UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, v. DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY Defendants.	)	Civil Action No. 08-00437 (RCL)

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

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INTRODUCTION

Plaintiffs in this Freedom of Information Act ("FOIA") action, the American Civil Liberties Union, seeks records from the Department of Defense (DoD) and the Central Intelligence Agency (CIA) regarding records related to the hearings of fourteen detainees before Combatant Status Review Tribunal ("CSRT") at the U.S. Naval Base at Guantanamo, Bay Cuba. Complaint at ¶ 2 (D.E. 1). DoD and CIA have reviewed, processed and provided to Plaintiffs the requested documents with certain redactions. See Declaration of Wendy M. Hilton, Associate Information Review Officer for the National Clandestine Service of the CIA. ("Hilton Decl.") ¶ 13-24 (attached hereto as Exhibit A). In making these redactions, the CIA and DoD withheld limited information pursuant to exemptions applicable to classified national security information, personally identifying information, and national security information protected from disclosure by separate statutes. The DoD and CIA's invocation of these exemptions was necessary and proper, as the detailed declaration submitted with this motion makes clear. Defendants are, therefore, entitled to summary judgment on Plaintiffs' FOIA claim.

BACKGROUND

On April 20, 2007, Plaintiffs submitted a FOIA request to CIA and DoD requesting documents relating to 14 High-Value Detainees (HVDs) currently in detention at Guantanamo Bay, Cuba. Hilton Decl. ¶ 9.[1] Each of the detainees had a hearing before the CSRT in spring

[1] The fourteen HVDs that are the subject of Plaintiffs' FOIA request are Abu Faraj al-Libi, Walid Bin Attash, Khalid Sheikh Muhammad, Ramzi Bin al-Shib, Ahmed Khalfan Ghailani, Mohd Farik bin Amin (known as Zubair), Mustafa Al Hawsawi, Abd Al Rahim Hussein Mohammed (known as Al Nashiri), Bashir Bin Lap (known as Lillie), Ammar Al Baluchi, Rjduan Bin Isomuddin (known as Hambali), Zayn Al Abidin Muhammad Husayn (known as Abu Zubaydah), Majid Khan, and Guleed Hassan Ahmed. Hilton Decl. n. 2.

2007. Id. Plaintiffs' FOIA request, as modified, seeks unredacted versions of the CSRT hearing transcripts and copies of all records provided to the CSRT by the detainees or their Personal Representative.[2] Id. Prior to processing Plaintiffs' FOIA request, the CIA had already reviewed and redacted 6 of the 14 transcripts in order for DoD to make them publicly available. Id. ¶ 14. The remaining 8 transcripts did not require any redactions. DoD has made the six redacted and 8 unredacted transcripts publicly available through its website since August 9, 2007. Id.

In response to Plaintiffs' FOIA request, CIA re-reviewed the six redacted transcripts according to FOIA standards and determined that the information withheld from the transcripts could not be publicly released as all the information is exempt from disclosure under both FOIA Exemptions (b)(1) and (b)(3). Id. ¶ 15. In its review, CIA made every effort to release as much information as possible and, as a result, most of the six redacted transcripts were not heavily redacted.

In addition to the CSRT transcripts, Plaintiffs requested copies of all records provided to the CSRT by the detainees or their Personal Representative. Many of these documents, such as prepared statements by the HVDs, were read verbatim into the CSRT transcript and thus subsumed in Plaintiffs first document request. Id. ¶ 17. By agreement of the parties, CIA was not required to process any documents that were read verbatim into the CSRT transcript. The CIA located 5 documents, totaling 13 pages, responsive to Plaintiffs' second request that were

[2] After consultation between the parties, Plaintiffs agreed to drop the third request for documents - - copies of records provided to the CSRT by the Recorder - - and dismiss those portions of its complaint addressing that request.

not publicly available and not included in the CSRT transcript.[3] Id. ¶ 17-18. The CIA processed these documents and released two in full. Id. ¶ 19. The CIA determined that some information in the remaining three documents could not be publicly released as the information is exempt from disclosure under both FOIA Exemption (b)(1) and (b)(3). Id. CIA redacted those three documents accordingly and produced them to Plaintiffs. Id. ¶ 20.

On October 29, 2009, this Court granted Defendants' Motion for Summary Judgment on Plaintiffs' FOIA request. October 29, 2009 Order. D.E. 14. Plaintiffs appealed that ruling to the Court of Appeals for the District of Columbia on December 10, 1009. Notice of Appeal, D.E. 15. Prior to opening briefs being filed in the Court of Appeals, several events occurred that required the CIA to reevaluate its redaction decisions. On January 22, 2009, President Obama issued three executive orders: (1) E.O. 13491 limited interrogation techniques employed by the United States Government, including the CIA, to those found in the Army Field Manual 2-22.3 ("Army Field Manual"), revoked prior interrogation guidelines inconsistent with the Army Field Manual and ordered the CIA to close any detention facilities it operates, see Exec. Order No. 13491, 74 Fed. Reg. 4893 (January, 27, 2009); (2) E.O. 13492 ordered that the detention facility at Guantanamo Bay be closed no later that one year from the date of the order and that the status of each individual held at Guantanamo Bay be reviewed to determine whether release, trial, or some other outcome best suited the interests of justice and national security, see Exec. Order No.

