IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE JAMES MADISON PROJECT	*	
Plaintiff,	*	
v.	*	Civil Action No. 07-01382 (RMU)
CENTRAL INTELLIGENCE AGENCY	*	
Defendant.	*	

OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff The James Madison Project ("JMP")[1] commenced this litigation pursuant to the Freedom of Information Act ("FOIA") to obtain copies of guidelines, regulations or policy memoranda pertaining to the operation of defendant Central Intelligence Agency's ("CIA") Publications Review Board ("PRB").

In the wake of the Supreme Court's ruling in Snepp v. United States, 444 U.S. 507 (1980), the CIA was faced with the task of creating a formalized process for reviewing manuscripts and other literary works created by current and former CIA employees – as well as contractors – that are intended for public dissemination. What emerged was the PRB, an internal administrative component charged with the responsibility of reviewing the written documents to ensure that classified information is not inadvertently disclosed while also seeking to avoid infringing upon the First Amendment rights of the writer.

[1] JMP (*www.jamesmadisonproject.org*) is a Washington, D.C.-based non-profit organization that was created in 1998, for the primary purpose of educating the public on issues relating to intelligence gathering and operations, secrecy policies, national security and government wrongdoing. Much of the work undertaken by JMP involves litigation under FOIA. The principles underlying the objectives of the JMP are derived from the 1997 findings of The Commission on Protecting and Reducing Government Secrecy, which are more fully discussed below.

Paradoxically, much of the inner workings of this division have remained largely shrouded from public view. It is with that in mind, and armed with the desire to provide a clear and concise understanding to CIA employees and contractors – past, present and future – of the mechanism with which they have to comply, that JMP has brought this litigation before this Court.

The CIA argues that it has conducted a reasonable search for responsive records and disclosed, either in their entirety or with redactions, all responsive records concerning which it determined disclosure would not harm national security. Furthermore, it has invoked Exemptions One, Two, Three and Five to justify both the redactions made and the records that were withheld in their entirety. From the CIA's perspective, it has done all that is necessary to comply with its obligations under FOIA and moves this Court to grant it summary judgment.

The CIA's assertions notwithstanding, the current record is insufficient to determine if its search for responsive records was adequate or if its invocation of FOIA exemptions was proper. Therefore, this Court should not grant summary judgment for the CIA but, in the alternative, permit discovery to commence.

INTRODUCTION

The circumstances presented in this litigation cry out for recognition by this Court that, metaphorically, the Emperor has no clothes. "National Security" is an important concept within which is embodied the principle that our nation must be protected from those who would do it and its citizens proscribed harms. The concept should not, and cannot be allowed to be turned into a catch-phrase which excuses any and all forms of illegitimate secrecy in the face of both law and common sense.

The Excessiveness Of Secrecy

The late Senator Daniel Patrick Moynihan, long regarded as a leading scholar on issues of secrecy, served as the distinguished chair of The Commission on Protecting and Reducing Government Secrecy. The Commission's 1997 Report is widely regarded as the most important analysis of U.S. Government classification and secrecy trends published in the last four decades, and it was clear in its condemnation of secrecy for secrecy's sake. The Commission warned of the specific dangers to democracy presented by illegitimate classification:

> Excessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate. This remains a dangerous world; some secrecy is vital to save lives, bring miscreants to justice, protect national security, and engage in effective diplomacy. Yet as Justice Potter Stewart noted in his opinion in the Pentagon Papers case, *when everything is secret, nothing is secret*. Even as billions of dollars are spent each year on government secrecy, the classification and personnel security systems have not always succeeded at their core task of protecting those secrets most critical to the national security. The classification system, for example, is used too often to deny the public an understanding of the policymaking process, rather than for the necessary protection of intelligence activities and other highly sensitive matters.

Report of The Commission on Protection on Protecting and Reducing Government Secrecy xxi (GPO, 1997)("*Commission Report*")(emphasis added).

The Commission concluded that "[t]he best way to ensure that secrecy is respected, and that the most important secrets remain secret, is for secrecy to be returned to its limited but necessary role. Secrets can be protected more effectively if secrecy is reduced overall." Id. The Commission enumerated the advantages of an American democratic system that permits the withholding of information only if its publication would truly cause harm to the nation.

> Greater openness permits more public understanding of the Government's actions and also makes it more possible for the Government to respond to criticism and justify those actions. It makes free exchange of scientific information possible and encourages discoveries that foster economic growth. In addition, by allowing for a fuller understanding of the past, it provides opportunities to learn lessons from what has gone before—making it easier to resolve issues concerning the Government's past actions and helping prepare for the future.

Id. The current Executive Order 12,958 (April 17, 1995), 3 C.F.R. 333 (1996), that governs the classification of information equally supports this premise. "Protecting information critical to our Nation's security remains a priority. In recent years, however, dramatic changes have altered, although not eliminated, the national security threats that we confront. These changes provide a greater opportunity to emphasize our commitment to open Government." Id.

Despite these aphorisms, over the years federal agencies such as the CIA have consistently ignored the warnings against overclassification voiced by Justice Stewart and others, at times taking secrecy into the realm of tragic comedy. By way of illustration, some of the more humorous examples of unwarranted excessive secrecy exercised by the past several Administrations have included:

- The U.S. Army classifying a study on archery under the heading "silent, flashless weapons." David Wise THE POLITICS OF LYING 67 (Random House, 1973)("*Politics of Lying*").

- The U.S. Navy classifying a report on sharks that was derived entirely from publicly available sources, purportedly to keep the documents from falling into the possession of the Soviet Navy, but more likely to keep the information from discouraging recruitment. Id. at 67-68.

- The Joint Chiefs' classifying as "TOP SECRET" a report which criticized the gross abuses of secrecy classification at all levels in the military. SANFORD J. UNGAR, THE PAPERS & THE PAPERS 219 (Columbia Univ. Press/Morning side ed., 1989).

- The Pentagon adamantly refusing to publish information that acknowledged that NASA had sent monkeys into space, despite the fact that the Washington Zoo had

already identified its monkeys with a plaque praising their participation in rocket experiments in the U.S. space program. The *Washington Post* reported that the Pentagon explained it was trying to preserve the U.S. relationship with India, where certain obscure sects still practiced "monkey worship." *Politics of Lying*, at 67-68.

- The classifying of White House menus as "Top Secret." Id. at 70.

- Weather reports produced by an aid to General Eisenhower during World War Two still being classified even thirty years after the fact. *Commission Report*, at 52.

- Journalist and former hostage Terry Anderson being denied access to files on his capture and release. After months of waiting for a response to his requests, he did finally receive copies of his own press clips which had been kept in classified government files. Id.

PROCEDURAL BACKGROUND

The factual and procedural background concerning JMP's FOIA request at issue in this litigation is set out in detail in the CIA's Memorandum in Support of Motion for Summary Judgment (filed May 30, 2008)("CIA's Memo"), the CIA's Declaration of Martha M. Lutz (dated May 30, 2008)("Lutz Declaration"), the CIA's Declaration of Joseph W. Lambert (dated May 27, 2008)("Lambert Declaration") and JMP's Rule 56(f) Declaration of Mark S. Zaid, Esq. ("Zaid Rule 56(f) Decl."), all of which are incorporated herein by reference.[2] The scope of JMP's request was limited to regulations and policy memoranda establishing the procedures and standards by which the PRB – which has no relation to conducting covert operations or evaluating highly-sensitive "raw" intelligence data – operates and complies with its obligations.

[2] The factual statements made in the CIA's Memo and the Lutz Declaration are incorporated only in relation to pages 2 through 5 and paragraphs 11 through 18, respectively, and only to the extent that they do not constitute legal characterizations and conclusions.

