**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| AMERICAN CIVIL LIBERTIES UNION<br>125 Broad Street<br>New York, NY 10004<br><br>AMERICAN CIVIL LIBERTIES UNION FOUNDATION<br>125 Broad Street<br>New York, NY 10004<br><br>Plaintiffs,<br><br>v.<br><br>CENTRAL INTELLIGENCE AGENCY,<br>Washington, DC 20505<br><br>Defendant. | ) | Case No. 1:11-cv-933-ABJ |

**MEMORANDUM IN SUPPORT OF CENTRAL INTELLIGENCE AGENCY'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

The American Civil Liberties Union originally brought this Freedom of Information Act ("FOIA") action to challenge the Central Intelligence Agency's ("CIA") failure to produce reports of the CIA Office of Inspector General ("OI

acknowledged receipt of the ACLU's request by letter dated May 5, 2011 and therein denied the ACLU's request for expedited processing. *See* Lutz Decl. Ex. B. Less than two weeks later, the ACLU filed the instant action challenging the CIA's denial of the ACLU's request for expedited processing and the agency's failure to produce the requested information. *See* Complaint for Injunctive Relief (May 18, 2011) [ECF No. 1]. The ACLU subsequently amended its complaint because the original action was filed before the twenty-day statutory limit for the CIA's response had elapsed. *See* First Amended Complaint for Injunctive Relief ¶ 22 (June 16, 2011) [ECF No. 8]. The CIA did not oppose the amendment and answered the Amended Complaint. *See* Answer (July 5, 2011) [ECF No. 9].

By Status Report dated August 4, 2011, the CIA advised the Court that it planned to complete the processing of Plaintiff's request by September 30, 2011, which the agency did. *See* Defendant's Status Report ¶ 3 (Aug. 4, 2011) [ECF No. 12]. On that date, the CIA, through counsel, produced three partially redacted, non-identical copies of a report entitled *Review of Certain Aspects of the Operations of the Office of Inspector General* (hereinafter the "Deitz Memorandum"), which the agency determined was responsive to Item No. 1 of Plaintiff's request. The CIA also advised that eleven reports responsive to Item No. 2 of Plaintiff's request (hereinafter Document Nos. 1-11) were being withheld in full pursuant to FOIA exemptions.[1] Thereafter, to facilitate a narrowing of the issues in dispute, the CIA produced to Plaintiff a draft *Vaughn* Index that described the type of information withheld and identified the particular

[1] The CIA's search located a twelfth responsive report entitled "Special Review – Counterterrorism Detention and Interrogation Activities (September 2001 - October 2003)," which was released in August 2009 in *ACLU v. Department of Defense*, Case No. 1:04-cv-04151 (S.D.N.Y.). By agreement of the parties, that report is not in issue in this litigation.

"In determining whether the agency has satisfied this burden, the Court may rely solely on agency affidavits," (*Grove v. Department of Justice*, 802 F. Supp. 506, 509 (D.D.C. 1992) (internal citations omitted)), and should award summary judgment "solely on the basis of information provided by the agency in declarations" that "describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith,'" (*Darui v. United States Dep't of State*, 798 F. Supp. 2d 32, 37 (D.D.C. 2011)). Unless the declarations are "deficient, the court need not conduct further inquiry into their veracity." *Ferranti v. Bureau of Alcohol, Tobacco & Firearms*, 177 F. Supp. 2d 41, 45 (D.D.C. 2001). Rather, they "enjoy a presumption of good faith, which may not be rebutted by purely speculative claims." *Mack v. Department of Navy*, 259 F. Supp. 2d. 99, 105 (D.D.C. 2003) (internal quotation omitted). As demonstrated by the attached Declaration of Martha M. Lutz, the CIA has met its burden here, and accordingly is entitled to summary judgment. *See* Lutz Decl. ¶¶ 16-54; Def. SOMF ¶¶ 3-10.

