EXEMPTION 1

Beginning with President Harry S. Truman in 1951,[1] the uniform policy of the executive branch concerning the protection of national security information traditionally has been set by the President with the issuance of a new or revised national security classification executive order.[2] Exemption 1 of the FOIA integrates the national security protections provided by this executive order with the FOIA's disclosure mandate by protecting from disclosure all national security information concerning intelligence collection, the national defense, or foreign policy that has been properly classified in accordance with the substantive and procedural requirements of the current executive order.[3] As such, of course, Exemption 1 does not protect information that is merely "classifiable" -- that is, meets the substantive requirements of the current such order but has not been actually reviewed and classified under it.[4] The executive order currently in effect is Executive Order 12,958, as amended, which was signed by President George W. Bush on March 25, 2003.[5] This amended order replaced the original version of

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[1] See Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 24, 1951). But see also Exec. Order No. 8381, 5 Fed. Reg. 1147 (Mar. 22, 1940) (establishing initial classification structure within military to protect information related to "vital military installations and equipment").

[2] See, e.g., Exec. Order No. 10,501, 3 C.F.R. 398 (1949-1953) (Eisenhower Administration order); Exec. Order No. 10,985, 27 Fed. Reg. 439 (Jan. 2, 1962) (Kennedy Administration order); Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975) (Nixon Administration order); Exec. Order 11,862, 40 Fed. Reg. 25,197 (June 11, 1975) (Ford Administration amendment); Exec. Order No. 12,065, 3 C.F.R. 190 (1978) (Carter Administration order); Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (Reagan Administration order), excerpted in FOIA Update, Vol. III, No. 3, at 6-7.

[3] 5 U.S.C. § 552(b)(1) (2000 & Supp. IV 2004).

[4] See, e.g., Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 8-9 (D.D.C. 2001) (explaining that agencies must follow procedural requirements of national security classification executive order to invoke Exemption 1), aff'd, 334 F.2d 55 (D.C. Cir. 2003); Lesar v. U.S. Dep't of Justice, 636 F.2d 474, 485 (D.D.C. 1980) (same). But see Goldberg v. U.S. Dep't of State, 818 F.2d 71, 77 (D.C. Cir. 1987) (finding that agency properly classified information under procedural requirements of existing executive order, subsequent to its receipt of FOIA request, despite its original marking of the information as "unclassified").

[5] See Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003) [hereinafter Exec. Order No. 12,958, as amended], reprinted in 50 U.S.C. § 435 note (2000 & Supp. III 2003) and summarized in *FOIA Post* (posted 4/11/03); see also, e.g., ACLU v. FBI, 429 F. Supp. 2d 179, 188 (D.D.C. 2006) (applying Executive Order 12,958, as amended); Judicial Watch v. U.S.

(continued...)

EXEMPTION 1

Executive Order 12,958, which was issued in 1995 by President William J. Clinton.[6] The provisions of this amended executive order are discussed below.

The issuance of each classification executive order, or the amendment of an existing executive order, raises the question of the applicability of successive executive orders to records that were in various stages of administrative or litigative handling as of the current executive order's effective date.[7] The appropriate executive order to apply, with its particular procedural and substantive standards, depends upon when the responsible agency official takes the final classification action on the record in question.[8]

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[5](...continued)
Dep't of Justice, 306 F. Supp. 2d 58, 64-65 (D.D.C. 2004) (same).

[6] 3 C.F.R. 333 (1996), reprinted in 50 U.S.C. § 435 note and reprinted in abridged form in FOIA Update, Vol. XVI, No. 2, at 5-10.

[7] See FOIA Update, Vol. XVI, No. 2, at 3, 12 ("OIP Guidance: The Timing of New E.O. Applicability").

[8] See Halpern v. FBI, 181 F.3d 279, 289-90 (2d Cir. 1999); Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 29 (D.C. Cir. 1998) ("[A]bsent a request by the agency to reevaluate an Exemption 1 determination based on a new executive order . . . the court must evaluate the agency's decision under the executive order in force at the time the classification was made."); Lesar, 636 F.2d at 480 (concluding that "a reviewing court should assess the agency's classification decision according to the guidelines established in the Executive Order in effect at the time classification took place"); see also Bonner v. U.S. Dep't of State, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (rejecting plaintiff's suggestion that court assess propriety of agency's classification determination at time of court's review, because to do so would subject agencies and courts to "an endless cycle of judicially mandated reprocessing"); King v. Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987) (finding that "[o]nly when a reviewing court contemplates remanding the case to the agency to correct a deficiency in its classification determination is it necessary to discriminate between the order governing for purposes of review and any that may have superseded it"); Assassination Archives, 177 F. Supp. 2d at 8-9 (finding that CIA properly classified subject records under Executive Order 10,501 because that order was in effect when agency made classification decision); Keenan v. Dep't of Justice, No. 94-1909, slip op. at 7-8 (D.D.C. Mar. 24, 1997) (rejecting argument that agency should apply Executive Order 12,958 because it did not produce supporting affidavit until after effective date of new order), renewed motion for summary judgment granted in part & denied in part on other grounds (D.D.C. Dec. 16, 1997); cf. Summers v. Dep't of Justice, 140 F.3d 1077, 1082 (D.C. Cir. 1998) (remanding to district court because district court failed to articulate whether it was applying Executive Order 12,356 or Executive Order 12,958
(continued...)

Under the precedents established by the Court of Appeals for the District of Columbia Circuit, the accepted rule is that a reviewing court will assess the propriety of Exemption 1 withholdings under the executive order in effect when "the agency's ultimate classification decision is actually made."[9] Only when "a reviewing court contemplates remanding the case to the agency to correct a deficiency in its classification determination is it necessary" to comply with a superseding executive order.[10] It also is important to note that agencies may, as a matter of discretion, reexamine their classification decisions under a newly issued or amended executive order in order to take into account "changed international and domestic circumstances."[11] This type of re-examination allows federal agencies to apply current executive branch national security policies in the protection of

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[8](...continued)
to evaluate Exemption 1 withholdings, even though district court record made it clear), on remand, No. 87-3168, slip op. at 2 (D.D.C. Apr. 19, 2000) (applying Executive Order 12,958 to uphold Exemption 1 withholdings).

[9] King, 830 F.2d at 217.

[10] Id.; see also Campbell, 164 F.3d at 31 n.11 (recognizing that when court remands to agency for rereview of classification, such review is performed under superseding executive order); Kern v. FBI, No. 94-0208, slip op. at 5-6 & n.2 (C.D. Cal. Sept. 14, 1998) (remanding due to lack of specificity of Vaughn Index; classified information to be reviewed under current Executive Order 12,958); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 12 (D.D.C. 1998) (applying Executive Order 12,356 to records at issue, but noting that Executive Order 12,958 would apply if court "[found] that the agencies improperly withheld information pursuant to Exemption 1"); cf. FOIA Update, Vol. XVI, No. 2, at 4, 12 (summarizing history of Exemption 1 disclosure orders and urging careful attention to classification determinations accordingly).

[11] Baez v. U.S. Dep't of Justice, 647 F.2d 1328, 1233 (D.C. Cir. 1980) (upholding agency's classification reevaluation under executive order issued during course of district court litigation); see, e.g., Miller v. U.S. Dep't of State, 779 F.2d 1378, 1388 (8th Cir. 1985) (agency chose to reevaluate under new Executive Order 12,356); Military Audit Project v. Casey, 656 F.2d 724, 737 & n.41 (D.C. Cir. 1981) (agency chose to reevaluate under new Executive Order 12,065); Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 7 (D.D.C. July 31, 2000) ("[E]ven though the existence of [subject] documents was originally classified under Executive Order 12,356, the fact that they were reevaluated under Executive Order 12,958 means that Executive Order 12,958 controls."); Keenan, No. 94-1909, slip op. at 7 (D.D.C. Mar. 24, 1997) (finding that although agency could "voluntarily reassess" its classification decision under Executive Order 12,958, issued during pendency of lawsuit, agency not required to do so).

national security information.[12] For example, agencies may find it particularly beneficial to re-examine some classification decisions under amended Executive Order 12,958, as it provides additional protections for information related to weapons of mass destruction and the threat of transnational terrorism through provisions that did not exist in the original version of the order.[13]

Before examining the principles that courts apply in Exemption 1 cases, it is useful to review briefly the early decisions construing this exemption, as well as its legislative history. Doing so illustrates the difficult dilemma facing courts in reviewing the propriety of the government's withholding decisions regarding national security information. In an early case on this dilemma in 1973, the Supreme Court in EPA v. Mink[14] held that records classified under proper procedures were exempt from disclosure per se, without any further judicial review, thereby obviating the need for in camera review of information withheld under this exemption.[15] In Mink the Supreme Court recognized that a great amount of deference should be accorded to the agency's decision to protect national security information from disclosure.[16] Responding in large part to the thrust of that decision, Congress amended the FOIA in 1974 to provide expressly for de novo review by the courts and for in camera review of documents, including classified documents, where appropriate.[17] In so doing, Congress sought to ensure that agencies properly classify national security records and that reviewing courts remain cognizant of their authority to verify the correct-

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[12] See Information Security Oversight Office Ann. Rep. 2 (2003) (comments of ISOO Director referring to "new priorities resulting from the events of September 11, 2001"). But see Wiener v. FBI, No. 83-1720, slip op. at 3 (C.D. Cal. Aug. 25, 2005) (denying FBI's request to reevaluate classified information under executive order as amended after court's earlier decision, and finding that FBI's decision not to conduct such review earlier suggests that such reconsideration "was not crucial to national security"), appeal dismissed per stipulation, No. 05-56652 (9th Cir. Jan. 3, 2007).

[13] Compare Exec. Order No. 12,958, as amended, §§ 1.1(a)(4), 1.4(e), (g), (h) (current version), with Exec. Order No. 12,958, §§ 1.2(a)(4), 1.5(e), (g) (original version); see also *FOIA Post* (posted 4/11/03). But cf. Primorac v. CIA, 277 F. Supp. 117, 120 (D.D.C. 2003) (recognizing that FOIA plaintiffs may not compel agencies to re-examine proper classification decisions under new executive order).

[14] 410 U.S. 73 (1973).

[15] Id. at 84.

[16] Id. at 84, 94.

[17] See 5 U.S.C. § 552(a)(4)(B).

ness of agency classification determinations.[18]

Standard of Review

After Congress amended the FOIA in 1974, numerous litigants challenged the sufficiency of agency affidavits in Exemption 1 cases, requesting in camera review by the courts and hoping to obtain disclosure of challenged documents. Nevertheless, courts initially upheld agency classification decisions in reliance upon agency affidavits, as a matter of routine, in the absence of evidence of bad faith on the part of an agency.[19] In 1978, however, the Court of Appeals for the District of Columbia Circuit departed somewhat from such routine reliance on agency affidavits, prescribing in camera review to facilitate full de novo adjudication of Exemption 1 issues, even when there is no showing of bad faith on the part of the agency.[20] This decision nevertheless recognized that the courts should "first 'accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'"[21]

The D.C. Circuit further refined the appropriate standard for judicial review of national security claims under Exemption 1 (or under Exemption 3, in conjunction with certain national security protection statutes), finding that summary judgment is entirely proper if an agency's affidavits are reasonably specific and there is no evidence of bad faith.[22] Rather than con-

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[18] See H.R. Rep. No. 93-876, at 7-8 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6272-73, and in House Comm. on Gov't Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents at 121, 127-28 (1975).

