ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5161

JEFERSON MORLEY, Appellant,

v.

CENTRAL INTELLIGENCE AGENCY, Appellee.

BRIEF FOR APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RONALD C. MACHEN, JR.,
United States Attorney

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C.A. No. 03-2545

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. Parties

Appellant, Plaintiff below, is Jefferson Morley. Appellee, Defendant below, is the Central Intelligence Agency. There are no intervenors or *amicus curiae*.

II. Ruling Under Review

The ruling under review is the 31 March 2010 memorandum opinion and final judgment of the Honorable Richard J. Leon in favor of the Central Intelligence Agency. This decision is published at 699 F. Supp. 2d 244 (D.D.C. 2010).

III. Related Cases

This case has been before this Court previously, in case No. 06-5382. Appellee is unaware of any other related matter.

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TABLE OF AUTHORITIES

FEDERAL CASES

*** Cases chiefly relied upon are marked with asterisks.**

FEDERAL STATUTES

GLOSSARY OF ABBREVIATIONS

AMBARB ..... Alleged DRE Covert Project in Latin America

AMHINT ..... Alleged Covert Project for support of DRE leaders in Latin America

AMSPELL ..... Project in support of DRE headquarters in Miami

ARRB ..... Assassination Records Review Board

DRE ..... Directorio Revolucionario Estudantil

FOIA ..... Freedom of Information Act

HSCA ..... House Select Committee on Assassinations

JA ..... Joint Appendix

JM/WAVE ..... CIA Headquarters in Miami; also "WAVE"

MOB ..... Military Operations Branch of DRE

RELEVANT STATUTES

The relevant statutory provisions in this case appear below:
Freedom of Information Act, 5 U.S.C. § 552.

(a) Each agency shall make available to the public information as follows:
(b) This section does not apply to matters that are--

(1) (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;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; . . .

(5) 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;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . .

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, . . .

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law , . . .

John F. Kennedy Assassination Records Collection Act of 1992. Pub. L. No. 102-523, 106 Stat. 3443 (1992) (set out in 44 U.S.C. § 2107. note (Supp. 1993):

§ 2107. Acceptance of records for historical preservation

When it appears to the Archivist to be in the public interest, he may--

(1) accept for deposit with the National Archives of the United States the records of a Federal agency, the Congress, the Architect of the Capitol, or the Supreme Court determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government;

(2) direct and effect the transfer to the National Archives of the United States of records of a Federal agency that have been in existence for more than thirty years and determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government, unless the head of the agency which has custody of them certifies in writing to the Archivist that they must be retained in his custody for use in the conduct of the regular current business of the agency;

(3) direct and effect, with the approval of the head of the originating agency, or if the existence of the agency has been terminated, then with the approval of his successor in function, if any, the transfer of records deposited or approved for deposit with the National Archives of the United States to public or educational institutions or associations; title to the records to remain vested in the United States unless otherwise authorized by Congress; and

(4) transfer materials from private sources authorized to be received by the Archivist by section 2111 of this title.

CIA Information Act, 50 U.S.C. § 431:

§ 431. Operational files of the Central Intelligence Agency

(a) Exemption by Director of Central Intelligence

The Director of the Central Intelligence Agency, with the coordination of the Director of National Intelligence, may exempt operational files of the Central Intelligence Agency from the provisions of section 552 of Title 5 (Freedom of Information Act) which require publication or disclosure, or search or review in connection therewith.

(b) "Operational files" defined

In this section, the term "operational files" means--

(1) files of the Directorate of Operations which document he conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;

(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; and

(3) files of the Office of Personnel Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources; except that files which are the sole repository of disseminated intelligence are not operational files.

(c) Search and review for information

Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning--

(1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of Title 5 (Freedom of Information Act) or section 552a of Title 5 (Privacy Act of 1974);

(2) any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of Title 5 (Freedom of Information Act); or

(3) the specific subject matter of an investigation by the congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of National Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

(d) Information derived or disseminated from exempted operational files

(1) Files that are not exempted under subsection (a) of this section which contain information derived or disseminated from exempted operational files shall be subject to search and review.

(2) The inclusion of information from exempted operational files in files that are not exempted under subsection (a) of this section shall not affect the exemption under subsection (a) of this section of the originating operational files from search, review, publication, or disclosure.

(3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.

(e) Supersedure of prior law

The provisions of subsection (a) of this section shall not be superseded except by a provision of law which is enacted after October 15, 1984, and which specifically cites and repeals or modifies its provisions.

(f) Allegation; improper withholding of records; judicial review.

Whenever any person who has requested agency records under section 552 of Title 5 (Freedom of Information Act) alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of Title 5, except that--

(1) in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations which is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined ex parte, in camera by the court;

(2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;

(3) when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence;

(4)(A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files,

the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of Title 5 by demonstrating to the court by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and

(B) the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence;

(5) in proceedings under paragraphs (3) and (4) of this subsection, the parties shall not obtain discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure, except that requests for admission may be made pursuant to rules 26 and 36;

(6) if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of Title 5 (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section; and

(7) if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.

(g) Decennial review of exempted operational files

(1) Review by Director of the Central Intelligence Agency and the Director of National Intelligence

Not less than once every ten years, the Director of the Central Intelligence Agency and the Director of National Intelligence shall review the exemptions in force under subsection (a) of this section to determine whether such exemptions may be removed from any category of exempted files or any portion thereof.

(2) Consideration; historical value; public interest

The review required by paragraph (1) shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein.

(3) Judicial review

A complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this subsection may seek judicial review in the district court of the United States of the district in which any of the parties reside, or in the District of Columbia. In such a proceeding, the court's review shall be limited to determining the following:

(A) Whether the Central Intelligence Agency has conducted the review required by paragraph (1) before October 15, 1994, or before the expiration of the 10- year period beginning on the date of the most recent review.

(B) Whether the Central Intelligence Agency, in fact, considered the criteria set forth in paragraph (2) in conducting the required review.

STATEMENT OF JURISDICTION

The District Court's jurisdiction was premised upon the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the District Court issued a final, appealable order on March 31, 2010. Morley filed a timely notice of appeal on May 27, 2010. JA 17.[1]

[1] Citations to "JA." are to the corresponding page in the Joint Appendix.

ISSUES PRESENTED

In the opinion of the Appellee, the following issues are presented:

1. Whether the Central Intelligence Agency adequately searched its operational files and the records it transferred to NARA.

2. Whether CIA sufficiently explained its search for the allegedly "missing" monthly progress reports on DRE/AMSPELL activities and its search generally.

3. Whether CIA adequately explained its Glomar response.

4. Whether CIA justified its withholdings under FOIA Exemptions 1, 3, 5, and 6.

5. Whether CIA sufficiently segregated nonexempt factual information.

COUNTERSTATEMENT OF THE CASE

This Freedom of Information Act ("FOIA"), case centers on Jefferson Morley's FOIA request to the Central Intelligence Agency ("CIA") on 4 July 2003, seeking "all records pertaining to CIA operations officer, George Efythron Joannides, (also known as 'Howard,' 'Mr. Howard' or 'Walter Newby')," including but not limited to 17 specific categories of records identified by Morley, all of which he contends will "shed new light on the assassination of President Kennedy." JA 20, Compl. at 1-2, Attachment A.

This is the second time this Court has heard this case, having narrowed the issues considerably in the first appeal. *Morley v. CIA* 508 F.3d 1108 (D.C. Cir. 2007). The prior opinion summarizes the proceeding up to that point and, accordingly, the emphasis here is on proceedings after that.

This Court remanded part of this matter with specific instructions that the CIA: a) search its operational files for records responsive to Morley's FOIA request; b) search the records that the CIA had transferred to NARA for records responsive to Morley's FOIA request; c) supplement the CIA's explanation regarding its search for the allegedly "missing" monthly progress reports on DRE/AMSPELL activities purportedly filed by Joannides; d) expand the description of the search it conducted for records responsive to Morley's FOIA request; e) provide additional explanation in support of the CIA's *Glomar* response; and f) explain in greater detail how FOIA Exemptions 2, 5, and 6 permit the CIA to withhold documents responsive to Morley's FOIA request. *Id*. at 1129.

After supplementing the record on remand the CIA renewed its motion for summary judgment. The District Court granted the motion. JA 1091, R. 102, Memorandum & Opinion (Mem. & Op.) at 14. This appeal followed. R. 105.

SUMMARY OF ARGUMENT

CIA supplemented its declarations on remand to answer each of the issues in this Court's remand instructions and supplemented its search efforts as well, even though an additional search was not required. The District Court correctly held that the CIA (a) conducted reasonable searches

in response to Morley FOIA request; (b) properly withheld certain information pursuant to applicable FOIA exemptions; and (c) filed a reasonably detailed declaration and Vaughn Index in good faith.

As demonstrated by its declarations, the CIA reviewed all responsive documents line-by-line to identify information which was properly withheld through the appropriate exemptions and to ensure that no reasonably segregable non-exempt information was withheld. As to the specific exemptions, the CIA properly withheld information pursuant to each of the exemptions claimed.

ARGUMENT

Standard of Review

This Court reviews *de novo* the grant of summary judgment to an agency on its response to a FOIA request, "applying the same standards as the District Court." *See e.g., Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005).

I. SEARCH OF OPERATIONAL FILES.

This Court remanded this matter with instructions for the CIA to search its operational files for records responsive to Morley's FOIA request. 508 F.3d 1119.

In responding to a FOIA request, an agency is required to conduct an adequate search for responsive records. *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). "The adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal quotations and citations omitted). Reasonableness "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dept. of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985). Additionally, the mere fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it. *Maynard v. C.I.A.*, 982 F.2d 546, 564 (1st Cir. 1993). The declaration evidences reasonableness by "setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exists) were searched." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999). An agency's declaration offered for this purpose is "accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and

discoverability of other documents." *Safecard Services, Inc. v. SEC*, 926 F.2d 1197,1200 (D.C. Cir. 1991).