## I. THE COURT SHOULD UPHOLD THE CIA'S WITHHOLDINGS UNDER EXEMPTION (B)(1).

The CIA has invoked exemption (b)(1) to protect information properly classified pursuant to Executive Order 13526. This exemption protects records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and (B) are in fact properly classified pursuant to such Executive order." *See* 5 U.S.C. § 552 (b)(1). Exemption (b)(1) thus "establishes a specific exemption for defense and foreign policy secrets, and delegates to the President the power to establish the scope of that exemption by executive order." *Military Audit Project v. Casey*, 656

F.2d 724, 737 (D.C. Cir. 1981). An agency can demonstrate that it has properly withheld information under exemption (b)(1) if it establishes that it has met the requirements of the applicable Executive Order. Substantively, the agency must show that the records at issue logically fall within the exemption, i.e., the Executive Order authorizes the classification of the information at issue. Procedurally, the agency must demonstrate that it followed the proper procedures in classifying the information. *See Salisbury v. United States*, 690 F.2d 966, 970-73 (D.C. Cir. 1982); *Military Audit Project*, 656 F.2d at 737-38. An agency that demonstrates substantive and procedural compliance with an applicable Executive Order is entitled to summary judgment. *See Abbotts v. Nuclear Regulatory Comm'n*, 766 F.2d 604, 606–08 (D.C. Cir. 1985). Here that order is Executive Order No. 13526, "Classified National Security Information." Under Section 1.1(a) of that order, information may be classified if:

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

75 Fed. Reg. 707, 707 (Dec. 29, 2009) ("Executive Order No. 13526"). As demonstrated by the Lutz Declaration filed herewith, these conditions are all met by the information over which exemption (b)(1) was asserted. *See* Lutz Decl. ¶¶ 16-39; Def. SOMF ¶ 4.

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

CIA Information Review Officer ("IRO") Martha Lutz has original classification authority and has determined that the information withheld pursuant to exemption (b)(1) is properly classified. *See*

methods," and "foreign relations or foreign activities of the United States." *See* Executive Order 13526 § 1.4(c), (d). The information over which the CIA has asserted exemption (b)(1) concerns these subjects. *See* Lutz Decl. ¶ 23 (declaring "[w]ith respect to the CIA information for which FOIA exemption (b)(1) is asserted in this case, that [the] information falls within the following classification categories in the Executive Order: 'information . . . concern[ing] . . . intelligence activities . . . [and] intelligence sources or methods' [] and 'foreign relations or foreign activities of the United States'"); *see also* Lutz Decl. ¶ 31. Specifically, the classified information here concerns "the capture, detention, confinement and interrogation of detainees; techniques used in the interrogation of detainees; and CIA classification markings." Lutz Decl. ¶ 28; Lutz Decl. ¶ 31 (explaining that Document Nos. 1-11 "concern intelligence activities related to the capture, detention, confinement and interrogation of detainees and the techniques and methods employed by the CIA in furtherance of those activities"); *see, e.g.*, Lutz Decl. ¶ 12 (describing Document Nos. 9-11 as "OIG reports concerning overseas CIA detention facilities and CIA counterterrorism operations" that "includ[e] details on specific regional operations that reflect the sources, methods, and activities of the CIA"); Lutz Decl. ¶ 13 (describing Document Nos. 1-2, 4-5, and 7-8 as "reports on the treatment of detainees" that "contain details on the capture, detention, confinement, and interrogation of certain detainees"); Lutz Decl. ¶ 14 (describing Document Nos. 3 and 6 as "OIG reports on the use of certain interrogation techniques at an overseas CIA detention facility, and the non-registration of certain detainees" that "contain sensitive information on foreign governments, CIA intelligence activities, and intelligence sources and methods"); Lutz Decl. ¶ 31 (explaining that portions of the Deitz Memorandum "contain information related to counterterrorism activities as well as intelligence sources and

methods"). The withheld information that concerns foreign relations "includes CIA intelligence activities overseas and the assistance provided by foreign governments in furtherance of those activities." Lutz Decl. ¶ 28; *see, e.g.*, Lutz Decl. ¶ 13 (describing Document Nos. 1-2, 4-5, and 7-8 as "detail[ing] CIA intelligence activities overseas, and the assistance provided by certain foreign governments in furtherance of those activities"). Such information clearly satisfies the substantive requirements of Executive Order 13526.

