UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff	)	
v.	)	No. 1:08-cv-01468 (EGS) Hon. Emmet G. Sullivan
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

UNITED STATES DEPARTMENT OF
JUSTICE'S MOTION FOR SUMMARY JUDGMENT

Defendant hereby moves pursuant to Fed. R. Civ. P. 56 for summary judgment. The grounds for this motion for summary judgment are set forth in the memorandum submitted herewith.

October 10, 2008

Respectfully submitted,

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UNITED STATES DEPARTMENT OF JUSTICE'S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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The records at issue in this Freedom of Information Act ("FOIA") case are law enforcement documents whose release the Attorney General has determined could compromise the integrity and effectiveness of a class of law enforcement investigations. Morever, the records contain descriptions of confidential deliberations among top White House officials which are protected by the deliberative process and presidential communications privileges. For these and other reasons, the documents are exempt from production under the Freedom of Information Act ("FOIA"), and summary judgment should be granted in favor of the Department of Justice.

BACKGROUND

In June 2008, the House of Representatives Committee on Oversight and Government Reform sought, by way of subpoena, reports of voluntary interviews of the Vice President and senior White House staff by Special Counsel Patrick Fitzgerald as part of his investigation into the disclosure of Valerie Plame Wilson's identity as a CIA employee. *See* Declaration of Steven G. Bradbury ¶ 3. The Office of Legal Counsel ("OLC") of the Department of Justice ("DOJ") assembled documents responsive to this subpoena. *Id.*

Portions of the subpoenaed interview reports describe confidential internal White House deliberations among senior presidential advisers, including the Vice President, the White House Chief of Staff, and the National Security Adviser concerning, among other things, the preparation of the President's January 2003 State of the Union Address, possible responses to inquiries about the accuracy of a statement in the President's address, and the decision to send Ms. Plame's husband, Ambassador Joseph Wilson, on a fact-finding mission to Niger in 2002. *Id.*

Prior to the subpoena, DOJ had, in an effort to accommodate the Committee's investigation, made available to the Committee staff for their review reports of interviews with

senior White House staff. *See id.* ¶ 3 n.1; *id.* Ex. B, at 1-2; Complaint ¶ 22; Answer ¶ 22. DOJ did not provide the Committee access to the report or notes of the interview of the Vice President (or of the President), because that request raised "heightened separation of powers concerns." Bradbury Decl. Ex. B., at 2.

After receiving the subpoena, "[b]ased on his concern that disclosure to Congress of the subpoenaed interview reports would risk impairing the effectiveness of future law enforcement investigations involving official White House conduct" and "in order to protect the confidentiality of the high-level White House deliberative information contained in the reports, the Attorney General requested that the President assert executive privilege in response to the Committee's subpoena." Bradbury Decl. ¶ 4. In doing so, the Attorney General explained how the documents were protected by the presidential communications, deliberative process, and law enforcement components of executive privilege. *Id.* Ex. B. The Attorney General emphasized that releasing the documents could deter future Presidents, Vice Presidents, and senior White House staff from cooperating voluntarily with future DOJ investigations involving the White House. *Id.* The President asserted executive privilege, and the Committee was notified on July 16, 2008. *Id.* Ex. C.

By letter dated July 17, 2008, Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") submitted a Freedom of Information Act request to DOJ's Office of Information of Privacy ("OIP"), the office that handles FOIA requests to, *inter alia*, the Offices of the Attorney General and Deputy Attorney General. Exhibit 1 (Letter from Anne Weismann to Carmen Mallon). CREW's request sought "transcripts, reports, notes and other documents relating to any interviews outside the presence of the grand jury of Vice President Richard B.