ARGUMENT

The CIA has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Summary judgment should be granted only if the moving party has shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Waterhouse v. Dist. of Columbia, 298 F.3d 989, 991 (D.C. Cir. 2002). In determining whether a genuine issue of material fact exists, the Court must view all facts in the light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The nonmoving party's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); see Celotex Corp., 477 U.S. at 324.

In a FOIA case, the Court exercises *de novo* review and summary judgment is only available to a defendant agency that has fully discharged its obligations under FOIA. See Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007). See also Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1350 (D.C. Cir. 1983).

I. THE CIA FAILED TO CONDUCT AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS AND GENUINE ISSUES OF MATERIAL FACT REMAIN PRECLUDING SUMMARY JUDGMENT AT THIS TIME

A. The CIA Is Unable At This Time To Demonstrate It Conducted An Adequate Search For Responsive Records

There is no dispute regarding the overarching case law pertaining to the adequacy of an agency's search for purposes of summary judgment. The burden rests upon the defendant agency to "show beyond a material doubt that it has conducted a search

reasonably calculated to uncover all relevant documents." Weisberg, 705 F.2d at 1351. See also Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 27 (D.C. Cir. 1988) ("reasonableness" standard is applied to determine the adequacy of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure). Put more succinctly, the CIA "must show that it has made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990).

It is also undisputed that a court may rely upon agency affidavits in adjudicating the adequacy of the search, Founding Church of Scientology v. Nat'l Sec. Agency, 610 F.2d 824, 836 (D.C. Cir. 1979), so long as those affidavits are detailed, nonconclusory and submitted in good faith. Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978); Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982)(*per curiam*)(highlighting that affidavits must shed sufficient light on "scope and method of the search conducted by the agency"). "Even if these conditions are met the requestor may nonetheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." Founding Church of Scientology, 610 F.2d at 836. See also Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004)("Likewise, the agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records.").

Therefore, the central issue here is whether the specific circumstances of the case at bar reveal "positive indications of overlooked materials", Founding Church of

Scientology, 610 F.2d at 837, which would have been found if the CIA had conducted a "diligent search for those documents in places in which they *might be expected to be found*." Miller v. U.S. Dep't of State, 779 F.2d 1378, 1385 (8th Cir. 1985)(emphasis added), cited with approval in Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003).

Relying upon the Lutz Declaration, the CIA asserts that since it: (1) searched for responsive records in seven different components; (2) used seven different search terms in conducting the search; and (3) revised its search in light of clarifying information provided by JMP, there does not remain any substantial doubt as to the reasonableness of the CIA's search and therefore no genuine issue of material fact exists. CIA's Memo at 8-11. The CIA's assertion to the contrary, the Lutz Declaration does not demonstrate conclusively that the CIA conducted a diligent search.

Mr. Zaid's letter dated January 17, 2008, articulates the search issues that were identified by JMP. Id. at Lutz Decl., Exhibit "E". Ms. Lutz attempted to respond to the specific concerns that JMP raised in her declaration. Lutz Decl. at ¶¶30-40. A review of those responses, however, demonstrates the deficiencies that continue to exist regarding the CIA's adequacy of search and require denial of its Motion without prejudice at this time. For one thing, quite a number of the records that JMP identified as responsive were not located.[3] While it is true that the inability of an agency to find a particular document does not *generally* render a search inadequate, see e.g., Nation Magazine, Washington

[3] The concerns raised by JMP were not "purely speculative" about the existence of other documents. Ground Saucer Watch v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981). As is evidenced in JMP's letter, the identification of "missing" was based on the personal knowledge of Mr. Zaid, as well as the review of released CIA records. Zaid Rule 56(f) Decl. at ¶¶1,11, attached as Exhibit "1".

Bureau v. U.S. Customs Serv., 71 F.3d 885, 892, n.7 (D.C. Cir. 1995)(emphasis added), *in certain circumstances*, a court may place significant weight on the fact that a records search failed to turn up a particular document. See Krikorian v. Dep't of State, 984 F.2d 461, 468 (D.C. Cir. 1993)(emphasis added)(factoring documents not found by agency into court's evaluation of adequacy of search).

Most importantly, the CIA concedes that in pursuing its search of those records identified by JMP as responsive it restricted its follow-up solely to the PRB only. Lutz Decl. at ¶31. At a minimum the CIA should have also tasked the other six components that were originally identified as likely to maintain possession of responsive records. Id. at ¶28; Zaid Rule 56(f) Decl. at ¶18, attached as Exhibit "1. Additionally, there is no evidence that the CIA sought input from two former PRB Chairmen in order to obtain assistance in locating the relevant responsive records notwithstanding the fact Mr. Zaid noted in his letter that these individuals remain employed by or affiliated with the CIA. Id. at Exhibit "E"; Zaid Rule 56(f) Decl. at ¶18, attached as Exhibit "1.

Moreover, while the majority of Mr. Zaid's letter pertains to the existence of specific identified records, concerns were also raised regarding a category of records pertaining to former CIA officers Frank Snepp and Michael Scheuer, both of whom were involved in prepublication review matters that led to significant changes within the CIA PRB system. The Snepp litigation, which arose from the publication of his book *Decent Interval* (Random House, 1977), lies at the heart of the CIA's current framework for the PRB. Mr. Scheuer's publication *Imperial Hubris* (Potomac Books Inc. 2004) was the subject of significant controversy within the CIA and also led to specific changes within the PRB's processing of submitted employee writings. Zaid Rule 56(f) Decl. at ¶19 attached as

Exhibit "1". Yet not one document has been released pertaining to these matters. Nor has the CIA addressed either issue within its declarations or Vaughn index.

While JMP will concede that - after discovery has concluded - the CIA may in fact be entitled as a matter of law to summary judgment regarding the adequacy of its search, the current record – consisting of the Lutz Declaration and the Vaughn Index – is insufficient as a matter of fact to justify awarding summary judgment to the CIA at this time.

B. The CIA's Lutz Declaration and Vaughn Index Are Insufficient For Purposes of Summary Judgment On The Adequacy Of Search At This Time

Agency affidavits must "explain in reasonable detail the scope and method of the search conducted by the agency [sufficient] to demonstrate compliance with the obligations imposed by the FOIA." Morley v. CIA, 508 F.3d 1108, 1121 (D.C. Cir. 2007), quoting Perry, 684 F.2d at 127. An affidavit that lacks the detail "necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment" will be deemed insufficient. See Morley, 508 F.3d at 1122 (rejecting as insufficient a CIA affidavit that failed to identify search terms, explain how the search was conducted in each component, or give an indication of what each component's search specifically yielded).

Admittedly, the Lutz Declaration does provide a modest degree of context regarding the search methodology used and offices searched. Lutz Decl. at ¶¶28-29. It also does describe the search methodology used in its efforts to follow up on JMP's clarifying suggestions, including – to a degree – the results of the searches. Id. at ¶¶30-39. JMP's specific concerns regarding the CIA's inadequate search have been addressed above. The CIA's Vaughn Index, for its part, fails to remedy the deficiencies of the Lutz Declaration.

See CIA's Memo, Exhibit "A" ("Ex. A"). On their face, the Lutz Declaration and the Vaughn Index are insufficient to satisfy the CIA's burden on summary judgment, as they singularly fail to demonstrate, as discussed above, that the CIA conducted a diligent search that was both reasonable and adequate.

The insufficiency of the CIA's affidavits deprives this Court of an adequate context in which to assess the reasonableness of the CIA's search and therefore justifies the denial of the CIA's Motion for Summary Judgment ("CIA's Motion") pending the completion of discovery or additional searches and agency review.