[3] These five documents are: (1) a one-page diary excerpt of Abu Zubaydah; (2) a two-page written statement of Khalid Sheikh Muhammad; (3) a seven-page written statement of Hambali; (4) two pages of "Detainee Session Notes" prepared by the Personal Representative of Majid Khan and entered into evidence at his CSRT hearing; and (5) a one-page written statement of Bin Lap responding to particular items of evidence. The CIA redacted information from the statements of Khalid Sheikh Muhammad, Hambali and Bin Lap. Hilton Decl. ¶¶ 18, 19.

13492, 74 Fed. Reg. 4897 (January, 27, 2009) and; (3) E.O. 13493 instituted a review of the lawful options available to the United States Government with respect to the apprehension, detention and disposition of terrorism suspects. See Exec. Order No. 13493, 74 Fed. Reg. 4901 (January, 27, 2009). Pursuant to these executive orders, the CIA has halted the use of Enhanced Interrogation Techniques (EITs) and closed its detention facilities. Hitlon Decl. ¶ 22.

In addition to the executive orders, on April 16, 2009, President Obama declassified four memoranda written by the Department of Justice Office of Legal Counsel (OLC) for the CIA that discussed the legality of EIDs. Id. ¶ 23. The release of these documents constituted a limited declassification of information relating to the legality of EITs. Id. Lastly, on August 24, 2009, the Government declassified and publicly released substantial portions of several OLC legal opinions that discussed the legality of EITs and general conditions of confinement. Id. ¶ 56.

In response to these events, and to ensure that any redaction taken in response to Plaintiffs' FOIA request were consistent with the law, Defendants requested that the case be remanded to the District Court so the documents could be reevaluated. Plaintiffs' FOIA requests were reprocessed and the CIA revised its redactions of the six CSRT statements and three detainee statements. Id. ¶ 24. The CIA determined it could release Ammar Al Baluchi's CSRT transcript without redaction except for the names and signatures of DoD personnel. Id. Of the remaining five CSRT transcripts, one has only a portion of one sentence redacted, three transcripts have redactions on only several of their pages, and one transcript has several pages redacted out of a total of 50 pages. Id. at ¶¶ 27-31. As for the three detainee statements, the CIA determined, as before, that most of the information in these documents could not be publicly released as the information is exempt from disclosure under both FOIA Exemption (b)(1) and

(b)(3). Id. at ¶¶ 32-34.

ARGUMENT

I. FOIA and Summary Judgment Standards of Review

The Freedom of Information Act, 5 U.S.C. § 552, "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." Center for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 89-1497, 89th Cong., 2d Sess. 6 (1966)). FOIA requires each federal agency to make available to the public non exempt information, and sets forth procedures by which requesters may obtain such information. See 5 U.S.C. § 552(a). At the same time, FOIA exempts nine categories of information from disclosure, while providing that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, while the FOIA requires agency disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the public interest." Baldrige v. Shapiro, 455 U.S. 345, 352 (1982). The nine FOIA exemptions "reflect Congress' recognition that the Executive Branch must have the ability to keep certain types of information confidential." Hale v. DOJ, 973 F.2d 894, 898 (10th Cir. 1992), vacated on other grounds, 509 U.S. 918 (1993). As the Supreme Court has stressed, the statutory exemptions must be construed "to have a meaningful reach and application." John Doe, 493 U.S. at 152.

In determining whether an agency has met its burden of justifying nondisclosure of information in a FOIA action, the district court must accord substantial weight to declarations submitted by the agency in support of claimed exemptions. 5 U.S.C. § 552(a)(4)(B). As courts

have recognized, in enacting the FOIA, Congress intended that courts give agency declarations substantial weight in recognition of the agency's expertise, particularly in cases concerning questions of national security. Gardels v. CIA, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982); Assassination Archives and Research Center v. CIA, 177 F. Supp. 2d 1, 5-6 (D.D.C. 2001). Accordingly, summary judgment is regularly granted in FOIA cases on the basis of agency declarations.