Cheney that are part of Special Counsel Patrick Fitzgerald's investigation into the leak of the identity of Valerie Plame Wilson." *Id.* at 1. CREW's letter noted that this request was "coextensive with the subpoena issued by the House of Representatives Committee on Oversight and Government Reform to Attorney General Michael B. Mukasey on June 16, 2008, for the same records concerning Vice President Cheney." *Id.*

After an initial search, OIP determined that the documents responsive to CREW's request, which had previously been collected in response to the House Committee subpoena, were not within either the Office of the Attorney General or the Office of the Deputy Attorney General, but were within the possession of the Office of Legal Counsel, a DOJ component that handles its own FOIA requests. As a result, on September 4, 2008, OIP referred CREW's request to OLC. *See* Bradbury Decl. Ex. D. On September 18, 2008, OLC responded to CREW's request. *See id.* Ex. E. OLC found that three documents totaling 67 pages were responsive to the request. *Id.* OLC found that the records were exempt from production pursuant to FOIA Exemption 7(A) because they "were compiled for law enforcement purposes and their production 'could reasonably be expected to interfere with enforcement proceedings.'" Bradbury Decl. Ex. E (quoting 5 U.S.C. § 552(b)(7)(A)).

OLC also withheld the documents because OLC found that each was subject to the deliberative process privilege, the presidential communications privilege, and the law enforcement investigative privilege. *Id.*; *see also* 5 U.S.C. § 552(b)(5). Finally, OLC withheld portions of each document because these portions contain material that is classified and protected from disclosure by the National Security Act. *Id.*

ARGUMENT

FOIA's "basic purpose" reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp*., 493 U.S. 146, 152 (1989). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). Thus, FOIA is designed to achieve a "workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." *John Doe*, 493 U.S. at 152 (quoting H.R. Rep. No. 1497, 89th Cong., 2 Sess. 6 (1966), reprinted in 1966 U.S.C.C.A.N. 2416, 2423). To that end, FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exceptions. *See* 5 U.S.C. § 552(b). "A district court only has jurisdiction to compel an agency to disclose improperly withheld agency records," *i.e.*, records that do "not fall within an exemption." *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996) (emphasis by the court). Despite the "liberal congressional purpose" of FOIA, the statutory exemptions must be given "meaningful reach and application." *John Doe*, 493 U.S. at 152. "Requiring an agency to disclose exempt information is not authorized." *Minier*, 88 F.3d at 803 (quoting *Spurlock v. FBI*, 69 F.3d 1010, 1016 (9th Cir. 1995)). This meaningful reach and application is particularly important here, given the separation of powers issues inherent in a request from a civil litigant for an Order from the judiciary requiring the Executive Branch to release of documents relating directly to the President and/or Vice President.

Under FOIA, the Court conducts a de novo review to determine whether the government properly withheld records under any statutory exemption. *See* 5 U.S.C. § 552(a)(4)(B). The

government may satisfy its burden of justifying non-disclosure of materials by submitting an agency declaration that describes the withheld material with reasonable specificity and the reasons for non-disclosure, and, if necessary, a Vaughn index. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 753 (1989); *Summers v. Department of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998); *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 577-78 (D.C. Cir. 1996). With respect to any record subject to such overlapping claims of exemption, this Court need only find any one Exemption applicable in order to grant summary judgment to the Department. *See Fund for Constitutional Gov't v. Nat'l Archives and Records Serv.*, 656 F.2d 856, 864 n.19 (D.C. Cir. 1981).

The declarations submitted by the agency are accorded a presumption of good faith, *SafeCard Servs., Inc. v. Securities and Exchange Comm'n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), and a presumption of expertise, *Piper v. United States Dep't of Justice*, 294 F. Supp. 2d 16, 20 (D.D.C. 2003). Summary judgment is to be freely granted where, as here, the declarations reveal that there are no material facts genuinely at issue and that the agency is entitled to judgment as a matter of law. *See Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 314-15 (D.C. Cir. 1988); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Summary judgment is accordingly the procedural vehicle by which most FOIA actions are resolved. *See, e.g.*, *Misciavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified.").