**D. The Unauthorized Disclosure of the Information Withheld Under Exemption (b)(1) Reasonably Could Be Expected to Damage National Security.**

Notwithstanding that the government has declassified certain information related to the CIA's detention and interrogation program, the information withheld from Plaintiff consists of previously undisclosed and classified information that if disclosed "reasonably could be expected to result in serious or exceptionally grave damage to the national security."[2] Lutz Decl. ¶ 25; *see also* Lutz Decl. ¶¶ 27-39. The fourth condition of information classified pursuant to Executive Order 13526 requires, as here, that "the original classification authority determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." 75 Fed. Reg. at 707. Recognizing that national security is a uniquely executive purview, courts typically defer to such an agency determination. *Center for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) ("[I]n the FOIA context, we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review."); *Weissman*

[2] As explained in the Lutz Declaration, she took into account prior public disclosures by the government about the CIA's detention and interrogation program during her review of the withholdings in this case. *See* Lutz Decl. ¶ 33.

such operations would become even more dangerous." Lutz Decl. ¶ 30.

The disclosure of the CIA's procedures and methods for collecting intelligence poses additional harms clearly not appreciated by Plaintiff, which saw fit only to carve out from its challenges "the specific questions asked of detainees by interrogators." *See* Lutz Decl. ¶ 9. "Public disclosure of the questioning procedures and methods, beyond the questions themselves, would allow terrorist organizations to more effectively train to resist such techniques, which would result in degradation in the effectiveness of the techniques in the future." Lutz Decl. ¶ 35. Clearly, if detainees "in U.S. Government custody are more fully prepared to resist interrogation,

## II. THE COURT SHOULD UPHOLD THE CIA'S WITHHOLDINGS UNDER EXEMPTION (B)(3).

Alternatively and independently, the Court should uphold the CIA's withholding of the information discussed in Part I, *supra*, under exemption (b)(3).[4] That exemption exempts from FOIA information whose disclosure is prohibited by *another* statute, if that statute either: (A) "requires that the matters be withheld from the public in such a manner to leave no discretion on the issue;" or (B) "establishes a particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A)(i-ii). This other statute "must, on its face, exempt matters from disclosure." *Reporters Comm. for Freedom of Press v. Department of Justice*, 816 F.2d 730, 735 (D.C. Cir.), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989); *see also Essential Info., Inc. v. USIA*, 134 F.3d 1165, 1168 (D.C. Cir. 1998) (noting that a statute that prohibits "dissemination" and "distribution" of certain information within the United States qualifies as an exemption (b)(3) "nondisclosure" statute). Unlike the requirements for exemption (b)(1), exemption (b)(3) does not require the government to demonstrate harm to the national security. Rather exemption (b)(3)'s "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 v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978); *see also Fitzgibbon v. CIA*, 911 F.2d 755, 761-62 (D.C. Cir. 1990) (same). Here again, deference to the agency's determination that withheld material is within the coverage of an exemption (b)(3)

[4] The CIA asserted exemption (b)(3) whenever exemption (b)(1) was asserted. Therefore, the Court need not reach the (b)(3) analysis if the CIA's (b)(1) withholdings are upheld, and vice versa.

The CIA also properly asserted that exemption as to information protected from disclosure by the Central Intelligence Act of 1949. Section 6 of that Act "provides that the CIA shall be exempted from the provisions of any law which requires the publication or disclosure of,

**III. THE COURT SHOv6(THEe UPHOEe COURTIA'S WITHHOEeINGS UNDER)TJ3 -1.17 TD0 Tc**

with their uninhibited opinion without fear of public scrutiny, to prevent premature disclosure of proposed policies, and to protect against public confusion through the disclosure of [a] document advocating or discussing reasons for policy decisions that were ultimately not adopted." *Kidd v. Department of Justice*, 362 F. Supp. 2d 291, 295-96 (D.D.C. 2005) (internal citations omitted); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) ("the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions"). To come within this privilege, the information must be predecisional and deliberative. *See Gutman v. United States Dep't of Justice*, 238 F. Supp. 2d 284, 292-93 (D.D.C. 2003); *Heggestad*, 182 F. Supp. 2d at 7; *Hamilton Sec. Group, Inc. v. Department of Hous. & Urban Dev.*, 106 F. Supp. 2d 23, 31-32 (D.D.C. 2000); *Judicial Watch, Inc. v. United States Dep't of Commerce*, 90 F. Supp. 2d 9, 14 (D.D.C. 2000).