In this matter, the CIA's declarations comfortably meet the standard for a reasonable search. CIA's searches for records responsive to Morley's FOIA request include the searches originally conducted in 2004, as well as the more recent searches in 2008. JA 130, Nelson Decl. ¶ 48. The CIA searched its operational files. JA 130, Nelson Decl. ¶¶ 27-39.

Specifically, the CIA's declaration identified the components likely to possess responsive material, in this case the National Clandestine Service ("NCS"), the Directorate of Science and Technology ("DS&T") and the DS/Office of Security ("OS"). These components are the only components which have operationally exempt files under the CIA Information Act. JA 130, Nelson Decl. ¶¶ 27-39.

A. Search of NCS Operational Files

The NCS is the organization within the CIA responsible for conducting the CIA's foreign intelligence and counterintelligence activities; coordinating liaison with foreign intelligence and security services; serving as the repository for foreign counterintelligence information; supporting clandestine technical collection; and coordinating CIA support to other U.S. Government agencies. JA 130, Nelson Decl. ¶

28. The NCS maintains official records of all clandestine foreign intelligence and counterintelligence activities and operations conducted by the CIA with respect to human sources. *Id.* The CIA searched the NCS operational files. *Id.* ¶ 30.

The CIA did not place any temporal restrictions on this search. Rather, the CIA searched for responsive records without regard to the time frames in which the CIA acknowledged Joannides' participation in covert projects, operations, or assignments 1962 through 1964 and 1978 through 1979. JA 130, Nelson Decl. ¶ 30.

The CIA used search terms that were reasonably calculated to locate responsive material. For example, the CIA used variations of the following names in its search for responsive records: George Efythron Joannides, Howard Hunt, Walter Newby, Directorio Revolucionario Estudantil, DRE, AMSPELL, Luis Fernandez Rocha, Juan Manual Salvat, Antonio Lanusa, Carlos Bringuier, Frank Fiorini, Frank Sturgis, David Phillips, and Theodore Shackley. JA 130, Nelson Declaration ¶ 31. These searches produced potentially responsive records. The CIA recalled the records from its records center and manually reviewed them for responsiveness. *Id.*

These potentially responsive documents did not reference Joannides. The CIA's search located these documents because they contained one or more of the other search terms used -- not because the records substantially pertained to Joannides. When reviewed, these records were unrelated to Joannides. For example, the CIA located documents using the search terms "DRE" and "AMPSPELL." These documents related to "DRE" and "AMSPELL," but, as it turned out, did not relate to, or mention, Joannides. Accordingly, the CIA determined these documents were not responsive to Morley's FOIA request. JA 130, Nelson Decl. ¶ 33.

The CIA's searches were reasonably designed to have captured any record that was 'inextricably linked' to Joannides, including records related to Joannides and his activities while he was assigned to JMWAVE during 1962-64. While at JMWAVE, Joannides was the case officer for the Directorio Revolutionario Estudantil (DRE) or AMSPELL. In conducting its records search for information pertaining to George Joannides, NCS specifically searched 14 terms, including Directorio Revolutionario Estudantil, DRE and AMSPELL. CIA then manually reviewed all potentially responsive and determined that none referred to Joannides, including those records on AMSPELL. For these reasons CIA's search of NCS's operational files was adequate under FOIA.

B. Search of DS&T Operational Files

The DS&T is the CIA component responsible for creating and applying technology to fulfill intelligence requirements. The DS&T maintains records on individuals in the private sector who work or have worked on CIA personal services or industrial contracts; individuals about which there is publicly-available information identifying a scientific, technical or related expertise of interest to CIA; and CIA staff and contract employees, and other individuals affiliated with CIA who work on CIA projects with private sector experts. JA 130, Nelson Decl. ¶ 34. The CIA searched the relevant DS&T record systems, including DS&T operational files. JA 130, Nelson Decl. ¶ 34. The DS&T is the CIA component responsible for creating and applying technology to fulfill intelligence requirements. *Id.* Although the CIA would not expect DS&T files to contain records on the subject of Morley's request because Joannides had no direct connection to DS&T, the CIA, out of an abundance of caution, searched the relevant DS&T record systems, including DS&T operational files. JA 130, Nelson Decl. ¶ 35.

The CIA did not place any temporal restrictions on this search. *Id*. ¶ 35. Specifically, the CIA used the following search terms in its search of relevant DS&T records: Joannides, Howard, and Newby. The CIA's

search of DS&T operational files did not locate any records responsive to Plaintiff's FOIA request. *Id.* CIA's search of DST files went well beyond what was required by FOIA and should be upheld.

C. Search of OS Operational Files

The Directorate of Support ("DS") is responsible for the CIA's administrative operations. The DS maintains records on all current and former CIA employees, whether employed in a contract or staff capacity, as well as other individuals for whom security processing or evaluation has been required. The DS records system includes those records located in the OS. The OS records are a subset of the DS records. JA 130, Nelson Decl. ¶ 36. In the 2008 search, the CIA used variations of the names George Efythron, Joannides, Mr. Howard, and Walter Newby in its search for responsive records. JA 130, Nelson Decl. ¶ 37. The CIA's search of DS records was reasonably calculated to discover any records responsive to Morley's FOIA request.

D. Adequacy of the CIA's Search

This Court remanded this matter with instructions for the CIA to expand upon its explanation concerning CIA's search efforts in general. 508 F.3d at 1129. As part of its response to this Court's remand instruction, the CIA not only expanded upon its explanation but voluntarily

conducted another search for responsive documents supplement its 2004 search.

1. 2004 Searches

In September 2004, the CIA asked the DO, the Director of Central Intelligence Area DCIA, and the Mission Support Office ("MSO") to determine whether their relevant record systems contained responsive records that the CIA had not previously disclosed pursuant to the JFK Act. The MSO search included the relevant record systems of the following DS components: Human Resources, Office of Medical Services, Office of Training and Education, and Office of Security. JA 130, Nelson Decl. ¶ 49. At the time of its 2004 searches, the CIA applied its GLOMAR response to any document outside the two acknowledged time periods. These two acknowledged time periods were: first, the CIA acknowledged Joannides participated in a covert action code named JM/WAVE or JMWAVE from 1962 through 1964 and second, the CIA acknowledged Joannides served as a CIA representative to the U.S. House of Representatives Select Committee on Assassinations from 1978 through 1979. JA 130, Nelson Decl. ¶ 16. Joannides served undercover in both of these assignments. Joannides also served undercover in projects,

operations, and assignments before and after the two acknowledged time periods. *Id.*

2. 2008 Searches

The CIA initially searched the relevant DS record systems, including OS operational files, in early 2008. Like its searches of NCS and DS&T operational files, the CIA did not place any temporal restrictions on its search of the relevant DS record systems. However, due to an initial misunderstanding regarding Joannides' actual cover status (JA 130, Nelson ¶ 16) the CIA did not then specifically look for responsive records that were outside the two previously acknowledged time periods when it conducted its early 2008 search and review of DS records. Based on those two time periods, the CIA deemed a document covered by its GLOMAR response if the date of the document was outside those two time periods. These searches located the same documents located during the CIA's search of the relevant OS record systems in 2004. JA 130, Nelson Decl. ¶ 39.

In May 2008, CIA conducted another search of the relevant NCS and DS record systems, including the OS operational files. JA 130 Nelson Decl. ¶52. At this time, however, CIA discovered that it previously had acknowledged Joannides as a CIA employee from approximately

September 1950 to January 12, 1979, though without linking him to specific projects beyond the two time periods mentioned above. *Id*. This discovery prompted a reevaluation of previous searches. Thus, CIA again searched and reviewed relevant NCS and DS record systems for responsive documents that were outside the two previously acknowledged time periods of Joannides' participation in covert projects, operations, or assignments not covered by the *Glomar*. *Id*. Accordingly, the CIA conducted another search of the relevant NCS and DS record systems, including the OS operational files. *Id*. The NCS did not place temporal restrictions on this search or review of its operational files. The CIA's May 2008 search of the relevant NCS and OS record systems located additional documents responsive to Morley's FOIA request. *Id*. ¶ 54.

On August 6, 2008, CIA released to Morley 293 documents located during this May 2008 search of NCS and DS record systems. *Id*. ¶ 54. The CIA's search of NCS, DS&T and DS records was reasonably calculated to discover any records responsive to Morley's FOIA request.

Morley contends that the CIA did not provide the exact terms each component used to search for responsive records. Appellant's Br. at 30-32. Morley is mistaken. Nelson's Declaration sets out the exact search terms

used to search for responsive records within each component. JA 130, Nelson Decl. ¶¶ 33, 35, 37.

Morley also argues that Nelson did "not identify all of those components, state which of them responded that they had done a search, or indicate what the results of each component's search was." Appellant's Br. at 32. To the contrary, the Nelson Declaration expressly identified the directorates -- DO and DS and independent offices within the DCIA Area (OGC and OCA, the successor office to the OLC) which conducted records searches and clearly identified those systems of records which were not searched, such as CIA operational files. The results of CIA's records search were clearly identified to Morley in correspondence and in the Vaughn Index and declarations. JA 130, Nelson Decl. ¶¶ 39-45 and attachments.

All of the information that Morley seeks regarding the CIA's search is not required for the Court to conclude the CIA adequately described its search. Like the adequacy of an agency's search, the sufficiency of an agency's description of its records search is based on *reasonably* describing the processing of Morley's request in light of the facts of the particular case. *Truitt*, 897 F.2d at 540.