II. THE CIA'S AFFIDAVITS ARE INSUFFICIENT FOR PURPOSES OF SUMMARY JUDGMENT TO SUPPORT THE INVOCATION OF EXEMPTIONS ONE, TWO, THREE, OR FIVE

"The significance of agency affidavits in a FOIA case cannot be underestimated." King v. Dep't of Justice, 830 F.2d 210, 218 (D.C. Cir. 1987). The rationale behind this well-established axiom is clear and apparent given that in FOIA cases "the agency alone possesses knowledge of the precise content of documents withheld", thereby forcing both the FOIA requester and the court to "rely upon the agency's representations for an understanding of the material sought to be protected." Id. In order to withhold information an agency must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." Id. at 219. See also Church of Scientology, Inc. v. Turner, 662 F.2d 784, 787 (D.C. Cir. 1980)("We have consistently maintained that vague, conclusory affidavits, or those that merely paraphrase the words of a statute, do not allow a reviewing judge to safeguard the

public's right of access to government records."). Most importantly, specificity is the defining requirement of the agency's affidavits. See Gardels, 689 F.2d at 1105.

The burden of demonstrating that the material in question was properly withheld commonly requires the preparation of a detailed Vaughn Index, which must "show specifically and clearly that the requested materials fall into the category of documents" that Congress has exempted. Hayden v. NSA, 608 F.2d 1381, 1390 (D.C. Cir. 1979). See also PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 250 (D.C. Cir. 1993)("[A]n affidavit that contains merely a 'categorical description of redacted material coupled with a categorical indication of anticipated consequences of disclosure is clearly inadequate.'"); King, 830 F.2d at 225 ("The measure of a Vaughn Index is its descriptive accuracy, and we are willing to accept innovations in its form so long, but only so long, as they contribute to that end.").[4] Of course, the determination in the agency affidavits that the materials are exempt and that no further segregation of materials is possible must be accorded "substantial weight". See Fitzgibbon, 911 F.2d at 761-62.

The CIA has invoked Exemptions One, Two, Three and Five of the FOIA as the bases for withholding and/or redacting the responsive records.[5] CIA's Memo at 11-31. In

[4] The requirement regarding segregability obligates agencies to divulge all portions of documents that are not specifically exempted from disclosure by statute. See Kimberlin v. DOJ, 139 F.3d 944, 950 (D.C. Cir. 1998). See also Irons v. Gottschalk, 548 F.2d 992 (D.C. Cir. 1976), cert. denied sub nom. Irons v. Parker, 434 U.S. 965 (1977).

[5] Exemption One exempts from disclosure national security information that has been "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552 (a)(b)(1). Exemption Two exempts from disclosure records that relate "solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(a)(b)(2). Exemption Three exempts from disclosure information that is "specifically exempt from disclosure by statute ... in such a manner as to leave no discretion on the issue, or ... establishes particular criteria for

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order to justify its withholdings, CIA submitted the Lambert Declaration, Lutz Declaration and the Vaughn Index. None of these affidavits - on their own or in combination with the others - satisfies the burden of specificity, as none provide sufficient information to enable this Court to "make a rational decision whether the withheld material must be produced without actually viewing the documents themselves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal." Dellums v. Powell, 642 F.2d 1351, 1360 (D.C. Cir. 1980). Therefore, the CIA's Motion must be denied and discovery permitted to assess the appropriateness of the invocation of the exemptions.

A. Exemption One

1. Legal Sufficiency of the Affidavits

As with any other exemption, the CIA bears the burden of justifying the invocation of Exemption One. See Campbell, 164 F.3d at 30. See also Coldiron v. Dep't of Justice, 310 F. Supp. 2d 44, 50 (D.D.C. 2004)(permitting challenges to agency affidavits as "insufficient for lack of detail/specificity"). The initial threshold issue is whether the agency has demonstrated a logical connection between the "documents at issue and the general standards that govern the national security exemption." Id. at 53, citing Campbell, 164 F.3d at 30. An agency can not simply engage in "cut and paste", but instead must provide – to the extent that it does not frustrate national security concerns – sufficient detail to demonstrate a "facially reasonable concern". Coldiron, 310 F. Supp. 2d at 54.

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withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(a)(b)(3). Exemption Five exempts from disclosure information consisting of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency". 5 U.S.C. § 552(a)(b)(5).

See also Campbell, 164 F.3d at 31 (finding that while it is true that "requiring too much detail in a declaration could defeat the point of the exemption, in most cases the agency should not have difficulty describing the context and nature of the withheld information without revealing its substance"). Of course, agency declarations invoking national security must be afforded "substantial weight", as the courts have stated repeatedly that they will not second-guess an agency's "facially reasonable concerns" regarding the harm disclosure may cause to national security. See Frugone v. CIA, 169 F.3d 772, 775 (D.C. Cir. 1999).

The CIA has failed to meet this burden in terms of the one document regarding which Exemption One was invoked. As expected, the CIA has raised the specter of "national security" and asserted that Document Number 1512157 – a legal memorandum from the PRB Associate Legal Advisor to the PRB – must be withheld in its entirety due to, at least in part, the existence of properly classified information within the document. See CIA's Memo at 11. See also Lutz Decl. at ¶58 ("This document contains SECRET information regarding the CIA's intelligence activities, sources, and methods."). The CIA argues that disclosure of the information would "jeopardize the CIA's liaison relationships and U.S. foreign policy by revealing CIA activities in certain foreign countries". CIA's Memo at 17.

However, an agency can not meet its burden simply by invoking the phrase "national security". Coldiron, 310 F. Supp. 2d at 53. Through its affidavits, an agency must describe with reasonable specificity the material withheld and demonstrate that it has specifically tailored its description of the harm likely to result from release to each particular redaction. See King, 830 F.2d at 223-24. The Lutz Declaration and the Vaughn

Index provide virtually identical descriptions of the allegedly-exempt information, namely that it details the "PRB's decision to prohibit publication of details surrounding specific CIA clandestine activities". Lutz Decl. at ¶58; Ex. "A" at 4. Both affidavits also state that the document "identifies specific CIA classified sources and methods and discusses how the PRB might handle a request to disclose this information". Id.

These descriptions fail to provide this Court with sufficiently specific context with which to evaluate the appropriateness of the CIA's invocation of Exemption One. Most predominantly, neither affidavit clarifies whether the document: (1) actually identifies "specific CIA clandestine activities", as opposed to simply addressing the legal conclusions regarding disclosure of details pertaining to clandestine activities in general; (2) includes information concerning "specific CIA classified sources" by way of identifying actual sources or types of information, as opposed to simply addressing them generically; or (3) includes information concerning "specific CIA classified … methods" by way of identifying actual mechanisms for gathering intelligence information, as opposed to simply addressing the procedures by which information pertaining to such mechanisms is identified as publicly releasable.

None of the CIA's legal pleadings sufficiently address the issue of "specific CIA clandestine activities". The CIA's Memorandum itself only references clandestine activities when it states that the document contains information that includes "general information regarding CIA clandestine activities". See CIA's Memo at 17. The Lutz Declaration only states that disclosure would provide "insights into CIA's past activities and clandestine operations", Lutz Decl. at ¶58, but does not explain whether those "insights" include specific identification of actual activities or operations, much less how

such insights would be gained from disclosure of a legal memorandum. It remains sufficiently unclear to what extent any actual clandestine activities - past or present - are specifically identified, let alone why such specific identification would exist in this particular document.