The predecisional requirement is satisfied if the information is "antecedent to the adoption of an agency policy." *Gutman*, 238 F. Supp. 2d at 292. To satisfy this requirement, "the agency need not identify a specific final agency decision;" it is sufficient for the agency to "establish what deliberative process [wa]s involved" and the role played by the withheld information "in the course of that process." *Heggestad*, 182 F. Supp. 2d at 7 (internal quotations omitted). The deliberative element requires that the information withheld be "a direct part of the deliberative-process in that it makes recommendations or expresses opinions on legal or policy matters." *Gutman*, 238 F. Supp. 2d at 293 (internal quotations omitted). "Deliberative communications are those reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Kidd*, 362 F. Supp. 2d at 295 (internal citations omitted). Courts should afford "considerable

deference" to an agency's "judgment as to what constitute[d] . . . 'part of the agency give-and-take – of the deliberative process – by which [an agency] decision itself [wa]s made.'" *Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984). Such deference is owed here to the CIA's determinations that certain information withheld from Plaintiff constitutes predecisional deliberations "generated as part of the process by which policy is formulated by the CIA." Lutz Decl. ¶ 48.

Specifically, the withheld reports were created as part of the OIG's function of "providing findings and recommendations" in furtherance of its "mission [] to promote economy, efficiency, effectiveness, and accountability in the management of CIA activities." Lutz Decl. ¶ 11. The reports are provided to "heads of independent offices and operating officials, who in turn determine whether to take any administrative action on those findings, conclusions, and recommendations." Lutz Decl. ¶ 46. The reports thus are part of a deliberative process predecisional to such administrative action. *See* Lutz Decl. ¶ 48 (explaining that "[t]he deliberative information contained in these documents was solicited, received, or generated as part of the process by which policy is formulated by the CIA"). The particular facts contained in OIG reports moreover "were identified, extracted, and highlighted out of other potentially relevant facts and background materials by the authors, in the exercise of their judgment" and thus are protected as well from disclosure. Lutz Decl. ¶ 45. In this case, the specific withholdings from the eleven OIG reports include "suggested solutions to identified issues involved in the detention and interrogation of detainees; evaluations and conclusions on the laws governing registration of detainees; findings and conclusions on the circumstances surrounding treatment of certain detainees; and recommendations on the scope of CIA counterterrorism

activities." Lutz Decl. ¶ 46.

The Deitz Memorandum, which was prepared for the Director of the CIA by then-Senior Councillor Robert Deitz, who "was asked to examine the primacy of legal interpretation between the OIG and the CIA's Office of General Counsel, and the quality of objectivity of OIG investigations," contains "recommendations on outstanding legal and policy issues, and preliminary findings, assessments and evaluations on policy and protocol related to the operations of the OIG;" all of which the CIA redacted pursuant to exemption (b)(5). Lutz Decl. ¶ 47. "Policy recommendations that were actually adopted have not been redacted" but were produced to Plaintiff by letter dated September 30, 2011. *See* Lutz Decl. ¶ 15 & Ex. C.

The disclosure of the information over which the CIA has asserted exemption (b)(5) "would threaten the confidence needed to ensure the candor of future deliberations" because the authors' "candid recommendations regarding sensitive national security issues" were offered with the expectation that they "would remain confidential." Lutz Decl. ¶ 49. Thus, their withholding pursuant to that exemption was proper and should be upheld.

### B. The CIA Properly Withheld Information Protected by the Attorney-Client Privilege.

The Deitz Memorandum, prepared by a CIA Senior Councillor at the direction of his client, the CIA Director, necessarily implicates the attorney-client privilege. *See* Lutz Decl. ¶ 15. It is well established that exemption (b)(5) protects attorney-client privileged material. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (citing *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir.1980)). Although an agency must establish that the attorney-client communication was confidential and not disclosed publicly, "confidentiality may be inferred when the communications suggest that 'the government is

