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

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| ACCURACY IN MEDIA, *et al.* | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Civil Action No. 14-1589 (EGS) |
| | ) | |
| UNITED STATES DEPARTMENT OF DEFENSE, *et al.* | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

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

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## INTRODUCTION

Plaintiffs, Accuracy in Media, Inc., and seven individuals who are members of the Citizens Committee on Benghazi (collectively, "Plaintiffs"), filed this Freedom of Information Act ("FOIA") case, which originally involved over 40 separate requests seeking disclosure of records related to the September 11, 2012 attack on the United States diplomatic facility in Benghazi, Libya. In the intervening three and a half years since Plaintiffs first filed this action, Defendants, United States Department of Defense ("DOD"), United States Department of State ("State"), the Federal Bureau of Investigation, a component of the United Department of Justice ("FBI"), and the Central Intelligence Agency ("CIA") (collectively, "Defendants"), have worked with Plaintiffs to narrow the scope of certain requests, conducted searches reasonably calculated to uncover responsive records, and released non-exempt records or the portions thereof. And with respect to responsive records that Defendants have withheld in full or part, each agency has carefully articulated the bases for its decision to withhold the challenged information, relying on, among other things, Exemptions 1, 3, 5, 6, 7(A), 7(C), 7(D), 7(E) and 7(F). Because Defendants have satisfied their obligations under FOIA, the Court should grant summary judgment in Defendants' favor.

## FACTUAL AND PROCEDURAL BACKGROUND

This FOIA action originally involved over 40 separate FOIA requests submitted to Defendants. *See generally* Am. Compl., ECF No. 31 (Jun. 24, 2015). Notwithstanding the number of FOIA requests originally at issue, the parties have agreed that the only issues that remain for the Court to resolve upon the parties' cross-motions for summary judgment are the following:

**The United States Department of Defense**

(1) Whether DOD's search for documents responsive to Plaintiffs' request for initial reports, orders, and communications referenced in Plaintiffs' FOIA request directed at DOD as referenced in ¶¶ 18-29, among other paragraphs

referencing initial reports, orders and communications, of the Second Amended Complaint, was reasonable**;**

(2) Whether DOD's search for records of Gaddafi's March 2011 interest in truce and abdication made to Africa Command in response to Plaintiffs' FOIA request as referenced in ¶ 35 of the Second Amended Complaint was reasonable; and

(3) Whether DOD properly withheld in full documents reflecting DOD's maps depicting assets in response to Plaintiffs' FOIA request as referenced in ¶ 30 of the Second Amended Complaint. The parties believe the Court's decision on this issue also will be dispositive on the issue of DOD's decision to withhold records regarding personnel and other available assets, which are the subject of Plaintiffs' other FOIA requests directed at DOD.

**The State Department**

(1) Whether the State Department's search for records responsive to the portion of Plaintiffs' FOIA request cited in ¶ 116(6) of the Second Amended Complaint was reasonable; and

(2) Whether the State Department properly withheld in full or part C05935290 (call log), C06052236 (ARB interview summary), C06052239 (ARB interview summary), C06052240 (ARB interview summary), and video footage bates labeled C05467904, C05467908, C05467912, C05467920, C05467921, C05467910, C05467913, C05467914, C05467915, C05467916, C05467917, and C05467919.

**The Central Intelligence Agency**

(1) Whether the CIA's *Glomar* assertion in response to Plaintiffs' request for records of "all communications generated in March 2011 regarding Colonel Muammar Gaddafi's expressed interest in a truce and possible abdication and exile out of Libya" as referenced in ¶ 144(2) of the Second Amended Complaint was proper;

(2) Whether the CIA's search for records in response to Plaintiffs' request for "[a]ll records of CIA Director David Petraeus's actions and communications for the 24-hour period beginning when first notified of the attack" and "[a]ll records of Deputy CIA Director Michael Morell[']s] *sic* actions and communications for the 24-hour period beginning when first notified that the Benghazi Mission was under attack" as referenced in ¶¶ 136(5)-(6) of the Second Amended Complaint was reasonable; and

(3) Whether the CIA properly withheld information in the document bates labeled C06354620 produced in response to Plaintiffs' request for records reflecting "allegations that the Executive Branch personnel deleted . . . records of CIA activities in Libya in the aftermath of the . . . attacks . . . including but not limited to records in possession of the CIA Office of the Inspector General" as referenced in ¶ 144(1) of the Second Amended Complaint.

**The Federal Bureau of Investigation**

(1) Whether the FBI's *Glomar* assertion in response to Plaintiffs' request for records reflecting survivors' accounts, including September 15 or 16 FBI

302 interview reports, as referenced in ¶ 126(8) of the Second Amended Complaint was proper.

**The Defense Intelligence Agency**

(1) Whether the agency properly withheld in full records V-11 (intelligence report dated Sept. 12, 2012), V-19 (situation report dated Sept. 12, 2012), V-45 (intelligence report dated Sept. 12, 2012), and V-48 (intelligence report dated Sept. 12, 2012).

*See* Joint Motion to Amend Briefing Schedule at 3-6, ECF No. 65 (Mar. 2, 2018).

As set forth in the parties' March 2, 2018 filing, Plaintiffs challenge the sufficiency of certain searches conducted by Defendants, DOD, CIA, and State, and their remaining challenges focus solely on Defendants' justifications for withholding certain records and the *Glomar* assertions of Defendants CIA and FBI. *See id.* Accordingly, Defendants have tailored their respective declarations and *Vaughn* indices (where applicable) to address these particular issues only. *See generally* Declaration of Alesia Y. Williams, Chief of the FOIA and Declassification Services Office for the Defense Intelligence Agency ("DIA") ("Williams Decl."); Declaration of Rear Admiral James J. Malloy, Vice Director of Operations for the Joint Staff at the Pentagon ("Malloy Decl."); Declaration of Mark H. Herrington, Associate Deputy General Counsel in the Office of General Counsel of DOD ("Herrington Decl."); Declaration of Antoinette B. Shiner, Information Review Officer for the Litigation Information Review Office at the CIA ("Shiner Decl."); Third Declaration of David M. Hardy, Section Chief of the Record/Information Dissemination Section, Records Management Division of the FBI ("Third Hardy Decl."); Declaration of David M. Hardy—Department of State Consultation ("Hardy Decl.—State Consultation"); Declaration of Eric F. Stein, Director of the Office of Information Programs and Services of State ("Stein Decl.").

## I. DOD's Search For Responsive Records

In response to Plaintiffs' request for initial orders and communications, DOD components DIA, EUCOM, the Navy's United States Naval Forces Europe-Africa/United States 6th fleet

("CNE-CAN-C6F"), and the Marine Corps' Forces Europe/Africa ("MARFOREUR/AF") conducted searches for records responsive to this request. *See* Herrington Decl. ¶¶ 8-15. EUCOM determined that the J2-Directorate of Intelligence, the J33-EUCOM Plans and Operations Center, Operations Division, and the J5/8-Directorate of Strategy were likely to have records responsive to this request and directed that these three directorates conduct searches for responsive records. *Id.* ¶¶ 10-11. The Navy's CNE-CAN-C6F, the Navy command with geographic responsibility for, among other countries, Libya, directed six offices —N21, N33, N35, Combined Task Force ("CTF") 65, CTF 67, and CTF 68—to conduct searches of both electronic and paper databases at all classification levels. *Id.* ¶¶ 12-13. Finally, MARFOREUR/AF, the Marine Corps component within the command of both the EUCOM and AFRICOM Combatant Commands, which has geographic responsibility for the region in and around Libya, conducted both an electronic and paper search for records responsive to Plaintiffs' request. *Id.* ¶¶ 14-15.

As explained in detail in the Herrington declaration, each of the offices and directorates that was identified as likely to have records responsive to this request then directed personnel to search paper files, including secured safes, and electronic files, including E-mail accounts and network share drives. *Id.* ¶¶ 10-15. With respect to the search of electronic files, personnel used broad search terms such as "Libya," "Benghazi," "FAST," "Marine Force Reconnaissance Team," "Marine Corps Fleet Antiterrorism Security Team," "Naval Station Rota," "NAVSTA Rota," "NASSIG," "NAS Sigonella," among other, to capture responsive records. *Id.* In addition, personnel were instructed to search paper and electronic files at all classification levels, including searches of shared drives on systems appropriate to the classification of the information. *Id.*

DIA also conducted a search for records responsive to Plaintiffs' request for "OPREP-3 PINNACLE report(s)." *Id.* ¶ 9. This is so notwithstanding the fact that DIA "would not be the

unit responsible for" issuing such a report. *Id.* ¶ 8. Rather, OPREP-3 PINNACLE reports are issued by the combatant command with responsibility for the area where the incident occurred, *i.e.*, AFRICOM. *Id.* The details of DIA's search, which included two searches of its proprietary database, are set forth in the Herrington declaration. *See id.* ¶ 9.