The affidavits also fail to provide any real context concerning the extent to which the document identifies "specific CIA classified sources". The Lutz Declaration defines "intelligence sources" as consisting of an actual "source" of information – such as a human asset – or the "kind of information or type of operational assistance the source is supplying". Id. at ¶52. However, neither the Lutz Declaration, Vaughn Index or even the CIA's Memorandum explain how – or why – a legal memorandum addressing conclusions regarding disclosure of information would specifically identify actual intelligence sources. Instead, the CIA relies upon boilerplate explanations regarding the nature of "intelligence sources" and the threat that disclosure can pose to such "sources". See CIA's Memo at 15-16, citing Lutz Decl. at ¶¶52-54.[6] No specific context is provided

[6] The ongoing problem of agencies relying upon boilerplate, repetitive explanations regarding Exemption One invocations has previously been addressed. In Coldiron, Judge Kennedy was quite clear in stating that "the court is not to be a wet blanket" and that its review should not be vacuous. Id., 310 F. Supp. 2d at 53. See also Id. at 52-54 (upholding the sufficiency of the FBI's affidavits only after concluding that the FBI indicated that disclosure of particular passages would make available the very criteria used by the FBI to decide what actions warranted an investigation and that disclosure would reveal the cooperation of foreign governments); Schrecker v. Dep't of Justice, 254 F.3d 162, 166 (D.C. Cir. 2001)(relating to documents identifying confidential sources, disclosure "should be expected to reveal the identity of a confidential human source or reveal the identify of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States by harming the FBI's ability to continuously recruit sources for current and future use"); Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980)(regarding the names of CIA attorneys, disclosure would "tend to reveal details of [intelligence] activities and that representatives of hostile, foreign intelligence services working in this country who, by a

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detailing how any actual specific "sources" are identified or how disclosure would provide foreign intelligence services with confirmation of the CIA's use of a specific "source".

Lastly, the affidavits fail to sufficiently demonstrate that the document identifies "specific CIA classified … methods", the disclosure of which could reasonably be expected to cause serious damage to the national security. To be sure, the CIA is attempting to persuade this Court that the definition of an "intelligence method" is broad enough to encompass "the means by which the CIA decides what information it can release to the public". See Id. at ¶56. From the perspective of the CIA, disclosure of that particular procedure(s) "would allow foreign intelligence services to manipulate and circumvent the rules, practices, and procedures the CIA uses when deciding whether it can release classified or sensitive information to the public without jeopardizing U.S. security". Id.

Needless to say, this position is wholly without merit. The CIA, like every other federal agency, is bound by Executive Order 13292, "Classified National Security Information" ("EO 13292"). In order to implement the directives of EO 13292 pertaining to declassification and comply with its obligations under the FOIA, the CIA has implemented – and made available to the public – internal regulations that detail the procedures and criteria by which information can identified and released pursuant to a FOIA request. See 32 C.F.R. §1900 et seq. The argument that the CIA's procedures for

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variety of techniques, can undertake courses of action to ascertain what other contacts, what other locations, and then arrive at determinations whether [the CIA's attorneys are] doing any other function for the Central Intelligence Agency")(internal quotations omitted).

declassifying and disclosing information under FOIA is somehow less sensitive than the PRB's procedures for declassifying and disclosing information quite honestly defies logic and credulity. More importantly, such procedures no more constitute an "intelligence method" than do the CIA's FOIA procedures.

2. Court's Ability to Evaluate Classification Decisions

This Court's ability to question the CIA's decision to withhold the documents under Exemptions One does not rise or fall based on the determination of the legal sufficiency of the affidavits. Following EPA v. Mink, 410 U.S. 73 (1973), Congress amended the FOIA to clarify its intent that "courts act as an independent check on challenged classification decisions." Goldberg, 818 F.2d 71, 76 (D.C. Cir. 1987). Courts are not to relinquish "their independent responsibility." Id. at 77. Nor should courts "give an agency carte blanche to redact or otherwise withhold responsive information without a valid and thorough affidavit ...." Lawyers Committee for Human Rights et al v. INS, 721 F.Supp. 552, 561 (S.D.N.Y. 1989).

Indeed, the D.C. Circuit Court of Appeals has unquestionable upheld the judiciary's ability to question an agency's Exemption One determination. In commenting on the Congressional override of resident Ford's veto of the 1974 FOIA legislation, the Court of Appeals opined that "this vote of confidence in the competence of the judiciary affirms our own belief that judges do, in fact, have the capabilities needed to consider and weigh data pertaining to the foreign affairs and national defense of this nation." Washington Post Co. v. U.S. Department of State, 840 F.2d 26, 35 (D.C. Cir. 1988), citing Zweibon v. Mitchell, 516 F.2d 594, 642-643 (1975)(en banc), cert. denied, 425 U.S. 944 (1976). Indeed, "the District Court must do more to assure itself of the factual basis and bona

fides of the agency's claim of exemption than rely solely upon an affidavit." Stephenson v. IRS, 629 F.2d 1140, 1145 (5th Cir. 1980)(footnote omitted).

Given, at a minimum, the insufficiency of the CIA's affidavits, summary judgment is not appropriate at this time and should be denied.

B. Exemption Three

Exemption Three permits withholding information that is exempted from disclosure by another statute. CIA's Memo at 18, citing 5 U.S.C. § 552(b)(3). JMP does not dispute that the National Security Act ("NSA Act"), as amended, and the CIA Act, as amended, qualify as withholding statutes under Exemption Three. See CIA's Memo at 19. See also 50 U.S.C. § 403-1(i)(1) (protect intelligence sources and methods from unauthorized disclosure); 50 U.S.C. § 403g (withhold intelligence sources and methods, as well as employees' personal identifiers and "internal organizational data"). The threshold issue, as the CIA itself admits, is whether the CIA's affidavits have sufficiently demonstrated that the "material withheld falls within the exemption claimed - i.e., whether it relates to intelligence sources and methods." Id at 18-19.

As an initial matter, the CIA continues to misconstrue the breadth of discretion that the courts have afforded to agencies invoking the NSA Act and the CIA Act. The CIA asserts that neither statute "requires the CIA to identify or describe the damage to national security that reasonably could be expected to result from unauthorized disclosure." CIA's Memo at 21, citing Hayden, 608 F.2d at 1390. To be sure, the D.C. Circuit in Hayden did state that "[a] specific showing of potential harm to national security, while necessary for Exemption 1, is irrelevant to the language of [the National

Security Act]".[7] Id. However, the Court did not go so far as to permit agencies to submit boilerplate, conclusory affidavits justifying the invocation of Exemption Three. See Hayden, 608 F.2d at 1390-91 (highlighting the Founding Church of Scientology ruling, in which the D.C. Circuit rejected an NSA affidavit as conclusory due to lack of specifics pertaining to the material other than "lawful signals intelligence activities" and to disclosure in that it would "reveal certain functions and activities of the NSA"). In contrast, the Circuit in Hayden upheld the sufficiency of an NSA affidavit that described the intelligence activity involved – NSA monitoring of foreign electromagnetic signals – and showed why disclosure of requested materials would reveal the nature of the activity. Id. at 1391.