## IV. THE COURT SHOULD UPHOLD THE CIA'S WITHHOLDINGS UNDER EXEMPTION (B)(7).

Certain information withheld by the CIA under exemptions (b)(1) and (b)(3) is additionally exempt under exemption (b)(7). Exemption (b)(7) protects six enumerated categories of "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). "Congress intended that 'law enforcement purpose' be broadly construed." *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982). Thus, the phrase encompasses, as here, records concerning national security-related government activities. *See Center for Nat'l Sec. Studies*, 331 F.3d at 926. "The ordinary understanding of law enforcement includes not just the investigation and prosecution of offenses that have already been committed, but also proactive steps designed to prevent criminal activity and to maintain security." *Milner v. Department of Navy*, 131 S. Ct. 1259, 1272 (2011). (Alito, J., concurring). Therefore, an agency like the CIA, which has a "clear law enforcement mandate" need only "establish that its investigating activities are realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached." *Pratt*, 673 F.2d at 421; *see also Church of Scientology of Cal. v. United States Dep't of Army*, 611 F.2d 738, 748 (9th Cir. 1979) ("An agency which has a clear law enforcement mandate, such as the FBI, need only establish a 'rational nexus' between enforcement of a federal law and the document for which an exemption is claimed."). Indeed, as an agency with such a mandate, the CIA is entitled to deference when, as here, it identifies material as having been compiled for law enforcement purposes under exemption (b)(7). *See Campbell v. United States Dep't of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998).

All of the OIG reports were created in connection with the CIA OIG's investigative and national-security functions and thus the withheld information satisfies the law-enforcement requirement for invocation of that exemption. *See* Lutz Decl. ¶ 11 (explaining that "[t]he OIG Reports contained in Document Nos. 1-11 were generated in the performance of the OIG's law enforcement functions"); *see also* Lutz Decl. ¶ 11 (explaining that the mission of the OIG "is to promote economy, efficiency, effectiveness, and accountability in the management of CIA activities by performing independent audits, inspections, investigations and reviews of CIA programs and operations"); Lutz Decl. ¶ 10 (describing the withheld reports as "fall[ing] into three categories: (1) Office of Inspector General (OIG) Reports on detention facilities and counterterrorism operations; (2) OIG Reports on the treatment of detainees; and (3) OIG Reports on interrogation techniques and detention methods"). Thus, the CIA's invocation of exemption (b)(7) should be upheld because this "law enforcement" information additionally falls within one or more of that exemption's enumerated categories. *See* Def. SOMF ¶¶ 5-8.

### A. The CIA Properly Withheld Information that Would Interfere With a Pending Law Enforcement Investigation If Disclosed.

The CIA withheld pursuant to exemption (b)(7)(A) two reports that "are the focus of a pending investigation being conducted by the Department of Justice." *See* Lutz Decl. ¶ 51; *see also* Lutz Decl. ¶ 11 (explaining that "[w]hen investigating alleged violations of law, the OIG works directly with the Department of Justice and other appropriate federal agencies"). That exemption authorizes the withholding of "records or information compiled for law enforcement purposes" "to the extent that" their production "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). For this exemption, the agency "need not justify its withholdings document-by-document; it may instead do so category-of-document by

category-of-document." *Kidder v. FBI*, 517 F. Supp. 2d 17, 28 (D.D.C. 2007); *see also Edmonds v. FBI*, 272 F. Supp. 2d 35, 54 (D.D.C. 2003) (same). "The categories relied upon, however, must be 'functional' – 'allowing the court to trace a rational link between the nature of the document and the alleged likely interference.'" *Id.*; *see also Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986) (same). Courts have held the interference requirement for invocation of exemption (b)(7)(A) satisfied by information that if disclosed would "reveal[] the nature and scope of the investigation[]," "stifle cooperation," and "impede the success of the investigation[]." *Edmonds*, 272 F. Supp. 2d at 55; *see also Kidder*, 517 F. Supp. 2d at 28. Clearly that requirement is satisfied here by reports whose subject-matters are the *focus* of a pending investigation. *See* Lutz Decl. ¶ 51. Their release "would reveal details that could interfere with and potentially jeopardize the [government]'s ability to obtain information needed to complete the investigation" or cause "irreversible damage to the pending investigations." Lutz Decl. ¶ 51. The CIA therefore properly invoked exemption (b)(7)(A) to protect those details in Document Nos. 7-8.

**B. The CIA Properly Invoked Exemptions (b)(7)(C) and (b)(7)(F) to Protect the Identities of CIA Investigators and Witnesses.**

The CIA appropriately withheld the names of OIG investigators and witnesses under exemption (b)(7)(C) which "authorizes the government to withhold 'records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" *Boyd v. Criminal Div. of Dep't of Justice*, 475 F.3d 381, 386 (D.C. Cir. 2007); 5 U.S.C. § 552(b)(7)(C). In evaluating the propriety of such withholdings, "the court must balance the privacy interests involved against the public interest in

disclosure." *Safecard Servs., Inc. v. Securities & Exch. Comm'n*, 926 F.2d 1197, 1205 (D.C. Cir. 1991). Courts, however, have construed this exemption as "afford[ing] broad[] privacy ixrC- to.

exemption (b)(7)(C) is clear.