In this case the CIA identified three components, the NCS, DS&T and the OS, as reasonably likely to possess responsive records to Morley's FOIA request. Morley's FOIA request asked the CIA to produce "all records pertaining to CIA operations officer, George Efythron Joannides, (also known as 'Howard,' or 'Mr. Howard,' or 'Walter Newby.'" JA 130, Nelson Decl. ¶ 9. The CIA's declarations described the reason these three components are reasonable components to search given Morley's FOIA request. JA 130 Nelson Decl. ¶¶ 29, 35-36. Because Joannides was a CIA employee involved with clandestine foreign intelligence and counterintelligence activities the NCS, DS&T and the OS, described above, all would likely contain information about Joannides because they are the components that service, evaluate and maintain records for foreign intelligence officers within the CIA. JA 130, Nelson Decl. ¶¶ 27-39.

These components used search terms that were clear and reasonable given the FOIA request at issue. All of the components used variations of Joannides' names in its search for responsive records. Both DS&T and OS component search used variations of Joannides' name to search (George Efythron Joannides, Mr. Howard, and Walter Newby). Because NCS's mission is to collect intelligence activities through the clandestine use of human sources, it used search terms that involved more names connected

to intelligence sources such as Luis Fernandez Rocha, Juan Manual Salvat, Antonio Lanusa, Carlos Bringuier, Frank Fiorini, Frank Sturgis, David Phillips, and Theodore Shackley in addition to George Efythron Joannides, Howard Hunt, Walter Newby, Directorio Revolucionario Estudantil, DRE, and AMSPELL. JA 130, Nelson Decl. ¶¶ 33, 35, 37.

Morley also complains that Nelson does not identify the persons who conducted the searches nor state whether they were involved in the searches CIA did initially for the ARRB [Assassination Records Review Board]. Appellant's Br. at 44-46. Morley points to no authority suggesting that CIA is required to do so. As stated in the Nelson Declaration, CIA's records search was conducted by appropriately trained information management personnel who regularly conduct FOIA searches as part of their normal responsibilities and who also search component records to support the component's daily mission. JA 130, ¶¶ 13-19. This satisfies CIA's burden of establishing that it conducted a search reasonably calculated to uncover all responsive records. *See, Truitt*, 897 F.2d at 542.

With respect to the CIA's search of operational files, Morley, on remand, challenged the adequacy of these searches alleging *inter alia* that DCIA operational files had not been searched. Because these files are defined by statute, this argument was without merit, as the D.C. District

Court found. 508 F.3d at 1126. In the instant appeal, Morley recasts his opposition by characterizing NCS, DS&T, and OS as merely "locations"; however, they also describe the applicable records system, especially with respect to the National Clandestine Service. *See* JA 130 Nelson Decl. ¶¶ 27-33. Morley now alleges that the NCS records search of its operational files did not include "the critically important" AMHINT, AMBARB or MOB. Appellant Br. at 47. This argument fails because none of these terms are 'systems of records.' Instead, these terms represent alleged CIA covert activities. JA 130, Nelson Declaration ¶¶ 30, 35-36; *See Oglesby v. Department of the Army*, 920 F.2d 57,68 (D.C.Cir.1990). With the exception of any records transferred from NCS to the JFK collection, records pertaining to any these activities (and records originated by any NCS component) are maintained in the NCS records system, which was searched. JA 130, Nelson Decl. ¶¶ 28-29. And the search terms were reasonably designed to locate responsive information.

Further, contrary to Morley's assertion, the CIA has not invoked its *Glomar* defense" to avoid a search of operational files. On remand, the operational files were searched. First, despite a detailed explanation in Nelson Declaration, ¶¶ 38-39 and 59-73, Morley misconstrues the *Glomar* assertion in this case. As noted above, CIA previously acknowledged

Joannides' involvement in covert activities at JMWAVE and his service as a CIA representative to the HSCA. The *Glomar* was invoked by CIA with respect to his involvement in any other "covert projects, operations, or assignments." JA 130, Nelson Decl. ¶¶ 58-60. Thus, information on Joannides and his activities while at JMWAVE, including any contacts he may have had with AMHINT and AMBARB individuals, are not covered by CIA's *Glomar* response. CIA searched its operational files for records pertaining to George Joannides, the subject of Morley's FOIA request.

Also, contrary to Morley's assertion that CIA "takes the position that release of records on these projects [AMHINT and AMBARB] under the JFK Records Act does not constitute official acknowledgment," the CIA has made clear that Joannides, a covert employee for most of his career, has been officially acknowledged for two assignments: while he was at JMWAVE (1962-64) and when he served as a CIA liaison officer to the HSCA (1978-79). As Morley acknowledges, while at JMWAVE, Joannides was the case officer for the Directorio Revolutionario Estudantil (DRE) or AMSPELL.[2]

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[2]Documents previously released under the JFK Assassination Records Collection Act indicate (as of late 1962) that AMSPELL, AMHINT and AMBARB, had individual case officers, i.e., three different individuals, one for each program/project.

As stated in the Nelson Declaration, in conducting its records search for information pertaining to George Joannides, NCS specifically included AMSPELL as one of its search terms. JA 130, Nelson Decl. ¶ 33. Then CIA manually reviewed all potentially responsive records and determined that none referred to Joannides, including the records on AMSPELL. *Id.* Morley's allegations regarding AMHINT, AMBARB and MOB are without merit and not relevant to CIA's limited *Glomar* response in this case. Morley's request did not seek records on AMHINT or AMBARB *per se*, but it sought records on Joannides and his activities, including all records on Joannides' "contacts with individuals or officers of the Directorio Revolucionario Estudantil or DRE between December 1962 and April 1964" (known in CIA records AMSPELL). JA 24-25. The CIA searched all records systems reasonably likely to contain material responsive to Morley's request for information on George Joannides and the CIA's records search was reasonably calculated to locate records on George Joannides and his activities, especially those relating to AMSPELL. Accordingly, these search terms do not represent Joannides' acknowledged covert activities, and their absence or presence does not speak to the adequacy of the search the CIA performed. *Halperin v. CIA*,

629 F.2d 144, 147-148 (D.C. Cir. 1980) (CIA owed deference on matters of national security).

Morley also challenges the designation of CIA operational files under the CIA Information Act. This argument is effectively moot. This Court ordered the CIA to search its operational files for records responsive to Morley's request. The CIA searched its operational files and those searches are fully described in the Nelson Declaration. JA 130, ¶¶ 27-39. Therefore, the District Court was correct in holding that the CIA adequately described its search of its operational files based upon Ms. Nelson's Declaration.

E. Search of Records Transferred to NARA Was Adequate

This Court remanded this matter with instructions for the CIA to search the records it had transferred to NARA for records responsive to Morley's FOIA request. *Morley*, 508 F.3d at 1119-20.

As part of its response to this Court's remand instruction, the CIA searched for responsive records within the records transferred to NARA and described in detail how the search was conducted. In early 2008, CIA also searched the JFK-related records that the CIA released to NARA for records responsive to Morley's FOIA request. JA 130, Nelson Decl. ¶56.

These searches located 113 documents, which CIA released to Morley on April 28, 2008, responsive to Morley's FOIA request. *Id.*

The CIA included in its search the roughly 1,100 documents housed in NARA's protected collection -- not scheduled for public release until 2017 -- and no responsive records were found in this collection. *Id*. ¶ 43. Morley does not challenge the adequacy of this search.

F. CIA's Search For The Allegedly "Missing" Documents was Adequate.

This Court remanded this matter with instructions for the CIA to expand upon its explanation concerning the 17 monthly reports on DRE/AMSPELL activities which Morley believes Joannides filed between 1962 and 1964. As part of its response to this Court's remand instruction, the CIA not only expanded upon its explanation but voluntarily conducted another search for allegedly missing monthly reports on DRE/AMSPELL activities and described in detail how the search was conducted.

Regarding the so-called "missing documents", the Nelson Declaration explains:

> Though not required by the Court of Appeals' decision, the CIA's search of NCS operational files included an attempt to locate the allegedly "missing" progress reports for the period of December 1962 to June 1964. The CIA retrieved and reviewed records located using the search terms "AMSPELL", "Directorio Revolucionario Estudantil," and "DRE" in an attempt to find these allegedly "missing" monthly progress reports, if they existed. As

> with the CIA's previous investigations, the CIA did not locate the allegedly "missing" monthly progress reports purportedly filed by Joannides.

JA 130, Nelson Decl. ¶ 47.

The CIA's declaration adequately details its search efforts to uncover the monthly reports on DRE/AMSPELL activities. (Nelson Decl. ¶¶ 44-47.) For instance, in the course of the agency's review of its operational files, the CIA searched for the monthly reports on DRE/AMSPELL activities with three search terms, "AMSPELL," "Directorio Revolucionario Estudantil," and "DRE." JA 130, Nelson Decl. ¶ 47.

The CIA's declarations explain in sufficient detail the agency's searches in response to Morley's original request. For example, with respect to the search strategy used by the agency's NCS directorate, the Nelson declaration sets out the 14 search terms which the agency used in varying formulations. *Id*. The declaration further explains the amount of material retrieved by these searches, as well as the criteria by which those who manually reviewed the material determined whether a document was responsive or not. *Id*. ¶¶ 31-33.

Similar explanations are provided for searches of the other directorates. *Id*. ¶¶ 35,37-39,41. Furthermore, Nelson's supplemental

declaration adequately explains the agency's search of "soft" file material, which this Court held was previously lacking. *See Morley*, 508 F.3d at 1121. As Nelson's declaration explains, "soft files" usually relate to personnel matters and are kept by the office to which an employee is assigned. JA 1098-99.