[19] See, e.g., Weissman v. CIA, 565 F.2d 692, 698 (D.C. Cir. 1977).

[20] Ray v. Turner, 587 F.2d 1187, 1194-95 (D.C. Cir. 1978).

[21] Id. at 1194 (quoting legislative history); see also Spirko v. USPS, 147 F.3d 992, 997 (D.C. Cir. 1998) (explaining that district court should first consider agency affidavits before resorting to in camera review); ACLU v. FBI, 429 F. Supp. 2d 179, 187 (D.D.C. 2006) (holding that "reviewing court must give 'substantial weight' to [agency] affidavits" (citing King v. Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987))); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 216 (D.D.C. 2005) (same).

[22] See Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980); see, e.g., Pub. Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) (finding agency's affidavits sufficiently detailed to support Exemption 1 withholding and determining that subsequent release of some previously classified information was not evidence of bad faith); Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (applying Halperin standard to waiver issue and finding that Department of State adequately explained

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duct a detailed inquiry, the court deferred to the expert opinion of the

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[22](...continued)
how national security concerns were not undermined -- and Exemption 1 was not waived -- by display of intelligence photographs to United Nations Security Council representatives from other countries); Wheeler v. CIA, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) (denying plaintiff discovery to gather information on agency's classification decisionmaking process because plaintiff failed to demonstrate any agency bad faith); Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative, 237 F. Supp. 2d 17, 20 (D.D.C. 2002) (affirming agency's withholding when its affidavits sufficiently explained application of Exemption 1 and were not contradicted by any evidence of bad faith); Falwell v. Executive Office of the President, 158 F. Supp. 2d 734, 738 (W.D. Va. 2001) (finding Exemption 1 applicable based on affidavit that "fairly described the contents of the material withheld and adequately stated . . . reasons for nondisclosure"); Schrecker v. U.S. Dep't of Justice, 74 F. Supp. 2d 26, 30 (D.D.C. 1999) (granting summary judgment as agency "affidavits and indices pertaining to nondisclosure under Exemption 1 . . . [are] reasonably detailed and submitted in good faith"), aff'd in pertinent part, 254 F.3d 162 (D.C. Cir. 2001); Judicial Watch, Inc. v. Comm'n on U.S.-Pac. Trade & Inv. Policy, No. 97-0099, slip op. at 33 (D.D.C. Sept. 30, 1999) (finding that the agency's "entries explain with substantial specificity what material it has withheld, why it withheld it, and the risk to U.S. foreign policy should the information be revealed," and that therefore the court "need not attempt to second guess the department's decision"); Voinche v. FBI, 46 F. Supp. 2d 26, 29 (D.D.C. 1999) (declaring that agency properly invoked Exemption 1 when declaration "show[ed], with reasonable specificity, why the documents fall within the exemption" and when "there is no evidence of agency bad faith"); Billington v. Dep't of Justice, 11 F. Supp. 2d 45, 54, 58 (D.D.C. 1998) (finding that plaintiff's evidence "whittles down to a string of if-then statements and suggestions of government conspiracy," which provide "no basis upon which to . . . warrant a probe of bad faith"), summary judgment granted in pertinent part, 69 F. Supp. 2d 128, 135 (D.D.C. 1999), aff'd in part, vacated in part & remanded all on other grounds, 233 F.3d 581 (D.C. Cir. 2000) (Exemption 1 decision not challenged on appeal); cf. Pipko v. CIA, 312 F. Supp. 2d 669, 674 (D.N.J. 2004) (commenting that agency affidavits must provide more than "merely glib assertions" to support withholding); Coldiron v. Dep't of Justice, 310 F. Supp. 2d 44, 52 (D.D.C. 2004) (observing that courts do not expect "anything resembling poetry," but nonetheless expressing dissatisfaction with agency's "cut and paste" affidavits); Voinche v. FBI, 940 F. Supp. 323, 328 (D.D.C. 1996) (granting summary judgment despite "troubling" and "vague" affidavits in light of thoroughness of agency's other submissions and fact that Vaughn affidavits in Exemption 1 cases "inherently require a degree of generalization" to prevent compromise of national security interests), aff'd per curiam, No. 96-5304, 1997 WL 411685 (D.C. Cir. June 19, 1997); Ajluni v. FBI, 947 F. Supp. 599, 607 (N.D.N.Y. 1996) (rejecting plaintiff's request for discovery of procedure by which documents are classified, because Vaughn Index was "sufficient").

agency, noting that judges "lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case."[23] This review standard has been reaffirmed by the D.C. Circuit on several occasions,[24] and it has been adopted by other circuit courts as well.[25] Of

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[23] Halperin, 629 F.2d at 148; see also Bowers v. U.S. Dep't of Justice, 930 F.2d 350, 357 (4th Cir. 1991) (stating that "a court should hesitate to substitute its judgment of the sensitivity of the information for that of the agency"); Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981) (emphasizing that deference is due agency's classification judgment); Edmonds v. U.S. Dep't of Justice, 405 F. Supp. 2d 23, 27 (D.D.C. 2005) (same); Nat'l Sec. Archive, 402 F. Supp. 2d at 216 (same); ACLU v. DOD, 389 F. Supp. 2d 547, 565 (S.D.N.Y. 2005) (same); Snyder v. CIA, 230 F. Supp. 2d 17, 24 (D.D.C. 2002) (observing that agency is in best position to make "ultimate assessment of harm to intelligence sources and methods").

[24] See, e.g., Stillman v. CIA, 319 F.3d 546, 548 (D.C. Cir. 2003) (criticizing the district court because it failed "to evaluate the pleadings and affidavits to be submitted by the Government in defense of its classification decision," thereby erroneously withholding the deference that ordinarily is owed to national security officials) (non-FOIA case); King, 830 F.2d at 217 (concluding that "the court owes substantial weight to detailed agency explanations in the national security context"); Goldberg v. U.S. Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987); see also Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (accepting that "the judiciary is in an extremely poor position to second-guess the executive's judgment in this area") (Exemption 7(A)); Edmonds, 405 F. Supp. 2d at 33 (explaining that "this court must respect the experience of the agency and stay within the proper limits of the judicial role in FOIA review"); Wheeler, 271 F. Supp. 2d at 140 (declining to substitute judgment of plaintiff or court for that of agency classification authority simply on basis that classification action required exercise of some discretion); ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 27 (D.D.C. 2003) (reminding that although the agency's declarations "are entitled to substantial weight, they must nevertheless afford the requester an ample opportunity to contest, and the Court to review, the soundness of the withholding"); Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 631847, at *26 (D.D.C. Aug. 22, 1995) (indicating that role of courts in reviewing Exemption 1 claims "is to determine whether the agency has presented a logical connection between its use of the exemption and the legitimate national security concerns involved; the Court does not have to ascertain whether the underlying facts of each specific application merit the agency's national security concerns"); cf. Dep't of the Navy v. Egan, 484 U.S. 518, 529-30 (1988) (allowing deference to agency expertise in granting of security clearances) (non-FOIA case).

[25] See, e.g., Tavakoli-Nouri v. CIA, No. 00-3620, 2001 U.S. App. LEXIS 24676, at *9 (3d Cir. Oct. 18, 2001) (recognizing that courts give "substantial weight to agency's affidavit regarding details of classified status of a disputed document" (referencing McDonnell v. United States, 4 F.3d 1227,

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course, where agency affidavits have been found to be insufficiently detailed, courts have withheld summary judgment in Exemption 1 cases on procedural grounds.[26]

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[25](...continued)
1242 (3d Cir. 1993))); Maynard v. CIA, 986 F.2d 547, 555-56 & n.7 (1st Cir. 1993) (recognizing that courts must accord "substantial deference" to agency withholding determinations and "uphold the agency's decision" so long as withheld information logically falls into the exemption category cited and there exists no evidence of agency "bad faith"); Bowers, 930 F.2d at 357 (stating that "[w]hat fact or bit of information may compromise national security is best left to the intelligence experts"); cf. Hunt, 981 F.2d at 1119 (applying similar deference in Exemption 3 case involving national security). But see Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996) (considering whether district court had "adequate factual basis upon which to base its decision" before undertaking de novo review (citing Painting Indus. of Haw. Mkt. Recovery Fund v. U.S. Dep't of the Air Force, 26 F.3d 1479, 1482 (9th Cir. 1994), and Schiffer v. FBI, 78 F.3d 1405, 1409 (9th Cir. 1996))) (Exemption 3).

[26] Halpern v. FBI, 181 F.3d 279, 293 (2d Cir. 1999) (declaring that agency's "explanations read more like a policy justification" for Executive Order 12,356, that the "affidavit gives no contextual description," and that it fails to "fulfill the functional purposes addressed in Vaughn"); Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 31, 37 (D.C. Cir. 1998) (remanding to district court to allow the FBI to "further justify" its Exemption 1 claim because its declaration failed to "draw any connection between the documents at issue and the general standards that govern the national security exemption"), on remand, 193 F. Supp. 2d 29, 37 (D.D.C. 2001) (finding declaration insufficient where it merely concluded, without further elaboration, that "disclosure of [intelligence information] . . . could reasonably be expected to cause serious damage to the national security"); Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1179-84 (D.C. Cir. 1996) (rejecting as insufficient certain Vaughn Indexes because agencies must itemize each document and adequately explain reasons for nondisclosure); Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 807 (9th Cir. 1995) (affirming district court disclosure order based upon finding that government failed to show with "any particularity" why classified portions of several documents should be withheld); Wiener v. FBI, 943 F.2d 972, 978-79 (9th Cir. 1991) (rejecting as inadequate agency justifications contained in coded Vaughn affidavits, based upon view that they consist of "boilerplate" explanations not "tailored" to particular information being withheld pursuant to Exemption 1); Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 66 n.12 (D.C. Cir. 1990) (articulating degree of specificity required in public Vaughn affidavit in Exemption 1 case, especially with regard to agency's obligation to segregate and release nonexempt material); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 15, 26-27 (D.D.C. 1998) (reserving judgment on Exemption 1 claims of CIA and FBI, and ordering new affidavits because agencies' Vaughn Indexes were found to be insufficient to permit court to engage in proper evaluation);
(continued...)

If an agency affidavit passes muster under this standard, in camera review may be inappropriate because substantial weight must be accorded that affidavit.[27] In a 1996 decision, the D.C. Circuit stated that in a na-

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[26](...continued)
Keenan v. Dep't of Justice, No. 94-1909, slip op. at 8-11 (D.D.C. Mar. 24, 1997) (finding to be insufficient coded Vaughn Index that merely recited executive order's language without providing information about contents of withheld information), renewed motion for summary judgment denied in pertinent part (D.D.C. Dec. 16, 1997).