II. CIA Properly Withheld Information Pursuant to FOIA Exemption 1.

As detailed in her declaration, Wendy M. Hilton, Associate Information Review Officer for the National Clandestine Service of the CIA, holds original classification authority at the TOP SECRET level and declassification authority pursuant to section 1.3(c) of the Executive Order 12,958, as amended.[4] Hilton Decl. ¶ 5. Ms. Hilton has personally reviewed all transcripts and records provided by detainees or their representativse to the CSRT that are at issue in this case, and has determined the information withheld from these documents was properly classified pursuant to the Executive Order. Id. ¶ 36. Ms. Hilton has determined that the information withheld under Exemption (b)(1) in the disputed documents warrants classification at the TOP SECRET , SECRET and/or CONFIDENTIAL level in the interest of national defense or foreign policy, pursuant to E.O. 12,958 § 1.4, because their release could be expected to: (a) reveal information concerning intelligence activities, and intelligence sources and methods, see Hilton Decl. ¶ 42; and (b) reveal sensitive foreign relations or foreign activities of the United States.

[4] E.O. 12,958 was amended by E.O. 13,292, effective March 25, 2003. See Exec. Order No. 12,958, 3 C.F.R. (1995), reprinted as amended in 50 U.S.C. § 435 note at 91 (supp. 2004); see also Exec. Order No. 13,292, 68 Fed. Reg. 15315 (March 28, 2003). All citations herein to E.O. 12,958 are to the Order as amended by E.O. 13,292.

See id. As detailed below, the CIA has met its burden under Exemption 1 and has established that all of the withheld information properly falls within one or more of these classification categories established by the Executive Order.

A. The Standards for Exemption 1

Exemption 1 protects records that are: (1) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and (2) are in fact properly classified pursuant to Executive Order. See 5 U.S.C. § 552 (b)(1). Section 1.2(a)(4) of E.O. 12,958, as amended, states that an agency may classify information that fits into one or more of the Executive Order's categories for classification when the appropriate classification authority "determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." 68 Fed. Reg. 15,315, 15,315 (March 25, 2003). In other words, under Exemption 1, FOIA requesters are "not entitled to records that have been properly classified." Blazy v. Tenet, 979 F. Supp. 10, 23 (D.D.C. 1997).

Executive Order 12,958, as amended, lists three classification levels for national security information:

(1) Information that, if subject to unauthorized disclosure, reasonably could be expected to cause damage to national security may be classified as CONFIDENTIAL;

(2) Information that, if subject to unauthorized disclosure, reasonably could be expected to cause serious damage to national security may be classified as SECRET; and

(3) Information that, if subject to unauthorized disclosure, reasonably could be expected to cause exceptionally grave damage to national security may be classified as TOP SECRET.

E.O. 12,958, as amended, § 1.2.

An agency can demonstrate that it has properly withheld information under Exemption 1 if it establishes that it has met the requirements of the Executive Order. Substantively, the agency must show that the records at issue logically fall within the exemption, i.e., that E.O. 12,958, as amended, authorizes the classification of the information at issue. Procedurally, the agency must demonstrate that it followed the proper procedures in classifying the information. See Salisbury v. United States, 690 F.2d 966, 970-73 (D.C. Cir. 1982); Military Audit Project v. Casey, 656 F.2d 724, 737-38 (D.C. Cir. 1981). An agency meeting both tests is then entitled to summary judgment. See, e.g., Abbotts v. NRC, 766 F.2d 604, 606-08 (D.C. Cir. 1985); Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984).

Agency decisions to withhold classified information under FOIA are reviewed de novo by the district court, and the agency bears the burden of proving its claim for exemption. See 5 U.S.C. § 552(a)(4)(B); Miller, 730 F.2d at 776. Nevertheless, because agencies have "unique insights" into the adverse effects that might result from public disclosure of classified information, the courts must accord "substantial weight" to an agency's declarations justifying classification. Military Audit Project, 656 F.2d at 738; cf. Miller, 730 F.2d at 776 (court must "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record"). Indeed, "the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions." Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980); see Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1997) ("Few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information"). To do so would violate the principle of according substantial weight to the expert opinion of the agency.

Cf. Stillman v. CIA, 319 F.3d 546, 548 (D.C. Cir. 2003) (in non-FOIA case, criticizing district court for withholding deference ordinarily owed to national security officials).

Moreover, the CIA's assessment of harm to intelligence sources and methods, 'is entrusted to the Director of Central Intelligence, not to the courts.'" Students Against Genocide v. Dep't of State, 257 F.3d 828, 835 (D.C. Cir. 2001) (quoting Fitzgibbon v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990)). Accordingly, the CIA's determination of potential harms, discussed below, merits "substantial weight" from the Court, see ACLU v. DOJ, 265 F. Supp. 2d 20, 27 (D.D.C. 2003), because "'[e]xecutive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record." Salisbury v. United States, 690 F.2d 966, 970 (D.C. Cir. 1982) (quoting S. Rep. No. 1200, 93rd Cong., 2d Sess. 12 (1974)); see also Frugone v. CIA, 169 F.3d 772, 775 (D.C. Cir. 1999) ("[m]indful that courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns"); Taylor v. Dep't of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (agency's determination should be accorded "'utmost deference'") (quoting Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978)). Thus, where an agency supplies a reasonably detailed declaration, which identifies and describes the reasons for withholding Exemption 1 material, the Court "must take seriously the government's predictions about the security implications of releasing particular information to the public . . ." ACLU, 265 F. Supp. 2d at 28.[5]

[5] To be sure, speculation as to the negative results likely to occur as a result of disclosure is necessarily suppositional. However, courts have recognized that such speculation is inevitable, and that to require an actual showing of harm would be judicial "overstepping." See Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980).