CIA's declaration detailed that "Soft files" are temporary by nature; appropriate material from a "soft" file is transferred to an employee's official file for longer term storage and the rest of the file is destroyed when the employee transfers assignment, resigns, or retires. JA 130, Nelson Decl. ¶¶ 7-8. Thus, when the CIA searched Joannides's official file, it would have uncovered any responsive "soft" file material which still exists. *Id*. ¶¶ 9. Even when a requested document indisputably exists or once existed, summary judgment will not necessarily be defeated by an unsuccessful search for the document so long as the search was diligent and well designed. *Nation Magazine*, 71 F.3d at 892 n.7. The CIA's efforts on remand comfortably complied with these standards and remand instructions concerning these monthly status reports on DRE/AMSPELL activities.

Morley speculates that the "missing" monthly progress reports on DRE/AMSPELL activities purportedly filed by Joannides exist and are

being improperly withheld by the CIA. Appellant Br. at 49. Morley's arguments are unavailing. First, this Court's instruction to the CIA on remand was only to supplement its explanation, 508 F.3d. at 1121, not to conduct another search for these documents. Notwithstanding the fact that this Court's decision did not require it to do so, CIA conducted another search for the documents in addition to supplementing its explanation regarding its prior searches. JA 130, Nelson Decl. ¶ 47.

Morley has presented no evidence to dispute any of CIA's statements regarding its search for the monthly progress reports on DRE/AMSPELL activities. Instead, Morley relies primarily upon his own sworn affidavit to point out alleged inaccuracies within two 1998 memorandums the CIA used to assist in recreating the circumstances surrounding the alleged "missing" reports on DRE/AMSPELL activities. Appellant Br. 50-51. Morley's main point concerning the memorandums appears to be that he disagrees with the memorandum's conclusions that it is likely that monthly reports on DRE/AMSPELL activities were never filed during the time period at issue. Appellant Br. 52-53. This is not evidence that such documents exist today or that CIA's search was somehow deficient. *See Oglesby 920 F.2d 60; Weisberg*, 745 F.2d 1487.

Even if citations to Morley's own affidavit were sufficient to show that monthly reports on DRE/AMSPELL activities once did exist, "failure of an agency to turn up one specific document in its search does not alone render a search inadequate." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Paragraph 47 of the Nelson Declaration relates the declarant's personal knowledge that the CIA devised and conducted a search for the "missing" monthly reports on DRE/AMSPELL activities but did not locate the monthly reports at issue. Morley fails to point to any flaws in the methodology of this search, e.g. by suggesting additional valid search terms or other locators. Because the search was reasonably designed and described, and Morley offers no material challenge to it. The District Court correctly found CIA's searches adequate.

Finally, Morley claims that he requires discovery in order to ensure that he has all the records to which he is entitled. Appellant Br. at 60. In FOIA actions, discovery relating to the agency's search and the exemptions it claims for withholding records is not normally permitted if the agency's affidavits are reasonably specific and "demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record or by evidence

of agency bad faith." *Casey*, 656 F.2d 724, 738 (D.C. Cir. 1978); *Simmons v. DOJ*, 796 F.2d 709, 711-12 (4th Cir. 1986) (approving district court's decision denying discovery because agency's affidavit filed with summary judgment motion made need for discovery "moot"). Indeed, discovery is not appropriate if the agency's affidavits are sufficiently detailed concerning the adequacy of the agency's search and the bases for claimed exemptions. *SafeCard Servs., Inc.*, 926 F.2d at 1200-02 (affirming decision to deny discovery as to adequacy of search on ground that agency's affidavits were sufficiently detailed); *Casey*, 656 F.2d at 751.

To justify discovery after an agency has submitted facially adequate declarations, the requester must show bad faith or tangible evidence that summary judgment is inappropriate. *See, Weisberg* 627 F.2d at 370-71. There is no reason to depart from the general rule that discovery is inappropriate in this case. Specifically, Morley relies on *Weisberg*, to support his demand for discovery. Contrary to Morley's assertion, this case is not like *Weisberg*. The affidavit relied on by the FBI in that case simply stated that the affiant "conducted a review of FBI files which would contain information that Mr. Weisberg requested . . . and FBI files to the best of my knowledge do not include any information requested by Mr. Weisberg other than that made available to him." *Id*. at 370.

Here, the declaration provided by CIA detailed the type of records that CIA maintains, specific steps taken to respond to Morley's request, the records systems searched, the search terms used in those searches, and the results of those searches.

Morley also cites *Negley* to support his demand for discovery concerning the CIA's records search. This case is inapposite to the matter at hand. In *Negley*, the FBI searched only one of nine records systems which might reasonably have contained responsive information. *Negley v. FBI*, 658 F.2d 57 (D.C. Cir. 2009). Here, as detailed in the CIA's declarations, the CIA searched all records systems which might reasonably contain information pertaining to Mr. Joannides. The Dorn and Nelson Declarations together fully describe the records search undertaken by CIA. *See* JA 203, Dorn Declaration ¶¶ 13-25; JA 130, Nelson Declarations ¶¶ 28-39. Accordingly, the District Courts ruling that the CIA adequately expanded its search description should be affirmed.

II. THE CIA PROPERLY INVOKED APPLICABLE FOIA EXEMPTIONS.

As stated in the Nelson Declaration, CIA withheld documents in full or in part pursuant to FOIA exemptions 1, 3, 5 and 6. As set out more fully below, CIA's assertion of these exemptions is justified under the law.

A. FOIA Exemption 1

On December 7, 2007, this Court affirmed the CIA's proper assertion of FOIA Exemption 1. 508 F.3d at 1123-26, 1128. Therefore, only documents located as a result of the 2008 searches are at issue. Morley challenges the District Court's decision with regard to the 2008 assertion of Exemption 1.

FOIA Exemption 1 provides that FOIA does not require disclosure of information that is: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). A record is exempt if it has been properly classified based on the substantive and procedural criteria set forth in the currently applicable Executive Order. *See Halperin*, 629 F.2d at 148. The legislative history of FOIA makes clear that "courts must 'recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record.'" *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982) (*quoting* S. Rep. No. 1200, 93rd Cong., 2d Sess. 12 (1974)). Courts normally will defer to the expert opinion of

the agency, because Courts "lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case." *Halperin*, 629 F.2d at 148. "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Larson*, 565 F.3d at 862 (*quoting Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007)). If the agency's declarations are neither contradicted by other record evidence nor contaminated by indications of bad faith, the reviewing court should not ordinarily second-guess the agency's judgment. *Halperin,* 629 F.2d at 147-48 (lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case).

Unsubstantiated assertions of government wrongdoing do not establish a meaningful evidentiary showing that can overcome the FOIA privacy exemption for law enforcement records. *Boyd v. Criminal Div. of U.S. Dept. of Justice*, 475 F.3d 381 (D.C. Cir. 2007).

Here, Nelson's Declaration and the Agency's Vaughn Index, Exhibit C demonstrate that the CIA properly invoked Exemption 1. Executive Order No. 12958 provides categories of properly classified information. Specifically, § 1.4(c) provides that information shall be classified only when it includes, among other things, information

concerning "intelligence activities (including special activities), intelligence sources or methods, or cryptology."

The information withheld from Morley falls into several of those categories. Namely, the Exemption 1 material, contains information concerning the CIA's intelligence activities, sources, and/or methods, more specifically: (1) the true names of covert CIA employees; (2) the names of clandestine human intelligence sources and other information (including home addresses and telephone numbers) that foreign intelligence services could use to identify clandestine human intelligence sources; (3) CIA cryptonyms; (4) specific countries in which the CIA operated; (5) specific countries which the CIA targeted for intelligence collection activities and covert action; (6) the years in which the CIA operated in certain countries; (7) cities and countries in which the CIA maintained covert CIA installations; (8) information regarding specific covert CIA activities; and, (9) information regarding specific CIA intelligence methods, including cover mechanisms that Joannides used. JA 130, Nelson Decl. ¶ 86, Vaughn Index, Exhibit C. The CIA invoked Section 1.4(c) of Executive Order 12958 to classify records as "Confidential" and "Secret" under Executive Order 12958, as amended. JA 130, Nelson Decl. ¶¶ 79; 82-85.

The withheld information was properly classified as either (i)

SECRET pursuant to E.O. 12958 because its disclosure could reasonably be expected to cause serious damage to U.S. national security, or, (ii) CONFIDENTIAL pursuant to E.O. 12958 because its disclosure could cause damage to national security. *Id.* ¶¶ 86-95. Nelson's Declaration states in detail that disclosure would reveal classified information regarding the CIA's intelligence activities, sources, and methods. Such disclosures would provide the United States' adversaries with keen insights into the CIA's intelligence activities, sources, and methods and reasonably could be expected to cause damage, serious damage, and, in some cases, extremely grave damage, to the national security. *Id.* ¶ 87. CIA withheld such information as covert CIA locations, *id.* ¶ 88, for which disclosure of such information would damage the national security by providing foreign intelligence services with specific information about the CIA's activities, sources, and methods and could reasonably be expected to damage U.S. foreign policy by revealing the countries in which the CIA operated or targeted for intelligence activities. *Id.*

CIA also withheld the names of CIA employees and clandestine human intelligence sources for which disclosure of such information could reasonably be expected to jeopardize the safety and welfare of these individuals and their families and associates. JA 130, Nelson Decl. ¶ 89.

Information regarding the CIA's intelligence methods was also withheld, because disclosure of such classified information in these documents would reveal details surrounding classified, clandestine intelligence methods that Joannides' used and certain years in which the CIA operated in Mexico City, Mexico. *Id.* ¶ 90.

