military plans and intelligence, and reveal military vulnerabilities, and would harm national interests. *See id.* ¶ 7 (citing Exec. Order 12,958, § 1.4(a), (c), (g)). Revealing this information would "show[] the presence of . . . coalition forces in a particular geographical location, and when all the capture locations are released simultaneously, this . . . could allow the enemy to map the historical movement of US forces, making [those forces] predictable and vulnerable to unanticipated surprise reprisals." *Id.* It could also "create a life and physical safety risk for any US personnel still at these locations." *Id.* Further, such a release "could allow the enemy to detect some of the United States' sources of intelligence that led to the capture of enemy combatants," potentially "revealing information about US objectives, raid locations, base camp locations, cordon and search locations, traffic control points, and border crossing points." *Id.*

Circumstances of capture: Furthermore, Major General Flynn states that release of the column listing certain information about the circumstances of the detainees' capture could also impact military plans and intelligence and reveal military vulnerabilities, therefore harming national interests. *See id.* ¶ 8 (citing Exec. Order 12,958, § 1.4(a), (c), (g)). In fact, he notes that this "is perhaps the most sensitive category being discussed." *Id.* Major General Flynn explains that "knowledge of these circumstances could allow the opposition to intuit military SOP, the sources of intelligence, or other critical operational factors," and when combined with the dates and locations of capture "could reveal critical tactical information about detainee collection

points, detainee holding areas, evacuation procedures, and the handling process that could place intelligence operations and detainee operations at jeopardy." *Id.* In particular, he notes, "the point-of-capture units' security in future operations, the safety of US resources, the protection of the detainees, planning, and SOP could be impacted if the circumstances of the detainees' captures were revealed." *Id.* Furthermore, "[t]he cumulative information related to capture place, time, and the circumstances of capture disclosed over a period of time for large numbers of detainees could assist the enemy in predicting our movement, plans, and procedures and could place [the United States'] national security at risk." *Id.*

Number of days detained: Finally, Major General Flynn also explains why the release of the number of days the detainees had been detained as of the date of the report would impact military plans and intelligence, and reveal military vulnerabilities, and would harm national interests. *See id.* ¶ 9 (citing Exec. Order 12,958, § 1.4(a), (c), (g)). He states that the United States' "enem[ies] may attempt to use this information to develop patterns of detention periods and correlate this data with the SOPs surrounding intelligence and detention operation," which could assist them in "circumvent[ing] military regulations and SOPs which could, in turn, lead to less quality intelligence gathered by the US and coalition forces and more robust estimative intelligence by the enemy." *Id.* He further notes that this information, "when combined with the other information on the chart, could assist the enemy in understanding [the United States'] evidence gathering and prosecution strategy which could be used to predict and exploit detention procedures." *Id.* He elaborates with an explanation :

> [D]etainees captured . . . under certain circumstances that are released within a short time frame might cause the enemy to infer that, if captured, being silent could lead to a more rapid release, which could lead to a chilling effect in intelligence gathered from these detainees. Conversely, holding a detainee for a longer period of time may lead some to think he cooperated with the United States and place his life in danger upon release.

Id.

DoD has thus provided, in as great detail as possible in an unclassified setting, the reasoning behind its classification of the material in question. *See id.* ¶ 12.

2. DoD Has Further Properly Justified Its Withholdings of the Relevant Columns as Part of a "Mosaic" of Classified Information

In addition to the justifications for DoD's withholdings of individual columns of information, discussed above, DoD has further justified these withholdings on the ground that the information in these columns, "when woven together, create a mosaic of information that reveals an additional association or relationship meeting the standards for this classification." *Id.* ¶ 10. Under a mosaic theory, a "[c]ompilation[] of items of information" — even if the individual items in the compilation are not themselves classified — "may be classified if the compiled information reveals an additional association or relationship that: (1) meets the standards for classification . . . ; and (2) is not otherwise revealed in the individual items of information." Exec. Order 12,958, § 1.7(e). Thus, even if the Court were to conclude that one or more of the columns of information about the detainees discussed above were not properly classified on its own, DoD has further justified the classification of that information as part of a classified compilation, or mosaic, of information.

Courts have repeatedly recognized the validity of the mosaic theory. *See, e.g.*, *Edmonds v. DOJ*, 405 F. Supp. 2d 23, 33 (D.D.C. 2005) (finding that the mosaic theory "comports with th[e] legal framework" for Exemption 1); *Am. Civil Liberties Union v. DOJ*, 321 F. Supp. 2d 24, 37 (D.D.C. 2004) ("this Circuit has embraced the government's 'mosaic' argument in the context of FOIA requests that implicate national security concerns"); *see also Loomis v. U.S. Dep't of Energy*, No. 96-CV-149 (LEK/RWS), 1999 WL 33541935, at *7 (N.D.N.Y. Mar. 9, 1999) (agreeing that "even individual unclassified elements of the . . . document, when taken as a

compilation, may reveal information about . . . nuclear powered ships [and are thus] properly classified"), *aff'd*, 21 Fed. App'x 80 (2d Cir. 2001); *cf. Sims*, 471 U.S. at 178 ("[B]its and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself." (internal quotation marks omitted)).