B. The CIA Records Are Protected by Exemption 1.

The Hilton Declaration shows that the CIA has followed the proper procedures for invoking Exemption 1 in this case. Ms. Hilton, as an Associate Information Review Officer for the National Clandestine Service of the CIA, and under a written delegation of authority pursuant to E.O. 12,958, § 1.3(c), holds original classification authority at the TOP SECRET level. Hilton Decl. ¶ 5, 40. As a result, Ms. Hilton is authorized to "conduct classification reviews and to make classification and declassification decisions." Id. ¶ 5. The Exemption 1 material withheld by the CIA in this matter is "properly classified as TOP SECRET, SECRET and/or CONFIDENTIAL." Id. ¶ 40.

Executive Order 12,958, as amended, provides that information shall not be classified unless it concerns one or more of eight categories. E.O. 12,958, § 1.4. In this case, the CIA's Exemption 1 withholdings implicate two categories for classified information:

- intelligence activities (including special activities), intelligence sources or methods, or cryptology, id. at § 1.4(c); and
- foreign relations or foreign activities of the United States, including confidential sources, id. at 1.4(d);

See Hilton Decl. ¶ 42. The classified information withheld by the CIA concerns foreign relations or foreign activities of the United States, and contains details about intelligence methods and activities. Id. ¶ 42, 48-75. This information, accordingly, falls within the § 1.4 categories outlined above. Id.

(i). The CIA Properly Withheld Information That Would Disclose Intelligence Activities Relating to the Capture, Detention, and Conditions of Confinement of Key Terrorist Leaders and Operatives.

Under § 1.4(c) of Executive Order 12,958, as amended, an "intelligence activity" refers to "the actual implementation of intelligence sources and methods in the operational context." Hilton Decl. ¶ 50. The CIA invoked Exemption 1 to withhold information from transcripts and documents provided to the CSRT regarding intelligence activities and/or methods involving: (1) capture, detention, and conditions of confinement of terrorists; and (2) the interrogation of terrorists.

The redacted information at issue in this case relates to a "highly classified, now discontinued, CIA program to capture, detain, and interrogate key terrorist leaders and operatives in order to prevent terrorist attacks (the "Program")." Hilton Decl. ¶ 53. As part of the Program, then President George Bush authorized the CIA to establish terrorist detention facilities outside the United States, the details of which remain classified. Id. Thus, while President Bush disclosed the existence of the Program and that fourteen individuals, subsequently transferred to Guantanamo Bay, had been in CIA custody and questioned outside the United States, he also made clear that the specifics of the program, including where the detainees had been held and the details of their confinement, could not be divulged and would remain classified. Id. ¶ 54, 55. Among the details that cannot be publicly released are conditions of detainees' capture and other operational details, which are classified at Top Secret, Sensitive Compartmented Information ("SCI").[6] Id. ¶ 55. It is these details that are redacted from the documents responsive to

[6] As described in the Hilton declaration, in addition to the levels of classification outlined in Executive Order 12,958 § 1.2., section 4.3 provides that:

Plaitniffs' FOIA request.

In her declaration, Ms. Hilton describes the specific harms that would result from the release of this information. First, disclosure of the intelligence sources and methods relating to the Program contained in the documents requested by Plaintiffs "is reasonably likely to degrade the CIA's ability to effectively question terrorist detainees and elicit information necessary to protect the American people." Id. ¶ 58. Second, while the former CIA Program has been discontinued, "the United States will continue to interrogate terrorists consistent with the law." Id. ¶ 59. In order for the United States to maintain an effective interrogation program, it will require the cooperation of foreign governments and use of effective interrogation techniques. Id. Unauthorized disclosure of these details of the former Program, which are included in the information redacted from the documents provided to Plaintiffs, "would undermine both of these requirements." Id. Finally, unauthorized disclosure of details regarding capture, detention and conditions of confinement reasonably could be expected to result in exceptionally grave damage to the national security. Id. For example, the CIA redacted information from the CSRT transcripts of Al Nahiri, Abu Zubaydah, Majid Kahn and Khalid Sheikh Muhammad because

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> specified officials may create special access programs upon a finding that the vulnerability of, or threat to, specific information is exceptional, and the normal criteria for determining eligibility for access applicable to information classified at the same level are not deemed sufficient to protect the information from unauthorized disclosure. The CIA is authorized to establish special access programs relating to intelligence activities, sources, and methods. These special access programs relating to intelligence are called Sensitive Compartmented Information (SCI) programs.