Both EUCOM and AFRICOM produced records responsive to Plaintiffs' request for initial orders and communications regarding the September 11, 2012 attack on the diplomatic facility in Benghazi, Libya. *Id.* ¶¶ 16-24. EUCOM produced a redacted copy of the EXECUTION ORDER ("EXORD") dated September 12, 2012, and time stamped 0700 Zulu (Greenwich meantime). *Id.* ¶ 16. "The EXORD is the initial written order directing EUCOM to execute an action in response to the September 11, 2012 attack on the United States mission in Benghazi, Libya." *Id.* Put another way, the "EXORD that EUCOM produced to Plaintiffs is the first written order" in response to the September 2012 attack in Benghazi, Libya. *Id.* ¶ 18; *see also id.* ¶ 19 (explaining that "the timeline provided to Plaintiffs demonstrates that the initial orders in response to the September 11, 2012 attack . . . were conveyed *verbally*" (emphasis added)). In response to Plaintiffs' request for OPREP-3 PINNACLE reports, AFRICOM produced this report to Plaintiffs. *See id.* ¶ 23. As explained in the Herrington declaration, AFRICOM, not DIA, is the combatant command responsible for the area encompassing Libya. *Id.* ¶ 24.

Finally, DOD component, AFRICOM, conducted a thorough search for "records of all communications generated in March of 2011, regarding Colonel Muammar Gaddafi's expressed interest in a truce and possible abdication and exile out of Libya." *Id.* ¶ 25. AFRICOM determined that the following offices were reasonably likely to have responsive records: AFRICOM'S J5 Directorate (Strategy, Engagement, and Programs); the Combined Joint Task Force – Horn of Africa Component, Records Management; and the J6 Directorate (Command, Control,

Communications, and Computer Systems). *Id.* AFRICOM also searched the AFRICOM portal and the Office of the Commander. *Id.* And it directed Colonel Brian Linvill to conduct a search of his electronic and paper files because Plaintiffs' request specifically mentioned him. *Id.*

Both Colonel Linvill and personnel in the three AFRICOM offices used broad search terms to locate electronic records, including such terms as "Gaddafi," "Qaddafi," "Dibri," "Kubic," "Ham," and "Linvill," covering the March 2011 time period referenced in Plaintiffs' FOIA request. *Id.* ¶ 26. To ensure that the search would cast a sufficiently wide net, the search effort "extended to all known spelling variants of the individuals named in the request." *Id.*

**II. CIA's Search For Responsive Records**

Plaintiffs challenge the sufficiency of CIA's search for "all records of Director Petraeus and Deputy Director Morell's actions and communications for the 24-hour period beginning when first notified that the Benghazi Mission was under attack." *See* Shiner Decl. ¶¶ 24. Plaintiffs ultimately agreed to narrow their request to include only emails, memoranda, and notes generated by Director Petraeus or Deputy Director Morell during this 24-hour time period. *See id.*

In response to this request, CIA first broadened the timeframe that the search covered from the 24-hours Plaintiffs requested to 30-hours, reasoning that "a 30-hour period of time would be more appropriate in order to avoid missing records likely responsive to Plaintiffs' underlying request." *Id.* ¶ 28. Information management professionals within the CIA's Information Management Services ("IMS") then directed "searches of the electronic mailboxes—both classified and unclassified—of Director Petraeus and Deputy Director Morell" covering the 30-hour time period. *Id.* ¶ 29. IMS personnel also conducted searches of multiple databases within the Director's Area in which other records generated by Director Petraeus and Deputy Director Morell would be found, including databases that contain handwritten notes and memoranda intended for either internal or external audiences. *Id.* As explained in the Shiner declaration, CIA

personnel were instructed to search electronic files and databases using broad search terms, including the relevant titles of Director Petraeus and Deputy Director Morell; locations, like "Benghazi;" facilities, like "annex;" and actions, like "attack." *Id.* ¶ 30.

**III. The State Department's Search for Responsive Records**

As explained in the Stein declaration, State's Office of Information Programs and Services ("IPS") is the office responsible for, *inter alia*, responding to FOIA requests, including identifying which offices, overseas posts, or other records systems within State may reasonably be expected to contain records responsive to the request. Stein Decl. ¶ 9. IPS determined that "the State Archiving System, the Executive Secretariat, and the Department's collection of emails sent and received by Secretary Clinton, which includes both materials provided to the Department by former Secretary Clinton and by the Federal Bureau of Investigation" were the offices and record systems likely to have records of Secretary's actions and communications during the 24-hour period beginning when she was first notified about the September 11, 2012 attack on the U.S diplomatic facility in Benghazi, Libya. *Id.* ¶ 11.

The Stein declaration delineates the specific searches conducted of these offices and systems, including the nature of the records contained therein and the search capability and access of the systems searched. *Id.* ¶¶13-24. This included searches of the State Archiving System, the Secretariat Tracking and Retrieval System ("STARS"), the Secretariat Telegram Processing System ("STePS"), and Top Secret Files, as well as searches of the Executive Secretariat's Retired Electronic Files and Retired Paper Files, the latter of which contained copies of former Secretary Clinton's calendar and official schedules and was manually searched for responsive documents by IPS personnel. *See id.* ¶¶ 13-23. State personnel also searched two additional sources of Secretary Clinton's emails—materials provided to the Department by Secretary Clinton in 2014, and

materials provided by the FBI in 2016. *See id.* ¶ 24. "Although not all of these materials were in the Department's possession and control at the time this FOIA request was made, [State] voluntarily agreed to conduct searches of the information transferred from the FBI to [State] for records responsive to Plaintiffs' FOIA request, in the interest of reducing any issues to be litigated." *Id.* In addition, IPS identified individuals who were likely to have responsive records and searched their individual electronic folders of files. *See id.* ¶ 20 (explaining that IPS searched of the electronic files of Cheryl Mills and Jacob Sullivan, former State employees within the Office of the Secretary during former Secretary Clinton's tenure).

With respect to the electronic searches conducted of the aforementioned systems, State personnel employed electronic search techniques specifically targeted at capturing all responsive records. *Id.* ¶¶ 9-24. Specifically, State personnel used the term "or" between terms to perform a disjunctive search, employed keyword searches that included common variations of the selected terms, and focused the search on the September 11, 2012, through September 12, 2012 timeframe. *Id.* State's search retrieved 63 records response to item 6 of the FOIA request. *Id.* ¶¶ 14, 19, 22, 23, 24.

## ARGUMENT

### I. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). FOIA actions are typically resolved on summary judgment. *See Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 200 (D.D.C. 2007). Where, as here, the parties have moved and cross-moved for summary judgment, the Court conducts a *de novo* review of the agency's response to the challenged FOIA requests. *See* 5 U.S.C.

§ 552(a)(4)(B). When a requester challenges the adequacy of an agency's search, "[i]n order to obtain summary judgment, the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

The agency must also justify any records withheld (in whole or in part) subject to FOIA's statutory exemptions. Congress recognized "that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). "Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) (quotation omitted)). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C.Cir.1982), and *Hayden v. NSA*, 608 F.2d 1381, 1388 (D.C.Cir.1979)).

## II. THE SEARCHES CONDUCTED BY DEFENDANTS CIA, DOD, AND STATE SATISFY THE REQUIREMENTS OF FOIA

The Court may grant summary judgment concerning the adequacy of an agency's search for responsive records based on information provided in "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Valencia–Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68) (alteration in

original); *Meeropol v. Meese*, 790 F.2d 942, 952 (D.C. Cir. 1986). "Such agency affidavits attesting to a reasonable search 'are afforded a presumption of good faith,' and 'can be rebutted only with evidence that the agency's search was not made in good faith.'" *Id.* (citations omitted).

Reasonableness, not perfection, is therefore the Court's guiding principle in determining the adequacy of a FOIA search. *Id.*; *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998). "There is no requirement that an agency search every record system." *Oglesby*, 920 F.2d at 68. Moreover, the mere fact that a search uncovers few documents—or even none at all—does not render that search inadequate: "the issue to be resolved is not whether there might exist any . . . documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Weisberg*, 745 F.2d at 1485 (internal citation omitted); *see also Meeropol*, 790 F.2d at 952-53 (search is not presumed unreasonable simply because it fails to produce all relevant material); *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (agency need not demonstrate that all responsive documents were found and that no other relevant documents could possibly exist). Conducting a "reasonable" search is a process that requires "both systemic and case-specific exercises of discretion and administrative judgment and expertise" and is "hardly an area in which the courts should attempt to micromanage the executive branch." *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 662 (D.C. Cir. 2003) (quotation omitted).

To that end, in evaluating the adequacy of a search, courts accord agency affidavits a presumption of good faith that cannot be rebutted by a plaintiff's speculation "about the existence and discoverability of other documents." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal quotation and citation omitted); *see also Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981) (same). Rather, to establish the sufficiency of its search, the agency's affidavits need only explain the "scope and method of the search" in "reasonable detail."

*Kidd v. Dep't of Justice*, 362 F. Supp. 2d 291, 295 (D.D.C. 2005). The agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *W. Ctr. for Journalism v. IRS*, 116 F. Supp. 2d 1, 9 (D.D.C. 2000), *aff'd*, 22 F. App'x 14 (D.C. Cir. 2001); *Roberts v. U.S. Dep't of Justice*, Civ. No. 92-1707 (NHJ), 1995 WL 356320, at * 1 (D.D.C. Jan. 29, 1993). As explained below, that is precisely what Defendants CIA, DOD, and State have done here.