Names of covert CIA employees were withheld to prevent disclosure of this secret information which would provide foreign intelligence services with valuable information that they could use to uncover CIA activities, sources, methods. JA 130, Nelson Decl. ¶ 91. Nelson's declaration explains that, if foreign intelligence services knew the identity of the CIA's covert officers, these intelligence services reasonably could identify the officer's activities, sources, and methods. *Id.*

The CIA withheld secret information from a JFK document regarding the number of CIA case officers who worked with Joannides at the CIA's JMWAVE Station. JA 130, Nelson Decl. ¶ 92. The disclosure of this information would provide foreign intelligence services with insights into the station's capabilities and the CIA's intelligence methods. *Id.*

The name of a clandestine human intelligence source classified as secret was withheld from a JFK document. *Id.* ¶ 93. Even today, such a

disclosure would provide foreign intelligence services with valuable insights into the CIA's activities, sources, and methods. Moreover, the disclosure of the source's identity also could endanger the source and his or her family and associates and subject them to reprisals, even if the source is deceased. *Id.* With regard to intelligence sources and methods, as was recognized in *Sims*, 471 U.S. at 175, the "forced disclosure [by the courts] of the identities of its intelligence sources could well have a devastating impact on the Agency's ability to carry out its mission." *Id.*

Finally, the CIA withheld classified information regarding a CIA clandestine human intelligence source and CIA cryptonyms from several confidential and secret documents, for which disclosure could reasonably could be expected to damage the national security by assisting foreign intelligence services identify both the CIA's intelligence methods and clandestine human intelligence sources. JA 130, Nelson Decl. ¶ 94.

Morley's primary claims are that the records at issue can not be classified under E.O. 12958 because they could not reasonably be "expected to cause damage to the national security that the original classification authority is able to identify or describe." E.O. 12958 § 1.5(3). Morley argues that this is so because of the age and "massive prior divulgence of the same or same kinds of information." Appellant’s Br. at

62.

This Court heard and rejected Morley's passage of time argument before, and he presents nothing new now. 508 F.3d at 1123-24*; see also Sims*, 471 U.S. at 174-177; *Fitzgibbon*, 911 F.2d at 763-64; *Wolf*, 473 F.3d at 377 ([I]t is logical to conclude that the need to assure confidentiality to a foreign source includes neither confirming nor denying the existence of records even decades after the death" and noting that "in *Fitzgibbon* we recognized that the passage of thirty years failed to negate the necessity of confidentiality because 'the Government has a compelling interest in protecting . . . the appearance of confidentiality so essential to the effective operation of our foreign intelligence service"). Morley's argument that the threat is speculative in nature is unavailing. The articulation of threatened harm in the future always will be somewhat speculative and a showing of actual harm is unnecessary. *Halperin* 629 F.2d at 149. Courts normally will defer to the expert opinion of the agency, because Courts "lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case." *Halperin*, 629 F.2d at 148; *Morley*, 508 F. 3d at 1123-24.

Morley asserts that "[e]vidence of bad faith is all pervasive where the matters under consideration -- Joannides, the DRE and Oswald's

activities-are concerned." Appellant Br. 63. For support, Morley cites three instances which concern CIA's handling of the underlying FOIA request at issue. First, Morley asserts that the CIA initially failed to respond to Morley's FOIA request by "seeking to foist it off on NARA." *Id*. However, as this Court stated in *Iturralde*, a case where State Department's first response was to advise requester to seek the materials from the Comptroller and DEA, "[i]n these circumstances, we conclude there is no evidence of bad faith by the Department, particularly in view of the fact that initial delays in responding to a FOIA request are rarely, if ever, grounds for discrediting later affidavits by the agency."). 315 F.3d at 315; *see also Boyd*, 475 F.3d at 391 in which this Court "rejected the notion that an initial agency delay in responding to a FOIA request constitutes bad faith." So too here do these delays say nothing to support Morley's reflexive bad faith argument.

Morley next asserts there is evidence of bad faith on the part of the CIA because even after this instant law suit was filed the CIA denied him access to records of operations, even those that had previously been acknowledged. Appellant Br. at 63-64. This assertion is baseless. The CIA issued a Glomar response to that portion of Morley's request seeking records regarding Joannides participation in any covert project, operation

or assignment, "unless of course previously acknowledged." JA 130, Nelson Decl. ¶ 58. As explained in CIA's declarations two assignments were previously acknowledged: his assignment to JMWAVE and as a liaison officer to the HSCA. These two assignments were acknowledged under the JFK Records Act and the records were publicly available at NARA; on remand, copies of all such records were provided to Morley.

Lastly Morley asserts that "[t]he circumstances surrounding the Joannides/DRE relationship at issue in this case suggest embarrassment may be a reason underlying the CIA's desire to keep this information hermetically sealed." Appellant Br. at 67. However, this claim is also without merit because, as has been detailed above, the information concerning the Joannides/DRE relationship was released under the JFK Act and been publicly available for several years.

In his discussion of public interest, Morley cites Section 3.2.(b) of E.O. 12958, which provides that "[i]t is presumed that information that continues to meet the classification requirements under this order requires continued protection." In some exceptional cases, however, the need to protect such information *may* be outweighed by the public interest in disclosure. Appellant Br. at 67-68. (emphasis added). Morley omits a key portion of this Executive Order: "This provision does not . . . create any

substantive or procedural rights subject to judicial review." Moreover, notwithstanding Morley's repeated mischaracterization of the information as pertaining to the assassination, this is not an exceptional case under this provision or under Agency regulations. *See* 32 C.F.R. § 1902.13(c).

In addition to the express limitation to section 3.2(b), section 6.2 (a) provides that "[n]othing in this order shall supersede any requirement made by or under . . . the National Security Act of 1947, as amended and § 6.2(d) further provides that "[n]othing in this order limits the protection afforded any information by other provisions of law," including FOIA Act Exemptions and the National Act of 1947, as amended. Accordingly, Morley has not presented any evidence of bad faith concerning CIA's response to the FOIA request at issue in this matter. Therefore the Court should affirm the CIA's use of Exemption 1.

B. Exemption 3

In 2007, this Court affirmed the CIA's assertion of FOIA Exemption 3 with regard to records addressed in the Dorn Declaration. 508 F.3d at 1123-26, 1128. Thus, only documents located as a result of the 2008 searches are at issue. Morley challenges the District Court's decision with regard to the 2008 assertion of FOIA exemption 3.

Exemption 3 of the FOIA exempts from mandatory disclosure

matters that are:

> Specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552 (b)(3). This Court upheld CIA's reliance of the 50 U.S.C. 403 as an Exemption 3 withholding statute. 508 F.3d at 1125.

As with Exemption 1 claims, courts evaluating Exemption 3 claims must accord substantial weight to the CIA's judgment with respect to the national security considerations at issue. *See, Morley*, 508 F.3d 1108, 1126. As Ms. Nelson's Declaration establishes, two Exemption 3 withholding statutes are at issue here. JA 130, Nelson Decl. ¶¶ 107-109. First, section 102A(i)(1) of the National Security Act of 1947, as amended ("National Security Act"), codified at 50 U.S.C. § 102A(i)(1), requires the protection of intelligence sources and methods from unauthorized disclosure. Second, as mentioned above, section 6 of the Central Intelligence Agency Act of 1949, as amended ("CIA Act"), codified at 50 U.S.C. § 403g, provides that the CIA shall be exempt from the provision of any other law requiring the publication or disclosure of the organization, functions, names, official titles, salaries or numbers of personnel employed by the CIA. *Id.*

The Supreme Court has held that both of these statutes are "withholding statutes" for purposes of FOIA Exemption 3. *Sims*, 471 U.S. at 167.[3] In *Sims*, the Court noted the "wide ranging authority" given to the DCI to protect intelligence sources and methods, and held that it was "the responsibility of the DCI, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk." *Id*. at 180. "FOIA simply does not apply to material the DCI specifically has exempted on the ground that it pertains to or could give rise to inferences about intelligence sources and methods." *Knight v. CIA*, 872 F.2d 660, 664 (5th Cir. 1989). The statutes exempt from FOIA's disclosure the identities of intelligence sources and methods. *See Sims*, 471 U.S. at 167-69; *Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993).

Under Exemption 3, "the CIA need only show that the statute claimed is one of exemption as contemplated by Exemption 3 and that the withheld material falls within the statute," i.e., pertains to intelligence sources and methods or other statutorily protected information. *Sims*, 471

[3]The Supreme Court decided Sims in 1985, prior to more recent amendments to the CIA Act and the passage of the Intelligence Reform and Terrorism Prevention Act of 2004, which created the Director of National Intelligence. None of the organizational changes in the intelligence community, however, undermine the authority of *Sims* or any of this Court's decisions.

U.S. at 167-69. *See also Larson v. Dept. of State*, 565 F. 3d at 402 *citing Fitzgibbon*, 911 F.2d at 761-62.

The CIA's declarations and Vaughn Index establish that the information withheld under Exemption 3 falls within the scope of the above withholding statutes. With respect to the National Security Act, the Nelson Declaration carefully explains in detail that much of the information withheld under Exemption 3 concerns the danger of exposing intelligence sources or methods and CIA organizational or functional information protected under the National Security Act and the CIA Act. JA 130, Nelson Decl. ¶¶ 107-11. Some of the information at issue here concerned intelligence sources on whom the agency depends for intelligence information. *Id*. ¶ 109. The explicit danger avoided by protecting the intelligence sources at issue is that intelligence sources can only be expected to furnish information when they are confident that the CIA will do everything in its power to ensure that their cooperation will remain secret as long as necessary. *Id*. ¶ 110. Collecting information related to intelligence methods is a key means by which the CIA accomplishes its mission. *Id*. If such methods become known, the continued successful use of the methods is severely hampered. *Id*.