I. The Records Are Exempt from Disclosure Pursuant to FOIA Exemption 7(A)

FOIA Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes . . . to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

Documents qualify as law enforcement records if they meet two criteria: 1) the documents were created or acquired in the course of an investigation related to the enforcement of federal laws; and 2) the nexus between the activity and one of the agency's law enforcement duties was based on information sufficient to support at least a "colorable claim" of its rationality. *Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996); *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982); *Blanton v. Department of Justice*, 63 F. Supp. 2d 35, 44 (D.D.C. 1999). The first prong is satisfied if the agency is "able to identify a particular individual or a particular incident as the object of its investigation and the connection between that individual or incident and a possible . . . violation of federal law." *Pratt*, 673 F.2d at 420. The second prong is "deferential," and a court "should be hesitant to second-guess" the agency's decision to investigate, rejecting the agency's rationale only if it is "pretextual or wholly unbelievable." *Id.* at 421.

Here, "FBI agents generated the documents in the course of the Special Counsel's investigation into the disclosure of Valerie Plame's status as an employee of the Central Intelligence Agency," Bradbury Decl. ¶ 9, and thus they were "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7)(A). Moreover, "[b]ecause the DOJ is an agency specializing in law enforcement, its claim of a law enforcement purpose is entitled to deference." *Center for*

Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 926 (D.C. Cir. 2003) (quotation and alteration omitted).

Under Exemption 7(A), DOJ need only show that production of the records at issue "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The government's burden in demonstrating interference with law enforcement proceedings under Exemption 7(A) has been significantly relaxed by Congress. Section 552(b)(7)(A) originally provided for the withholding of information that "***would*** interfere with enforcement proceedings," but the Freedom of Information Reform Act of 1986 amended that language and replaced it with the phrase "***could reasonably be expected to*** interfere with" enforcement proceedings. *See* Pub. L. No. 99-570 § 1802, 100 Stat. 3207, 3207-48 (emphases supplied). Courts have repeatedly recognized that this change in the statutory language substantially broadens the scope of the exemption. *See, e.g.*, *Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1164 n.5 (3d Cir. 1995) (purpose of 1986 amendment was "to relax significantly the standard for demonstrating interference with enforcement proceedings"); *Gould Inc. v. GSA*, 688 F. Supp. 689, 703 n.33 (D.D.C. 1988) ("The 1986 amendments relaxed the standard . . . by requiring the government to show ***merely*** that production of the requested records 'could reasonably be expected' to interfere with enforcement proceedings.") (emphasis supplied); *see also Spannaus v. United States Dep't of Justice*, 813 F.2d 1285, 1288 (4th Cir. 1987) (explaining that relaxed standard "is to be measured by a standard of reasonableness, which takes into account the 'lack of certainty in attempting to predict harm.'").

To meet the current standard, DOJ need show only that disclosure of the records "(1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending

or ***reasonably anticipated***." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993) (emphasis in original). "Exemption 7(A) does not require a presently pending 'enforcement proceeding.'" *Center for National Security Studies v. United States Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003).

The Attorney General himself has determined that release of these documents would threaten "the integrity and effectiveness of future law enforcement investigations by the Department of Justice." Bradbury Decl. Ex. B, at 4. For the reasons that the Attorney General set forth in his letter to the President, "releasing the investigative interview report and notes of the interview with the Vice President, which include discussion of confidential internal White House deliberations, could significantly undermine future Department of Justice criminal investigations involving official White House activities." Bradbury Decl. ¶ 9. In particular, release "could deter senior White House officials from participating fully and frankly in voluntary interviews in such investigations." *Id.*; *accord id.* Ex. B, at 4 (release would create "an unacceptable risk that such knowledge could adversely impact [future Presidents and Vice Presidents'] willingness to cooperate fully and candidly in a voluntary interview"). Presidents and Vice Presidents might insist on disclosing information only pursuant to a grand jury subpoena in order to ensure the secrecy protections of Rule 6(e) of the Federal Rules of Criminal Procedure. *Id.* ¶ 9. The Attorney General has determined that under either of these scenarios, "the Department's ability to conduct future law enforcement investigations that might require White House cooperation would be significantly impaired." *Id.*