The Shiner, Herrington, and Stein declarations demonstrate that each agency "made a good faith effort to conduct . . . search[es] for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68. CIA, DOD, and State each searched "'all locations likely to contain responsive documents.'" *Id.*; *see also Huntington v. U.S. Dep't of Commerce*, 234 F. Supp. 3d 94, 103-04 (D.D.C. 2017) (quoting *Bartko v. U.S. Dep't of Justice*, 167 F. Supp. 3d 55, 64 (D.D.C. 2016)). Each declaration describes in detail the particular offices searched and the search methods used to locate records responsive to the particular request. *See* Shriner Decl. ¶¶ 28-31; Herrington Decl. ¶¶ 8-27; Stein Decl. ¶¶ 4- 25.

Nor may Plaintiffs overcome this finding by claiming that that there must be other responsive records that the agencies have not produced. Indeed, "[a]n agency's 'failure to turn up a particular document or mere speculation that as yet uncovered documents might exist,' . . . does not undermine the determination that the agency conducted an adequate search for the requested records.'" *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 143 (D.D.C. 2015). Here, Plaintiffs' "assertion that various records related to [their] requests must have existed is 'simply conjecture' and is 'insufficient to justify a finding that the search was inadequate.'" *Id.* Accordingly, the Court should find that Defendants CIA, DOD, and State satisfied their respective search obligations under FOIA.

## III. DEFENDANTS CIA AND FBI PROPERLY DECLINED TO CONFIRM OR DENY THE EXISTENCE OR NON-EXISTENCE OF RECORDS RESPONSIVE TO PLAINTIFFS' FOIA REQUESTS

A *Glomar* response allows the Government to "refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception." *Wolf*, 473 F.3d at 374 (quoting *Gardels*, 689 F.2d at 1103 (D.C. Cir. 1982)). The Court should afford "substantial weight" to an agency's decision to assert a Glomar response. *Sea Shepherd Conservation Soc'y v. IRS*, 208 F. Supp. 3d 58, 89 (D.D.C. 2016). And summary judgment is appropriate when the agency puts forth "public affidavit[s] explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records." *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). Ultimately, the Government can establish the appropriateness of the Glomar response if it is deemed "logical" or "plausible." *Wolf*, 473 F.3d at 375.

Courts in this Circuit have consistently upheld *Glomar* responses where, as here, confirming or denying the existence or nonexistence of records would reveal classified information protected by FOIA Exemption 1; disclose information protected by statute in contravention of FOIA Exemption 3; or risk disclosure of information that could result in the destruction of evidence, the chilling or intimidation of witnesses, or reveal the scope and nature of the government's investigation. *See, e.g.*, *Frugone v. CIA*, 169 F.3d 772, 774–75 (D.C. Cir. 1999) (finding that CIA properly refused to confirm or deny the existence of records concerning the plaintiff's alleged employment relationship with CIA pursuant to Exemptions 1 and 3); *Larson*, 565 F.3d at 861–62 (upholding the National Security Agency's use of the Glomar response to the plaintiffs' FOIA requests regarding past violence in Guatemala pursuant to Exemptions 1 and 3); *Wheeler v. CIA*, 271 F. Supp. 2d 132, 140 (D.D.C. 2003).

Moreover, where, as here, the requested records implicate national security concerns, courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) (internal citation omitted). "[I]n the national security context," therefore, "the reviewing court must give 'substantial weight' to agency declarations." *ACLU v. U.S. Dep't of Justice*, 265 F. Supp. 2d 20, 21 (D.D.C. 2003) (internal citation omitted). In according such deference, "a reviewing court must take into account . . . that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm." *Wolf*, 473 F.3d at 374 (internal citation omitted).

As explained below and more fully in the accompanying declarations, Defendants CIA and FBI can neither confirm nor deny whether the agencies possess records responsive to Plaintiffs' FOIA requests because the Government has determined that the existence or non-existence of any such records is exempt from disclosure. *See* Third Hardy Decl. ¶¶ 5-16; Shiner Decl. ¶¶ 57-71.

### A. Defendant CIA Correctly Invoked Its Glomar Response under FOIA Exemptions 1 and 3

FOIA Exemption 1 protects from disclosure information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is "in fact properly classified pursuant to such Executive Order." 5 U.S.C. § 552(b)(1). Under Executive Order 13,526, an agency may withhold information that an official with original classification authority has determined to be classified because its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security[.]" Exec. Order 13526 § 1.4, 75 Fed. Reg. 707, 709 (Dec. 29, 2009). The information must also "pertain[] to" one of the categories of information specified in the Executive Order,

including "intelligence activities (including covert action), intelligence sources or methods." Exec. Order 13526 §§ 1.4(c); *see also Judicial Watch, Inc. v. U.S. Dep't of Defense*, 715 F.3d 937, 941 (D.C. Cir. 2013) ("[P]ertains is not a very demanding verb.").

Agencies may also invoke FOIA Exemption 3 to support a *Glomar* response. *See Larson*, 565 F.3d at 862-63. This exemption bars disclosure of information that Congress has required by statute to be "withheld from the public." 5 U.S.C. § 552(b)(3). To that end, Exemption 3 protects from disclosure information that is protected by another statute, provided the statute "(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.* § 552(b)(3)(A). The "purpose of Exemption 3 [is] to assure that Congress, not the agency, makes the basic nondisclosure decision." *Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987); *see also id.* ("[T]he policing role assigned to the courts in a[n Exemption 3] case is reduced.").

To determine whether the CIA has properly invoked Exemption 3, courts apply a two-prong test. *See CIA v. Sims*, 471 U.S. 159, 167-68 (1985). First, the court must determine whether the statute qualifies as an exempting statute under Exemption 3. Second, the court must decide whether the withheld material falls within the scope of the exempting statute. *See id.* Here, the CIA relies on two statutes—(1) section 6 of the Central Intelligence Act of 1949 ("the CIA Act"), which provides that the CIA shall be exempted from the provisions of "any other law" (in this case FOIA) that requires, *inter alia*, the disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency, *see* 50 U.S.C. § 3507; *see also* Shiner Decl. ¶¶ 41-42; and (2) section 102(A)(i)(1) of the National Security Act of 1947, which requires that "[t]he Director of National Intelligence shall protect intelligence sources and methods from

unauthorized disclosure," *see* 50 U.S.C. § 3024(i)(1); *see also* Shiner Decl. ¶¶ 43-44. Because both the CIA Act and the National Security Act are exempting statutes for the purposes of Exemption 3, *see, e.g., ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011); *Larson*, 565 F.3d at 865; *see also, e g., Halperin v. CIA*, 629 F.2d 144, 148-50 (D.C. Cir. 1980), the CIA has satisfied the first prong of the *Sims* inquiry.

The CIA's *Glomar* response also easily satisfies the second prong of *Sims* because any requested records fall well within the broad scope of section 102(A)(i)(1)'s protection of "intelligence sources and methods." The Supreme Court has recognized the "broad sweep of [section 102(A)(i)(1)'s] statutory language," as well as the lack of any "limiting language." *Sims*, 471 U.S. at 169; *see also id.* at 169-70 ("Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence. The plain statutory language is not to be ignored."); *see also Leopold v. CIA*, 106 F. Supp. 3d 51, 57-58 (D.D.C. 2015). In fact, the mandate to withhold information pursuant to the National Security Act is broader than the authority to withhold information pursuant to FOIA Exemption 1 and Executive Order 13526, on which the CIA also relies to neither confirm nor deny the existence of the requested records.[1] *Cf. Gardels*, 689 F.2d at 1107.

Applied to this case, the Shiner Declaration aptly explains that revealing the existence or nonexistence of records responsive to Plaintiffs' FOIA request for records pertaining to Colonel Muammar Gaddafi's purported request for abdication and exile "would itself reveal a classified

[1] As set forth in the Shiner declaration, the CIA also relies on § 3.6(a) of Executive Order 13526, which authorizes the CIA to neither confirm nor deny the existence or nonexistence of requested records "whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." Shiner Decl. ¶ 57.

fact—namely, whether CIA has or had an intelligence interest in Colonel Muammar Gaddafi's possible abdication, exile, or truce, as well as any intelligence interest in General Abdulqader Yusef Dibri as it pertains to Gaddafi's possible abdication, exile, or truce." Shiner Decl. ¶ 58. Indeed "acknowledging the existence or nonexistence of such records necessarily would disclose at a minimum the CIA's association with or intelligence interest, or lack thereof, in the expressed interested in a truce or possible abdication and exile out of Libya of Muammar Gaddafi. Disclosure of whether CIA was involved or not in these alleged specific intelligence activities and interests would reveal information concerning the reach, locations, and capabilities or limitations of CIA's clandestine intelligence activities and operations." *Id.* ¶ 62. Moreover, "[t]he release of such information would provide CIA's adversaries with insight on how the CIA might or might not choose to focus its intelligence activities, including, for example, whether the CIA has or had any affiliation with Muammar Gaddafi or Abdulqader Yusef Dibri." *Id.* ¶ 63. Such disclosures, and the resulting endangerment to human intelligence sources and compromising of intelligence activities and methods, as Mr. Shiner states, reasonably could be expected to cause serious damage to our national security. *See id.* ¶¶ 64-65.

Because the Shiner Declaration thoroughly explains how revealing information on whether the CIA has or had an intelligence interest in Colonel Muammar Gaddafi's possible abdication, exile, or truce would harm national security and reveal information concerning "intelligence sources or methods" that Congress has barred from disclosure, nothing more is required to support the agency's *Glomar* assertion in response to this particular request. *See Wolf*, 473 F.3d at 375-76; *see also Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927.