Major General Flynn's declaration satisfies both of the requirements for DoD's invocation of the mosaic theory as to the detainee list: it satisfies the standards for classification, and the compilation reveals associations that are not revealed in the individual columns of information. He states that the release of this information would impact military plans and intelligence and could harm U.S. interests. *See* Flynn Decl. ¶ 10 (citing Exec. Order 12,958, § 1.4(a), (c)). His declaration explains DoD's concern that "disclosure of [the withheld information] would impair national security because specifics pertaining to US operational activities at the time of the capture could damage US operational planning and intelligence activities by revealing patterns, capabilities, and strategies of the US military." *Id.* For example, Major General Flynn states, "the dates, places, citizenships, and circumstances of capture could, when considered together, reveal significant details of classified missions that, in turn, could place future mission operations in jeopardy." *Id.* Finally, he notes that the names of the detainees at Bagram, which have previously been released by DoD:

> by themselves, do not provide enough background or statistics for the enemy to formulate patterns or develop theories about these detainees. However, when the rest of the information on the spreadsheet is disclosed and added to the detainees' names and the report date, . . . [for] a wide range of detainees, taken together over a period of time, [it] would reveal too much about historical military operations and assist the enemy in predicting future military operational tactics, plans, and movements.

Id.

This justification is more than sufficient to justify these withholdings. As with other

justifications based on national security concerns, it is entitled to deference from this Court, *see Berman v. CIA*, 378 F. Supp. 2d 1209, 1217 (E.D. Cal. 2005), especially because "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene," *Am. Civil Liberties Union*, 321 F. Supp. 2d at 37 (internal quotation marks omitted). As courts have recognized, even "'bits and pieces' of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance itself,'" *id.* (internal quotation marks omitted). As the D.C. Circuit has colorfully put it, "[t]he [Government] has the right to assume that foreign intelligence agencies are zealous ferrets." *Gardels v. CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982).

3. Prior DoD Releases of Certain Personal Information Regarding Particular Detainees Do Not Undercut DoD's Withholding of the Aggregated Information

Finally, Plaintiffs argue that DoD's prior releases of certain information about the circumstances in which a handful of detainees were captured suggest that such information is not properly classified. *See* ACLU Br. at 9-11. They point to DoD statements about a handful of Bagram detainees in the context of individual habeas actions, *see* Hafetz Decl. ¶ 5, and in press releases highlighting particular military missions, *see id.* ¶ 7, as well as to public DoD statements relating to Bagram and the detainees there generally, *see id.* ¶¶ 6, 8. Plaintiffs also cite "judicial decisions, reports by human rights organizations, and media articles" relating to Bagram, *id.* ¶ 9, as well as information relating to the detainees at Guantanamo, *see id.* ¶¶ 10, 11.

None of these materials effects a "public disclosure" sufficient to undermine DoD's determination that the withheld materials are classified and should thus be withheld.[12] As

[12] After reviewing Plaintiff's submissions, DoD has released a revised Bagram detainee list, in which information it had previously officially disclosed is no longer redacted. *See* Supplemental Declaration of Jean-David Barnea, dated April 12, 2010, Ex. A.

explained above, a public disclosure by an agency can override a classification decision only if the classified information is "as specific as the information previously released" and also "match[es] the information previously disclosed." *Wilson*, 586 F.3d at 186. Here — putting aside any statements by non-DoD or appropriate Executive Branch officials for the reasons discussed above, *see supra* Point II.A.2 — the information publicly disclosed by DoD does not "match" the withheld information in its scope. As one district court has put it, "[t]his court is not persuaded by [plaintiff's] argument that because information about [a government program] has become publicly available there is reason to be skeptical of [the Government's] assertion that releasing the withheld documents would harm national security. To the contrary, just because some information about the [the government program] has become public, it does not follow that releasing the documents poses any less of a threat to national security." *Elec. Privacy Info. Ctr. v. DOJ*, 584 F. Supp. 2d 65, 71 (D.D.C. 2008).

Major General Flynn specifically addresses this issue in his declaration. He states that "[d]espite past piecemeal releases of this type of information, releasing all of this information now, in the aggregate, would greatly affect national security by giving the enemy a complete picture of our military operations." Flynn Decl. ¶ 11. He notes that DoD "control[s] the piecemeal releases under current classification guidelines," but that "an aggregate release would create a mosaic of information that would assist our enemies and endanger Soldiers' lives." *Id.* Thus, while DoD has released a few select pieces of information about individual Bagram detainees when appropriate — and after thorough classification review — it does not follow that all such information can safely or must be released for all Bagram detainees.