[27] See, e.g., Doherty v. U.S. Dep't of Justice, 775 F.2d 49, 53 (2d Cir. 1985) (adjudging that "the court should restrain its discretion to order in camera review"); Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979) (stating that "[w]hen the agency meets its burden by means of affidavits, in camera review is neither necessary nor appropriate"); Pub. Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 22 (D.D.C. 1995) (declining in camera review of withheld videotapes after according substantial weight to agency's affidavit that public disclosure would harm national security); King v. U.S. Dep't of Justice, 586 F. Supp. 286, 290 (D.D.C. 1983) (characterizing in camera review as last resort), aff'd in part & rev'd in part on other grounds, 830 F.2d 210 (D.C. Cir. 1987); cf. Stillman, 319 F.3d at 548 (finding in general that in camera affidavits can effectively supplement public affidavits to explain agency classification decisions) (non-FOIA case); Young v. CIA, 972 F.2d 536, 538-39 (4th Cir. 1992) (holding that district court did not abuse its discretion by refusing to review documents in camera -- despite small number -- because agency's affidavits found sufficiently specific to meet required standards for proper withholding). But see, e.g., Patterson v. FBI, 893 F.2d 595, 599 (3d Cir. 1990) (finding in camera review of two documents appropriate when agency description of records was insufficient to permit meaningful review and to verify good faith of agency in conducting its investigation); Allen v. CIA, 636 F.2d 1287, 1291 (D.C. Cir. 1980) (holding that conclusory affidavit by agency requires remand to district court for in camera inspection of fifteen-page document); Trulock v. U.S. Dep't of Justice, 257 F. Supp. 2d 48, 51 (D.D.C. 2003) (observing that documents should be reviewed in camera when declarations are insufficient to demonstrate validity of withholdings); Armstrong v. Executive Office of the President, No. 89-142, slip op. at 4-8 (D.D.C. July 28, 1995) (ordering in camera review of four of seventeen documents at issue because government's explanation for withholdings was insufficient, but denying plaintiff's request that court review documents merely on basis that government subsequently released previously withheld material), aff'd on other grounds, 97 F.3d 575 (D.C. Cir. 1996); Moore v. FBI, No. 83-1541, 1984 U.S. Dist. LEXIS 18732, at *9 (D.D.C. Mar. 9, 1984) (finding in camera review particularly appropriate when only small volume of documents were involved and government made proffer), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (unpublished table decision); cf. Jones v. FBI, 41 F.3d 238, 242-44 (6th Cir. 1994) (finding in camera inspection necessary, not because FBI acted in bad faith with regard to plaintiff's FOIA request, but due to evidence of illegality with regard to FBI's underlying investiga-
(continued...)

tional security case, a district court exercises "wise discretion" when it limits the number of documents it reviews in camera.[28] In upholding the district court's decision not to review certain documents in camera, the D.C. Circuit opined that limiting the number of documents examined by a court "makes it less likely that sensitive information will be disclosed" and, if there is an unauthorized disclosure of classified information, "makes it easier to pinpoint the source of the leak."[29]

In another case, the Court of Appeals for the Seventh Circuit analyzed the legislative history of the 1974 FOIA amendments and went so far as to conclude that "Congress did not intend that the courts would make a true de novo review of classified documents, that is, a fresh determination of the legitimacy of each classified document."[30] It also is noteworthy that the only Exemption 1 FOIA decision to find agency "bad faith,"[31] one in which an appellate court initially held that certain CIA procedural shortcomings amounted to "bad faith," was subsequently vacated on panel rehearing.[32]

Despite the courts' general reluctance to "second-guess" agency decisions on national security matters, agencies still have the responsibility to justify classification decisions in supporting affidavits.[33] In Exemption 1

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[27](...continued)
tion); Wiener, 943 F.2d at 979 & n.9 (holding that in camera review by district court cannot "replace" requirement for sufficient Vaughn Index and can only "supplement" agency's justifications contained in affidavits).

[28] Armstrong v. Executive Office of the President, 97 F.3d 575, 580 (D.C. Cir. 1996).

[29] Id.

[30] Stein v. Dep't of Justice, 662 F.2d 1245, 1253 (7th Cir. 1981).

[31] McGehee v. CIA, 697 F.2d 1095, 1113 (D.C. Cir. 1983).

[32] McGehee v. CIA, 711 F.2d 1076, 1077 (D.C. Cir. 1983); see also Wheeler, 271 F. Supp. 2d at 139 (finding that it was not at all proof of bad faith to show merely that agency handled two similar FOIA requests in different manner); Wash. Post Co. v. DOD, No. 84-2949, 1987 U.S. Dist. LEXIS 16108, at *12 (D.D.C. Feb. 25, 1987) (deciding that addition of second classification category at time of litigation "does not create an inference of 'bad faith' concerning the processing of plaintiff's request or otherwise implicating the affiant's credibility").

[33] See ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 35 (D.D.C. 2004) (declaring that "it is not a question of whether the Court agrees with the defendant's assessment of the danger, but rather, 'whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the [agency] is expert and given by Congress a special
(continued...)

cases, courts are likely to require that the affidavit be provided by an agency official with direct knowledge of the classification decision.[34] When an affidavit contains sufficient explanation, however, it is generally accepted that "the court will not conduct a detailed inquiry to decide whether it agrees with the agency's opinions."[35]

Deference to Agency Expertise

As indicated above, while the standard of judicial review often is expressed in different ways, courts generally have heavily deferred to agency expertise in national security cases.[36] Such deference is based upon the

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[33](...continued)
role'" (quoting Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982))).

[34] See Hudson v. Dep't of Justice, No. C 04-4079, 2005 WL 1656909, at *3 (N.D. Cal. July 11, 2005) (accepting that affiant had requisite knowledge of classification decision despite fact that she did not possess original classification authority); Judicial Watch, Inc. v. U.S. Dep't of Transp., No. 02-566, 2005 WL 1606915, at *8 (D.D.C. July 7, 2005) (finding that affiant, while not original classification authority, had personal knowledge of matters set forth in his declaration). But see also Wickwire Gavin, P.C. v. Def. Intelligence Agency, 330 F. Supp. 2d 592, 600 (E.D. Va. 2004) (holding that "in order to sustain a claim of FOIA Exemption One under Exec. Order 12,958, courts require an affidavit from an individual with classifying authority").

[35] Edmonds, 405 F. Supp. 2d at 33; see also Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at *11 (D.D.C. Aug. 10, 2005) (explaining that "[g]iven the weight of authority counseling deference . . in matters involving national security, this court must defer to the agency's judgment"); Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1334 (S.D. Fla. 2005) (declaring that Exemption 1, properly applied, serves as "absolute bar" to release of classified information); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 162 (D.D.C. 2004) (ruling that "a reviewing court is prohibited from conducting a detailed analysis of the agency's invocation of Exemption 1" (citing Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980))); Wolf v. CIA, 357 F. Supp. 2d 112, 116 (D.D.C. 2004) (commenting that "this Circuit has required little more than a showing that the agency's rationale is logical"), aff'd in pertinent part & remanded, 473 F.3d 370, 376 (D.C. Cir. 2007) (concluding that "[i]n light of the substantial weight accorded agency assertions of potential harm made in order to invoke the protection of FOIA Exemption 1, the [agency a]ffidavit both logically and plausibly suffices").

[36] See, e.g., Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (holding that because courts lack expertise in national security matters, they must give "'substantial weight to agency statements'" (quoting Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980))); Bowers v. U.S. Dep't of Justice, 930 F.2d 350, 357 (4th Cir. 1991) (observing that
(continued...)

"magnitude of the national security interests and potential risks at stake,"[37] and it is extended by courts because national security officials are uniquely positioned to view "the whole picture" and "weigh the variety of subtle and complex factors" in order to determine whether the disclosure of information would damage the national security.[38] Indeed, courts ordinarily are

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[36](...continued)
"[w]hat fact . . . may compromise national security is best left to the intelligence experts"); Doherty v. U.S. Dep't of Justice, 775 F.2d 49, 52 (2d Cir. 1985) (according "substantial weight" to agency declaration); Taylor v. Dep't of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (holding that classification affidavits are entitled to "the utmost deference") (reversing district court disclosure order); Edmonds v. FBI, 272 F. Supp. 2d 35, 46, 49 (D.D.C. 2003) (opining that courts should not challenge "the predictive judgments" of national security officials without cause to do so); ACLU v. U.S. Dep't of Justice, 429 F. Supp. 2d 179, 188 (D.D.C. 2006) (holding that "the court must recognize that the executive branch departments responsible for national security and national defense have unique insights and special expertise concerning the kind of disclosures that may be harmful" (citing Krikorian v. Dep't of State, 984 F.2d 461, 464 (D.C. Cir. 1993))); Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 7 (D.D.C. 2001) (recognizing that district courts must "defer to federal agencies in questions of national security and intelligence"), aff'd, 334 F.2d 55 (D.C. Cir. 2003); Canning v. U.S. Dep't of Justice, 848 F. Supp. 1037, 1042 (D.D.C. 1994) (describing how in according such deference, courts "credit agency expertise in evaluating matters of national security"); cf. Stillman v. CIA, 319 F.3d 546, 549 (D.C. Cir. 2003) (instructing that agency affidavits should be reviewed "with the appropriate degree of deference owed to the Executive Branch concerning classification decisions") (non-FOIA case); Wiener v. FBI, No. 83-1720, slip op. at 5 (C.D. Cal. Mar. 5, 2001) (rejecting the plaintiff's request to review redacted versions of the withheld documents in order to "independently verify" the government's characterization of their content, because to grant it would "remove all deference to the FBI's classification of its documents"), summary judgment for plaintiff granted (C.D. Cal. Sept. 27, 2004), reh'g denied (C.D. Cal. Aug. 25, 2005), appeal dismissed per stipulation, No. 05-56652 (9th Cir. Jan. 3, 2007). But see also FOIA Update, Vol. XVI, No. 2, at 4, 12 (summarizing history of Exemption 1 disclosure orders and urging careful attention to classification determinations accordingly).

[37] Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (quoting CIA v. Sims, 471 U.S. 159, 179 (1985)) (Exemption 7(A)); see also L.A. Times Commc'ns, LLC v. Dep't of the Army, No. CV 05-8293, 2006 WL 2336457, at *14 (C.D. Cal. July 24, 2006) (deferring to judgment of senior Army officers regarding risks posed to soldiers and contractors by enemy forces in Iraq); ACLU v. DOD, 406 F. Supp. 2d 330, 333 (D.D.C. 2006) (acknowledging that "one may criticize the deference extended by the courts as excessive," but holding that such deference is the rule).