Alternatively and independently, this same information properly was withheld under exemption (b)(7)(F) which protects from disclosure information compiled for law enforcement purposes where its release "could reasonably be expected to endanger the life or physical safety of any individual" – here the CIA investigators and witnesses identified in the withheld OIG reports. 5 U.S.C. § 552(b)(7)(F). Courts routinely have upheld the invocation of this exemption to protect the identities of law enforcement personnel. *See, e.g.*, *Blanton v. Department of Justice*, 182 F. Supp. 2d 81, 87 (D.D.C. 2002) (recognizing that the disclosure of FBI special agents could endanger their safety); *Watson v. Department of Justice*, 799 F. Supp. 193, 197 (D.D.C. 1992) (upholding invocation of exemption (b)(7)(F) to protect the names and identities of DEA special agents, supervisory special agents, and other law enforcement officers); *Moody v. DEA*, 592 F. Supp. 556, 558 (D.D.C. 1984) (upholding invocation of exemption (b)(7)(F) to protect DEA supervisory agents and other DEA special agents). Accordingly, the CIA's withholding of the identities of government investigators and witnesses is justified on this alternative ground. *See* Lutz Decl. ¶ 52 (explaining that disclosure of the "names of OIG investigators, as well as the names of CIA officers who were interviewed as part of the OIG investigations" "could endanger their physical safety and expose them to unnecessary harm"); Lutz Decl. ¶ 52 (explaining that "[p]ublic disclosure of the names of CIA officers creates a foreign intelligence threat as well, as it exposes these individuals' association with the CIA and their involvement with that particular subject matter").

### C. The CIA Properly Withheld Confidential Source Information Under Exemption (b)(7)(D).

The CIA additionally invoked exemption (b)(7)(D) to protect confidential source information contained in Document Nos. 1-8. *See* Lutz Decl. ¶ 53 ("Document Nos. 1, 2, 3, 4, 5, 6, 7, and 8 are OIG reports that contain confidential source information."); *see also* Lutz Decl. ¶ 36 (explaining that "[i]n Document Nos. 1, 4, 7, and 12 the CIA has withheld the names of certain detainees" and their disclosure "could be expected to damage the national security by disclosing the identities of intelligence sources and . . . the identities of foreign governments that assisted the CIA"). That invocation clearly was proper. Exemption (b)(7)(D) exempts from disclosure law enforcement records that "could reasonably be expected to disclose" (1) "the identity of a confidential source" and (2) "information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D); *see also Shaw v. FBI*, 749 F.2d 58, 62 (D.C. Cir. 1984). It has long been recognized that exemption (b)(7)(D) affords the most comprehensive protection of all of the FOIA's law-enforcement exemptions in recognition of the need to "ensure that . . . confidential sources are not lost because of retaliation against the sources for past disclosure or because of the sources' fear of future disclosure." *Brant Constr. Co. v. United States Envtl. Prot. Agency*, 778 F.2d 1258, 1262 (7th Cir. 1985); *Billington v. United States Dep't of Justice*, 301 F. Supp. 2d 15, 21 (D.D.C. 2004); *see also Ortiz v. United States Dep't of Health & Human Servs.*, 70 F.3d 729, 732 (2d Cir. 1995) ("Exemption 7(D) is meant to (1) protect confidential sources from retaliation that may result from the disclosure of their participation in law enforcement activities, and (2) encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." (citation and quotations omitted)); *Miller v. Department of Justice*, 562 F. Supp. 2d 82, 122 (D.D.C. 2008) ("Experience has shown the FBI

that its sources must be free to provide information without fear of reprisal and without the understandable tendency to hedge or withhold information out of fear that their names or their cooperation with the FBI will later be made public." (quotations omitted)). Unlike exemption (b)(7)(C), exemption (b)(7)(D) requires no balancing of private and public interests. *See Peltier v. FBI*, 563 F.3d 754, 766 (8th Cir. 2009); *Brant Const. Co.*, 778 F.2d at 1262. Rather, exemption (b)(7)(D) applies as long as the source has provided information pursuant to either an express or implied promise of confidentiality. *See Department of Justice v. Landano*, 508 U.S. 165, 179-80 (1993).