None of the CIA's affidavits – either on their own or in combination with the others - satisfy the burden established in Hayden. The Lutz Declaration, for its part, first reiterates its rather expansive interpretation of the scope of the terms "intelligence sources" and "intelligence methods". See Lutz Decl. at ¶58 ("[D]efinition of 'intelligence sources' is much broader than a source's identity … '[I]ntelligence methods' also include the special practices and procedures of an intelligence agency. The National Security Act exempts the information at issue in this case because disclosure of this information could reveal the CIA's intelligence sources and/or methods."). See also Id. at ¶¶78, 80 (stating that the CIA Act exempts disclosure of intelligence sources", "intelligence methods" and employees' names and personal identifiers – among other internal data – since disclosure would reveal "CIA sources, methods, organization, functions, employee names, and

[7] It goes without saying that this apparent concession by the CIA that a showing of specific harm to national security is required for Exemption One invocations only strengthens the arguments JMP espoused earlier regarding the insufficiency of the CIA's affidavits in relation to the CIA's invocation of Exemption One.

official titles"). It also identifies thirteen different types of "internal data" that it argues constitute "sources" or "methods" that fall within the scope of the two withholding statutes. See Id. at ¶80. Subsequently, both the Lutz Declaration and the Lambert Declaration attempt to address the Exemption Three redactions made in seven (7) of the twenty-seven (27) "redacted-in-part" documents. Id. at ¶¶81-83; Lambert Decl. at ¶¶10-12. Neither of the two affidavits, however, addresses the three (3) "denied-in-full" documents, all of which contain Exemption Three redactions. Ex. "A" at 2-4.

At a minimum, the CIA's identification of "internal CIA regulation numbers" as falling within the scope of permissible withholdings by way of the NSA Act or CIA Act is without merit. The CIA has previously disclosed in prior, unrelated litigation before this Court a host of its internal regulation numbers, including for regulations pertaining to classified information. See e.g., Agency Regulation ("AR") 10-1, "Security Clearances, Accesses and Approvals", attached as Exhibit "2"; AR 10-16, "Appeal of Personnel Security Decisions", attached as Exhibit "3"; AR 70-5, "Declassification and Release", attached as Exhibit "4". There is nothing in any of the CIA's affidavits that adequately demonstrates how internal regulation numbers fall within the scope of either statute.

While the threat to national security by way of the "mosaic theory" arguably deserves consideration and the CIA's affidavits are afforded substantial weight, neither factor relieves the CIA of its obligation to provide sufficiently-detailed affidavits. The CIA's affidavits fail to meet the burden of demonstrating specifically how particular information falls within the scope of either withholding statute and therefore are insufficient for purposes of summary judgment.

C. Exemption Two

Both parties agree that Exemption Two can be invoked to protect from disclosure matters "related solely to the internal personnel rules and practices of an agency". 5 U.S.C. § 552(b)(2). A two-step test determines the applicability of the exemption: "First, the material withheld should fall within the terms of the statutory language. . . . Second, [i]f so, the agency may defeat disclosure by proving that either disclosure may risk circumvention of agency regulation, . . . or the material relates to trivial administrative matters of no genuine public interest." Morley, 508 F.3d at 1124 (internal quotations omitted).[8] There are two types of information that can be protected from disclosure, namely "high 2" information which – if released – would "risk circumvention of the law" or "low 2" information which pertains solely to "internal matters of a relatively trivial nature". CIA's Memo at 23, quoting Wiesenfelder v. Riley, 959 F. Supp. 532, 535 (D.D.C. 1997).

What is disputed is whether the CIA has met its burden – by way of its affidavits – of demonstrating that the information exempted satisfies the two-step test. After all, the exemption "does not shield information on the sole basis that it is designed for internal agency use." Fitzgibbon v. U.S. Secret Serv., 747 F. Supp. 51, 56 (D.D.C. 1990). "[A] reasonably low threshold should be maintained for determining when withheld

[8] In Schwaner v. Dep't of Air Force, the D.C. Circuit sought to resolve the ongoing confusion regarding the scope of information that constitutes "internal personnel rules and practices of an agency". Id. 898 F.2d 793 (D.C. Cir. 1990). The Circuit established a "predominant internality" test, and concluded that information need not actually be "rules and practice" to qualify so long as the matter "related" to rules and practices. Id. at 795. Addressing the conflicting analyses in the FOIA House and Senate Reports, the Circuit held that Exemption Two would protect "trivial rules and practices" – such as "matters of internal management" – and "nontrivial ones" – such as operating rules and procedures for investigators – whose disclosure would circumvent agency regulation. Id.

administrative material relates to significant public interests." Founding Church of Scientology of Wash. v. Smith, 721 F.2d 828, 830 n.4 (D.C. Cir. 1983).

1. "High 2" Withholdings

The CIA has chosen to argue that disclosure of allegedly-exempt information contained within four different versions of an internal handbook for CIA publication reviewers would "significantly risk circumvention of the regulations from which the information came" by way of providing a blueprint for ways to circumvent the prepublication review process. See CIA's Memo at 23-24, citing Schiller v. NLRB, 964 F.2d 1205, 1208 (D.C. Cir. 1992). See also Lutz Decl. at ¶¶71-72 (arguing that disclosure of the information "would allow a would-be author to 'game the system' and force the disclosure of classified information that could damage the national security"). It is the CIA's view, more or less, that disclosure of the information would render operationally useless the effectiveness of the prepublication review process in general, and the usefulness of the documents in particular. See Lutz Decl. at ¶72.[9]

This argument simply makes no logical sense. Zaid Rule 56(f) Decl. at ¶¶21-22 attached as Exhibit "1". Moreover, the CIA has failed to: 1) apply consistent standards in making redactions; and 2) sufficiently demonstrate through its affidavits that disclosure of the information would render operationally useless the prepublication review process. As the CIA has made quite clear, the "high 2" information in question relates to the CIA's internal procedures for: a) reviewing works of fiction; b) reviewing information from other agencies or foreign governments; c) handling and classifying manuscripts;

[9] Indeed, the CIA does not specifically identify a single federal statute or regulation that is designated with the task of preventing this type of conduct. In effect, the CIA is relying exclusively upon the notion that disclosure would render the prepublication review process operationally useless.

d) reviewing galley proofs; e) reviewing material previously disclosed; f) reviewing publications that contain classified information available in open sources; and g) reviewing materials intended for use in official publications. CIA's Memo at 24; Lutz Decl. at ¶71; Ex. "A" at 15, 18, 42, 43.

First, for reasons known only by the CIA, it has failed to maintain a consistent application of Exemption Two criteria in its redactions. For example, the CIA has already identified the internal procedures in question here, yet in Document Number 1531053, the CIA chose to redact even the simple identification of those procedures from the "Table of Contents" and from the body of the document. Conversely, the CIA chose to disclose those very same identifications in the other three versions of the handbook. Additionally, again in Document Number 1531053, the CIA chose to disclose the entirety of Section 2(f), which deals with assigned dates by which reviews must be completed. Conversely, in Document Number 1531068 (an *older*, more outdated version of the handbook), that very same section on assigned dates has been largely redacted, save the virtually identical first sentence that reads, "Finally, the assigned dates by which reviews must be completed are very important". On what grounds were these inconsistent redactions on identical substantive content applied? The CIA's affidavits are silent on this issue.

Second, the CIA's affidavits fail to provide any real concrete explanations that identify in what manner disclosure of the allegedly-exempt information would render the prepublication review process operationally useless. The D.C. Circuit has been quite clear regarding the degree of specificity that it requires in agency affidavits justifying "high 2" redactions. See e.g., PHE, Inc., 983 F.2d at 251 (disclosure of one particular page - out of

a 16 page FBI manual – detailing the sources of information available to FBI agents investigating unlawful transportation of obscene matter would provide violators with the ability to impede lawful investigations); Schiller, 964 F.2d at 1208 (disclosure of guidelines for implementing the Equal Justice Act would compromise the NLRB's ability to defend itself by way of revealing litigation strategies); National Treasury Employees Union v. United States Custom Serv., 802 F.2d 525, 530-31 (D.C. Cir. 1986)(disclosure of evaluative criteria used by USCS personnel concerning applicants for federal employment would make correct evaluation more difficult); Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1073 (D.C. Cir. 1981)(disclosure of a manual detailing law enforcement investigatory techniques would undermine agency's ability to prevent violation of statutes regulating use of alcohol, tobacco and firearms).