[38] Sims, 471 U.S. at 179-80; see also, e.g., Zadvydas v. Davis, 533 U.S.
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very reluctant to substitute their judgment in place of the agency's "unique insights"[39] in the areas of national defense and foreign relations.[40] This is

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[38](...continued)
678, 696 (2001) (commenting that "terrorism or other special circumstances" may warrant "heightened deference") (non-FOIA case); Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) (explaining that "courts traditionally have been reluctant to intrude upon the authority of the executive in national security affairs") (non-FOIA case); Ctr. for Nat'l Sec. Studies, 331 F.3d at 918 (rejecting "artificial limits" on deference, and explaining that "deference depends on the substance of the danger posed by disclosure -- that is, harm to the national security -- not the FOIA exemption invoked").

[39] Miller v. U.S. Dep't of State, 779 F.2d 1378, 1387 (8th Cir. 1985).

[40] See, e.g., Maynard v. CIA, 986 F.2d 547, 556 n.9 (1st Cir. 1993) (stating that court "not in a position to 'second-guess'" agency's determination regarding need for continued classification of material); Krikorian, 984 F.2d at 464-65 (acknowledging agency's "unique insights" in areas of national defense and foreign relation and further explaining that because judges "'lack the expertise necessary to second-guess . . . agency opinions in the typical national security FOIA case,'" they must accord substantial deference to an agency's affidavit (quoting Halperin, 629 F.2d at 148)); ACLU v. FBI, 429 F. Supp. 2d 179, 188 (D.D.C. 2006) (reasoning that "while a court is ultimately to make its own decision, that decision must take seriously the government's predictions" of harm to national security); Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 8 (D.D.C. July 31, 2000) ("Agencies have more experience in the national security arena than courts do, and therefore their judgment warrants deference as long as the agency can demonstrate a logical connection between a withheld document and an alleged harm to national security."); Aftergood v. CIA, No. 98-2107, 1999 U.S. Dist. LEXIS 18135, at *9-10 (D.D.C. Nov. 12, 1999) (declaring that courts must respect agency predictions concerning potential national security harm from disclosure, and recognizing that these predictions "must always be speculative to some extent"); Braslavsky v. FBI, No. 92 C 3027, 1994 WL 247078, at *2 (N.D. Ill. June 6, 1994) (commenting that "[a] court has neither the experience nor expertise to determine whether a classification [decision] is substantively correct"), aff'd, 57 F.3d 1073 (7th Cir. 1995) (unpublished table decision). But see King, 830 F.2d at 226 (holding that trial court erred in deferring to agency's judgment that information more than thirty-five years old remained classified when executive order presumed declassification of information over twenty years old and agency merely indicated procedural compliance with order); Coldiron v. Dep't of Justice, 310 F. Supp. 2d 44, 53 (D.D.C. 2004) (cautioning that court's deference should not be used as "wet blanket" to avoid proper justification of exemptions); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 561 (S.D.N.Y. 1989) (reminding that such deference does not give agency "carte blanche" to withhold responsive documents without "valid and thorough affidavit"), subsequent decision, No. 87-Civ-1115, slip op. at 1-2 (S.D.N.Y. June 7, 1990) (up-
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because courts have recognized that national security is a "uniquely executive purview"[41] and that "the judiciary is in an extremely poor position to second-guess the executive's judgment" on national security issues.[42] The tragic events of September 11, 2001, and their aftermath, have served to make courts more aware of the need for deference when considering issues related to national security, with one court observing that "America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore."[43]

Nevertheless, some FOIA plaintiffs have argued -- and in some cases courts have agreed -- that the nature of judicial review should involve questioning the underlying basis for the agency's classification decision.[44] However, the majority of courts have firmly rejected the idea that judicial review is to serve as a quality-control measure to reassure a doubtful re-

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[40](...continued)
holding Exemption 1 excisions after in camera review of certain documents and classified Vaughn affidavit).

[41] Ctr. for Nat'l Sec. Studies, 331 F.3d at 927; see also L.A. Times Commc'ns, 2006 WL 2336457, at *15 (echoing the belief that national security is "a uniquely executive purview" (citing Zadvydas, 533 U.S. at 696)).

[42] Ctr. for Nat'l Sec. Studies, 331 F.3d at 928. But see Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at *9 (D.D.C. Aug. 10, 2005) (observing that deference "does not mean acquiescence").

[43] Ctr. for Nat'l Sec. Studies, 331 F.3d at 928; see also Morley v. CIA, No. 03-2545, 2006 WL 2806561, at *3 (D.D.C. Sept. 29, 2006) (expressing deferential standard on national security issues); L.A. Times Commc'ns, LLC v. Dep't of the Army, No. CV 05-8293, 2006 WL 2336457, at *14 (C.D. Cal. July 24, 2006) (explaining that "[t]he test is not whether the court personally agrees in full with the [agency's] evaluation of the danger -- rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the [agency] is expert and given by Congress a special role"); Bassiouni v. CIA, No. 02-C-4049, 2004 WL 1125919, at *6 (N.D. Ill. Mar. 31, 2004) (deferring to the agency's determination of harm, and further noting that "[i]n the realm of intelligence, a lot can occur in a short period of time"), aff'd, 392 F.3d 244 (7th Cir. 2004), cert. denied, 545 U.S. 1129 (2005).

[44] See ACLU, 429 F. Supp. 2d at 186 (concluding that "the importance of the issues raised by this case" make in camera review necessary); Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1338 (S.D. Fla. 2005) (granting in camera review "to satisfy an 'uneasiness' or 'doubt' that the exemption claim may be overbroad given the nature of Plaintiff's arguments").

quester.[45] Further, courts have overwhelmingly rejected the notion that additional judicial review should be triggered by a requester's unsupported allegations of wrongdoing against the government in a national security case.[46] By the same token, though, courts may not readily apply too much deference where an agency has merely raised a national security concern without providing an adequate explanation of it.[47]

Courts have demonstrated this deference to agency expertise also by according little or no weight to opinions of persons other than the agency classification authority when reviewing the propriety of agency classification determinations.[48] Persons whose opinions have been rejected by the

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[45] See, e.g., Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 221 (D.D.C. 2005) (declining to conduct in camera review merely "to verify the agency's descriptions and provide assurances, beyond a presumption of administrative good faith, to FOIA plaintiffs that the descriptions are accurate and as complete as possible"); Haddam v. FBI, No. 01-434, slip op. at 21 (D.D.C. Sept. 8, 2004) (observing that "[w]hile Plaintiff understandably would like to review the FBI's decisions for classifying the material, nothing in FOIA entitles Plaintiff to do so"); Wiener, No. 83-1720, slip op. at 5 (C.D. Cal. Mar. 5, 2001) (rejecting plaintiff's request that court "independently verify" government's characterization of records).

[46] See NARA v. Favish, 541 U.S. 157, 174 (reminding that "[a]llegations of government misconduct are 'easy to allege and hard to disprove'" (quoting Crawford-El v. Britton, 523 U.S. 574, 585 (1998))) (Exemption 7(C) case)), reh'g denied, 541 U.S. 1057 (2004); Bassiouni v. CIA, 392 F.3d 244, 247 (7th Cir. 2004) (commenting that "Exemption 1 would not mean much if all anyone had to do, to see the full list of the CIA's holdings, was allege that the agency had some documents showing how he 'exercises rights guaranteed by the First Amendment'"), cert. denied, 545 U.S. 1129 (2005); Nat'l Sec. Archive Fund, 402 F. Supp. 2d 211, 222 (D.D.C. 2005) (holding that a plaintiff had not proven its assertions of waiver, and explaining that "courts do not play a 'guessing game' with such sensitive and potentially dangerous information" (citing Assassination Archives at district and appellate court levels, 177 F. Supp. 2d at 10; 334 F.3d at 60-61 & n.6)); Peltier v. FBI, No. 03-CV-905, 2005 WL 735964, at *7 (W.D.N.Y. Mar. 31, 2005) (finding that plaintiff's bare claim that agency classified requested records solely in order to prevent embarrassment does not alone necessitate greater judicial scrutiny).

[47] See, e.g., ACLU v. DOD, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004) (finding that "[m]erely raising national security concerns can not [sic] justify unlimited delay," and considering "the public's right to receive information on government activity in a timely manner").

[48] See, e.g., Van Atta v. Def. Intelligence Agency, No. 87-1508, 1988 WL 73856, at *1-2 (D.D.C. July 6, 1988) (rejecting opinion of requester about willingness of foreign diplomat to discuss issue); Wash. Post v. DOD, No.

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courts in this context include:

(1) a former ambassador who had personally prepared some of the records at issue;[49]

(2) a retired admiral;[50]

(3) a former CIA agent;[51]

(4) a retired CIA staff historian;[52]

(5) a retired member of the CIA's Historical Advisory Committee;[53] and

(6) a former Special Assistant to the President of the United States.[54]

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[48](...continued)
84-2949, 1987 U.S. Dist. LEXIS 16108, at *19-20 (D.D.C. Feb. 25, 1987) (rejecting opinion of U.S. Senator who read document in official capacity as member of Committee on Foreign Relations); cf. Lawyers Alliance for Nuclear Arms Control v. Dep't of Energy, No. 88-CV-7635, 1991 WL 274860, at *1-2 (E.D. Pa. Dec. 18, 1991) (holding that requester provided no "admissible evidence" that officials of former Soviet Union consented to release of requested nuclear test results). But cf. Wash. Post v. DOD, 766 F. Supp. 1, 13-14 (D.D.C. 1991) (adjudging that "non-official releases" contained in books by participants involved in Iranian hostage rescue attempt -- including ground assault commander and former President Carter -- have "good deal of reliability" and require government to explain "how official disclosure" of code names "at this time would damage national security").

[49] See Rush v. Dep't of State, 748 F. Supp. 1548, 1554 (S.D. Fla. 1990) (finding that plaintiff, who retired from government service in 1977, failed to rebut opinion of current government officials on necessity of continued classification); cf. Goldberg v. U.S. Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987) (accepting classification officer's national security determination even though more than 100 ambassadors did not initially classify information).

[50] See Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989).

[51] See Gardels v. CIA, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982).

[52] See Pfeiffer v. CIA, 721 F. Supp. 337, 340-41 (D.D.C. 1989).

[53] See Berman v. CIA, 378 F. Supp. 2d 1209, 1219 (E.D. Cal. 2005) (referring to declarations submitted by plaintiff in support of argument that information no longer warranted national security classification).

[54] See id.