Thus, its invocation here clearly was proper. *See* Def. SOMF ¶ 8. The confidential sources whose information appears in Document Nos. 1-8 "relied" upon "mutual assurances of confidentiality" "in agreeing to cooperate with the CIA." Lutz Decl. ¶ 53. "The protection of CIA sources is critical to the collection of intelligence" because "[i]f the CIA proves to be unwilling or unable to protect the confidential nature of its intelligence relationships, sources will stop cooperating with the CIA to the detriment of the national security." Lutz Decl. ¶ 53. This Court therefore should uphold the CIA's withholding of such information pursuant to exemption (b)(7)(D).

## V. THE CIA SATISFIED FOIA'S SEGREGABILITY REQUIREMENT.

The CIA has complied with FOIA's segregability requirement by withholding from Plaintiff only statutorily exempt information. FOIA requires that "[a]ny reasonably segregable portion of a record [] be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b); *see also Mead Data Cent., Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) ("It has long been a rule in this Circuit

that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions."). In determining whether an agency has complied with that requirement, the Court again "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated." *Juarez v. Department of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008); *see, e g., Gutman*, 238 F. Supp. 2d at 296 (concluding that segregability requirement met based on Vaughn Index and declarations); *Ferranti*, 177 F. Supp. 2d at 47 (concluding that segregability requirement met based in part on "good faith declaration that only such properly withheld information was redacted"). Indeed, "[a]gencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. United States Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). That presumption is warranted on the facts here.

As explained in the Lutz Declaration, the CIA "conducted a line-by-line review of Document Nos. 1-12 to identify all reasonably segregable, non-exempt portions of those documents." Lutz Decl. ¶ 54. IRO Lutz determined that the Deitz Memorandum "could be released in segregable form, with the remaining information exempt from disclosure under FOIA exemptions (b)(1), (b)(3) and (b)(5)." Lutz Decl. ¶ 54. Three "partially redacted, non-identical versions" of this document were provided to Plaintiff. *See* Lutz Decl. ¶ 8 & Ex. D. As to the remaining eleven reports, and notwithstanding Plaintiff's concession that certain categories of information could be withheld, (*see* Lutz Decl. ¶ 9), 425 0 TDJentang eful

"would reveal intelligence sources, methods and foreign government information . . . which would result in serious or exceptionally grave damage to the national security." Lutz Decl. ¶ 54. To these extent those documents contain "relatively innocuous words or sentences," they are "so inextricably intertwined with the classified information" that their release would "produce only meaningless, incomplete, fragmented, unintelligible words or sentences." Lutz Decl. ¶ 54. Since FOIA clearly does not require the production of such information, the CIA has met its burden of demonstrating compliance with FOIA's segregability requirement. *See Mead Data Central*, 566 F.2d at 261 n.55 (noting that "a court may decline to order an agency to commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content").

**CONCLUSION**

For the foregoing reasons, the CIA respectfully requests that the Court grant this motion and enter judgment in its favor.

Dated: January 10, 2012

Respectfully submitted,

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**Counsel for the Central Intelligence Agency**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| AMERICAN CIVIL LIBERTIES UNION<br>125 Broad Street<br>New York, NY 10004<br><br>AMERICAN CIVIL LIBERTIES UNION FOUNDATION<br>125 Broad Street<br>New York, NY 10004<br><br>Plaintiffs,<br><br>v.<br><br>CENTRAL INTELLIGENCE AGENCY,<br>Washington, DC 20505<br><br>Defendant. | ) | Case No. 1:11-cv-933-ABJ |

**PROPOSED ORDER**

Upon consideration of Defendant's Motion for Summary Judgment, the opposition thereto, and the complete record in this case, it is hereby

ORDERED that Defendant's Motion is GRANTED. Judgment is hereby entered in favor of the Central Intelligence Agency.

SO ORDERED.

Date: _____

United States District Court Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on January 10, 2012, a true and correct copy of the foregoing Defendant's Motion for Summary Judgment was electronically filed through the U.S. District Court for the District of Columbia Electronic Document Filing System (ECF) and that the document is available for viewing on that system.

s/ Jacqueline Coleman Snead
JACQUELINE COLEMAN SNEAD