### B. Defendant FBI Correctly Invoked Its Glomar Response under FOIA Exemption 7(A)

The withholding of "'records or information compiled for law enforcement purposes'" is permitted by FOIA Exemption 7 "to the extent one or more listed risks are present." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1113 (D.C. Cir. 2007) (quoting 5 U.S.C. § 552(b)(7)). "The Exemption 7 'law enforcement purpose' includes both civil and criminal investigations and proceedings within its scope." *Pratt v. Webster*, 673 F.2d 408, 420 n.32 (D.C. Cir. 1982). Reflecting its role as "the primary investigative agency of the federal government," *Pinson v. U.S. Dep't of Justice*, 245 F. Supp. 3d 225, 250 (D.D.C. 2017) , the FBI "need only 'establish a rational nexus between [an] investigation and one of the agency's law enforcement duties and a connection between an individual or incident and a possible security risk or violation of federal law'" to "show that . . . disputed documents were 'compiled for law enforcement purposes'" and thus come within the purview of Exemption 7. *Blackwell v. FBI*, 646 F.3d 37, 40 (D.C. Cir. 2011) (quoting *Campbell*, 164 F.3d at 32).

Exemption 7(A) is one of six subdivisions of Exemption 7. Reflecting "the Congress's recognition that 'law enforcement agencies ha[ve] legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it [comes] time to present their case,'" *Citizens for Resp. & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1096 (D.C. Cir. 2014), "exempts from disclosure 'records or information compiled for law enforcement purposes . . . to the extent that [their] production . . . could reasonably be expected to interfere with enforcement proceedings.'" *Id.* (quoting 5 U.S.C. § 552(b)(7)(A)). An agency withholding records under Exemption 7(A) "must therefore demonstrate that [the] disclosure [of the records] 'could reasonably be expected to interfere with . . . enforcement proceedings that are . . . pending or reasonably anticipated.'" *Id.* (quoting *Mapother v. U.S Dep't of Justice*, 3 F.3d

1533, 1540 (D.C. Cir. 1993)). Examples of records that are protected by Exemption 7(A) include "records [that] could disclose to individuals under investigation the identities of potential witnesses, the content of the government's evidence and trial strategy and the focus of the investigation." *Id.* at 1098. The "general principle of deference to the executive on national security issues" that applies to the withholding of records under FOIA Exemptions 1 and 3 applies as well to the withholding of records under FOIA Exemption 7(A). *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928.

As explained in the attached Third Hardy Declaration, "confirming or denying that the FBI does or does not possess specific statements responsive to Plaintiffs' request [for FBI 302 reports] would require the FBI to confirm or deny whether it has this purported information and could reasonably be expected to interfere with the FBI's ongoing investigations into the attacks on U.S. Government personnel and facilities in Benghazi, Libya." Third Hardy Decl. ¶ 13; *see also id.* ¶¶ 14-15. Plaintiffs invite this Court to find otherwise, arguing that the FBI's right to assert a *Glomar* response has been waived by the publication of the book *13 Hours*. But "[t]he FBI . . . has never acknowledged the existence of the alleged FBIA 302s, which are the subject of Plaintiffs' request. Nor has the FBI ever made the alleged FBI 302s or the information purportedly contained therein available to the public." *Id.* ¶ 7. Because Plaintiffs cannot "point[] to specific information in the public domain that appears to duplicate that being withheld," *Whalen v. U.S. Marine Corps*, 407 F. Supp. 2d 54, 59 (D.D.C. 2005), the Court should uphold the FBI's *Glomar* assertion. *See Leopold*, 106 F. Supp. 3d at 57-58 ("An agency only waives its right to assert an otherwise valid exemption defense when it has *officially acknowledged* the *precise* information at issue." (emphasis added).

Moreover, it is easy to see—and Mr. Hardy explains—how the release of such information, if it even exists, could reasonably be expected to cause severe and manifest harm to ongoing criminal investigations. "[W]hile it is publicly known the FBI is actively investigating the Benghazi attacks, specific details such as the direction, scope, pace, particular witness statements, and focus of the investigations are not known." *Id.* ¶ 15. It is for this reason that "the mere acknowledgement that specific interview reports were obtained or not obtained itself undermines the integrity of the ongoing investigations." *Id.*

The FBI's decision to neither confirm nor deny the existence of any FBI 302 reports also serves another important function: It protects against the "destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation." *Tipograph v. Dep't of Justice*, 83 F. Supp. 3d 234, 239 (D.D.C. 2015). To that point, Mr. Hardy explains that "[a]cknowledgment that any individual has or has not provided the FBI with a statement concerning an investigation may subject the individual to harassment, ridicule, or even retaliation as acknowledgment would confirm or deny the identity of potential cooperating witnesses." Third Hardy Decl. ¶ 16. Relatedly, "acknowledgment that any individual has or has not provided the FBI with a statement would chill the FBI's investigative efforts as prospective witnesses would reasonably be reluctant to cooperate if they know the FBI will inform third party requesters about their involvement, if any, in an investigation." *Id.* ¶ 16. Because these are precisely the type of harms that courts routinely find sufficient to justify withholding records under Exemption 7(A), *see, e.g.*, *Boyd v. Criminal Div. of the U.S. Dep't of Justice*, 475 F.3d 381, 386 (D.C. Cir. 2007), these documents (should they exist) would be exempt from disclosure under Exemption 7(A).

## IV. DEFENDANTS CIA, DIA, DOD, AND STATE PROPERLY WITHHELD INFORMATION UNDER EXEMPTIONS 1, 3, 5, 6, 7(A), 7(C), 7(D), 7(E), AND 7(F)[2]

### A. Defendants CIA, DIA, DOD, and State Properly Withheld Information Under Exemption 1

As explained above, Exemption 1 protects from disclosure records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Information withheld on the basis of Exemption 1 often "implicat[es] national security, a uniquely executive purview." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926–27. While courts review *de novo* an agency's withholding of information pursuant to a FOIA request, "de novo review in FOIA cases is not everywhere alike." *Ass'n of Retired R.R. Workers, Inc.*, 830 F.2d at 336. That is because courts defer to an agency's determination that the challenged records implicate national security concerns, reasoning that "the executive ha[s] unique insights into what adverse [e]ffects might occur as a result of public disclosure of a particular classified record." *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (internal quotation marks omitted); *see also Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927 (citing *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001)); *Larson*, 565 F.3d at 865.

Accordingly, "in the national security context . . . the reviewing court . . . give[s] 'substantial weight'" to agency declarations. *ACLU*, 265 F. Supp. 2d at 27 (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987)); *see Frugone*, 169 F.3d at 775; *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990). In according such deference, "a reviewing court must take into account . . . that any affidavit or other agency statement of threatened harm to national

[2] Defendants CIA, DIA, DOD, and State carefully reviewed all documents from which information was withheld for reasonable segregation of non-exempt information and implemented segregation when possible.

security will always be speculative to some extent, in the sense that it describes a potential future harm." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (citation and internal quotation marks omitted). "[T]he text of Exemption 1 itself suggests that little proof or explanation is required beyond a plausible assertion that information is properly classified." *Morley v. C.I.A.*, 508 F.3d 1108, 1124 (D.C. Cir. 2007); *see also Darui v. U.S. Dep't of State*, 798 F. Supp. 2d 32, 41 (D.D.C. 2011) (same).

For Exemption 1 purposes, the current Executive Order, E.O. 13526, governs the classification of national security information. An agency establishes that it has properly withheld information under Exemption 1 if it demonstrates that it has met the classification requirements of E.O. 13526. Section 1.1 of the Executive Order sets forth four requirements for the classification of national security information: (1) an original classification authority classifies the information; (2) the U.S. Government owns, produces, or controls the information; (3) the information is within one of eight protected categories listed in section 1.4 of the Order; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security, and the original classification authority is able to identify or describe the damages. E.O. 13526 § 1.1(a).

In this case, Defendants DIA, DOD, CIA, and State properly invoked Exemption 1, having concluded that (i) certain records responsive to Plaintiffs' requests satisfy the classification criteria of Executive Order 13526; and (ii) their respective agency has not previously authorized or officially acknowledged public release of the information. *See* Williams Decl. ¶¶ 2, 10-20; Malloy Decl. ¶¶ 4-11; Shiner Decl. ¶¶ 3-4, 32-39; Stein Decl. ¶¶ 1, 25-35. And as explained in detail in the accompanying declarations, the records that Plaintiffs have requested, *i.e.*, records concerning the September 11, 2012 terrorist attack on the United States' diplomatic facility in Benghazi,

including records reflecting DOD force posture during that time period and intelligence analyses and reports, fall well within the scope of records protected from disclosure under Exemption 1. *See id.*

**1. Executive Order § 1.4(a) — Military Plans, Weapons, or Systems**

DOD properly invoked Exemption 1 to protect from disclosure 12-pages in response to Plaintiffs' request for "'maps depicting all assets that could have been dispatched to the Benghazi mission or the CIA annex facility'" on September 11, 2012, or September 12, 2012 without regard to whether "'such maps were created before or after September 11, 2012.'" Malloy Decl. ¶¶ 3-4. As explained in the Malloy declaration, "the 12 pages withheld by Joint Staff contain the force posture of the Department of Defense for the European Command, Central Command, and Africa Command areas of responsibility as well as the force posture of Special Operation forces worldwide during the relevant timeframe in September 2012." *Id.* ¶ 9. "These documents contain the numbers of and location of ships, submarines, response forces, and aircraft surrounding Benghazi, Libya . . . [and] further contain the numbers of military personnel located in particular countries during that time." *Id.* These records also contain "the transit time required for each available asset to reach Benghazi." *Id.*