Courts have found that the possibility that witness cooperation will be chilled justifies the invocation of Exemption 7(A). *E.g.*, *Center for National Security Studies*, 331 F.3d at 929

(upholding DOJ's assertion of Exemption 7(A) and finding that "the government's judgment that disclosure would deter or hinder cooperation by [potential witnesses] is reasonable"); *Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1165 (3d Cir. 1995) (upholding DOJ's assertion of Exemption 7(A) because "disclosure of FBI reports could result in a chilling effect upon potential cooperators and witnesses" (quotation omitted)). Here, such chilling of cooperation presents a much more serious issue than in the normal case. In short, releasing the investigative documents at issue in this case could "impair[ ] the integrity and effectiveness of future Department of Justice criminal investigations involving official conduct of the White House." Bradbury Decl. ¶ 10. And, as recent history demonstrates, investigations requiring presidential and vice presidential cooperation certainly can be "reasonably anticipated." *Mapother*, 3 F.3d at 1540.

Because release of the documents could reasonably be expected to interfere with future enforcement proceedings that can be reasonably anticipated, the documents are exempt from disclosure pursuant to FOIA Exemption 7(A). Moreover, because it is the release of the interview reports themselves that threatens a chilling effect, "no meaningful information in the documents can be released without disclosing" protected information. Bradbury Decl. ¶ 17.

II. The Records Are Exempt from Disclosure Pursuant to FOIA Exemption 5

Exemption 5 allows the agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption Five ensures that members of the public cannot "obtain through FOIA what they could not ordinarily obtain through discovery undertaken in a lawsuit against the agency." *Schiller v. Nat'l Labor Relations Bd.*, 964 F.2d 1205, 1208 (D.C.

Cir. 1992) (citation omitted). As a result, Exemption Five "exempt[s] those documents . . . normally privileged in the civil discovery context." *Id.* (citations omitted)). Of the litigation privileges generally available to DOJ, the law enforcement privilege, the deliberative process privilege, and the presidential communications privilege are applicable here.

A. The Records Are Protected in Their Entirety by the Law Enforcement Privilege

DOJ and other law enforcement agencies possess a law enforcement privilege which exists to "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness[es] and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *Singh v. S. Asian Soc'y*, 2007 WL 1556669, at *3 (D.D.C. 2007) (quoting *In re Department of Investigation of the City of New York*, 856 F.2d 481, 484 (2d Cir.1988)) (alteration in original).

In this case, both the Attorney General, in his letter to the President, and the head of the Office of Legal Counsel, in his declaration to this Court, have explained with specificity the manner in which release could impair a class of law enforcement investigations, namely investigations involving the conduct of White House activities. *See* Bradbury Decl. ¶ 9-10, 12; *id.* Ex. B; *supra* Part I. Because release would risk interference in a class of investigations, the law enforcement privilege applies to these documents in their entirety.

B. Portions of the Records Are Protected by the Deliberative Process Privilege

Documents are covered by the deliberative process when they "reflect[ ] advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (citation omitted). FOIA's inclusion of the deliberative process privilege among its exemptions "reflect[s] the legislative judgment that the quality of administrative decision-making would be seriously undermined if agencies were forced to 'operate in a fishbowl' because the full and frank exchange of ideas on legal or policy matters would be impossible." *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir.1997).

A record must satisfy three conditions to qualify for the deliberative process privilege. It must be "inter-agency or intra-agency," 5 U.S.C. § 552(b)(5), that is, "its source must be a Government agency," *Klamath*, 532 U.S. at 8; it must be "predecisional," *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); and it must be "deliberative," *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 v. Export-Import Bank*, 108 F. Supp. 2d 19, 35 (D.D.C. 2000) (citation omitted). In other words, "final agency action" in an Administrative Procedure Act sense need not have resulted for the deliberative process to be protected.