And in a further example of deference to agency expertise, a court considering the sensitivity of CIA budget information not long ago concluded that it "must defer to . . . [the agency's] decision that release . . . amidst the information already publicly-available, provides too much trend information and too great a basis for comparison and analysis for our adversaries."[55]

Nevertheless, while judicial deference to agency expertise is the norm in Exemption 1 litigation, in some cases courts have rejected an agency's classification decision.[56] An example of this occurred in Weatherhead v. United States,[57] a case decided under the original version of Executive Order 12,958 in which a district court initially ordered the disclosure of a letter sent by the British Home Office to the Department of Justice, which was not classified until after receipt of the FOIA request.[58] On a motion for reconsideration, the district court rejected the government's arguments that the court had failed to give the agency's determination of harm sufficient deference.[59] The court "reluctantly" agreed to review the letter in camera because "of the danger that highly sensitive . . . material might be

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[55] Aftergood, No. 98-2107, 1999 U.S. Dist. LEXIS 18135, at *11-12 (D.D.C. Jan. 12, 1999) (deferring to Director of Central Intelligence's determination that release of 1999 CIA budget data could reasonably be expected to harm intelligence activities, despite fact that the President had encouraged disclosure of previous budget data); see also Aftergood v. CIA, No. 02-1146, slip op. at 3 (D.D.C. Feb. 6, 2004) (finding CIA's aggregate intelligence budget data for 2002 to be exempt from disclosure, because it reveals the allocation, transfer, and funding of intelligence programs) (Exemption 3), reconsideration denied (D.D.C. Sept. 29, 2004).

[56] See FOIA Update, Vol. XVI, No. 2, at 4, 7 (compiling and discussing cases in which courts have rejected Exemption 1 claims and in some cases have ordered disclosure, but commenting that such disclosure orders nearly always were overturned on appeal); cf. AFL-CIO v. FEC, 333 F.3d 168, 179 (D.C. Cir. 2003) (concluding that the agency's disclosure policies in relation to the FOIA might be unconstitutional as applied, and requiring the agency to "provide a separate First Amendment justification for publicly disclosing" information "relating to speech or political activity" that it compiled for law enforcement purposes) (Exemption 7(C)).

[57] Weatherhead v. United States, No. 95-519, slip op. at 5-6 (E.D. Wash. Mar. 29, 1996), reconsideration granted in pertinent part (E.D. Wash. Sept. 9, 1996) (upholding classification upon in camera inspection), rev'd, 157 F.3d 735 (9th Cir. 1998), appellate decision vacated & case remanded for dismissal, 528 U.S. 1042 (1999); see also Wiener v. FBI, No. 83-1720, slip op. at 9 (C.D. Cal. Sept. 27, 2004) (rejecting FBI's determination that national security harm would result from release), reh'g denied (C.D. Cal. Aug. 25, 2005).

[58] Id. at 2.

[59] Weatherhead, No. 95-519, slip op. at 3-4 (E.D. Wash. Sept. 9, 1996).

released only because [the agency was] unable to articulate a factual basis for their concerns without giving away the information itself."[60] When this proved to be the case upon the court's in camera review of the document, the court granted the motion for reconsideration and upheld the letter's classification.[61]

On appeal, however, the Court of Appeals for the Ninth Circuit, in a two-to-one decision, flatly refused to defer to the State Department's judgment of foreign relations harm and ordered the letter disclosed.[62] The Solicitor General then petitioned the Supreme Court to grant certiorari review of the Ninth Circuit's ruling, which it did, and the case was scheduled for Supreme Court argument.[63] During the briefing of the case, however, the requester suddenly revealed that he was in possession of a subsequent letter from a local British Consul that addressed the same subject.[64] In response to this revelation, the State Department brought this new information to the attention of the British Government, which then decided to no longer insist on confidentiality for the letter.[65] Accordingly, and on an expedited basis, the letter was declassified and disclosed to the requester.[66] The Solicitor General then successfully moved to have the Supreme Court nullify the Ninth Circuit's adverse precedent on the ground that it no longer could be appealed.[67]

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[60] Id. at 7-8.

[61] Id. at 8. But see Keenan v. Dep't of Justice, No. 94-1909, slip op. at 8-9 (D.D.C. Dec. 16, 1997) (ordering upon in camera inspection the release of document segments that the agency withheld pursuant to Exemption 1, because the agency "failed to demonstrate" how disclosure of information ranging from thirty-two to forty-six years old could "continue to damage the national security"); Springmann v. U.S. Dep't of State, No. 93-1238, slip op. at 9-11 (D.D.C. Apr. 21, 1997) (ruling that disclosure of two paragraphs in embassy report about American employee engaging in religiously offensive behavior in Saudi Arabia would not harm national security), summary judgment granted to defendant upon reconsideration (D.D.C. Feb. 24, 2000) (ruling ultimately in agency's favor based upon in camera declaration).

[62] Weatherhead v. United States, 157 F.3d 735, 742 (9th Cir. 1998).

[63] See Weatherhead v. United States, 527 U.S. 1063 (1999).

[64] See FOIA Update, Vol. XX, No. 1, at 1.

[65] See id.

[66] See id.

[67] See United States v. Weatherhead, 528 U.S. 1042 (1999) (vacating Ninth Circuit decision).

In Camera Submissions and Adequate Public Record

There are numerous instances in which courts have permitted agencies to submit explanatory in camera affidavits in order to protect certain national security information that could not be discussed in a public affidavit.[68] It is entirely clear, though, that agencies taking such a special step are under a duty to "create as complete a public record as is possible" before doing so.[69] This public record is intended to provide a meaningful and fair opportunity for a plaintiff to challenge, and an adequate evidentiary ba-

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[68] See, e.g., Patterson v. FBI, 893 F.2d 595, 599-600 (3d Cir. 1990); Simmons v. U.S. Dep't of Justice, 796 F.2d 709, 711 (4th Cir. 1986); Ingle v. Dep't of Justice, 698 F.2d 259, 264 (6th Cir. 1983) (ruling that in camera review should be secondary to testimony or affidavits); Salisbury v. United States, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982); Stein v. Dep't of Justice, 662 F.2d 1245, 1255-56 (7th Cir. 1981); cf. Stillman v. CIA, 319 F.3d 546, 548 (D.C. Cir. 2003) (holding that in camera affidavits are effective tools for justifying national security withholdings) (non-FOIA case); Armstrong v. Executive Office of the President, 97 F.3d 575, 580-81 (D.C. Cir. 1996) (finding that although district court may have erred by not explaining reasons for using in camera affidavit, any such error was "harmless" because agency adequately explained why it could not release withheld information).

[69] Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976); see also Armstrong, 97 F.3d at 580 (holding that when district court uses an in camera affidavit, even in national security cases, "it must both make its reasons for doing so clear and make as much as possible of the in camera submission available to the opposing party" (citing Lykins v. U.S. Dep't of Justice, 725 F.2d 1455, 1465 (D.C. Cir. 1984))); Patterson, 893 F.2d at 600; Simmons, 796 F.2d at 710; Pub. Citizen v. Dep't of State, 100 F. Supp. 2d 10, 27-28 (D.D.C. 2000) (ordering submission of an in camera affidavit after first finding that agency's public affidavit was as complete as possible and that any further description "would reveal the [very] information the agency is trying to withhold"), aff'd on other grounds, 276 F.3d 674 (D.C. Cir. 2002); Scott v. CIA, 916 F. Supp. 42, 48-49 (D.D.C. 1996) (denying request for in camera review until agency "creates as full a public record as possible"); Pub. Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 22 (D.D.C. 1995) (ordering in camera review only after the agency created "as full a public record as possible" (citing Hayden v. NSA, 608 F.2d 1381, 1384 (D.C. Cir. 1979))); Nat'l Sec. Archive v. Office of Indep. Counsel, No. 89-2308, 1992 WL 1352663, at *3-4 (D.D.C. Aug. 28, 1992) (applying Phillippi standards, and refusing to review in camera affidavits until agency "has stated publicly 'in as much detail as possible' . . . reasons for non-disclosure"); Moessmer v. CIA, No. 86-948, slip op. at 9-11 (E.D. Mo. Feb. 17, 1987) (finding in camera review appropriate when record contains contradictory evidence), aff'd, 871 F.2d 1092 (6th Cir. 1988) (unpublished table decision); cf. Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1083 (9th Cir. 2004) (approving the "use of in camera affidavits in order to supplement prior public affidavits that were too general," but rejecting the district court's use of in camera affidavits as "the sole factual basis for a district court's decision").

sis for a court to rule on, an agency's invocation of Exemption 1.[70]

In this regard, it is reasonably well settled that counsel for plaintiffs are not entitled to participate in such in camera proceedings.[71] Several years ago, though, one court took the unprecedented step of appointing a special master to review and categorize a large volume of classified records.[72] In other instances involving voluminous records, courts have on occasion ordered agencies to submit samples of the documents at issue for in camera review.[73]

In a decision that highlights some of the difficulties of Exemption 1 litigation practice, the Court of Appeals for the Fourth Circuit issued a writ

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[70] See Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 30 (D.C. Cir. 1999) (requiring defendant to provide plaintiff with "'a meaningful opportunity to contest, and the district court [with] an adequate foundation to review, the soundness of the withholding'" (quoting King v. U.S. Dep't of Justice, 830 F.2d 210, 218 (D.C. Cir. 1987))); Coldiron v. Dep't of Justice, 310 F. Supp. 2d 44, 49 (D.D.C. 2004) (same); Campbell v. U.S. Dep't of Justice, 193 F. Supp. 2d 29, 37 (D.D.C. 2001) (same), partial reconsideration denied, 231 F. Supp. 2d 1 (D.D.C. 2002); see also ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 27 (D.D.C. 2003) (acknowledging that agency affidavits "are entitled to substantial weight," but finding that they "must nevertheless afford the requester an ample opportunity to contest" them).

[71] See Salisbury, 690 F.2d at 973 n.3; Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982); Hayden, 608 F.2d at 1385-86; see also Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983) (holding that plaintiff's counsel not permitted to participate in in camera review of documents arguably covered by state secrets privilege); Pollard v. FBI, 705 F.2d 1151, 1154 (9th Cir. 1983) (finding no reversible error where court not only reviewed affidavit and documents in camera, but also received authenticating testimony ex parte); cf. Arieff v. U.S. Dep't of the Navy, 712 F.2d 1462, 1470-71 & n.2 (D.C. Cir. 1983) (denying participation by plaintiff's counsel even when information withheld was personal privacy information). But cf. Lederle Lab. v. HHS, No. 88-249, 1988 WL 47649, at *1 (D.D.C. May 2, 1988) (granting restrictive protective order in Exemption 4 case permitting counsel for requester to review contested business information).

[72] See Wash. Post v. DOD, No. 84-3400, slip op. at 2 (D.D.C. Jan. 15, 1988), petition for mandamus denied sub nom. In re DOD, 848 F.2d 232 (D.C. Cir. 1988); cf. Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State, 818 F. Supp. 1291, 1301 (N.D. Cal. 1992) (holding that court "will not hesitate" to appoint special master to assist with in camera review of documents if agency fails to submit adequate Vaughn declaration).