In contrast, the CIA's affidavits have provided nothing more than generic statements about the abstract threat that disclosure of the information would somehow permit a would-be author to "game the system" and force disclosure of classified information. See Lutz Decl. at ¶72. As an initial matter, given that the PRB only applies to former and current CIA employees and contractors who maintain or maintained security clearances with the CIA, which by its very nature indicates that the CIA itself determined that it was clearly consistent with the interests of national security that the particular individual be given access to classified information, surely there must be a presumption of good faith applied to the conduct of any of the individuals who would subsequently be submitting written manuscripts to the PRB for review. More importantly, in what manner would disclosing these particular procedures imbue even the most devious of individuals with the ability to trick the PRB's well-trained staff into not noticing the existence of classified

information – or at least information which, in conjunction with other unclassified information, might arguably become classified – in a written document? How would such an individual be in a position to "force" the disclosure of anything, let alone classified information, when the ability to publish the information is subject to the discretionary authority of the PRB? That answer remains a secret apparently known only to the CIA.

Admittedly, JMP concedes that – after discovery – some of the information may indeed fall within the scope of the high 2 exemption. However, at this juncture JMP is not required to demonstrate anything more other than that, in light of the factual record, there remains a genuine issue of material fact regarding the applicability of the exemption. See Morley, 508 F.3d at 1125. Given the insufficiency of the CIA's affidavits, JMP has met its burden, rendering meritless the argument that the CIA is entitled to summary judgment.

2. "Low 2" Withholdings

The CIA has done no better with its justifications for the invocation of Exemption Two in relation to "low 2" information. The CIA seeks to withhold information concerning: "1) CIA employee identification numbers and official titles; 2) CIA employee telephone and fax numbers; 3) the names and/or numbers for internal CIA regulations, publications, Employee Bulletins, review handbooks, reports, and forms … ; 4) internal CIA organizational information, including but not limited to, component abbreviations; 5) internal procedures used by the PRB to resolve intra-PRB disagreements regarding the damage to national security that could result from the publication of sensitive information; 6) the CIA's internal policy regarding which CIA publications are exempt from the PRB regulation; 7) the CIA's internal review process

used to evaluate CIA employees' resumes; and 8) the CIA's internal policy regarding OGC's ethics review of the circumstances surrounding the release of publications by CIA employees." CIA's Memo at 25-26. The CIA asserts that such administrative matters are matters in which the public has no legitimate interest. See CIA's Memo at 25. See also Lutz Decl. at ¶64 ("The information withheld from these documents does not purport to regulate the public's activities or set standards CIA personnel must follow when deciding whether to proceed against or take action affecting members of the public.").

The CIA's affidavits, however, fail to provide an adequate context in which an assessment can be made of the appropriateness of the "low 2" withholdings. At a minimum, the Lutz Declaration's vague references to "internal organizational information" and "numbers for internal regulations" are insufficient in light of the law of this Circuit. See e.g., Morley, 508 F.3d at 1125 (rejecting as insufficient the CIA's vague references to "internal organizational data" and "internal Agency regulations and practices" and remanding for a more detailed explanation); Fitzgibbon, 747 F. Supp. at 56-57 (rejecting agency argument that disclosing identification markings and numbers would "compromise the integrity" of the recordkeeping system and holding that "agencies have no generalized interest in keeping secret the method by which they store records"); Schwaner, 898 F.2d at 798 (finding that information linked to data-collecting practices, as well as to duty assignment rules and practices, was not protected by Exemption Two).

The Vaughn Index, for its part, fails to fill in the gaps. Instead, the explanations consist largely of boilerplate recitations of the descriptions provided in the Lutz Declaration, devoid of any specific context. For example:

- MORI 1512161 – Subject: Revised Agency Regulation on Procedures for Review of Official or Nonofficial Publication – "The information withheld pursuant to FOIA exemption low (b)(2) would reveal internal personnel rules and practices and includes: a) internal CIA regulation numbers; b) CIA employees' names and signatures; c) the internal name of a CIA Web site; d) internal CIA addresses; e) internal CIA regulation, publication and form names and numbers; f) a CIA employee's telephone number; g) CIA organizational information, including component abbreviations; h) external and internal mailing addresses, fax numbers, telephone numbers, and email addresses for the PRB; i) internal procedures used by the PRB to resolve intra-PRB disagreements; j) the CIA's internal policy regarding which CIA publications are exempt from the PRB regulation; and k) the CIA's internal management and ethics review process. The information withheld pursuant to FOIA exemption low (b)(2) is predominantly internal, not of any genuine public interest, and does not purport to regulate the public's activities or set standards that CIA personnel must follow when deciding whether to proceed against or take action affecting members of the general public."

- MORI 1512162 – Subject: Executive Correspondence Routing Sheet and Memorandum – "The information withheld pursuant to FOIA exemption low (b)(2) would reveal internal personnel rules and practices, including internal CIA regulation numbers and information regarding CIA employees' official representational activities, i.e., speeches, conference participation, interviews, etc. The information withheld pursuant to FOIA exemption low (b)(2) is predominantly internal, not of any genuine public interest, and does not purport to regulate the public's activities or set standards that CIA personnel must follow when deciding whether to proceed against or take action affecting members of the general public."

Ex. "A" at 11, 13.

Furthermore, it remains the CIA's burden to establish that the information withheld is too trivial to warrant disclosure and JMP is not required to produce any dispositive evidence that there is a public interest in the information. See Morley, 508 F.3d at 1125, citing 5 U.S.C. § 552(a)(4)(B).

Given the insufficiency of the CIA's affidavits, there remains a genuine issue of material fact and summary judgment in favor of the CIA is not appropriate pending discovery.

D. Exemption Five

Neither party disputes that Exemption Five encompasses "inter-agency or intra-agency memorandum or letters which would not be available by law to a party … in litigation with the agency" and that the initial threshold question is whether the record qualifies as an "inter-agency or intra-agency memorandum". See CIA's Memo at 26-27. If the initial threshold is satisfied, the record can be withheld under Exemption Five if it would be "normally privileged in the civil discovery context". NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The CIA asserts, and JMP does not dispute, that the attorney-client privilege, the attorney work-product doctrine, and the deliberative process privilege all qualify as privileges that would normally be found in the civil discovery context and therefore fall within the scope of Exemption Five. See CIA's Memo at 27, citing NLRB, 421 U.S. at 148-49.

To date, the Supreme Court has not yet defined what constitutes "inter-agency or intra-agency" documents, United States v. Weber Aircraft Corp, 465 U.S. 792, 798 n. 13 (1984), but the D.C. Circuit has chosen to employ a "functional rather than a literal test in assessing" whether memoranda are "inter-agency or intra-agency". See Ryan v. Dep't of Justice, 617 F.2d 781, 789-90 (D.C. Cir. 1980). With that in mind, the Lutz Declaration identified eight (8) documents as constituting "inter-agency or intra-agency" records that meet the initial threshold. Lutz Decl. at ¶85. The eight documents consist of the following:

1) a memorandum from the Chairman of the PRB to the Director of the CIA regarding revisions to CIA procedures;

2) a legal memorandum from the PRB's Associate Legal Advisor to the PRB;

3) a second legal memorandum from the PRB's Associate Legal Advisor to the PRB;

4) a memorandum concerning the designation of a Chairman of the PRB;

5) a powerpoint presentation regarding the rights and responsibilities of those who fall within the scope of the PRB;

6) a second powerpoint presentation regarding the rights and responsibilities of those who fall within the scope of the PRB;

7) an October 1991 report on the PRB by the Office of the Inspector General; and

8) an Inspection Report on the PRB by the Deputy Director for Planning & Coordination.