Nelson also explains that Section 6 of the CIA Act, like the

National Security Act, statutorily protects certain sensitive information from disclosure. *Id*. ¶ 109. Specifically, Section 6 exempts from publication and disclosure the organization, functions, names, official titles, salaries or numbers of personnel employed by the CIA. *Id*. On the basis of this statute -- and thus under FOIA exemption 3 -- CIA employees' names and personal identifiers (e.g., employee signatures, employee numbers or initials), titles, file numbers, and internal organizational data are absolutely protected from disclosure by law. *Id*. The statute covers even seemingly "innocuous" information that "might enable an observer to discover the identity of an intelligence source." *Id.* at 471 U.S. 178. Consequently, the statute exempts from FOIA's disclosure the identities of intelligence sources and methods. *See Sims*, 471 U.S. at 167-69; *Krikorian*, 984 F.2d 461 at 465. For these reasons, CIA's declarations fully justified the agency's Exemption 3 withholdings.

Morley states that CIA invokes Exemption 3 "in tandem" with Exemption 1 for "virtually every one of the 295 documents withheld in their entirety." There is nothing to this. Though the information protected surely overlaps, perhaps completely, the CIA asserts that the exemptions are two distinct exemptions and invokes them separately and independently.

Morley's previous attempts to conflate Exemptions 1 and 3 have been rejected by this Court. 508 F.3d 1108, 1124. Morley attempts the same tactic with regard to the two statues which the CIA relies on to invoke Exemption 3: the National Security Act, and the CIA Act. Appellant Br. at 74-75. With the exception of a footnote, Morley's entire discussion focuses on one statute -- the National Security Act.

Morley states that "CIA has not established the need for suppression or the risk to national security." Morley offers no authority specific to Exemption 3 in this regard. Morley also asserts that the CIA has presented "no evidence of the need to protect the sources and methods at issue and that there is an unacceptable risk that their disclosure would damage national security." Appellant Br. at 71. Morley's arguments are unpersuasive. First, this Court has found that the CIA's description in the Dorn Declaration, which is supplemented by the Nelson Declaration, provides "substantial insight into the CIA's reasons for protecting intelligence sources and methods along with other internal information." *Morley* 508 F.3d 1108, 1125. Second the CIA's declarations properly detail what the withheld exempt information and documents would reveal if disclosed: CIA sources, methods, organization, functions, employee names, and the number of personnel employed by the CIA. Simply put,

the two withholding statutes protect this information from disclosure. JA 130, Nelson Decl. ¶¶ 107; 110.

Given the special deference owed to agency affidavits on national security matters, Morley's challenges are insufficient to show that summary judgment on Exemption 3 was inappropriate. 508 F. 3d 1108 at 1126.

C. FOIA Exemption 5

This Court remanded this matter with instructions for CIA to explain in greater detail how FOIA Exemption 5 permits the CIA to withhold documents the CIA claimed fell under the deliberative process privilege.

The deliberative process privilege protects "materials that are both predecisional and deliberative." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). The purpose of the deliberative process privilege is to "prevent injury to the quality of agency decisions." *See Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). The privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir.1980). In *McKinley v. Board of Governors of Federal Reserve System*, 647 F.3d

331 (D.C. Cir. 2011), the D.C. Circuit determined that the an agency properly invokes the deliberative process privilege to protect certain memoranda, rejecting plaintiff's claim that a "record is 'deliberative' only if its disclosure would harm the agency's decision making process." Instead, the D.C. Circuit found that, "Congress enacted FOIA Exemption 5 . . . precisely because it determined that disclosure of material that is both predecisional and deliberative does harm an agency's decision making process." *Id*. at 339.

Moreover, the Court noted that "[i]t would be impossible for courts to administer a rule of law to the effect that some but not all information about the deliberative process may be disclosed without violating Exemption 5." *Id*. at 340.

The predecisional character of a document is not altered by the passage of time in general. *In re Sealed Case*, 121 F.3d 729, 753 (D.C. Cir. 1997). The Supreme Court has held that Exemption 5 incorporates the government's deliberative process privilege, the ultimate purpose of which is to prevent injury to the quality of agency decision making. *Sears Roebuck & Co.*, 421 U.S. at 150-51. *Bonner v. U.S. Dept. of State*, 928 F.2d 1148, 1152-1153 (D.C. Cir. 1991) ("FOIA judicial review. . . while *de novo*, remains an assessment of the agency decision to withhold a

document. That decision, we hold, ordinarily must be evaluated as of the time it was made . . . . To require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing.").

The two documents withheld under Exemption 5 are fully described in the Nelson declaration and accompanying index. *See* JA 130, Nelson Decl. ¶¶ 116-17. The decision they concern was a periodic background and security reinvestigation, and both were dated April 28, 1978. *See* JA 130, Nelson Decl. ¶ 116. These documents were authored by CIA subordinates and directed to CIA decision makers. *Id*. The decisions at issue concerned Joannides fitness for the duty to which he was assigned. *Id*. The documents at issue reflect pre-decisional opinions concerning Joannides' evaluation for continuing fitness for duty. For example, one document is a confidential request for recommendations regarding Joannides' security clearance. *Id.* This document contains handwritten notes regarding Joannides' familial background and his suitability for a security clearance. *Id*. These handwritten notes are both pre-decisional and deliberative in nature.

Similarly, the other document, is an internal processing sheet regarding Joannides' security background investigation. *Id*. This

document contains recommendations concerning the waiver of certain reinvestigation methods and practices. These recommendations relate to a subsequent decision to maintain Joannides' security clearance and such recommendations are pre-decisional and deliberative in nature and, thus, protected by the deliberative process privilege. *Id*.

If these predecisional documents were released, the CIA's pre-decisional policy analysis, deliberations or debate would be stifled or chilled. *Id*. ¶ 115. Indeed, agency officials would hesitate to voice opinions or points of view that may, at first blush, appear to be too "outside the box," and thus they would refrain from providing the unvarnished truth in their analyses to policy makers. *Id*.

The CIA also withheld nine documents (including duplicates) which are described in the Nelson Declaration and index at Exhibit C. All of these documents (as well as the two discussed above), either solicited advice from or provided recommendations to decision makers regarding Joannides' employment and suitability as a CIA employee. JA 130, Nelson Decl. ¶ 118.

These internal CIA memoranda were authored by CIA subordinates to CIA decision makers and reflect predecisional opinions and contain recommendations regarding Joannides employment status as part of the

CIA's personnel and security review processes. These documents provided guidance to ultimate decision makers and were predecisional. JA 130, Nelson Decl. ¶ 113. If these predecisional documents were released, the CIA's pre-decisional policy analysis, deliberations or debate would be stifled or chilled. *Id*. ¶ 115. Indeed, agency officials would hesitate to voice opinions or points of view that may, at first blush, appear to be too "outside the box," and thus they would refrain from providing the unvarnished truth in their analyses to policy makers. *Id*. These documents were withheld in full based on Exemptions 1 and/or 3 and 5 and, in three instances, Exemption 6 as well.

Morley asserts that "[a]side from a bare assertion that the information is predecisional, no descriptive information is provided. Appellant's Br. at 82. This broad accusation is false.

The Nelson Declaration and accompanying Vaughn index describe the nature of the deliberative process and the chilling effects on the agency's deliberative processes if this particular information were released. *See* JA 130, Nelson ¶¶ 112-118. As described in the Nelson Declaration, all of these documents are integral parts of CIA's personnel and security processes and the deliberations involved in the hiring and retention of CIA employees. These processes are deliberative and based on

recommendations which inherently move up the organization. Typically, recommendations are made by component officials to staff chiefs, to office deputy directors and directors, to directorate level officials, and, if merited, to the executive leadership of the Agency, and such was the case with these documents. All of the documents solicited advice from or provided recommendations to decision makers regarding Joannides employment, security clearance, and suitability as a CIA employee. *See* JA 130, Nelson Decl. 118.

Morley asserts that "[t]here is no indication whether the documents flowed from a superior to a subordinate or vide versa. Nor is there any indications whether the recommendations were adopted." Appellant's Br. at 82. This too is false. The Nelson Declaration and accompanying Vaughn index describe the nature of the deliberative process and the chilling effects on the agency's deliberative processes if this particular information were released. *See* JA 112-118. In addition, the Nelson Declaration also describes all of the documents as containing either soliciting advice from or providing recommendations to decision makers regarding Joannides' employment and suitability as a CIA employee. JA 130, Nelson Decl. ¶ 118. The CIA invoked Exemption 5 along with Exemption 3 to protect information withheld from the two documents

addressed initially by the Dorn Declaration. The documents were released in part. JA 130, Nelson Decl. ¶ 116. As such, the withheld material protected by Exemption 5.

D. FOIA Exemption 6

This Court remanded for CIA to support its withholdings under Exemption 6. 508 F.3d at 1128. FOIA Exemption 6, provides for the withholding of matters contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). The Supreme Court held that Exemption 6 "'[was] intended to cover detailed Government records on an individual which can be identified as applying to that individual'." *Department of State v. Washington Post Co.*, 456 U.S 595, 602 (1982); *New York Times Co. v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc). This broad construction of "similar files" was necessary in view of Congress's primary purpose in enacting Exemption 6, which was "to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Washington Post Co.*, 456 U.S. at 599.

Once it is established that the withheld information meets the threshold requirement that it be in personnel, medical, or similar files, a

determination must then be made as to whether disclosure would constitute a "clearly unwarranted invasion of personal privacy." This requires balancing of the individual interest in privacy against public interest in disclosure. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

The limiting language, "clearly unwarranted invasion of personal privacy," strikes "a proper balance between protection of an individual's right of privacy and preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." *Rose*, 425 U.S. at 372 (citations omitted).