Nor do DoD's releases of information regarding detainees at Guantanamo change this analysis. As Major General Flynn notes, for those detainees, DoD has released their "names,

nationalities, ID numbers, dates of birth, and places of birth." *Id.* He explains that this "limited information . . . did not contain the detailed scope of the larger data set in question here and thus provided limited connectivity and contextuality" for terrorist and insurgent groups to exploit. *Id.* Further, DoD had never classified this limited information about the Guantanamo detainees — the agency had argued only that it was private information protected by other FOIA exemptions. Judge Rakoff's rejection of DoD's *privacy* rationale thus sheds no light on how this Court should resolve Plaintiffs' objection to DoD's *classification* decision. *See Assoc. Press v. U.S. Dep't of Defense*, 410 F. Supp. 2d 147, 150 (S.D.N.Y. 2006).

Here, in contrast, DoD is not asserting detainee privacy as its justification for withholding this information; rather, it has amply justified its determination that this information is properly classified. As Major General Flynn explains, "the [prior] disclosure of the [detainees'] names and the date of the report combined with [Plaintiffs' requested release of] the place, time, and circumstances of capture, the date (if any) of their release, and the length of detention [would] reveal too much about specific geographical and chronological operational centers of gravity in an actual theater of war and how the DoD's operations shifted and progressed over a period of time," and this information is thus properly classified. Flynn Decl. ¶ 11. This determination is entitled to the Court's deference and should be upheld.

B. DoD Has Properly Withheld the Full ISNs Under Exemption 2

Finally, Plaintiffs' objection to DoD's withholding of the detainees' full ISN numbers, on the asserted ground that Major General Hood's declaration supporting this withholding was not sufficiently detailed, *see* ACLU Br. at 11-13, fails as well. While DoD believes that Major General Hood's declaration was sufficient, Major General Flynn's declaration addresses this issue in more detail. Major General Flynn explains that, in addition to the SEQ number, which

DoD has disclosed, "[t]he full ISN contains information related to the capturing power (i.e., the country or entity that captured the detainee), the command/theater involved (i.e., the relevant military or other unit), the detainee's nationality/power served, . . . and the United States' detainee classification process." Flynn Decl. ¶ 13. This information "relates solely to the internal practices of [the United States' and its allies'] detention operation." *Id.* The release of this information "risks allowing terrorists and insurgents to circumvent intelligence collection efforts," by revealing how DoD classifies detainees. *Id.* This "would assist the enemy in understanding the level of US intelligence about detainees and the information used to classify detainees, such that . . . [revealing] this intelligence would assist future detainees [in] avoid[ing] being labeled as enemy combatants." *Id.* On this basis, Major General Flynn reaffirms that the full ISNs were properly withheld under Exemption 2 "high." *See id.*

Adding this detail to Major General Hood's declaration, DoD has clearly met its burden of showing that the full ISNs meet the two-part standard for withholding under Exemption 2 "high" — that it is "used for predominantly internal purposes," *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (internal quotation marks omitted), and its release may risk circumvention of agency regulation, *see Massey v. FBI*, 3 F.3d 620, 622 (2d Cir. 1993).

While Plaintiffs object that some of the cases the Government cited in its opening brief related to withholdings of numbers and codes for tracking confidential informants, *see* ACLU Br. at 12-13, they read those cases too narrowly: the courts in those cases approved of government agencies withholding numbers and codes it used to keep track of certain individuals (whether informants or otherwise), because this information was predominantly internal and its release could disrupt agency operations. *See Massey*, 3 F.3d at 622; *Blanton v. DOJ*, 63 F. Supp.

2d 35, 43 (D.D.C. 1999); *Linn v. DOJ*, Civ. A. No. 92-1406, 1995 WL 417810, at *6 (D.D.C. June 6, 1995). This is not limited to matters involving confidential informants.

Indeed, in the *Linn* case, the Drug Enforcement Administration properly withheld "numbers [that] identify a specific suspected drug violator and track violator-related information about the subject of an investigation as well as about third-parties associated with the violator," *in addition to* "numbers assigned to specific informants of the DEA which identify the source of specific information." *Linn*, 1995 WL 417810, at *6. Other cases have approved of agency withholdings of numbers or codes that are not related to confidential informants as well. *See, e.g.*, *Zavala v. DEA*, 667 F. Supp. 2d 85, 96-97 (D.D.C. 2009) (DEA properly withheld numbers "assigned to a case when it is opened, . . . used to indicate the classification of the violator, the types and amount of suspected drugs involved, the priority of the investigation and the suspected location and scope of criminal activity" (internal quotation marks omitted)); *Singh v. FBI*, 574 F. Supp. 2d 32, 44 (D.D.C. 2008) (agency properly withheld "distribution and apprehension codes" that "indicate various aspects of the enforcement case").

DoD thus properly asserted Exemption 2 to withhold the full ISNs.

CONCLUSION

For the reasons stated above and in the Government's moving brief, the Court should grant CIA and DoD's motion for partial summary judgment and deny Plaintiffs' cross-motion for partial summary judgment.

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Respectfully submitted,

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