Ex. "A." at 2, 3, 4, 14, 22, 23, 25, 44.

JMP does not dispute that all eight documents constitute "inter-agency or intra-agency" documents. However, JMP does dispute that the CIA's affidavits have sufficiently demonstrated for purposes of summary judgment that the redactions made fall within the scope of the three evidentiary privileges. Accordingly, summary judgment is not appropriate at this time pending discovery.

A. Deliberative Process Privilege

The basic purpose behind the deliberative process privilege, namely protecting from disclosure pre-decisional agency deliberations, is not in dispute. CIA's Memo at 27-28, citing Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108, 1113 (D.C. Cir. 2004). See also Dep't of Interior v. Klamath Water Users Protective Assoc., 532 U.S. 1, 8-9 (2001)("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within

the Government.")(internal quotations and citation omitted); Mead Data Cent., Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977)("A decision that certain information falls within exemption five should therefore rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency."). JMP will also concede that the CIA's ultimate judgment regarding "what confidentiality is needed 'to prevent injury to the quality of agency decisions … while the decisionmaking process is in progress'" shall be afforded considerable deference. CIA's Memo at 28, citing Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118 (D.D.C. 1984).

However, it is the CIA's burden, through its affidavits, to first demonstrate that the documents are pre-decisional - as opposed to post-decisional – and that the information reflects "deliberative or policy-making processes" – as opposed to purely factual, investigative matters. See e.g. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980)("It is also clear that the agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process."); Mead Data Cent., Inc., 566 F.2d at 258 (agency required to provide "specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA").[10]

For its part, the D.C. Circuit has already taken on the task of establishing a structure by which the courts could determine if an agency's affidavits had sufficiently

[10] The D.C. Circuit has attempted to distinguish the "pre-decisional" and "deliberative" requirements, explaining that the two focus on different functions. See Access Reports v. Dep't of Justice, 926 F.2d 1192 (D.C. Cir. 1991). "While the 'predecisional' label clearly focuses attention on the role of the entire document in the decision-making process, the 'deliberative' criterion may be useful in distinguishing between privileged and non-privileged material within a single 'predecisional' document." Id. at 1195.

demonstrated both that the document was pre-decisional and the information reflected the deliberative process. See Senate of Puerto Rico ex rel. Judiciary Comm. v. Dep't of Justice, 823 F.2d 574 (D.C. Cir. 1987). "In deciding whether a document should be protected by the privilege we look to whether the document is 'predecisional' -- whether it was generated *before* the adoption of an agency policy -- and whether the document is 'deliberative' -- whether it reflects the give-and-take of the consultative process." Id. at 585 (emphasis in original). The agency affidavits have to demonstrate that the document preceded, in temporal sequence, the "decision" to which it relates. Id. Furthermore, the Circuit noted that "predecisional communications are not exempt merely because they are predecisional", but that the agency's affidavits must also establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process". Id. at 585-86. See also SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1204 (D.C. Cir. 1991)("[T]he agency must describe not only the contents of the document but also enough about its context, *viz.* the agency's decisionmaking process, to establish that it is a pre-decisional part thereof. Specifically, the court needs to know whether the document explains, directly or by reference, the reason for the agency's decision.").[11]

At a minimum, the CIA's affidavits have failed to demonstrate the validity of the privilege in relation to at least two of the documents within which the CIA has redacted information by way of the deliberative process privilege. According to the Lutz Declaration, Document Numbers 1531057 and 1531058 consist of "PowerPoint

[11] The D.C. Circuit also identified two factors that can assist in the determination regarding the availability of the privilege: the "nature of the decisionmaking authority vested in the officer or person issuing the disputed document," and the relative positions in the agency's "chain of command" occupied by the document's author and recipient. Senate of Puerto Rico ex rel. Judiciary Comm., 823 F.2d at 586.

presentations regarding the PRB, and contain recommendations, analyses, and discussions designed to inform and/or assist in future decision-making processes". Lutz Decl. at ¶95. The Lutz Declaration fails to identify any "decision" or "policy" – if indeed any exists – to which either document pertained other than "future decision-making processes", let alone what role the documents would play in the course of those processes. The affidavit also omits, as does the Vaughn Index, any description of the "decisionmaking authority vested" in the authors of the documents – whose names and titles have also been redacted – as well as their position in the CIA's "chain of command". Id; Ex. "A" at 22-23.

B. Attorney-Client and Work-Product Privileges

The fundamental principles underlying both the attorney-client privilege, protecting confidential communications between clients and their attorneys in relation to securing legal advice, and the attorney work-product privilege, protecting information prepared in anticipation of litigation, are not in dispute. CIA's Memo at 30, citing Fisher v. United States, 425 U.S. 391, 403 (1976); FTC v. Grolier, Inc., 462 U.S. 19, 25 (1983). As always, though, the burden remains on the CIA to sufficiently demonstrate, by way of its affidavits, that the redacted information falls within the scope of either privilege.

The attorney client-privilege protects an agency's communications with its attorneys, provided that the communications are necessary to obtain informed legal advice and their disclosure is limited to those who are authorized to speak or act for the agency. Coastal States Gas Corp., 617 F.2d at 862-64. The burden is on the agency to demonstrate that confidentiality was expected in the handling of the communications, and that it was

reasonably careful to keep the confidential information protected from general disclosure. Id. at 863.

For its part, the attorney work-product privilege does not extend to "materials prepared 'in the ordinary course of business or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes'". Hertzberg v. Veneman, 273 F. Supp. 2d 67, 78 (D.D.C. 2003), citing Fed. R. Civ. P. 26(b). Conversely, the litigation does not need to be "actual or imminent", but merely "fairly foreseeable". Id. See also Schiller, 964 F.2d at 1208 (holding that "some articulable claim, likely to lead to litigation, must have arisen", although a specific claim does not yet have to be contemplated). Ultimately, the "testing question" is "whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation". In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998). See also Id. (arguing that the party "must at least have had a subjective belief that litigation was a real possibility, and that belief must have been *objectively reasonable*" in the circumstances)(emphasis added).

At a minimum, the CIA's affidavits fail to provide a sufficiently adequate context in which assess the extent to which Document Numbers 1512156 and 1512157 were drafted in objectively reasonable anticipation of litigation. The Lutz Declaration and the Vaughn Index generically state that the attorney drafting the two legal memoranda could reasonably anticipate litigation on the two subject matters in question, namely the CIA's compliance with the PRB's thirty day review requirement and how the CIA reviews factual material in fictional manuscripts. Lutz Decl. at ¶93; Ex. "A" at 3-4. However, neither affidavit provides any supplemental context in which to assess the attorney's

subjective belief, let alone to evaluate the objective reasonableness of that determination. Upon what basis did the PRB's Associate Legal Advisor decide that there would be reasonable foreseeable litigation on these two issues? The CIA's affidavits are silent on the issue.

In light of the insufficiency of the CIA's affidavits, summary judgment is not appropriate at this time.