After its 2004 review, CIA invoked FOIA Exemption 6 to withhold exempt information contained in thirty-two documents. *See* JA 130, Nelson Decl. ¶ 120. CIA also asserted FOIA exemption 6 to withhold exempt information contained in many of the documents from its 2008 searches. *Id*.

CIA specifically determined that certain information should be withheld because it identified "the names of, and or identifying information (including biographical information and medical history), about specific individuals, including CIA employees and their family members," the

disclosure of which would constitute an unwarranted invasion of the personal privacy of third parties. JA 130, Nelson Decl. ¶¶ 86-89; ¶¶ 123-37.

For example, documents withheld contain biographical information regarding Joannides' mother and her travel plans; other documents containing Joannides' social security number; the names, dates of birth, places of birth, and addresses for Joannides' children; the name, relationship, home address, and home telephone number for Joannides' emergency contact; the names, addresses, and/or telephone numbers for Joannides' supervisors, references, and a close relative; biographical information regarding Joannides' wife, Violet J. Joannides. *Id*. ¶¶ 123-24.

Other documents contained the names and/or signatures of CIA employees, *id*. ¶ 125; or the signatures of CIA employees and information concerning Joannides' family, including Mrs. Joannides' maiden name, *id*. ¶ 126. CIA also withheld Joannides' social security number and Mrs. Joannides' maiden name from several documents and withheld personal information regarding Joannides and the names and signatures of CIA employees. *Id*. ¶ 127.

In addition, copies of Joannides' Form W-4 (federal income tax withholding for Joannides) for 1964 containing personal information

regarding Joannides' claimed deductions and home address were withheld. *Id*. ¶ 129.

Information relating to Joannides' family such as handwritten notes regarding Joannides' parents and uncles, including their place of birth and U.S. citizenship and Joannides' social security number, Mrs. Joannides' maiden name, biographical information regarding Joannides' children, their names, ages, dates of birth, and/or citizenship and emergency contacts were all properly withheld. *Id*. ¶¶ 130-133.

Information regarding CIA clandestine human intelligence sources, including home addresses, and/or telephone numbers. *Id*. ¶ 135, and information of Charles D. Ford's family and biographical information of third parties were all properly withheld. *Id*. ¶ 136. The individuals identified in these documents have a privacy interest in the information that the CIA withheld. As Joannides' children, they are potential targets for, at a minimum, unsolicited media inquires. Given the tenacity of today's media, there is a realistic probability that disclosure of the withheld information regarding Joannides' children could cause unwanted intrusion into their privacy. *Id.* Similarly, it is reasonable to assume these unwanted intrusions of the children's privacy would not be limited to the media. Publicly disclosing the children's biographical information also would

likely raise their public profile and result in unsolicited inquiries from co-workers, neighbors, and friends. Whether the unwanted intrusions take the form of media telephone calls, written correspondence, personal solicitations for interviews, or questions from inquisitive neighbors, it is reasonable to anticipate these invasions of privacy will be significant. *Id.*

The same rationale applies to the individuals identified as Joannides' emergency contacts. These individuals have a privacy interest in their names, home address, home telephone number, and relationship with Joannides. Disclosure of these individuals' biographical information reasonably may subject these individuals to questions regarding Joannides and what they knew of his work at the CIA. *Id.* ¶ 140.

The CIA employees who worked with and supervised Joannides also have a significant privacy interest in their biographical information. Disclosing their signatures, addresses, telephone number, affiliation with Joannides, or affiliation with the CIA would undoubtedly subject them to intense questioning from a variety of sources, that is, the media, family, friends, neighbors, etc. JA 130, Nelson Decl. ¶ 140. Similarly, disclosure of this information could also place the CIA employees and their families in danger from individuals seeking retribution against Joannides directly and the CIA generally. *Id.*

Though these individuals may never have worked with Joannides directly, disclosure of their biographical information in the context of a FOIA request about Joannides might lead one to conclude they worked on the same projects as Joannides. Even Morley admits that with the 50th anniversary of President's Kennedy's assassination "rapidly approaching with major movies and books "on the way" there will be renewed interests in private citizens thought to be connected to President Kennedy's assassination. Accordingly, disclosure of the information withheld by the CIA under Exemption 6 would constitute a clearly unwarranted invasion of personal privacy.

Although Morley has repeatedly, and literally without exception, characterized the documents at issue in this case as "pertaining to the assassination" and "Cuban operations" and of the "utmost public interest," Appellant's Br. at 15-22, this is neither correct nor sufficient. The nature of the information withheld pursuant to Exemption 6, namely personal and identifying information concerning Joannides' children, family and emergency contacts, indicate that these individuals have privacy interests in that information that outweighs the public interest in disclosing such information.

Nelson further concluded that in balancing the interest in

safeguarding the individuals' private affairs from unnecessary public scrutiny against the public's right to government information, there was no overriding public interest that requires the disclosure of the names of, or identifying information about the third parties at issue. JA 130, Nelson Decl. ¶¶ 119-141. In this regard, Morley has not demonstrated any public interest in this type of information or explain in any way how disclosure would shed light on government operations. *Id.* at ¶ 141.

Nelson determined that even if some miniscule public interest could be found, the balance would still tilt dramatically against disclosure. Disclosure of the personal information at issue here would certainly violate the personal privacy of third parties. *Id.* at ¶ 134.

Accordingly, the CIA has demonstrated that it properly withheld information that would constitute a clearly unwarranted invasion of personal privacy and that the privacy interests involved clearly outweigh the negligible public interest in disclosure. JA 130, Nelson Decl. ¶¶ 119-141. Therefore, FOIA Exemption 6 was properly invoked and summary judgment on this issue should be affirmed.

E. CIA Demonstrated That Its *Glomar* Response Was Proper

This Court remanded with instructions for the CIA to provide additional explanation in support of its CIA's *Glomar* response,

specifically for more "specific details [of] the danger to intelligence sources and methods if the existence of response records were disclosed." 508 F.3d at 1126.

FOIA exemptions 1 and 3 apply in similar ways regarding CIA's Glomar response here. *See e.g.*, *Larson v. Department of State*, 565 F.3d 857, 862-63 (D.C. Cir. 2009) (commenting in a *Glomar* case that either Exemption 1 or Exemption 3 by itself "would likely be sufficient").

As the Nelson declaration in this case explained, any action requiring the CIA to confirm or deny the existence or nonexistence of CIA records about Mr. Joannides as a covert officer also would cause serious harm to national security. JA 130, Nelson Decl. ¶¶ 58-60**.** Among other things, such a confirmation or denial would potentially reveal persons or entities that are or have been sources, which in turn, would impact the insurance or inducements of both current and future sources. *See Fitzgibbon*, 911 F.2d at 763-64. With such information, foreign intelligence services could redirect their resources to identify potential CIA sources and circumvent CIA's monitoring efforts. *Id*.; *see Frugone*, 169 F.3d at 775. Official acknowledgment may also be construed negatively by foreign governments. *Id*. ¶¶ 28, 31-32. These explanations show the necessary detail to demonstrate risk of revealing sources and methods, as

required by the Court's remand instruction.

Contrary to Morley's assertion, the CIA has not invoked its *Glomar* defense to avoid a searching operational files. On remand, CIA the operational files were searched. First, despite a detailed explanation in Nelson Declaration, paragraphs 38-39 and 59-73, Morley misconstrues the *Glomar* in this case. As noted above, CIA previously acknowledged Joannides' involvement in covert activities at JMWAVE and his service as a CIA representative to the HSCA. The Glomar was invoked by CIA with respect to his involvement in any *other* "covert projects, operations, or assignments." Thus, information on Joannides and his activities while at JMWAVE, including any contacts he had with AMHINT and AMBARB, are not covered by CIA's *Glomar* response; CIA searched its operational files for records pertaining to George Joannides, the subject of Morley's FOIA request.

Morley asserts that CIA "takes the position that release of records on these projects [AMHINT and AMBARB] under the JFK Records Act does not constitute official acknowledgment." Appellant Br. 47-48. The CIA has maintained throughout this matter that Joannides, a covert employee for most of his career, has been officially acknowledged for two assignments: while he was at JMWAVE (1962-64) and when he served as

a CIA liaison officer to the HSCA (1978-79). As Morley acknowledges, while at JMWAVE, Joannides was the case officer for the Directorio Revolutionario Estudantil (DRE) or AMSPELL. As stated in the Nelson Declaration, in conducting its records search for information pertaining to George Joannides, NCS specifically searched 14 terms, including AMSPELL. Then CIA manually reviewed all potentially responsive records and determined that none referred or "pertain[ed]" to Joannides, including the records on AMSPELL. Morley's allegations regarding AMHINT, AMBARB and MOB are totally without merit and not relevant to CIA's limited *Glomar* response in this case.

Morley characterizes the documents at issue in this case as "pertaining to the assassination" and "Cuban operations" and of the "utmost public interest." Appellant's Br. 15-22. He accompanies this unfounded assertion with the misleading assertion that the information in these documents has previously been released. *Id*. 51, 59, 61-62. These twin arguments lie at the heart of many of his challenges –- Exemptions 1, 3, 6, and the Glomar. Specifically, Morley states that examples of intelligence sources and methods he cited "are drawn from officially disclosed records maintained at NARA's JFK Records Act Collection and they pertain to the same subject matter as to the withheld materials." Thus,

Morley contends that he met his "initial burden of pointing to information in the public domain that appears to duplicate that being withheld;" thereby creating a material fact at issue. However, Morley fails to address the full legal standard. A plaintiff must further demonstrate both that "the information requested [is] as specific as the information previously released" and it "must match the information previously disclosed." *Fitzgibbon v. C.I.A*, 911 F.2d 755, 765 (D.C. Cir. 1990)(emphasis added). *See also Assassination Archives & Research Center v. C.I.A.*,334 F.3d 55,60 (D.C. Cir. 2003) (that plaintiff must show that the previous disclosure duplicates specificity of the withheld material). The plaintiff carries the burden of production on both of these issues. *See Davis v. Dept. of Justice*, 968 F. 2d 1276, 1279 (D.C. Cir. 1992). Morley has not and cannot met this burden because most of the documents withheld are not from the same time period and do not pertain to the same subject matter.