[73] See, e.g., Wilson v. CIA, No. 89-3356, 1991 WL 226682, at *3 (D.D.C. Oct. 15, 1991) (ordering in camera submission of "sample" of fifty documents because it was "neither necessary nor practicable" for court to review all 1000 processed ones).

of mandamus that required court personnel who would have access to classified materials submitted in camera in an Exemption 1 case to obtain security clearances prior to the submission of any such materials to the court.[74] On remand, the district court judge reviewed the disputed documents entirely on his own.[75] Consistent with the special precautions taken by courts in Exemption 1 cases, the government also has been ordered to provide a court reporter with the requisite security clearances to transcribe in camera proceedings, in order "to establish a complete record for meaningful appellate review."[76]

In other cases, courts have compelled agencies to submit in camera affidavits when disclosure in a public affidavit would vitiate the very protection afforded by Exemption 1.[77] Affidavits -- whether public, in camera,

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[74] In re U.S. Dep't of Justice, No. 87-1205, slip op. at 4-5 (4th Cir. Apr. 7, 1988).

[75] Bowers v. U.S. Dep't of Justice, No. C-C-86-336, 1990 WL 41893, at *1 (W.D.N.C. Mar. 9, 1990), rev'd on other grounds, 930 F.2d 350 (4th Cir. 1991).

[76] Willens v. NSC, 720 F. Supp. 15, 16 (D.D.C. 1989); cf. Physicians for Soc. Responsibility, Inc. v. U.S. Dep't of Justice, No. 85-169, slip op. at 3-4 (D.D.C. Aug. 25, 1985) (placing transcript of in camera proceedings -- from which plaintiff's counsel was excluded -- under seal). But cf. Pollard, 705 F.2d at 1154 (finding no reversible error when no transcript made of ex parte testimony of FBI Special Agent who merely "authenticated and described" documents at issue).

[77] See, e.g., Pub. Citizen, 100 F. Supp. 2d at 27-28 (ordering submission of an in camera affidavit because further description in a public affidavit "would reveal the [very] information the agency is trying to withhold"); Pub. Educ. Ctr., 905 F. Supp. at 22 (ordering in camera affidavit because "'extensive public justification would threaten to reveal the very information for which . . . [Exemption 1 was] claimed'" (quoting Lykins, 725 F.2d at 1463)); cf. Maynard v. CIA, 986 F.2d 547, 557 (1st Cir. 1993) (reasoning that "a more detailed affidavit could have revealed the very intelligence sources and methods the CIA wished to keep secret"); Gilmore v. NSA, No. C92-3646, 1993 U.S. Dist. LEXIS 7694, at *18-19 (N.D. Cal. May 3, 1993) (ruling that agency has provided as much information as possible in public affidavit without "thwarting" purpose of Exemption 1 (citing King, 830 F.2d at 224)); Krikorian v. Dep't of State, No. 88-3419, 1990 WL 236108, at *3 (D.D.C. Dec. 19, 1990) (declaring agency's public affidavits sufficient because requiring more detailed descriptions of information would give foreign governments and confidential intelligence sources "reason to pause" before offering advice or useful information to agency officials in future), aff'd in pertinent part, 984 F.2d 461, 464-65 (D.C. Cir. 1993); Green v. U.S. Dep't of State, No. 85-0504, slip op. at 17-18 (D.D.C. Apr. 17, 1990) (determining that a public Vaughn affidavit containing additional information could "well have the ef-

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or a combination of the two -- have been employed when even the confirmation or denial of the existence of records at issue would pose a threat to national security, which is the so-called "Glomar" situation.[78] Indeed,

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[77](...continued)
fect of prematurely letting the cat out of the bag").

[78] See Phillippi, 546 F.2d at 1013 (dealing with request for records regarding Glomar Explorer submarine-retrieval ship, so "neither confirm nor deny" response is now known as a "Glomar" response or as "Glomarization"); see, e.g., Frugone v. CIA, 169 F.3d 772, 775 (D.C. Cir. 1999) (finding that the CIA properly refused to confirm or deny whether plaintiff was ever employed by the CIA, on the basis that disclosure could cause "diplomatic tension between Chile and the United States" or could "lessen the burden facing a foreign intelligence agency attempting to track the CIA's covert activities abroad"); Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984) (applying response to request for any record reflecting any attempt by Western countries to overthrow Albanian government); Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (applying response to request for any record revealing any covert CIA connection with University of California); Wheeler v. CIA, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (allowing the agency to give a "Glomar" response to a request for records concerning plaintiff's activities as a journalist in Cuba during the 1960s); Hogan v. Huff, No. 00-6753, 2002 WL 1359722, at *7 (S.D.N.Y. June, 21, 2002) (ruling that the agency may use a "Glomar" response to protect information "whenever the fact of [the information's] existence is itself classified") (decided under original version of Executive Order 12,958); Rubin v. CIA, No. 01 CIV 2274, 2001 WL 1537706, at *4 (S.D.N.Y. Dec. 3, 2001) (holding that CIA properly refused to confirm or deny existence of records concerning two deceased British poets, because acknowledgment would negatively impact foreign relations and compromise intelligence sources); Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 9 (D.D.C. July 31, 2000) (finding that a "Glomar" response would have been appropriate for a request for CIA biographies on seven living former East European leaders, because disclosing which leaders were the subjects of biographic intelligence "would reveal how the CIA allocates its resources" and thus help adversaries "subvert CIA efforts," but concluding that the CIA waived its Glomar position through prior disclosure of the existence of records); Arabian Shield Dev. Co. v. CIA, No. 3-98-0624, 1999 WL 118796, at *9 (N.D. Tex. Feb. 26, 1999) (holding that agency properly refused to confirm or deny whether it "has collected intelligence regarding specific individuals or corporations, or has an intelligence interest or a facility in a particular foreign location"), aff'd per curiam, 208 F.3d 1007 (5th Cir. 2000) (unpublished table decision); Roman v. Dailey, No. 97-1164, 1998 U.S. Dist. LEXIS 6708, at *7-10 (D.D.C. May 11, 1998) (finding that agencies properly refused to confirm or deny existence of records about alleged satellite capabilities) (Exemptions 1 and 3); Earth Pledge Found. v. CIA, 988 F. Supp. 623, 627 (S.D.N.Y. 1996) (ruling that agency properly refused to confirm or deny existence of correspondence between CIA headquarters and alleged CIA station in Dominican Republic, because fact of station's exis-
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"Glomarization" has become a major part of the overall landscape for Exemption 1.[79] (For a further discussion of in camera review, see Litigation

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[78](...continued)
tence itself was classified and disclosure would reveal agency's intelligence methods and could cause damage to U.S. foreign relations), aff'd per curiam, 128 F.3d 788 (2d Cir. 1997); Nayed v. INS, No. 91-805, 1993 WL 524541, at *2 (D.D.C. Nov. 29, 1993) (finding "Glomar" response appropriate for request for records on former Libyan national denied entry into United States because "confirmation that information exists would . . . be admission of identity of CIA intelligence interest . . . [while] denial . . . would allow interested parties to ascertain [such] interests based on their analysis of patterns of CIA answers in different FOIA cases"); D'Aleo v. Dep't of the Navy, No. 89-2347, 1991 U.S. Dist. LEXIS 3884, at *4-5 (D.D.C. Mar. 27, 1991) (holding that any confirmation or denial of existence of nondisclosure agreement allegedly signed by plaintiff would cause serious damage to national security); Marrera v. U.S. Dep't of Justice, 622 F. Supp. 51, 53-54 (D.D.C. 1985) (applying "Glomar" response to request for any record which would reveal whether requester was target of surveillance pursuant to Foreign Intelligence Surveillance Act); see also Exec. Order No. 12,958, as amended, § 3.6(a), 68 Fed. Reg. 15,315 (Mar. 28, 2003), reprinted in 50 U.S.C. § 435 note (2000 & Supp. III 2003) and summarized in *FOIA Post* (posted 4/11/03); cf. Minier v. CIA, 88 F.3d 796, 801-02 (9th Cir. 1996) (finding "neither confirm nor deny" response proper for request seeking records on individual's employment relationship with CIA because to reveal such information would "provide a window into the [agency's] 'sources and methods'") (Exemption 3); Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (holding "Glomar" response proper for request for records on murdered Iranian national) (Exemption 3); Bassiouni v. CIA, No. 02-C-4049, 2004 WL 1125919, at *7 (N.D. Ill. Mar. 31, 2004) (allowing agency to give "no number, no list" response -- i.e., admission that records existed, coupled with refusal to further describe them -- to protect classified national security information even though agency previously acknowledged existence of records), aff'd, 392 F.3d 244 (7th Cir. 2004), cert. denied, 545 U.S. 1129 (2005); Levy v. CIA, No. 95-1276, slip op. at 11-14 (D.D.C. Nov. 16, 1995) (finding a "Glomar" response appropriate regarding a request for CIA records on a foreign national because "[c]onsistent treatment of all requests relating to foreign nationals is a critical element to the CIA's protective strategy to safeguard its intelligence sources and methods") (Exemption 3), summary affirmance granted, No. 96-5004, 1997 WL 68328 (D.C. Cir. Jan. 15, 1997).

[79] See ACLU v. DOD, 406 F. Supp. 2d 330, 333 (D.D.C. 2006) (holding that limited disclosure in news reports did not waive agency's use of "Glomar" response); Wheeler v. CIA, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (allowing agency to give "Glomar" response to request for records concerning plaintiff's activities as journalist in Cuba during 1960s); Hogan v. Huff, No. 00-6753, 2002 WL 1359722, at *7 (S.D.N.Y. June, 21, 2002) (ruling that the agency may use a "Glomar" response to protect information "whenever the fact of [the information's] existence is itself classified") (decided under pre-
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Considerations, In Camera Inspection, below.)

Waiver of Exemption Protection

Several courts have had occasion to consider whether agencies have a duty to disclose classified information that purportedly has found its way into the public domain.[80] This issue most commonly arises when a plaintiff argues that an agency has waived its ability to invoke Exemption 1 as a result of prior disclosure of similar or related information.[81] In this regard, courts have held that, in making an argument of waiver through some prior public disclosure, a FOIA plaintiff bears "the initial burden of pointing to specific information in the public domain that appears to duplicate that be-

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[79](...continued)
vious version of Executive Order 12,958); Rubin, 2001 WL 1537706, at *4 (holding that CIA properly refused to confirm or deny existence of records concerning two deceased British poets, because acknowledgment would negatively impact foreign relations and compromise intelligence sources); Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 9 (D.D.C. July 31, 2000) (finding that a "Glomar" response would have been appropriate for a request for CIA biographies on seven living former East European leaders, because disclosing which leaders were the subjects of biographic intelligence "would reveal how the CIA allocates its resources" and thereby help adversaries "subvert CIA efforts," but concluding that the CIA waived its "Glomar" position through its prior disclosure of the existence of such records). But see ACLU v. DOD, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) (commenting that the "danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing that revelatory of intelligence sources or methods").

[80] See, e.g., Pub. Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) (reaffirming that burden is on requester to establish that specific record in public domain duplicates that being withheld (citing Afshar v. Dep't of State, 702 F.2d 1125, 1132 (D.C. Cir. 1983))); Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (finding that disclosure made by employee of agency other than agency from which information is sought is not official and thus does not constitute waiver).