Hilton Decl. ¶ 57. Due to the importance of the information and the grave damage to national security if released, information relating to the CIA terrorist detention program has been placed in a TOP SECRET//SCI program to enhance protection from unauthorized disclosure. Id. ¶ 58.

they contained detailed information regarding capture, detention and conditions of confinement as well as intelligence information he provided during his detention and interrogation. Id. ¶¶ 28 - 31. The same is true of the 3 CSRT Statements. Id. ¶¶ 32-34.

In the area of intelligence sources and methods, this Circuit has been strongly inclined to accept the agency's assessment that disclosure of such information will damage national security interests because the area is "necessarily a region for forecasts in which [the agency's] informed judgment as to potential future harm should be respected." Gardels v. CIA, 689 F.2d, 1100, 1106 (D.C. Cir. 1982); see also Schrecker v. DOJ, 254 F.3d 162, 166 (D.C. Cir. 2001) (protecting intelligence sources because release would harm national security by "dissuading current and future sources from cooperating"). Indeed, the protection for information pertaining to sources and methods is so broad, that one federal appeals court has described it as a "near-blanket FOIA exemption," which is "only a short step [from] exempting all CIA records from FOIA." Minier v. CIA, 88 F.3d 796, 801 (9th Cir. 1996) (internal quotation marks and citation omitted).

(ii). The CIA Properly Withheld Information That Would Disclose Intelligence Activities Relating to Interrogation Methods, Questions, and Intelligence Collection

Another form of intelligence activity information redacted from the documents produced to Plaintiffs involves interrogation and intelligence collection methods used by the CIA to acquire information regarding terrorist threats. Hilton Decl. ¶ 60-64. Even though certain details of the CIA Detention Program, such as the use of EITs, have been discontinued, the information withheld from the documents would still be of value to al Qaeda and must be protected because:

> [t]he withheld information provides insight not only into the use of EITs and conditions of confinement, but also into the strategy and methods used by the United States when conducting any sort of interrogation, including those under the

> Army Field Manual. If the information withheld were to be disclosed, it would not only inform al Qaeda about the historical use of EITs but also what techniques the United States would use in a current interrogation.

Id. ¶ 60.

These interrogation methods have provided information regarding possible terrorist targets and methods of attacks on the United States, including information sufficient to thwart "a plot to fly a plane into the tallest building in Los Angeles." Id. ¶ 62. In addition, use of interrogation methods as part of the discontinued CIA detention program has disrupted plots that involved flying hijacked planes into Heathrow Airport and attacking the U.S. consulate in Karachi, Pakistan using car bombs and motorcycle bombs. Id. Further, information acquired in the Program through the use of interrogation methods has been essential in the capturing and questioning of senior al Qaeda operatives. Id. "For example, interrogations of detainees produced information that provided initial leads to the locations of al Qaeda operatives, which led to their capture. In addition, the United States gained valuable information that explained previously unknown details of al Qaeda, such as its organization, financing, communications, and logistics." Id.

Because acquiring this type of information from terrorists is so valuable, al Qaeda and other terrorist organizations specifically train their members in counter-interrogation techniques. National security is threatened by release of questioning procedures and methods used by the CIA as part of the detention program because it would allow:

> al Qaeda and other terrorists to more effectively train to resist such techniques, which would result in degradation in the effectiveness of the techniques in the future. If detainees in United States custody are more fully prepared to resist interrogation, it could prevent the United States from obtaining vital intelligence that could disrupt future attacks.

Hilton Decl. ¶ 61.

This information has been classified at the TOP SECRET//SCI level because interrogation methods are integral to the CIA's detention program. Id. The types of questions asked and specific questions to particular detainees must be protected because they could provide insight to the intelligence interests and knowledge of the United States. Id. at 63. Public disclosure could reveal, "what the CIA knew at the time and allow others to infer what the CIA did not know at the time." Id. This would allow other terrorists "to make judgments about the intelligence capabilities of the CIA and to anticipate the type of questioning they might undergo in United States custody." Id.

While certain instances of intelligence gained through interrogation methods have been publicly disclosed by the U.S. Government as described above, the information redacted from the documents provided to Plaintiffs remains classified. Id. ¶ 64. "Intelligence information gained through interrogation is currently used by the U.S. Government to conduct counterterrorism operations and pursue terrorists. If the CIA were to reveal intelligence information gained through its use of interrogation methods, the information would no longer be useful in counterterrorism efforts." Id. For example, CIA redacted information from the CSRT transcript of Khalid Sheikh Muhammad that revealed intelligence information gained through his detention and interrogation as well as the interrogation methods he claims to have experienced and specific questions posed to him during interrogation which would reveal the intelligence interests of the CIA. Id ¶ 31.