Because the 12-pages that DOD withheld contain detailed information concerning military operations and plans they "fit squarely within section[] 1.4(a) . . . E.O. 13256. . . ." *Id.* ¶ 10. Moreover, this information "is sensitive and classified at the SECRET level" because the "release of this information reasonably could be expected to cause serious damage to the national security." *Id.* ¶ 11. This is true notwithstanding the "passage of time." *Id.* As explained in the Malloy declaration, "how DOD forces are positioned at a particular time could provide great insight to adversaries regarding DOD's interests, intent, and potential operations in these volatile regions of

the world." *Id.* Moreover, disclosure of DOD's force posture and positioning could increase "[t]ensions with hostile governments' and allow terrorist organizations to use "transit time capability information to plan attacks within windows of perceived vulnerability." *Id.* Given the sensitivity of this information, "the information is currently and properly classified and must not be released." *Id.*

**2. Executive Order § 1.4(c)—Intelligence Sources and Methods**

Defendants DIA, CIA, and State properly withheld information in records the disclosure of which would reveal intelligence sources and methods. DIA has determined that certain information within records bates labeled V-11 and V-19 (finished intelligence products) and V-45 and V-48 (intelligence reports classified as Top Secret) "remains currently and properly classified at the TOP SECRET and SECRET levels under E.O. 13,526." Williams Decl. ¶ 13. V-11, V-19, V-45, and V-48 each contain analyses and information related to the September 2012 Benghazi attack, which is either based on classified sources or methods, summarizes intelligence gaps, or would reveal specific details about the sources and methods associated with obtaining the reported intelligence information. *See id.* 16. The disclosure of this intelligence information "would provide adversaries of the United States sufficient information about the specific intelligence collection techniques utilized by the United States that adversaries could then use to develop countermeasures to resist such intelligence gathering techniques" thereby undermining the efficacy and reliability of these intelligence sources and methods. *Id.* at ¶ 17.

The same is true with respect to CIA's decision to redact certain information in the IG report responsive to Plaintiffs' request, *see* Shiner Decl. ¶ 34(c), and State's decision to withhold information in ARB interview summary bates labeled C6052236 and the video surveillance footage bates labeled C05467917, which State has withheld on behalf of the CIA, *see* Stein Decl.

¶¶ 31-33. As explained in detail in Ms. Shiner's declaration, the CIA redacted "code words, locations, names of covert CIA personnel, as well as references to classified Agency programs, functions, assets, and activities unrelated to the September 2012 attacks," as the disclosure of this information would reveal "intelligence activities . . . [or] intelligence sources or methods" and cause "serious damage to the national security." Shiner Decl. ¶¶ 34(c), (d), 35. Likewise, State has withheld portions of the ARB interview conducted after the September 11, 2012 Benghazi attack that directly reference "intelligence activities, sources, or methods," the disclosure of which "could enable foreign governments or persons or entities opposed to U.S. foreign policy objectives to identify U.S. intelligence activities, sources, or methods and to undertake countermeasures that could frustrate the ability of the U.S. Government to acquire information necessary to the formulation and implementation of U.S. foreign policy." Stein Decl. ¶ 31. And State has applied virtually the same rationale that the CIA utilized to withhold the names and other identifying information of covert CIA personnel, to withhold video surveillance footage that contains images of CIA personnel. *Id.* ¶ 32. As the Stein declaration aptly explains, "[i]ntelligence methods also include the physical security and force protection measures taken to protect CIA facilities and personnel, the CIA's security response, strategies, and the tactics techniques, and procedures used by CIA security personnel who react to threats." *Id.* Disclosure of this information could allow "a foreign intelligence service or adversary nation" to "glean from those methods what precautions the CIA took and why, how the CIA responded and why, and how the CIA could use those precautions to respond in different situations," thereby allowing them to use the information "to thwart future intelligence operations," among other things. *Id.* There should be no question that the information withheld by Defendants DIA, CIA, and State "reasonably could be expected to

result in damage to the national security" and thus is currently and properly classified and exempt from disclosure under Exemption 1.

### 3. Executive Order § 1.4(d)—Foreign Relations or Foreign Activities of the United States

Defendants DIA, DOD, and State (on behalf of the CIA) also properly withheld classified information pertained to the national defense or foreign relations of the United States under § 1.4(d) of Executive Order 13526. *See* Williams Decl. ¶¶ 18-20; *see also* Malloy Decl. ¶¶ 8-11; Stein Decl. ¶¶ 18-20. DIA has explained that the two classified, finished intelligence reports that it withheld in full, V-11 and V-19, "contain analyses related to the Benghazi consulate attack, including references to confidential sources and sensitive aspects of U.S. foreign relations," the disclosure of which "could have a chilling effect on current United States foreign relations with certain countries, and any future relations inasmuch as potential associations might be precluded for fear of exposure, especially with sources that are confidential." Williams Decl. ¶¶ 18-19. These two records, moreover, contain "information regarding intelligence relationships and agreements that DIA has with certain foreign countries." *Id.* ¶ 20.

As explained above, DOD has withheld a classified 12-page document that contains the force posture of military assets and personnel, including information detailing "military operations conducted overseas" and thus directly implicating the "foreign activities of the United States." Malloy Decl. ¶¶ 9-10. Finally, on behalf of Defendant CIA, State has withheld video surveillance footage bates labeled C05467917, explaining that the video footage "contains information related to both confidential sources and sensitive aspects of U.S. foreign activities, including, in particular, activities relating to identifying potential threats to U.S. national security." Stein Decl. ¶ 34. Because the withheld information directly implicates the foreign relations or foreign activities of

the United States, Defendants DIA, DOD, and State properly classified this information and withheld it under Exemption 1.

#### 4. Executive Order § 1.4(g)—Vulnerabilities or Capabilities of Systems, Installations, Infrastructures, Projects, Plans, or Protection Services Relating to the National Security

Finally, Defendants DOD and State properly invoked Exemption 1 to withhold classified information pertaining to the vulnerabilities or capabilities of the United States' military posture and its overseas missions. Both DOD and State have explained in detail how the challenged records, *i.e.*, the 12-pages containing the force posture of DOD and State's two ARB interview summaries, contain information directly from which the "vulnerabilities or capabilities" of the United States' military operations, including overseas missions, could be gleaned if this information was disclosed. *See* Malloy Decl. ¶¶ 9-11; *see also* Stein Decl. ¶ 35. Because the withheld information is currently and properly classified, Defendants DOD and State properly withheld the challenged records under Exemption 1.

### B. Defendants CIA, DIA, and State Properly Withheld Information Under Exemption 3

Exemption 3 protects from disclosure information that is protected by a separate statute, provided that such statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue," or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).[3] The "purpose of Exemption 3 [is] to assure that Congress, not the agency, makes the basic nondisclosure decision." *Ass'n of*

[3] The FOIA section setting forth Exemption 3 was amended seven years ago to specify that statutes "enacted after the date of enactment of the OPEN FOIA Act of 2009" must specifically cite to the appropriate section of FOIA to qualify as withholding statutes pursuant to Exemption 3. *See* 5 U.S.C. § 552(b)(3)(B) (added by OPEN FOIA Act of 2009, Pub. L. No. 111-83, tit. V, § 564, 123 Stat. 2142). Here, the statutes invoked by government were enacted well before the date of that amendment.

*Retired R.R. Workers*, 830 F.2d at 336. Courts apply a two-pronged inquiry when evaluating an agency's invocation of Exemption 3. *See Sims*, 471 U.S. at 167-68. First, the court must determine whether the statute identified by the agency qualifies as an exempting statute under Exemption 3. Second, the court should consider whether the withheld material falls within the scope of the statute. *See id.* As the D.C. Circuit has recognized, "Exemption 3 presents considerations distinct and apart from the other eight exemptions." *Ass'n of Retired R.R. Workers*, 830 F.2d at 336. Indeed, "its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Id.* (quoting *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1987)).

Notably, the mandate to withhold information pursuant to Exemption 3 is broader than the authority to withhold information pursuant to FOIA Exemption 1 and Executive Order 13526. *Cf. Gardels*, 689 F.2d at 1107 (noting that the executive order governing classification of documents was "not designed to incorporate into its coverage the CIA's full statutory power to protect all of its 'intelligence sources and methods"). This is because, unlike section 1.1(a)(4) of E.O. 13526, the relevant statutes do not require the agency to determine that the disclosure of the information would be expected to result in damage to the national security. *Compare, e.g.*, 50 U.S.C. § 3507 *with* E.O. 13,526 § 1.1(a)(4). Congress has already made that determination by enacting these statutes. *See Hayden*, 608 F.2d at 1390. In the context of this case, the two statutes on which Defendants rely are the National Security Act of 1947 and the Central Intelligence Agency Act of 1949.