[81] See, e.g., Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 60 (D.C. Cir. 2003) (holding that FOIA plaintiff must show that previous disclosure duplicates specificity of withheld material to establish waiver of exemptions, and determining that CIA's prior disclosure of some intelligence methods employed in Cuba does not waive use of exemptions for all such methods); Wheeler v. CIA, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (rejecting plaintiff's contention that foreign nation's knowledge of past U.S. intelligence activities creates general waiver of all intelligence activities related to that nation).

ing withheld."[82] Accordingly, Exemption 1 claims should not be undermined by generalized allegations that classified information has been leaked to the press or otherwise made available to members of the public.[83]

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[82] Afshar, 702 F.2d at 1130; see James Madison Project v. NARA, No. 02-5089, 2002 WL 31296220, at *1 (D.C. Cir. Oct. 11, 2002) (affirming that the "party claiming that public disclosure prevents withholding the same information bears the burden of showing that the specific information at issue has been officially disclosed"); Pub. Citizen, 276 F.3d at 645 (rejecting plaintiff's waiver claim as "speculation" where plaintiff failed to demonstrate that specific information had been released into public domain, even though records were publicly accessible in NARA reading room upon request); Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative, 237 F. Supp. 2d 17, 20 (D.D.C. 2002) (holding that plaintiff failed to show that information was in public domain when it merely pointed to other publicly available documents dealing with same general subject matter); Billington v. Dep't of Justice, 11 F. Supp. 2d 45, 54-56 (D.D.C. 1998) (rejecting plaintiff's unsubstantiated allegations that agency had previously released subject information, and concluding that because FBI "may have released similar types of information in one case does not warrant disclosure" in this case), summary judgment granted in pertinent part, 69 F. Supp. 2d 128, 135 (D.D.C. 1999), aff'd in part, vacated in part & remanded all on other grounds, 233 F.3d 581 (D.C. Cir. 2000) (Exemption 1 decision not challenged on appeal); Meeropol v. Reno, No. 75-1121, slip op. at 6-7 (D.D.C. Mar. 26, 1998) (ruling that plaintiffs failed to carry "burden of production" in asserting that withheld information about atomic bomb spies Julius and Ethel Rosenberg was available in public domain) (Exemptions 1 and 7(D)); Scott v. CIA, 916 F. Supp. 42, 50 (D.D.C. 1996) (ordering plaintiff to compile list of information allegedly in public domain "with specific documentation demonstrating the legitimacy of such claims" and requiring release of that information if actually in public domain unless government demonstrates its release "threatens the national security"); Pfeiffer v. CIA, 721 F. Supp. 337, 342 (D.D.C. 1989) (holding that plaintiff must do more than simply identify "information that happens to find its way into a published account" to meet this burden); cf. Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (stating that a "party who asserts . . . material publicly available carries the burden of production on that issue . . . because the task of proving the negative -- that the information has not been revealed -- might require the government to undertake an exhaustive, potentially limitless search") (Exemptions 3, 7(C), and 7(D)). But see Wash. Post v. DOD, 766 F. Supp. 1, 12-13 (D.D.C. 1991) (suggesting that agency has ultimate burden of proof when comparing publicly disclosed information with information being withheld, determining whether information is identical and, if not, determining whether release of slightly different information would harm national security).

[83] See Exec. Order No. 12,958, as amended, § 1.1(b), 68 Fed. Reg. 15,315 (Mar. 28, 2003) (stating that "[c]lassified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or

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Courts have carefully distinguished between a bona fide declassification action or official release on the one hand and unsubstantiated speculation lacking official confirmation on the other, refusing to consider classified information to be in the public domain unless it has been officially disclosed.[84] While this yields an especially narrow concept of "waiver" in the

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[83](...continued)
similar information"), reprinted in 50 U.S.C. § 435 note (2000 & Supp. III 2003) and summarized in *FOIA Post* (posted 4/11/03); see also Pub. Citizen v. Dep't of State, 11 F.3d 198, 201 (D.C. Cir. 1993) (holding that "an agency official does not waive FOIA exemption 1 by publicly discussing the general subject matter of documents which are otherwise properly exempt from disclosure under that exemption") (decided under Executive Order 12,356); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 222 (D.D.C. 2005) (ruling that plaintiff's "bald assertions" of public disclosure do not satisfy waiver standard).

[84] See, e.g., Hoch v. CIA, No. 88-5422, 1990 WL 102740, at *1 (D.C. Cir. July 20, 1990) (concluding that without official confirmation, "clear precedent establishes that courts will not compel [an agency] to disclose information even though it has been the subject of media reports and speculation"); see also Frugone, 169 F.3d at 775 (holding that letter from OPM advising plaintiff that his employment records were in CIA custody is not "tantamount to an official statement of the CIA"); Hunt v. CIA, 981 F.2d 1116, 1120 (9th Cir. 1992) (finding that although some information about subject of request may have been made public by other governmental agencies, CIA's "Glomar" response in Exemption 3 context was not defeated); Simmons v. U.S. Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986) (ruling that there had been no "widespread dissemination" of information in question); Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985) (reasoning that even if the withheld data were the same as an estimate in the public domain, that is not the same as knowing the NRC's official policy as to the "proper level of threat a nuclear facility should guard against"); Afshar, 702 F.2d at 1130-31 (observing that a foreign government can ignore "[u]nofficial leaks and public surmise . . . but official acknowledgment may force a government to retaliate"); Philippi v. CIA, 665 F.2d 1325, 1332 (D.C. Cir. 1981) (concluding that a disclosure by a former Director of Central Intelligence did not result in waiver, and reasoning perceptively that "without the disclosure of the documents demanded by [plaintiff], foreign analysts remain in the dark as to the provenience of the information appearing in published reports"); Edmonds v. FBI, 272 F. Supp. 2d 35, 49 (D.D.C. 2003) (holding that anonymous leak of information concerning FBI counterterrorism activities did not prevent agency from invoking exemption, because disclosures in tandem would amount to official confirmation of authenticity); Rubin v. CIA, No. 01 CIV 2274, 2001 WL 1537706, at *5 (S.D.N.Y. Dec. 3, 2001) (finding that plaintiff's mere showing that some private publication alleged that CIA maintained files on subject was not evidence of official disclosure and, therefore, that agency's "Glomar" position was not defeated); Arabian Shield Dev. Co. v. CIA, No. 3-98-0624, 1999 WL 118796, at *3
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national security context, courts have recognized the importance of protecting sensitive national security information through such an approach.[85] Indeed, this approach firmly comports with the amended Executive Order 12,958, which allows agencies to classify or reclassify information following an access request if it "has not previously been disclosed to the public under proper authority."[86] (For a discussion of the requirements for such belated classification, see Exemption 1, Executive Order 12,958, as Amended, below.)

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[84](...continued)
n.5 (N.D. Tex. Feb. 26, 1999) (rejecting plaintiff's citation to "unspecified public news reports" identifying individuals as CIA agents and holding that "public speculation and disclosure . . . is quite different from official disclosure"), aff'd per curiam, 208 F.3d 1007 (5th Cir. 2000) (unpublished table decision); Steinberg v. U.S. Dep't of Justice, 801 F. Supp. 800, 802 (D.D.C. 1992) (recognizing that "[p]assage of time, media reports and informed or uninformed speculation based on statements by participants cannot be used . . . to undermine [government's] legitimate interest in protecting international security [information]"), aff'd in pertinent part, 23 F.3d 548, 553 (D.C. Cir. 1994); Van Atta v. Def. Intelligence Agency, No. 87-1508, 1988 WL 73856, at *2-3 (D.D.C. July 6, 1988) (holding that disclosure of information to foreign government during diplomatic negotiations was not "public disclosure"). But see Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (ruling that Exemption 1 protection is not available when same documents were disclosed by foreign government or when same information was disclosed to media in "off-the-record exchanges").

[85] See Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (ruling that disclosure made by employee from agency other than one from which information was sought is not official and thus does not constitute waiver); Edmonds v. U.S. Dep't of Justice, 405 F. Supp. 2d 23, 29 (D.D.C. 2005) (finding that even agency's disclosure to plaintiff's counsel during meeting does not constitute declassification action that waives Exemption 1); Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 12-13 (D.D.C. July 31, 2000) (ruling that Exemption 1 can be waived only through "the stamp of truth that accompanies official disclosure," even where requested information is otherwise "common knowledge in the public domain," and that "[d]isclosure by other agencies of CIA information does not preempt the CIA's ability to withhold that information"); see also Carson v. U.S. Dep't of Justice, 631 F.2d 1008, 1016 n.30 (D.C. Cir. 1980) (explaining that "the extent to which prior agency disclosure may constitute a waiver of the FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed").

[86] Exec. Order No. 12,958, as amended, § 1.7(d), see also White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002), reprinted in *FOIA Post* (posted 3/21/02).

EXEMPTION 1

A recurring issue in the waiver arena is whether public statements by former government officials constitute such an "official disclosure," and thus prevent an agency from invoking Exemption 1 to withhold information that it determines still warrants national security protection. In this regard, the Court of Appeals for the Second Circuit has rejected the argument that a retired admiral's statements constituted an authoritative disclosure by the government.[87] It pointedly stated: "Officials no longer serving with an executive branch department cannot continue to disclose official agency policy, and certainly they cannot establish what is agency policy through speculation, no matter how reasonable it may appear to be."[88] Additionally, the Second Circuit affirmed the decision of the district court in holding that the congressional testimony of high-ranking Navy officials did not constitute official disclosure because it did not concern the specific information being sought.[89]

Similarly, courts have rejected the view that widespread reports in the media about the general subject matter involved are sufficient to overcome an agency's Exemption 1 claim for related records. Indeed, in one case, the court went so far as to hold that 180,000 pages of CIA records concerning Guatemala were properly classified despite the fact that the public domain contained significant information and speculation about CIA involvement in the 1954 coup in Guatemala: "CIA clearance of books and articles, books written by former CIA officials, and general discussions in [c]ongressional publications do not constitute official disclosures."[90] In a subsequent case, one court went even further, holding that documents were properly withheld under Exemption 1 even though they previously had been disclosed "involuntarily as a result of [a] tragic accident such as an aborted rescue mission [in Iran], or used in evidence to prosecute espionage."[91]

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[87] See Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989).

[88] Id. at 422.

[89] Id. at 421; see also Edmonds, 272 F. Supp. 2d at 49 (declaring that when an agency provides classified information to a congressional committee it "does not deprive [itself] of the right to classify the information under Exemption 1").

[90] Schlesinger v. CIA, 591 F. Supp. 60, 66 (D.D.C. 1984); see Pfeiffer v. CIA, 721 F. Supp. at 342; see also Wash. Post, 766 F. Supp. at 11-12 (finding no "presumption of reliability" for facts contained in books subject to prepublication review by government agency); cf. McGehee v. Casey, 718 F.2d 1137, 1141 & n.9 (D.C. Cir. 1983) (determining that CIA cannot reasonably bear burden of conducting exhaustive search to prove that particular items of classified information have never been published) (non-FOIA case).