Moreover, disclosure of explicit details of conditions of confinement and specific interrogations where EITs were used would provide al Qaeda with propaganda it would use to

recruit and raise funds. Id. ¶ 72. The CIA has determined that the "resultant damage to the national security would likely be exceptionally grave." Id. Therefore, as the disclosure of this information could reasonably be expected to cause these specific and exceptionally grave harms to national security, it is properly classified at the "TOP SECRET//SCI" level and withheld pursuant to E.O. 12,958, as amended, § 1.4 (c) and exempt from disclosure pursuant to Exemption 1. See McErlean v. United States Dep't of Justice, Civ No. 97-7831-BSJ, 1999 WL 791680, at **5-6 (S.D.N.Y. Sept. 30, 1999) (holding that the government correctly withheld classified information that "identifies an CIA investigative unit which is assigned to, and specializes in, specific intelligence or counterintelligence operations" because disclosure "would reveal an intelligence operation which is still ongoing today"). For all of the foregoing reasons, the CIA properly withheld classified information that would reveal or identify the CIA's intelligence activities, operations, or methods.

(iii). Limited Declassification of the Use of Interrogation Techniques Does Not Require the Full Disclosure of the Other, Still Classified Information

As explained above, the President declassified and released in large part OLC memoranda analyzing the legality of specific EITs. However, the EITs as addressed in the OLC memoranda were analyzed in the abstract. This abstract analysis is of a "quantitatively different nature than the conditions of confinement and interrogation techniques *as applied,*" which are described in the CSRT transcripts and documents. Hilton Decl. ¶ 70 (emphasis in original). In addition, on August 24, 2009, the United States declassified and publicly released portions of two additional OLC opinions discussing conditions of detainee confinement. Id. Similar to four OLC memoranda released in April 2009, the August 24, 2009 OLC memoranda are legal opinions that

discuss general issues of detainee confinement, rather than specific *operational* details pertaining to any specific detainee. Id. (emphasis in original). The information within the CSRT transcripts and documents reveal a level of detail about the *operational* conditions of confinement and the *application* of specific interrogation techniques that does not exist in the OLC memoranda, which provide only legal analyses of specific *proposed* intelligence activities. See Id. ¶ 70-71. Redacted information includes details of *"actual* intelligence activities, sources and methods." Id ¶ 71 (emphasis in original). The unauthorized release of this information, which has been classified at the TOP SECRET level, would cause exceptionally grave damage to national security interests because, "[e]ven if the EITs are never used again, the CIA will continue to be involved in questioning terrorists under legally approved guidelines . . . and [t]he information in these documents would provide future terrorists with a guidebook on how to evade such questioning." Id.

Limited declassification of certain information concerning a classified program--in this instance, the Program's existence, as well as some abstractly described interrogation techniques that may or may not have been used on the detainees at issue--does not require full disclosure of the other, still-classified aspects of that program. See, e.g., Ctr. for Nat'l Security Studies v. U.S. Dep't of Justice, 331 F.3d 918, 930-31 (D.C. Cir. 2003) ("The disclosure of a few pieces of information in no way lessens the government's argument that complete disclosure would provide a composite picture of its investigation and have negative effects on its investigation."); Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) ("The fact of disclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case.")

Because the disclosure of information related to detention and conditions of confinement could reasonably be expected to cause specific and exceptionally grave harms to national security, such information is properly classified at the "TOP SECRET//SCI" level and properly withheld pursuant to E.O. 12,958, as amended, § 1.4 (c) and pursuant to Exemption 1.

(iv). The CIA Properly Withheld Foreign Relations and Foreign Activities of the United States Information

The CIA has also properly classified and withheld information concerning the foreign relations and/or foreign activities of the United States. Section 1.4(d) of Executive Order 12,958, as amended, exempts from disclosure foreign relations and activities information, including that concerning cooperative endeavors between the CIA and foreign governments' intelligence components. "In this case, foreign governments have provided critical assistance to CIA counterterrorism operations, including but not limited to hosting of foreign detention facilities, under the condition that their assistance be kept secret." Hilton Decl. ¶ 66. The withheld information identifies the specific locations of the CIA's detention program's foreign locations as well as other "critical assistance that foreign countries have provided the to the CIA's counterterrorism operations . . ." Id.; see Snyder v. CIA, 230 F. Supp. 2d 17, 23 (D.D.C. 2002) (finding Exemption 1 satisfied by government explanation that "disclosure of the withheld information could reveal the names and location of covert foreign CIA installations . . ."). It is enough to uphold CIA's assertion of Exemption 1 for information concerning these confidential relationships with other nations upon its showing that the cooperation from other nations is conditioned upon being kept secret and is ongoing. See, e.g., Linn v. DOJ, Civ. No. 92-1406, 1995 WL 631847, at *26 (D.D.C. August 22, 1995) (Exemption 1 withholding of information

concerning cooperative relationship with foreign component was proper where FBI demonstrated "that the United States has a present understanding with the foreign government at issue that shared information will remain secret and that information concerning the relationship between the United States and that government will also remain secret"); see also Navasky, 521 F. Supp at 129-30.