**1. National Security Act of 1947**

Defendants DIA and State, the latter on behalf of the CIA, rely on Section 102A(i)(1) of the National Security Act of 1947, as amended, as justification for their protection of certain

information from disclosure. *See* Williams Decl. ¶¶ 23-24; *see also* Stein Decl. ¶¶ 36-37; Shiner Decl. ¶¶ 43-44. That provision states that the Director of National Intelligence "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1).[4] Thus, the National Security Act qualifies as a withholding statute under FOIA Exemption 3, *see, e.g.*, *ACLU*, 628 F.3d at 619, and the Supreme Court has recognized the "wide-ranging authority" provided by the National Security Act, entrusting the agency to "weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence gathering process." *Sims*, 471 U.S. at 180. Rather than place any limit on the scope of the Act, "Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information the Agency needs to perform its statutory duties with respect to foreign intelligence." *Id.* at 169-70.

In this case, DIA, "which carries out its intelligence mission under guidance from the Director of National Intelligence and in accordance with the National Security Act, has invoked the Act to protect information, *i.e.*, 2 finished intelligence products and 2 Top Secret level intelligence reports, which, if released, could reasonably be expected to lead to the unauthorized disclosure of intelligence sources and methods. *See* Williams Decl. ¶¶ 23-24. The withheld information contains intelligence sources and methods, the disclosure of which "would allow

[4] This section was formerly known as 50 U.S.C. § 403-1(i)(1), and several of the cases cited herein cite the provision in this manner. While the text of the statute speaks of the "Director of National Intelligence"—or, prior to 2004, of the Director of Central Intelligence, see 50 U.S.C. § 403-3(c)(7) (2001)—the Government has long taken the position that any member of the intelligence community may assert the National Security Act to protect intelligence sources and methods, and courts have regularly upheld other agencies' assertions of that Act in support of Exemption 3 withholdings, including those of State. See, e.g., *Sack v. CIA*, 53 F.Supp.3d 154 (D.D.C. 2014) (DIA); *Larson*, 565 F.3d at 868–69 (National Security Agency); *Krikorian v. U.S. Dep't of State*, 984 F.2d 461, 465–66 (D.C. Cir. 1993) (Department of State); *Schoenman v. FBI*, 763 F. Supp. 2d 173, 193 n.12 (D.D.C. 2011) (DOJ on behalf of FBI), *aff'd*, 841 F. Supp. 2d 69 (D.D.C. 2012) .

adversaries to employ countermeasures, thus reducing the effectiveness of the sources and methods as intelligence collection tools." *Id.* ¶ 24. Because this information is protected from disclosure under the National Security Act, DIA properly invoked Exemption 3 to prevent the challenged records' release.

The same is true with respect to State's invocation of Exemption 3 and the National Security Act on behalf of the CIA with respect to the ARB interview summary based labeled C06052236 and the video surveillance footage bates labeled C05467917. *See* Stein Decl. ¶ 37; *see also* Shiner Decl. ¶43. "The CIA withheld certain information in the ARB interview summary C06052236 and the video surveillance footage C05467917, as required under the National Security Act of 1947, because the information, if released, could reasonably be expected to lead to the unauthorized disclosure of intelligence sources and methods." Stein Decl. ¶ 37; *see also* Shiner Decl. ¶ 43. Under these circumstances, State properly invoked Exemption 3 on behalf of the CIA to prevent the disclosure of "properly classified information pertaining to intelligence activities, sources and methods and foreign relations and foreign activities of the United States, which is protected by statute." *Id.*; *see also* Shiner Decl. ¶ 44.

**2. Section 6 of the CIA Act and 50 U.S.C. § 3024(m)(1)**

Defendants CIA and State, the latter on behalf of the CIA, rely on Section 5 of the CIA Act to support their decision to withhold certain information contained in the challenged Inspector General Report, the ARB interview summary C06052236, and the September 11, 2012 video surveillance footage bates labeled C05467917 respectively. As explained above, Section 6 of the

CIA Act, 50 U.S.C. § 3507,[5] as amended, provides further authority for withholdings under Exemption 3. That provision provides:

> In the interests of the security of the foreign intelligence activities of the United States and in order to further implement section 403-1(i) of this title that the Director of National Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the . . . [CIA] shall be exempted from . . . the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.

This section authorizes specific and absolute protection from disclosure of CIA employees' names and personal identifiers (*e.g.*, employee signatures, employee numbers, or initials), titles, file numbers, and internal organizational data.[6] As mentioned above, the CIA Act meets the requirements for withholding information under FOIA Exemption 3. *See, e.g.*, *Military Audit Project v. Casey*, 656 F.2d 724, 737 n.39 (D.C. Cir. 1981); *Morley v. CIA*, 453 F. Supp. 2d 137, 150-151 (D.D.C. 2006) (protecting CIA employee names and personal identifiers under section 6 of the CIA Act and Exemption 3), *rev'd on other grounds*, 508 F.3d 1108 (D.C. Cir. 2007); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 167-68 (D.D.C. 2004) (same).

Here, there is little doubt that the CIA and State (on behalf of the CIA) properly invoked Exemption 3 and the CIA Act to prevent the disclosure of the withheld information. The CIA redacted information in the IG report "concerning the organization, names, or official titles of personnel employed by the CIA," the disclosure of which is prohibited under the CIA Act. Shiner Decl. ¶ 41. Indeed, courts routinely uphold the CIA's redaction of this type of information. *See*

[5] This section was formerly known as 50 U.S.C. § 403g, and several of the cases cited herein cite the provision in this manner.

[6] 50 U.S.C. § 3024(m)(1) authorizes the Director of National Intelligence to exercise the same authority to protect disclosure of information about the personnel of the Office of Director of National Intelligence.

*Morley*, 453 F. Supp. 2d at 150-151. And although it is not required to identify or describe the nature of the threat to national security that disclosure of the information could reasonably be expected to result from the information's disclosure, the CIA has aptly explained that "the damage to national security that reasonably could be expected to result from the unauthorized disclosure of information relating to the identities and functions of CIA personnel is co-extensive with the damage that reasonably could be expected to result from the unauthorized disclosure of classified information." Shiner Decl. ¶ 42. Indeed, in this case it is not difficult to conceive the potential damage to national security of disclosing the names, functions, and other identifying information of CIA personnel who were interviewed by the IG as it assessed the efficacy of the CIA's operations with respect to the September 2012 attack on the diplomatic facility in Benghazi, Libya. Under these circumstances, the CIA properly invoked Exemption 3 and the CIA Act to withhold information identifying information about CIA personnel, including names, official tiles, and organizations, as referenced in the IG report.

The same is true with respect to State's decision to withhold the ARB interview summary bates labeled C06052236 and the video surveillance footage bates labeled C05467919 on behalf of the CIA. "The interview summary and video footage, if disclosed, would reveal or disclose the functions of the CIA," including "the identities of CIA employees and information disclosing their duties or functions, including functions related to the protection of intelligence methods." Stein Decl. ¶ 38. And although it is not required, State has articulated the harm posed if it was required to release this statutorily-protected information. *See* Stein Decl. ¶ 38.

**C. Defendant State Properly Withheld Information Under Exemption 5**

FOIA Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C.

§ 552(b)(5). The exemption ensures that members of the public cannot obtain through FOIA what they could not ordinarily obtain through discovery in a lawsuit against the agency, including, as relevant here, information protected from disclosure on the basis of the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

Among the privileges protected by Exemption 5 is the deliberative process privilege, a privilege uniquely available to the government. *See Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 601 (D.C. Cir. 2001). The deliberative process privilege applies to "decisionmaking of executive officials generally," and protects documents containing deliberations that are part of the process by which government decisions are formulated. *In re Sealed Case*, 121 F.3d 729, 737, 745 (D.C. Cir. 1997). The purpose of the deliberative process privilege is to encourage full and frank discussion of legal and policy issues within the government, and to protect against public confusion resulting from disclosure of reasons and rationales that were not ultimately the bases for the agency's action. *See, e.g.*, *Mapother*, 3 F.3d at 1537; *Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). The privilege is animated by the common-sense proposition that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process." *Sears, Roebuck & Co.*, 421 U.S. at 150-51 (citation omitted).

To fall within the scope of the deliberative process privilege, a document must be both predecisional and deliberative. *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional if "it was generated before the adoption of an agency policy" and it is deliberative if "it reflects the give-and-take of the consultative process." *Id.* "To establish that [a] document is predecisional, the agency need not point to an agency final decision, but merely establish what deliberative process is involved, and the role that the

documents at issue played in that process." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (citing *Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1223 (D.C. Cir. 1989)).

Courts have held that the deliberative process privilege broadly applies to "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*, 617 F.2d at 866. As courts in this Circuit have explained, "[D]raft documents by their very nature, are typically predecisional and deliberative, because they reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors." *In re Apollo Group, Inc. Securities Litigation*, 251 F.R.D. 12, 31 (D.D.C. 2008) (non-FOIA case) (quotations omitted). Accordingly, "drafts are commonly found exempt under the deliberative process exemption." *People for the American Way Foundation v. National Park Service*, 503 F. Supp. 2d 284, 303 (D.D.C. 2007); *see also*, *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996).

Exemption 5 covers "not only communications which are themselves deliberate in nature, but also all communications which, if revealed, would expose to public view the deliberative process of an agency," and, therefore, applies if, "disclosure of even purely factual material would reveal an agency's decision-making process." *Russell*, 682 F.2d at 1048. It has been held to protect "material reflecting deliberative or policy-making processes." *Montrose Chem. Corp. of California v. Train*, 491 F.2d 63, 67 (D.C. Cir. 1974).