Moreover, a document created after the decision at issue, can still be "predecisional" if it memorializes protected predecisional deliberative information. *See Appleton v. Food and Drug Admin*., 451 F.Supp.2d 129, 144 n. 9 (D.D.C. 2006) (protecting "memorialization" of discussions subject to the deliberative process privilege); *Electronic Privacy Info. Ctr. v. DHS*, No. 04-1625,

2006 U.S. Dist. LEXIS 94615, at *22-24 (D.D.C. Dec. 22, 2006) (protecting under deliberative process privilege an e-mail that "recounted" past deliberations over a prior decision).

A record is "deliberative" when "it reflects the give-and-take of the consultative process." *Wolfe v. Department of Health and Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988) (citation and internal quotation marks omitted) (en banc). "There should be considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take – of the deliberative process – by which the decision itself is made.'" *Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975)). The agency is best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions.'" *Chemical Mfrs.*, 600 F. Supp. at 118 (quoting *Nat'l Labor Relations Bd.*, 421 U.S. at 151).

The document portions at issue here fall within the deliberative process privilege as they "reflect or describe frank and candid deliberations involving, among others, the Vice President, the White House Chief of Staff, the National Security Advisor, the Director of the Central Intelligence Agency, and the White House Press Secretary." Bradbury Decl., ¶ 13. "These deliberations concern, among other things, the preparation of the President's January 2003 State of the Union Address, possible responses to media inquiries about the accuracy of statement in the President's address and the decision to send Ambassador Joseph Wilson on a fact-finding mission to Niger in 2002, the decision to declassify portions of the October 2002 National Intelligence Estimate, and the assessment of the performance of senior White House staff." *Id.* "These high-level deliberations do not represent final decisions; rather, they reflect simply the preliminary and predecisional interactions and deliberations that accompany any decisionmaking

process." *Id.*

Because the deliberative portions of the records at issue reflect internal, pre-decisional governmental interactions and decisionmaking, they are protected by the deliberative process privilege.

C. Portions of the Records Are Protected by the Presidential Communications Privilege

The Supreme Court has recognized a "presumptive privilege for Presidential communications" founded on the "President's generalized interest in confidentiality," *United States v. Nixon*, 418 U.S. 683, 708 (1974), and the Court of Appeals has specifically identified that privilege as one falling within the ambit of those covered by Exemption Five of FOIA. *See Judicial Watch, Inc. v. Dept. of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004). The Supreme Court found the presidential communications privilege "necessary to guarantee the candor of presidential advisers and to provide '[a] President and those who assist him . . . [with] free[dom] to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir.1997) (quoting *Nixon*, 418 U.S. at 708).

The presidential communications privilege applies here, as "[p]ortions of the withheld documents summarize communications among the Vice President and senior presidential advisers in the course of preparing information or advice for potential presentation to the President." Bradbury Decl. ¶ 14. In addition, "some portions explicitly reference a conversation between the President and the Vice President." *Id.* These documents which reflect deliberations between senior White House advisors preparing advice for the President and conversations

between President and his advisors are at the very core of the presidential communications privilege. *E.g.*, *Nixon v. Adm'r of Gen. Servs*., 433 U.S. 425, 449 (1977); *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993). "Disclosing such sensitive conversations involving the President, the Vice President, and other senior White House officials could impair effective Executive Branch decisionmaking." Bradbury Decl. ¶ 14.

III. Portions of the Records are Exempt from Disclosure Pursuant to Exemptions 6 and 7(C)

The records at issue contain personal information – namely, names of third party non-government employees, law enforcement personnel, and low level government employees not under investigation as well as personal information such as social security numbers – that is exempt from disclosure pursuant to FOIA Exemptions 6 and 7(C). Bradbury Decl. ¶ 15.

Exemption 6 exempts from disclosure information about individuals in "personnel and medical and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." *See* 5 U.S.C. § 552(b)(6). Exemption 6 was "intended to cover detailed Government records on an individual which can be identified as applying to that individual." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). It therefore protects personal information contained in any government file so long as that information "applies to a particular individual." *Id.* at 602; *see also New York Times Co. v. NASA*, 920 F.2d 1002, 1006 (D.C. Cir. 1990) (en banc). This "minimal" threshold "ensures that FOIA's protection of personal privacy is not affected by the happenstance of the type of agency record in which personal information is stored." *Washington Post Co. v. Dep't of Health & Human Servs.*, 690 F. 2d 252, 259 (D.C. Cir. 1982).