Ms. Hilton also details the specific harms that could reasonably be expected to result from disclosure of this classified information. Unauthorized disclosure of this information "would damage the CIA's relations with these foreign governments and could cause them to cease cooperating with the CIA on such matters . . . If the United States demonstrates that it is unwilling or unable to stand by its commitments to foreign governments, they will be less willing to cooperate with the United States on counterterrorism activities." Hilton Decl. ¶ 66; see also Malizia v. U.S. Dep't of Justice, 519 F. Supp. 338, 343 (S.D.N.Y. 1981) ("Unauthorized disclosure of foreign government information is presumed to cause at least identifiable damage to the national security.").

Indeed, Ms. Hilton provides a real world example of the damage to national security that results from disclosure of foreign relations information regarding the CIA detention program:

> Just prior to the President Bush's 6 September 2006 speech announcing the transfer of detainees to Guantanamo Bay, the CIA provided certain foreign governments specific assurances that the CIA would protect the fact of their cooperation from disclosure. These liaison partners expressed their deep appreciation and highlighted that their continued cooperation was conditioned on the CIA's commitment and ability to keep their assistance strictly confidential.
>
> In one instance, however, a particular foreign government reduced its cooperation with the CIA when its role in the terrorist detention program leaked to a third country whose national had been detained within the program. The foreign government lost the trust and cooperation of that third country in matters of their

> own national security. Repair of the CIA's relationship with this foreign government came only through the senior-level intervention of the CIA Director personally apologizing for the leak. Despite this significant effort, to this day the damage this one incident has caused to the CIA's relationship with the foreign government is incalculable, as the CIA can never be sure to what extent the foreign government is withholding vital intelligence necessary to the national security of the United States.

Hilton Decl. ¶ 67-68. The CIA has determined that like harm could be expected to result from the unauthorized disclosure of the information regarding foreign relations which was redacted from the documents sought by Plaintiffs. See Halpern v. FBI, No. 94-CV-365A, 2002 WL 31012157, *7 (August 31, 2001) (holding that the FBI properly withheld information under Exemption 1 because disclosure would "identif[y] a foreign government component that expects its cooperative endeavors with the FBI to remain classified"); Malizia, 519 F. Supp. at 344 ("It is clear that, even without the presumption of identifiable damage to the national security that is accorded foreign government information, disclosure of such cooperation with foreign agencies could not only damage the (FBI's) ability to gather information but could also impair diplomatic relations.") (internal citations omitted); Navasky v. CIA, 521 F. Supp 128, 129-30 (S.D.N.Y. 1981) (holding that CIA declaration "justif[ied] a finding that the disclosure of the classified information at issue could reasonably be expected to cause identifiable damage to the national security in the field of foreign relations" because release of the information would have an adverse effect on foreign relations with the foreign countries and leaders).

III. CIA Has Properly Invoked Exemption 3.

The CIA has withheld records and information protected by FOIA Exemption 3. In examining an Exemption 3 claim, a court must determine, first, whether the claimed statute is a statute of exemption under FOIA, and, second, whether the withheld material satisfies the criteria

of the exemption statute. See CIA v. Sims, 471 U.S. 159, 167 (1985); Fitzgibbon v. CIA, 911 F.2d 755, 761 (D.C. Cir. 1990).

The CIA's Exemption 3 withholdings are based on two statutes:

(1) Section 102A(i)(1) of the National Security Act of 1947, see 50 U.S.C. § 403-1(i)(1), which requires the CIA to protect intelligence sources and methods from unauthorized disclosure; and

(2) Section 6 of the Central Intelligence Agency Act of 1949, see 50 U.S.C. § 403g, which provides that the CIA shall be exempt from the provision of any other law requiring the publication or disclosure of the organization, function, names, official titles, salaries, or numbers of personnel employed by the CIA.

See Hilton Decl., ¶ 76-79. Because the threshold issue for the application of Exemption 3 is based on the statute invoked by the agency, Exemption 3 the analysis differs from other FOIA exemptions. As the D.C. Circuit has explained, "[e]xemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage." Goland, 607 F.2d at 350-51.

A. The CIA's Withholdings Under the National Security Act of 1947

The National Security Act of 1947 requires the Director of the CIA to safeguard information concerning CIA intelligence sources and methods.[7] See 50 U.S.C. § 403-1(i)(1). The statute falls within the ambit of Exemption 3. See, e.g., Sims, 471 U.S. at 167 ("Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure."); Krikorian, 984 F.2d at 465 ("It is well settled that

[7] This information has also been withheld pursuant to Exemption 1 and is described in more detail in that part of this memorandum and in the Hilton Declaration. See, supra, at II.B; Hilton Decl., ¶¶ 48-75, 77.

section [403-3(c)(7)] falls within exemption 3."); Goland, 607 F.2d at 350-51; Snyder, 230 F. Supp. 2d at 22-23; Blazy, 979 F. Supp. at 23.