Here, State withheld three Accountability Review Board ("ARB") interview summaries because these records contain predecisional and deliberative analyses concerning the September 2012 attack on the diplomatic facility in Benghazi, Libya. *See* Stein Decl. ¶¶ 39-40. The ARB

was a group convened to analyze the facts and circumstance of the attack on the U.S. facilities in Benghazi, Libya, identify procedural vulnerabilities that allowed the attacks to occur, and recommend policy changes to prevent future similar events." Exhibit A to Stein Decl. The three ARB interview summaries, all of which are marked "draft-pre-decisional and deliberative," *see* id., contain "a selection and analysis of facts" concerning the September 2012 Benghazi attack, which "reflect[] the judgment of the author" and "opinions" expressed as "Department officials . . . formulate[ed] a strategy for official action in response to an international security matter." *Id.* ¶ 40. Moreover, the interview notes contain content that is itself deliberative, including the views of "the interviewee concerning the security measures or tactics that would be advisable at a diplomatic facility." *Id.* In other words, the information contained in the three ARB interview summaries reflects the predecisional and deliberative processes of State, the disclosure of which "could reasonably be expected to chill the open and frank expression of ideas, recommendations, and opinions" of agency personnel. *Id.* Moreover, "[d]isclosure of this information would also impede the ability of responsible Department officials to formulate and carry out executive branch programs by inhibiting candid internal discussion and the expression of recommendations and judgments regarding the preferred course of action" in response to the Benhgazi attack. *Id.* Under these circumstances, State properly invoked Exemption 5 to protect the predecisional and deliberative information contained in the ARB interview summaries.

### D. Defendants CIA and State Properly Withheld Information Under Exemption 6

DOD and State properly withheld information pursuant to FOIA Exemption 6, which protects "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 has adopted a broad construction of the privacy interests protected by Exemption 6. In *U.S. Dep't of*

*Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763 (1989), the Court rejected a "cramped notion of personal privacy" under the FOIA's exemptions and instead emphasized that "privacy encompass[es] the individual's control of information concerning his or her person." As the Supreme Court has explained, "[p]rivacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others." *Id.* at 764 n.16 (citation omitted).

In the context of FOIA, privacy is of particular importance because a disclosure required by FOIA is a disclosure to the public at large. *See Painting & Drywall Work Preservation Fund, Inc. v. HUD*, 936 F.2d 1300, 1302 (D.C. Cir. 1991) (finding that if information "must be released to one requester, it must be released to all, regardless of the uses to which it might be put"). It is for this reason that Exemption 6 requires an agency to balance the individual's right to privacy against the public's interest in disclosure. *See U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). The agency must determine whether disclosure of the information threatens a protectable privacy interest; if so, the agency must weigh that privacy interest against the public interest in disclosure, if any. *See Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991). The "only relevant public interest to be weighed in this balance is the extent to which disclosure would serve the core purpose of FOIA, which is contribut[ing] significantly to public understanding *of the operations or activities of the government*." *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis as in *Fed. Labor Relations Auth.*; internal citation and quotation marks omitted). Plaintiffs bear the burden of demonstrating that disclosure of the challenged information would serve this interest. *See Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 391-92 nn. 8 & 13 (D.C. Cir. 1987). In this case, Plaintiffs are unable to satisfy this burden.

Defendant CIA properly invoked Exemption 6 to protect against disclosure the names of CIA officers and contractors who were interviewed in connection with the CIA IG's independent investigation of the September 2012 Benghazi attack and whose names are referenced within the withheld IG report. *See* Shiner Decl. ¶¶ 45-49. The same is true of Defendant State, which has invoked Exemption 6 to protect "the identities of [State] Department personnel, other U.S. Government employees, contractors, and other third parties" referenced in the ARB interview summaries that Plaintiffs seek here. Stein Decl. ¶ 42.

As Ms. Shiner has explained with respect to the information withheld in the IG's report, disclosure of the names of CIA officers and contractors whom the IG interviewed in connection with its investigation of the September 2012 attack "would constitute a clearly unwarranted invasion of personal privacy," potentially "trigger hostility towards" these particular individuals, and jeopardize ongoing and future investigations by the IG. Shiner Decl. ¶¶ 47-48. State has articulated the same concerns with respect to disclosure of the names and identities of its personnel, other U.S. Government employees, contractors, and other third parties who are identified in both the ARB interview summaries and certain surveillance videos. *See* Stein Decl. ¶¶ 42-45. The same is true with respect to State's decision to withhold the names of family members of the victims that appear in the call log. State explained that it withheld this information in order to spare them from "harassment, unwanted attention, or unsolicited communications that would not shed light on the operations of the U.S. Government." Exhibit 1 to Stein Decl. Both CIA and State have concluded that these privacy concerns outweigh any interest the public has in disclosure of the names and identities of these individuals. *See* Shiner Decl. ¶ 45; *see also* Stein Decl. ¶ 45. Because nothing more is required of Defendants, the decision to withhold this information was proper.

### E. Defendants CIA and State Properly Withheld Information Under Exemption 7

FOIA Exemption 7 protects from disclosure all "records or information compiled for law enforcement purposes" that could reasonably be expected to cause one of the six harms outlined in the Exemption's subparts. 5 U.S.C. § 552(b)(7). "To fall within any of the exemptions under the umbrella of Exemption 7, a record must have been 'compiled for law enforcement purposes.'" *Pub. Emps. for Envtl. Responsibility v. Int'l Boundary & Water Comm'n* ("*PEER*"), 740 F.3d 195, 202 (D.C. Cir. 2014) (quoting 5 U.S.C. § 552(b)(7)). "According to the Supreme Court, the term 'compiled' in Exemption 7 requires that information be created, gathered, or used by an agency for law enforcement purposes at some time before the agency invokes the exemption." *Id*. at 203 (citation omitted). As explained in detail below and in the accompanying declarations submitted on their behalf, Defendants CIA and State asserted Exemption 7 to protect law enforcement-related information contained in the CIA's IG report, the ARB interview summaries bates labeled C06052239 and C06052240 and State's 12 surveillance videos of the United States' diplomatic facility in Benghazi, Libya. *See* Shiner Decl. ¶¶ 50-56; Stein Decl. ¶¶ 46-62. Their invocation of Exemption 7 in these instances was proper.

#### 1. FOIA Exemption 7(A) – Pending Law Enforcement Proceedings

"Exemption 7(A) covers materials compiled for law enforcement purposes whose disclosure 'could reasonably be expected to interfere with enforcement proceedings.'" *Sussman*, 494 F.3d at 1113–14 (quoting 5 U.S.C. § 552(b)(7)(A)). The enforcement proceedings must be either ongoing or "reasonably anticipated." *Id.* at 1114 (quoting *Mapother*, 3 F.3d at 1540). In the national security context, "the long-recognized deference to the executive" utilized by the courts when applying Exemptions 1 and 3 should also apply in the Exemption 7(A) context. *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 932.

Defendant State has invoked Exemption 7(A) on behalf of itself and the FBI to withhold in full "twelve Department-originated videos . . . that, if released could reasonably be expected to interfere with current law enforcement activities of [State] and the FBI." Stein Decl. ¶ 54; *see also* Hardy-Dep't of State Consultation Decl. ¶¶ 10-13. Both State and the FBI have "ongoing investigations" into the September 11, 2012 attack on the diplomatic facility in Benghazi, Libya. *Id.* The challenged surveillance video footage "shows activity at the compound before and during the attacks, including the identities and movements of specific individuals," the disclosure of which "could further interfere with successful investigation and prosecution by revealing the images of potential witnesses to the crimes committed, including foreign nationals, and enabling them to be identified and intimidated prior to offered needed testimony." *Id.* In addition to identifying potential witnesses, release of the surveillance footage would interfere with State and FBI's respective active investigations by "revealing critical evidence and leads vital to ongoing investigative operations and continuing efforts to develop cases for criminal prosecution, including revealing potential suspects, the scope of the investigation, and the evidence collected to date." *Id.*; *see also* Hardy-Dep't of State Consultation Decl. ¶ 12.

Both State and FBI also have detailed the significant harm to ongoing criminal investigations and prosecutions that disclosure of the 12 surveillance videos could create. *See* Stein Decl. ¶ 54; *see also* Hardy-Dep't of State Consultation Decl. ¶¶ 12-13. Under these circumstances, the information is properly withheld under Exemption 7(A). *See, e.g., Azmy v. U.S. Dep't of Def.*, 562 F. Supp. 2d 590, 605 (S.D.N.Y. 2008) (explaining that disclosure of "names of individuals and organizations of ongoing law enforcement interest" could reasonably be expected to interfere with investigation because "subjects of the Government's interest would likely attempt

to conceal their activities"); *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 929 (upholding 7(A) withholding of information that could be useful to terrorists in "intimidating witnesses").

**2. FOIA Exemption 7(C) – Personal Information**

Exemption 7(C) authorizes withholding of information compiled for law enforcement purposes if release of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). If the records at issue were compiled for law enforcement purposes, Exemption 7(C) requires the agency to balance the relevant individual privacy rights against the public interest in disclosure. *See Reporters Comm. for Freedom of the Press*, 489 U.S. at 762; *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992). The balancing analysis is similar to the analysis conducted under Exemption 6, but the analysis under Exemption 7(C) tilts more in favor of nondisclosure. *See Reporters Comm. for Freedom of the Press*, 489 U.S. at 756 (comparing statutory language of Exemption 6 and Exemption 7(C)); *Reed*, 927 F.2d at 1251 (same). Here, both State and CIA have conducted this balancing assessment with respect to the challenged records and respectively concluded that the analysis tilts in favor of nondisclosure. *See* Stein Decl. ¶¶ 55-56, 52; *see also* Shiner Decl. ¶¶ 55-56.