F. FOIA Exemption 2

This Court remanded this matter with instructions for CIA to explain in greater detail how FOIA Exemption 2 permits the CIA to withhold documents responsive to Morley's FOIA request.

The CIA had initially invoked Exemption 2 for certain documents,

but upon further review following the Supreme Court's decision in *Milner v. Department of Navy*, 131 S. Ct. 1259 (2011), the CIA withdraws its assertions of Exemption 2 in all instances for the purposes of this matter only. However the CIA does not believe that this requires a remand to the District Court as all remaining documents at issue were withheld or partially withheld under other FOIA exemption statutes.

Morley contends that this Court should again remand this matter with instructions for CIA to explain in greater detail how FOIA Exemption 2 permits the CIA to withhold documents responsive to Morley's FOIA request. Appellant Br. 44. Among other exemptions, the CIA had initially invoked Exemption 2 for certain documents. Upon further review following Supreme Court's decision in *Milner v. Department of Navy*, 131 S. Ct. 1259 (2011), CIA withdraws its assertions of Exemption 2 in all instances for the purposes of this matter only. All of the remaining documents at issue were withheld pursuant to FOIA exemptions b(1) and/or b(3); some were also withheld pursuant to FOIA exemptions b(5) and/or b(6).[4] As any consideration of Exemption 2 is now moot, no

[4]There are two documents that were identified on the Vaughn index as having been withheld solely on the basis of b(2). In light of the CIA's decision to withdraw exemption b(2) for this matter only, the first document has been or will be produced to Morely. The second document listed in the Vaughn index citing only (b)(2)was administrative error; the information is

remand is necessary if this Court determines that the CIA's invocation of FOIA exemptions other than b(2) was proper, as it has previously done regarding the CIA's application of the same exemptions to similar information in this case.

G. The CIA's Vaughn Index Clearly Describes And Justifies The Bases For The Relevant FOIA Exemption Claims.

This Court affirmed the adequacy of the CIA's Vaughn Index. 508 F.3d 1108 at 1123-26; 1128, but nevertheless, Morley challenges the District Court's ruling finding the CIA's Vaughn index sufficient.

A Vaughn index is intended, in part, to afford the FOIA requester a meaningful opportunity to challenge the agency's claims of exemption. *See King v. United States Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987). There is no set formula for a Vaughn index. *Kay v. FCC*, 172 F.3d 919 (D.C. Cir. 1998); *see also Delaney, Midgail & Young, Chartered v. IRS*, 826 F.2d 124, 128 (D.C. Cir. 1987).

The test for a Vaughn index is "that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure." *Hinton v. Dep't of Justice*, 844 F.2d 126, 129 (D.C. Cir. 1988).

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withheld pursuant (b)(1), (b)(3) and (b)(6).

This Court held that a "[c]ategorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate." *Id*. at 224. In *Judicial Watch, Inc. v. Food & Drug Administration*, 449 F.3d 141, 147 (D.C. Cir. 2006), however this Court also explained that "[w]e have never required repetitive, detailed explanations for each piece of withheld information-that is, codes and categories may be sufficiently particularized to carry the agency's burden of proof." The Court observed that "[e]specially where the agency has disclosed and withheld a large number of documents, . . . particularity may actually impede court review and undermine the functions served by a Vaughn index." *Id*. In holding that the Vaughn index was adequate, this Court noted the index included eleven categories of information describing the nature of each record. *Id*. at 146-47.

In this matter, the CIA's Vaughn index contains many of the same categories as in *Judicial Watch*, including an identification number, the document's subject, and the date. Although the CIA has not matched each redaction with a specific explanation, its Vaughn index does identify the exemptions claimed for each individual document. In *Judicial Watch* the index and the agency affidavit worked in tandem, the court validating the

index because it "tied each individual document to one or more exemptions, and the [agency's] declaration linked the substance of each exemption to the documents' common elements." *Id*. at 147. The released portion of the document supplements the Vaughn index, so that "[t]he released content of the documents served to illuminate the nature of the redacted material." *Id*. at 145. The District Court correctly ruled that the coding in the Vaughn index at issue conveys enough information for Morley and the District Court to identify the records referenced and understand the basic reasoning behind the claimed exemptions. Summary judgment was therefore appropriate on the adequacy of the CIA's Vaughn index.

Instead of applying the applicable reasonableness standard, Morley argues that the CIA must describe with minute particularity the various "kinds" of "the nonexempt information" that could not be segregated. Appellant's Br. at 44. He even goes as far as to insist that the CIA must inform him of the exact "percentage" of the surface area on each page the nonsegregable information covers and exactly where in the document the nonsegregable information appears. *Id*. He has no support for these requirements.

Indeed, this Court has previously endorsed the very coding system

the CIA employed in its Vaughn index in this case and has held that, so long as an accompanying declaration explains each code "in considerable detail, describing generically why information so designated qualifies for an exemption," the index is sufficient. *Keys*, 830 F. 2d at 349. The CIA has done precisely that here. CIA's declaration liberally describes every code the CIA applied to the category of information withheld under each exemption. *See* JA 130, Nelson Decl. Index C.

H. Segregability

"[T]he District Court ha[s] an affirmative duty to consider the segregability issue sua sponte." 508 F.3d 1123. This Court instructed the District Court to make "the requisite segregability determination."

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt." 5 U.S.C.§ 552(b). "Before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007) (citations omitted). The question of segregability is context-specific based on the nature of the document in question, and an agency must provide a reasonably detailed justification rather than conclusory statements to

support its claim that the non-exempt material in a document is not reasonably segregable. *Mead Data*, 566 F.2d at 261.

In this case, the CIA met its segregability obligation. The Dorn and Nelson declarations indicate that all of the records responsive to appellant's FOIA request have been reviewed line-by-line and all reasonably segregable non-exempt information has been released. JA 130, Nelson Decl. ¶ 142; JA 203, Dorn Decl. ¶¶ 21-24. Furthermore, the agency released documents with appropriate redactions rather than withholding all documents in full. The number of documents released (in whole or in part) further illustrates that the CIA reviewed all records carefully and determined what portions could be released and what portions needed to be withheld. *Id.* For all the documents that the CIA withheld in their entirety, either the entire document constituted information that was exempt from disclosure or the exempt information within the document was "inextricably intertwined" with non-exempt portions. JA 130, Nelson Decl. ¶ 143; JA 203, Dorn Decl. ¶¶ 86-87; *see Mead Data*, 566 F.2d at 260. The Dorn and Nelson declarations attest to the fact that the CIA expressly considered the segregability issue and concluded that no additional information could be released to Morley. *Id.* Thus, the CIA properly concluded that no further information could be

released without compromising information exempt under claimed exemptions.

Morley argues that the CIA's Vaughn index does not pass muster with respect to several documents that were withheld, because, he claims, the CIA has either inadequately described exempt information or failed to provide nonexempt, segregable information. None of the challenges Morley raises has any merit.

Morley's segregability argument fails as a general matter because he misunderstands the legal standard to which the CIA is held. The Vaughn index lists each applicable code with respect to every document withheld. For example, page document number 1199978, which Morley challenges, contains information withheld under category codes (b)(1),(b)(3) and (7)(C)(e), which correspond to names and identifying information of third parties of investigative interest, and under codes (b)(6)-4 and (b)(7)(C)-4, which correspond to names and identifying information concerning third parties merely mentioned. JA 616. The privacy information contained on those pages is so intertwined that, once redacted, the pages contain no meaningful segregable information. *Id*. Though Morley insists without basis that he is entitled to more particularized descriptions, the descriptions provided here precisely mirror

the descriptive system endorsed in *Keys*.

As *Keys* held -- and contrary to Morley's erroneous understanding of the applicable descriptive standard -- the CIA is not required to "identify the information that had been blacked out on each specific document." 830 F.2d at 349 (emphasis in original & internal quotation marks omitted). Morley's argument also "disregards the propriety of using generic terms so long as they have been defined aptly for purposes of resolving FOIA claims." *Id*.

As *Keys* observed, the approach Morley demands -- and the approach *Keys* rejects -- would require the agency to supply either an unnecessary "phony individualization" of the reasons for each redaction or "a degree of detail that would reveal precisely the information that the agency claims it is entitled to withhold." *Id*. When, as here, the CIA has adequately explained each withholding using the "functional categories" represented by the codes, the Vaughn index provides a sufficient description of withheld information. *See id*. Morley's proffered incredulity at the CIA's representations that many documents contained no segregable information after application of the category codes is not a legal argument and, in any case, cannot rebut the presumption of good faith to which the CIA declarations are entitled. Morley's true complaint may well

be that he does not believe that any information, no matter how fragmented, is information that CIA is entitled to withhold. *See* Appellant's Br. at 84 ("It is hard to conceive of nonexempt information that is not meaningful in the context of a covert operation which has some bearing on the assassination of a president."). The District correctly found that the CIA's Vaughn index is sufficient.

CONCLUSION

WHEREFORE, for all these reasons, Appellee respectfully submits that the Court should affirm the District Court's judgment.

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and contains 13543 words.

/s/ *Benton Peterson*
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CERTIFICATE OF SERVICE

I hereby certify that on this th day of February 28, 2012, I caused a copy of the foregoing Brief for Appellee to be served by the Court's ECF system on counsel for Appellant.

/s/ *Benton Peterson*

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