III. CIA HAS FAILED TO DEMONSTRATE THAT ALL SEGREGABLE PORTIONS OF THE RESPONSIVE RECORDS HAVE BEEN RELEASED

A Vaughn index must expressly indicate for each document that any reasonably segregable information has been disclosed. Krikorian, 984 F.2d at 467. The Court of Appeals for the District of Columbia Circuit has repeatedly held that it is reversible error for a district court not to make a finding of segregability. See e.g. Kimberlin, 139 F.3d at 950 (in remanding case for segregability determination, stating that it is reversible error for district court to fail to make segregability finding); Schiller, 964 F.2d at 1210 (same); see also Animal Legal Defense Fund v. Department of the Air Force, 44 F. Supp.2d 295, 299 (D.D.C. 1999) (chastising agency for failing to discharge "its duty under § 552(b)").

Notwithstanding the different Exemptions that might be asserted, nonexempt portions of all records must be released. See 5 U.S.C. § 552(b) (1998)(sentence immediately following exemptions). Here, CIA has done little to present any credible evidence that segregable portions of the records in question cannot be released. All it claims is that it "it determined that any non-exempt information is so inextricably interwined with the exempt information that there are no meaningful, reasonably segregable, non-exempt portions." See Lutz Decl. at ¶¶98-99.

This is completely unacceptable and contrary to law. See e.g., Davin v. U.S. Dep't of Justice, 60 F.3d 1043, 1052 (3d Cir. 1995)(rejecting conclusory representation on segregation when declaration failed to describe process by which segregability determinations were made and provided no "factual recitation of why certain materials are not reasonably segregable"); Krikorian, 984 F.2d at 466-67 (segregability requirement applies to all documents and all FOIA exemptions); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F.Supp. 1291, 1300 (N.D.Cal. 1992)("boilerplate" statement that "no segregation of non-exempt, meaningful information can be made for disclosure" deemed "entirely insufficient").

Therefore, CIA's request for summary judgment is premature and must be denied. See Voinche v. FBI, 46 F.Supp.2d 26, 33 (D.D.C. 1999)(refusing to grant summary judgment because agency's blanket segregability statement was inadequate).[12]

IV. ALTERNATIVELY, JMP IS ENTITLED TO CONDUCT LIMITED DISCOVERY TO ASCERTAIN THE ADEQUACY OF THE CIA'S SEARCH AND THE APPROPRIATENESS OF THE CIA'S WITHHOLDINGS

Discovery is a permissible and useful tool in the proper judicial administration of the FOIA with regard to agency searches that are inadequate. See Founding Church of

[12] See also Judicial Watch v. U.S. Dep't. of Health & Human Services, 27 F.Supp.2d 240, 246 (D.D.C. 1998)("If a court is to make specific findings of segregability without conducting in camera review in every FOIA case, the government simply must provide more specific information in its Vaughn affidavits."). Under the circumstances, JMP has no objection to the Court undertaking an *in camera* review of the unredacted records, which is within the discretion of the Court. Spirko v. United States Postal Serv., 147 F.3d 992, 996 (D.C.Cir. 1998). Furthermore, *in camera* review would clearly not impose an onerous burden on the court since there are only a limited number of records in question that likely do not encompass a significant number of pages. See Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 393 (D.C.Cir. 1987)(number of documents and length involved is factor for consideration). In fact, given the vast experience of the Court in adjudicating numerous lawsuits involving the regulations of various federal agencies it is in a unique position to be able to compare the CIA's alleged "classified" regulations with those the Court has openly interpreted in other cases.

Scientology, 610 F.2d at 836-37 ("To accept its claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the Freedom of Information Act … and if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory."). Since in most FOIA cases the government possesses all of the relevant evidence, it is permissible to use discovery to uncover facts to determine the adequacy of the government's search or the exempt status of requested documents. See Weisberg v. Webster, 749 F.2d 864, 868 (D.C. Cir. 1984).[13] Given the insufficiency of the CIA's affidavits and the subsequent inability by the CIA to demonstrate that it conducted an adequate and reasonable search, discovery is necessary and permitted.

The D.C. Circuit and this Court are arguably replete with case law that supports the notion that discovery can be required to address the insufficiency of an agency's affidavits regarding the adequacy of a search. See e.g., Oglesby, 902 F.2d at 71 (vacating district court's grant of summary judgment to defendant agency and remanding for further findings regarding adequacy of search); Weisberg, 705 F.2d at 1348 (permitting discovery to resolve material factual dispute regarding adequacy of search); Perry, 684 F.2d at 124-25 (awarding summary judgment to defendant agency only after the agency had been forced to conduct two additional searches pursuant to judicial order); Western Ctr. for Journalism v. IRS, 116 F. Supp. 2d 1, 5-6 (D.D.C. 2000)(awarding summary judgment only after defendant agency had conducted an additional search

[13] While the court was addressing the particular right of the government to utilize discovery, it affirmed that right by stating that the government, "like any other litigant", should be able to utilize the rules of discovery. Weisberg, 749 F.2d at 868.

subsequent to its original motion for summary judgment and released an additional 658 pages of responsive records).

The permissibility of discovery in relation to exemption claims is no different. See e.g., Tax Analysts v. IRS, 214 F.3d 179, 185 (D.C. Cir. 2000)(determining that discovery necessary to develop factual record); Schaffer v. Kissinger, 505 F.2d 389, 391 (D.C. Cir. 1974)(reversing and remanding district court's grant of summary judgment with instructions that plaintiffs be permitted to undertake discovery relating to whether the records in question had been "properly classified" in accordance with an Executive Order as is required by the terms of Exemption 1). Courts are to "require the agency to create as full a public record as possible concerning the nature of the documents and the *justification* for nondisclosure." Hayden, 608 F.2d at 1384 (emphasis added). See also Gardels, 689 F.2d at 1105 ("The test is not whether the court personally agrees in full with the [agency]'s evaluation of the danger - rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility...."). If the agency's affidavits are insufficient, the Court is permitted to "conduct a detailed inquiry into whether it agrees with the agency's opinions...." Halperin, 629 F.2d at 148. At least one court has even used the opportunity to simply order the disclosure of relevant records. Powell v. United States Dep't of Justice, No. C-82-326, slip op. at 8 (N.D.Cal. Mar. 27, 1985)(district court ordered disclosure of classified information because it was "convinced [that] disclosure of this information poses no threat to national security.").

Given the previously-detailed insufficiency of the CIA's affidavits in relation to the justifications for invoking Exemptions One, Two, Three and Five, the need for discovery

on this end is both permissible and necessary. The Vaughn Index in particular fails to adequately "describe the injury to national security that would follow from the disclosure" of the regulations. See Wiener v. FBI, 943 F.2d 972, 980 (9th Cir.1991). It is not enough to rely "on general assertions that disclosure of certain categories of facts may result in disclosure of the source and disclosure of the source may lead to a variety of consequences detrimental to national security." Id. See also Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 808 (9th Cir. 1995)(same).[14]

Discovery does not need to be overly burdensome or excessive in scope. At a minimum, supplemental CIA affidavits could fill at least some of the evidentiary gaps identified by JMP. In addition, a limited number of interrogatories and depositions will be necessary to identify the full scope of responsive documents that exist and assess whether the CIA's search methodology was reasonably calculated to uncover all responsive documents in light of that information. Zaid Rule 56(f) Decl. at ¶18. Similarly limited discovery will also be necessary to ascertain the appropriateness of the CIA's invocations of Exemptions One, Two, Three and Five. Id.

[14]Moreover, the D.C. Circuit's Court of Appeals has ruled that "[a]n assurance of *procedural* compliance does not, by itself, afford an adequate foundation for de novo review of the *substantive* propriety of the withholdings in question." King, 830 F.2d at 226.

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Respectfully submitted,

/s/

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