The CIA Director's obligation to protect information pertaining to agency sources and methods reflects Congress's intent to "give the [agency] broad authority to protect the secrecy and integrity of the intelligence process." Sims, 471 U.S. at 170.

> Plainly the broad sweep of this statutory language comports with the nature of the Agency's unique responsibilities. To keep informed of other nations' activities bearing on our national security the Agency must rely on a host of sources. At the same time, the Director must have the authority to shield those Agency activities and sources from any disclosures that would unnecessarily compromise the Agency's efforts.

Id. at 169. In a similar vein, the Ninth Circuit has noted that the "sources and methods" statutory mandate is a "near-blanket FOIA exemption," which is "only a short step [from] exempting all CIA records from FOIA." Minier, 88 F.3d at 801. Accordingly, the CIA need only demonstrate that the information "relates to intelligence sources and methods." Fitzgibbon, 911 F.2d at 762. The CIA has already demonstrated at length how the redacted information relates to intelligence sources and methods in the context of the Exemption 1 determination. See Section II.B., *et seq., supra.* Like the agency's determination under Exemption 1, the agency's determination under exemption 3 is entitled to "substantial weight and due consideration." Id.; Linder v. DOD, 133 F.3d 17, 25 (D.C. Cir. 1998).

B. The CIA's Withholdings Under the Central Intelligence Agency Act of 1949 Are Protected by Exemption 3.

Section 6 of the Central Intelligence Agency Act of 1949 mandates that the CIA "shall be exempted from . . . the provisions of any other 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. This statute also meets the requirements of Exemption 3. See, e.g., Goland, 607 F.2d at 350-51 (upholding Exemption 3 claims when the CIA demonstrated the deleted material described CIAs intelligence methods, including the functions and organization of CIA personnel) ; Sims, 471 U.S. at 167; Snyder, 230 F. Supp. 2d at 22-23; Blazy, 979 F. Supp. at 23.

Because all the information withheld by the CIA in the five transcripts and three documents provided by the detainees to the CSRT would disclose functions of the CIA and its personnel, that information is also properly withheld under this statute. Hilton Decl. ¶¶27-34, 78. As described above, each of the classified categories of information contained in the documents at issue in this case relates to the functions of CIA personnel and their ability to collect counterterrorism intelligence and perform counterintelligence functions which are core functions of the CIA. Id. ¶ 78. For example, the information redacted from the CSRT transcript of Majid Kahn provides detailed information regarding his capture as well as, "the conditions and locations of his detention, interrogation methods he claims to have experienced, intelligence information gained through his detention and interrogation, and information relating to foreign relations and foreign activities of the United States." Hilton Decl. ¶ 30. To reveal this information would force the CIA to disclose critical functions of the CIA and its personnel because, for example, it could reveal the former locations of CIA facilities in foreign countries. Id. ¶ 30, 49; see also Blazy, 979 F. Supp. at 23 (upholding Exemption 3 claim pursuant to Section 6 of the Central Intelligence Agency Act of 1949 when information would reveal CIA locations and organizational data). Similarly, the CIA redacted information in a written statement prepared by Hambali and submitted by him as an exhibit to his CSRT that contained

information detailing the conditions of his interrogation, including specific questions he was asked, information regarding his capture and detention, interrogation methods he claims to have experienced, and information relating to foreign relations and foreign activities of the United States. Id. at ¶ 33. Again, this is information central to the mission of the CIA and would disclose critical functions of its personnel as well as reveal former foreign CIA locations that are still classified. Id. ¶ 33, 49.

The CIA withheld information pursuant to statutes that shield information from disclosure under the FOIA. Accordingly, the information is protected by Exemption 3, and summary judgment should be granted for the CIA.[8]

IV. The CIA Has Reasonably Segregated Exempt Portions of the Documents.

The FOIA requires agencies to release "any reasonably segregable portion of a record . . . after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Consistent with this obligation, the CIA has provided Plaintiffs with as much non-exempt information as possible without compromising the interests in nondisclosure protected by the FOIA. Hilton Decl. ¶ 3, 80. With respect to the documents released in part, Ms. Hilton conducted a line-by-line review of those documents to identify and release all reasonably segregable, non-exempt portions of the documents. Id. ¶ 80. Based on that review, the CIA released all the information that could be reasonably segregated from the information withheld pursuant to Exemptions 1 and 3. Id.

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[8] Pursuant to Exemption 3 and Exemption 6, DoD redacted a small amount of information that would reveal the names of DoD personnel who are deployed to the Office for the Administrative Review of the Detention of Enemy Combatants Forward in Guantanamo Bay, Cuba. Plaintiffs do not challenge these redactions by DoD.

CONCLUSION

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

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