Exemption 6 requires an agency to balance the individual's right to privacy against the public's interest in disclosure. *See United States Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). Thus, where, as here, there is a protectable privacy interest, 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). However, the only relevant "public interest in disclosure" to be weighed in this balance is the extent to which disclosure would serve the "'core purpose of the FOIA,' which is 'contribut[ing] significantly to the public understanding ***of the operations or activities of the government***.'" *United States Dep't of Defense v. FLRA*, 510 U.S. 487, 495 (1994) (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)) (emphasis and alteration in original).

Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" to the extent that the production of such law enforcement records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In applying Exemption 7(C), the Court must "balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information." *Davis v. Department of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992). However, recognizing the considerable stigma inherent in being associated with law enforcement proceedings, courts do not apply "a balance tilted emphatically in favor of disclosure" when reviewing a claimed 7(C) exemption. *Bast v. Department of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). In addition, the public interest "must be assessed in light of FOIA's central purpose," and this purpose "is not fostered by disclosure about private individuals that is accumulated in various government files but that reveals little or nothing about an agency's

conduct." *Nation Magazine Washington Bureau v. United States Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995) (quotation marks and citation omitted).

It is settled that parties mentioned in law enforcement materials have a presumptive privacy interest in having their names and other personal information withheld from public disclosure. *See, e.g.*, *Nation Magazine Washington Bureau*, 71 F.3d at 894; *Safecard Servs., Inc. v. Securities and Exchange Comm'n*, 926 F.2d 1197, 1206 (D.C. Cir. 1991); *Bast*, 665 F.2d 1251. The Supreme Court has concluded that "as a categorical matter . . . a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy." *Reporters Commitee*, 489 U.S. at 780; *see also Perrone v. FBI*, 908 F. Supp. 24, 26 (D.D.C. 1995). On the other hand, the public interest in knowing the names of individuals mentioned in law enforcement records, as a general matter, is nil. *See Blanton v. Department of Justice*, 63 F. Supp. 2d 35, 45 (D.D.C. 1999) ("The privacy interests of individual parties mentioned in law enforcement files are 'substantial' while '[t]he public interest in disclosure [of third party identities] is not just less substantial, it is unsubstantial.'" (quoting *Safecard*, 926 F.2d at1205) (alterations in original)).

The same is true for law enforcement personnel and low level government employees. As the Second Circuit has explained, "individuals, including government employees and officials, have privacy interests in the dissemination of their names. Public disclosure of the names of FBI agents and other law enforcement personnel . . . could subject them to embarrassment and harassment in the conduct of their official duties and personal affairs." *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993) (citations omitted); *accord Jones v. FBI*, 41 F.3d 238, 246-47 (6th Cir. 1994) (holding that "federal law enforcement officials have the right to be

protected against public disclosure of their participation in law enforcement investigations" (quotation omitted)); *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980) ("As several courts have recognized, [FBI] agents have a legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harassment in either their official or private lives.").

Similarly, it is clear that personal information, such as social security numbers, addresses, and phone numbers, are protected under both Exemption 6 and the even more protective Exemption 7(C). *E.g.*, *FLRA*, 510 U.S. at 497-502 (holding that addresses were exempt from disclosure pursuant to Exemption 6 and noting that "[w]e are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions"); *Painting & Drywall Work Preservation Fund, Inc. v. Dep't of Housing and Urban Dev.*, 936 F.2d 1300 (D.C. Cir. 1991) (holding that names and addresses were properly exempt because of the "substantial privacy interest" in the information); *Dayton Newspapers v. Dep't of Air Force*, 35 F. Supp. 2d 1033, 1035 (S.D. Ohio 1988) (ordering a military tort database produced, but with names, addresses, and social security numbers redacted, declaring this information to be "personal and private, the disclosure of which would constitute an unwarranted invasion of an individual's privacy"). This personal information is thus exempt from disclosure pursuant to Exemptions 6 and 7(C).