In six of the surveillance videos, State has withheld the "images and identities of [State] agents, government contractors, and local forces assisting in the protection of the Beghazi facility." Stein Decl. ¶ 56. CIA has likewise withheld the names of CIA officers and contractors. *See* Shiner Decl. ¶¶ 46-49, 52. Both Defendants withheld the challenged information in order to protect the privacy interests of the individuals identified in the challenged records, reasoning that disclosure of their respective identifies "could reasonably be expected to subject them to harassment and/or intimidation, which could constitute an invasion of privacy." Shiner Decl. ¶ 56; *see also* Stein Decl. ¶ 56. This is particularly so where, as here, disclosure of their identities "in connection with

a particular investigation [in the case of the IG report]," *see* Shiner Decl. ¶ 48, and the underlying attack on the Benghazi facility "could trigger hostility towards that particular individual," *see id.*, potentially "jeopardize ongoing and future investigations of the IG," *see id*., or cause grave physical harm, *see* Shiner Decl. ¶ 56. Accordingly, the withheld information is properly exempt under 7(C).

**3. FOIA Exemption 7(D) —Identity of Confidential Sources**

Exemption 7(D) authorizes withholding of information compiled for law enforcement purposes if release of the information "could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis." 5 U.S.C. § 552(b)(7)(D). "Unlike Exemptions 6 and 7(C), Exemption 7(D) requires no balancing of public and private interests. If . . . production of criminal investigative records 'could reasonably be expected to disclose the identity of a confidential source' or 'information furnished by' such a source, that ends the matter. . . ." *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1184–85 (D.C. Cir. 2011) (citation omitted). Exemption 7(D) applies if the source provided information under an express or implied assurance of confidentiality. *See id.* at 1184.

In this case, the CIA properly withheld the identities of confidential sources to the IG in the course of its investigation into the September 2012 attacks in Benghazi. As Ms. Shiner explained, the CIA IG "is charged with providing objective and independent oversight into the programs and operations of the CIA." Shiner Decl. ¶ 54. In order to perform this task, the IG "does not disclose the identities of persons it interviews or the substance of their statements unless such disclosure is determined to be necessary for the full reporting of a matter or the fulfillment of other [Inspector General] or [CIA] responsibilities." *Id.* Moreover, as a matter of CIA policy, "all

[IG] interviewees were under an express or implied promise of confidentiality." *Id.* Indeed, as Ms. Shiner has explained, "the performance of the [IG's] mission to conduct independent investigations is heavily reliant upon its access to unfiltered information contained by confidential sources." *Id.*

Here, Plaintiffs seek disclosure of the IG report, which contains, *inter alia*, "details that would tend to identify the [IG's interviewees] . . . by virtue of their position in the Agency or their role in, or knowledge of, the underlying events," *i.e.*, the September 2012 attack on the U.S. mission in Benghazi, Libya. *Id.* The CIA properly withheld this information under Exemption 7(D) given that "[d]isclosure of the [IG]s] sources and information provided would severely compromise . . . [its] ability to perform those duties." *Id.*

**4. FOIA Exemption 7(E) – Techniques and Procedures/Guidelines**

Exemption 7(E) authorizes withholding of information compiled for law enforcement purposes if release of the information "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." 5 U.S.C. § 552(b)(7)(E). Congress intended that Exemption 7(E) protect from disclosure techniques and procedures used to prevent and protect against crimes, as well as techniques and procedures used to investigate crimes after they have been committed. *See, e.g.*, *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 250-51 (D.C. Cir. 1993) (holding that portions of an FBI manual describing patterns of violations, investigative techniques, and sources of information available to investigators were protected by Exemption 7(E)). "[T]he exemption is written in broad and general terms" to avoid assisting lawbreakers. *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009).

The terms of the statute provide that, to withhold records that would reveal law enforcement "guidelines," an agency must show that "disclosure could reasonably be expected to risk circumvention of the law." It is not clear whether this requirement also applies to withholding of records that would reveal "techniques and procedures." *See Citizens for Responsibility & Ethics in Wash.*, 746 F.3d at 1102 n.8. However, the D.C. Circuit has stressed that the risk-of-circumvention requirement sets a "low bar." *Blackwell*, 646 F.3d at 42; *see also Mayer Brown*, 562 F.3d at 1193. Given the low threshold for meeting the risk-of-circumvention requirement, and given that disclosure of law enforcement techniques and procedures usually has obvious potential to create a risk of circumvention, it generally makes little practical difference whether the risk-of-circumvention requirement applies to all of Exemption 7(E) or only the part dealing with "guidelines." *See Pub. Emps. for Envtl. Responsibility*, 740 F.3d at 204 n.4. In any event, State's withholdings under Exemption 7(E) on its own behalf and on behalf of the FBI meet the requirement, if it applies.

The 12 withheld surveillance videos "contain hours of synchronized footage from every camera angle available recording the Benghazi facility." Stein Decl. ¶59. Disclosure of this surveillance footage would reveal "security measures and procedures, defensive capabilities, and counter-measures in place at the Benghazi facility, that are indicative of the protections currently in place at other current State Department facilities in other locations around the world." *Id.*; *see also Judicial Watch, Inc. v. U.S. Dep't of State*, Civ. No. 12-893 (JDB), 2017 WL 3913212 at *5 (D.D.C. Sept. 6, 2017) (upholding FBI's decision to withhold in full surveillance footage and the agency's conclusion that footage was not segregable, reasoning that "release of any portion of the videos—either as video clips or still photos—might create a risk of circumvention of the law"). Indeed, as the Stein declaration makes clear, the disclosure of the surveillance video footage would

reveal "particular technologies or physical features in place, methods for covering an overall facility with camera surveillance, movements and responsive tactics of security personnel, and evacuation methods for such facilities." *Id.* ¶ 59. It is not difficult to comprehend how individuals or groups harboring ill-intent toward the United States could use this surveillance footage, "especially when compared side by side with additional synchronized camera angles," to circumvent the "strategies utilized to protect diplomatic compounds." *Id.*; *see also, e.g.*, *Gilman v. U.S. Dep't of Homeland Sec.*, 32 F. Supp. 3d 1, 20-21 (D.D.C. 2014). State's withholding of the written description of security measures and techniques employed at the Benghazi facility in ARB interview summaries C06052239 and C06052240 is justified by the same concerns. Stein Decl. ¶59.

**5. FOIA Exemption 7(F)—Information That Could Reasonably Be Expected to Endanger the Life or Physical Safety Of Any Individual**

FOIA Exemption 7(F) authorizes the withholding of information compiled for law enforcement purposes if release of the information "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(F). "That language is very broad. . . . Disclosure need not *definitely* endanger life or physical safety; a reasonable expectation of endangerment suffices." *Pub. Emps. for Envtl. Responsibility*, 740 F.3d at 205. Exemption 7(F) is similar to Exemptions 7(D) and 7(E) in that it provides an "absolute" exemption from disclosure, unlike Exemption 7(C), which requires balancing private interests against public interests. *Raulerson v. Ashcroft*, 271 F. Supp. 2d 17, 29 (D.D.C. 2002).

Because Exemption 7(F) provides broad protection for the identities of law enforcement officers and related personnel, *see Blanton v. U.S. Dep't of Justice*, 182 F. Supp. 2d 81, 87 (D.D.C. 2002), State properly invoked Exemption 7(F) on behalf of itself and Defendant FBI in order to protect the lives and safety of State's own "agents, government contractors and local forces

assisting in the protection of the Benghazi facility, as well as other third party individuals, including potential bystanders" who may have witnessed the September 11, 2012 attack. Stein Decl. ¶ 62; *see also* Hardy-Dep't of State Consultation Decl. ¶ 19. "[State Department] agents whose identities are revealed, some of whom are currently serving at posts abroad where identification as a U.S. law enforcement official may be particularly dangerous, may be targeted by individuals hostile to their mission. In addition, the release of the identities of non-Americans appearing in the footage could expose them to serious bodily harm or death due to perceived association with either the U.S. Government or local militias." *Id.*; *see also* Hardy-Dep't of State Consultation Decl. ¶ 19. The substantial risk of grave harm is particularly present where, as here, "Libya has an unstable security environment and it is reasonable to expect that individuals identified as working for or against the U.S. Government could be targeted for retribution." *Id.*; *see also* Hardy-Dep't of State Consultation Decl. ¶ 19.

## CONCLUSION

Defendants conducted a reasonable search, processed and released all reasonably segregable information, and withheld information only where authorized by a statutory exemption, or with respect to Defendants CIA and FBI, where the agency could neither confirm nor deny the existence or nonexistence of the records as a result of a statutory exemption. Because Defendants have satisfied their obligation under FOIA, the Court should grant summary judgment in Defendants' favor.

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Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

*/s/ Tamra T. Moore*
TAMRA T. MOORE
District of Columbia Bar No. 488392
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, Room 5375
Washington, DC 20001
Tel: (202) 305-8628
Fax: (202) 305-8517
E-mail: tamra.moore@usdoj.gov
Attorneys for Defendants