IV. Portions of the Records Are Exempt from Disclosure Pursuant to Exemption 1

FOIA Exemption 1 allows an agency to protect records that are: (1) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (2) are in fact properly classified pursuant to Executive

Order. *See* 5 U.S.C. § 552 (b)(1). Exemption One thus "establishes a specific exemption for defense and foreign policy secrets, and delegates to the President the power to establish the scope of that exemption by executive order." *Military Audit Project v. Casey*, 656 F.2d 724, 737 (D.C. Cir. 1981). Section 1.2(a)(4) of Executive Order 12958, as amended, states that an agency may classify information that fits into one or more of the Executive Order's categories for classification when the appropriate classification authority "determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." 68 Fed. Reg. 15315, 15315 (March 25, 2003).

The issue for the Court is whether "on the whole record, the Agency's judgment objectively survives the test of reasonableness, good faith, specificity and plausibility in the field of foreign intelligence in which [the agency] is expert and [has been] given by Congress a special role." *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982). Although the agency bears the burden of proving its claim for exemption, *see* 5 U.S.C. § 552(a)(4)(B), because agencies have unique insights into the adverse effects that might result from public disclosure of classified information, the courts must accord "substantial weight" to an agency's affidavits justifying classification. *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984); *Military Audit Project*, 656 F.2d at 738. As the D.C. Circuit has noted, "in the FOIA context, we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Center for National Security Studies v. United States Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003).

Here, a number of paragraphs are classified at the secret level by the Central Intelligence Agency. Bradbury Decl. ¶ 16. "[T]he CIA has determined that the documents contain

information concerning intelligence sources and methods that is properly classified pursuant to section 1.4(c) of Executive Order 12958." *Id.* "The information regarding intelligence sources contained within the documents relates to foreign government information and liaison relationships." *Id.* "The information regarding intelligence methods contained within the document relates to the practices and procedures that the CIA uses to assess and evaluate intelligence and to inform policymakers." *Id.* Because the disclosure of this type of information about intelligence sources and methods could obviously be expected to result in damage to the national security, these paragraphs are exempt from disclosure pursuant to Exemption 1.

V. Portions of the Records Are Exempt from Disclosure Pursuant to Exemption 3

FOIA Exemption 3 protects from disclosure information that Congress has separately determined warrants special protection. Thus, FOIA "does not apply to matters that are . . . specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). In examining an Exemption 3 claim, the Court must determine first whether the claimed statute is a statute of exemption under FOIA, and second whether the withheld material satisfies the criteria of the exemption statute. *See CIA v. Sims*, 471 U.S. 159, 167 (1985); *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990). "A specific showing of potential harm to national security . . . is irrelevant to the language of [an Exemption Three statute]. Congress has already, in enacting the statute, decided that disclosure of [the specified information] is potentially harmful." *Hayden v. National Security Agency*, 608 F.2d 1381, 1390 (D.C. Cir. 1979). Thus, as the Court of Appeals has explained, "'Exemption 3 differs from other

FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.'" *Fitzgibbon*, 911 F.2d at 761-62 (quotation omitted).

The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), codified as part of the National Security Act at 50 U.S.C. § 403-1(i)(1), requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." It is "settled" that this statute falls within Exemption 3. *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982) (discussing substantively similar predecessor statute applicable to CIA which provided that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure"); *accord Sims*, 471 U.S. at 167-68, 193 (1985); *Fitzgibbon*, 911 F.2d at 761 ("There is thus no doubt that [the predecessor CIA statute] is a proper exemption statute under exemption 3"). The relevant portions of the FBI interview report contains intelligence sources and methods and as such falls squarely within this statute. *See* Bradbury Decl. ¶ 16; *supra* Part V. As such, this information is protected from disclosure by Exemption 3.

CONCLUSION

For the reasons stated above, DOJ's Motion for Summary Judgment should be granted.

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