[91] Wash. Post Co. v. DOD, No. 84-3400, slip op. at 3 (D.D.C. Sept. 22,

(continued...)

Another issue that has arisen in this regard has been the possible argument for waiver created when a government agency releases limited information on a subject while retaining additional information on the same subject as classified.[92] In a 1990 decision, the Court of Appeals for the District of Columbia Circuit held that for information to be "officially acknowledged" in the context of Exemption 1, it must: (1) be as "specific" as the information previously released; (2) "match" the information previously disclosed; and (3) have been made public through an "official and documented" disclosure.[93] Applying these criteria, the D.C. Circuit reversed the low-

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[91](...continued)
1986) (refusing to find official disclosure through abandonment of documents in Iranian desert following aborted rescue mission or through government's introduction of them into evidence in espionage trial).

[92] See, e.g., Whalen v. U.S. Marine Corps, 407 F. Supp. 2d 54, 57 (D.D.C. 2005) (holding that the defendant agency's prior disclosures on a subject did not constitute a waiver of all information on that subject, and noting that "it seems equally as likely that the government's prior voluminous disclosures indicate diligent respect by the coordinate agencies to Executive Order 12,958 and bolster the defendant's position that it has withheld only that information which it must under the applicable exemptions").

[93] Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990); see also Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007) (reaffirming the rule in Fitzgibbon and the necessity of an "insistence on exactitude" when considering potential waiver of national security information and holding that in that case the "'specific information at issue,'" i.e. the existence of particular records, had been officially acknowledged by the agency during congressional testimony"); Assassination Archives & Research Ctr., 334 F.3d at 61 (determining that previous disclosure concerning Cuban operatives pursuant to John F. Kennedy Assassination Records Collection Act, 44 U.S.C. § 2107 note (2000), did not waive exemptions for specific CIA compendium of information); Students Against Genocide v. Dep't of State, 257 F.3d 828, 835 (D.C. Cir. 2001) (holding that a prior release of photographs similar to those withheld did not waive Exemption 1, because the fact that "some 'information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to [national security]'" (quoting Fitzgibbon, 911 F.2d at 766)); Afshar, 702 F.2d at 1130, 1133-34 (determining that agency review of books written by former agency officials does not create official acknowledgment of information or waive applicability of FOIA exemptions); Kelly v. CIA, No. 00-2498, slip op. at 10, 12 (D.D.C. Aug. 8, 2002) (holding that official release of general agency memo concerning "agency-academic relations" did not waive Exemption 1 protection with regard to specific and detailed agency-academic information (citing Fitzgibbon, 911 F.2d at 765-66)), modified on other grounds, No. 00-2498, slip op. at 1 (D.D.C. Sept. 25, 2002), appeal on adequacy of search dismissed on procedural grounds, No. 02-5384, 2003 WL 21804101 (D.C. Cir. July 31, 2003). But see Nat'l Sec. Archive, No. 99-1160, slip op. at 15-16 (D.D.C. July 31,
(continued...)

er court's disclosure order and held that information published in a congressional report did not constitute "official acknowledgment" of the purported location of a CIA station, because the information sought related to an earlier time period than that discussed in the report.[94]

In so ruling, the D.C. Circuit did not address the broader question of whether congressional release of the identical information relating to intelligence sources and methods could ever constitute "official acknowledgment," thus requiring disclosure under the FOIA.[95] However, the D.C. Circuit had previously considered this broader question and had concluded that congressional publications do not constitute "official acknowledgment" for purposes of the FOIA.[96]

In 1993, the D.C. Circuit had another opportunity to consider the issue of whether an agency had "waived" its ability to properly withhold records pursuant to Exemption 1. The case involved the question of whether the public congressional testimony of the U.S. Ambassador to Iraq constituted such a "waiver" so as to prevent the agency from invoking the FOIA's national security exemption to withhold related records.[97] The district court had held -- after reviewing the seven documents at issue in camera -- that the public testimony had not "waived" Exemption 1 protection because the "context" of the information in the documents was sufficiently "different"

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[93](...continued)
2000) (ordering CIA to disclose fact that it kept biographies on seven former East European heads of state because "Glomar" response was waived by CIA's 1994 admission that it kept biographies on all "heads of state" -- a "clear and narrowly defined term that is not subject to multiple interpretations," but noting that CIA's "Glomar" response otherwise would have been appropriate), reconsideration denied (D.D.C. Feb. 26, 2001); Krikorian v. Dep't of State, 984 F.2d 461, 467-68 (D.C. Cir. 1993) (remanding to district court to determine whether information excised in one document had been "officially acknowledged" by comparing publicly available record with record withheld; leaving to district court's discretion whether this could best be done by supplemental agency affidavit or by in camera inspection).

[94] Fitzgibbon, 911 F.2d at 765-66.

[95] Id.

[96] See, e.g., Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (holding that inclusion of information in Senate report "cannot be equated with disclosure by the agency itself"); Military Audit Project v. Casey, 656 F.2d 724, 744 (D.C. Cir. 1981) (finding that publication of Senate report does not constitute official release of agency information); see also Earth Pledge Found. v. CIA, 988 F. Supp. 623, 628 (S.D.N.Y. 1996) (same), aff'd per curiam, 128 F.3d 788 (2d Cir. 1997).

[97] Pub. Citizen v. Dep't of State, 11 F.3d 198, 199 (D.C. Cir. 1993).

so as to not "negate" their "confidentiality."[98] Terming this an "unusual FOIA case" because the requester did not challenge the district court's conclusion that the documents were properly exempt from disclosure under Exemption 1 and because the requester also conceded that it could not meet the strict test for "waiver," the D.C. Circuit firmly rejected the requester's argument that the facts of this case distinguished it from the court's prior decisions on this question.[99]

The requester contended first that the court's prior decisions concerned attempts by FOIA requesters to compel agencies to confirm or deny the truth of information that others had already publicly disclosed.[100] The plaintiff then argued that the Ambassador's public statements about her meeting with the Iraqi leader prior to the invasion of Kuwait were far more detailed than those that the D.C. Circuit had found did not constitute "waiver" in previous cases.[101] The D.C. Circuit repudiated both of the requester's points and, in affirming the district court's decision, grounded its own decision in the fact that the requester "conceded" it could not "meet [the] requirement that it show that [the Ambassador's] testimony was 'as specific as' the documents it [sought] in this case, or that her testimony 'matche[d]' the information contained in the documents."[102] Acknowledging that such a stringent standard is a "high hurdle for a FOIA plaintiff to clear," the D.C. Circuit concluded that the government's "vital interest in information relating to the national security and foreign affairs dictates that it must be."[103] To hold otherwise in a situation where the government had affirmatively disclosed some information about a classified matter would, in the court's view, give the agency "a strong disincentive ever to provide the citizenry with briefings of any kind on sensitive topics."[104] Indeed, in an opinion following this D.C. Circuit decision, the United States Court of Appeals for the Seventh Circuit reasoned that the public "is better off under a system that permits [the agency] to reveal some things without revealing everything; if even a smidgen of disclosure required [the agency] to open its files, there would be no smidgens."[105]

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[98] Pub. Citizen v. Dep't of State, 787 F. Supp. 12, 13, 15 (D.D.C. 1992).

[99] Pub. Citizen, 11 F.3d at 201.

[100] Id. at 201-03.

[101] Id. at 203.

[102] Id.

[103] Id.

[104] Id.

[105] Bassiouni v. CIA, 392 F.3d 244, 247 (7th Cir. 2004), cert. denied, 545 U.S. 1129 (2005). But see Wolf, 473 F.3d at 379-80 (remanding for determination of whether CIA Director's 1948 testimony before Congress, which

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In a case decided nearly a decade later, the D.C. Circuit once again visited the issue of claimed public disclosure of classified information. In Public Citizen v. Department of State,[106] it considered whether an Exemption 1 claim was defeated because the requested documents were, prior to their classification, publicly accessible upon request at the National Archives and Records Administration.[107] The district court earlier had rejected the plaintiff's waiver argument because the documents, while accessible, were not maintained in a public access area and were not likely to have been accessed by a researcher.[108] The district court had explained that such a "remote possibility of very limited disclosure" was not the type of "widespread" official dissemination capable of defeating an Exemption 1 claim.[109] Agreeing with this, the D.C. Circuit began its discussion of the issue by observing that, as an initial matter, the party claiming prior disclosure must point to "'specific information in the public domain that appears to duplicate that being withheld,'"[110] lest the defendant agency unrealistically bear "the task of proving the negative."[111] The D.C. Circuit concluded that the plaintiff had failed to meet this burden, and it dismissed the public disclosure claim as nothing more than "speculation."[112] (For a further discussion of this issue, see Discretionary Disclosure and Waiver, below.)

A final, seemingly obvious point -- but one nevertheless not accepted by all FOIA requesters -- is that classified information will not be released under the FOIA even to a requester of "unquestioned loyalty."[113] In a case

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[105](...continued)
was found to constitute "official acknowledgment" of "existence" of requested records, had also waived exemption protection for their "contents").

[106] 276 F.3d 634 (D.C. Cir. 2002).

[107] Id. at 644-45.

[108] Pub. Citizen v. Dep't of State, 100 F. Supp. 2d 10, 29 (D.D.C. 2000).

[109] Id. at 28-29.

[110] Pub. Citizen, 276 F.3d at 645 (quoting Afshar, 702 F.2d at 1129).

[111] Id. (quoting Davis v. Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992). But see also NARA v. Favish, 541 U.S. 157, 167, 174 (accepting that unofficial leak and subsequent publication of photograph did not constitute waiver) (Exemption 7(C)), reh'g denied, 541 U.S. 1057 (2004); U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762-63, 780 (1989) (introducing "practical obscurity" standard, and commenting that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access" to them).

[112] Id.

[113] Levine v. Dep't of Justice, No. 83-1685, slip op. at 6 (D.D.C. Mar. 30, (continued...)

decided in 1990, a government employee with a current "Top Secret" security clearance was denied access to classified records concerning himself because Exemption 1 protects "information from disclosure based on the nature of the material, not on the nature of the individual requester."[114]

Executive Order 12,958, as Amended

As is mentioned above, Executive Order 12,958, which was amended on March 25, 2003,[115] sets forth the standards governing national security classification and the mechanisms for declassification.[116] As with prior executive orders, the amended Executive Order 12,958 recognizes both the right of the public to be informed about activities of its government and the need to protect national security information from unauthorized or untimely disclosure.[117] Accordingly, information may not be classified unless "the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism."[118] Courts grappling with the degree of certainty

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[113](...continued)
1984) (concluding that regardless of a requester's loyalty, the release of documents to him could "open the door to secondary disclosure to others").

[114] Martens v. U.S. Dep't of Commerce, No. 88-3334, 1990 U.S. Dist. LEXIS 10351, at *10 (D.D.C. Aug. 6, 1990) (Privacy Act case); see also Miller v. Casey, 730 F.2d 773, 778 (D.C. Cir. 1984) (accepting that plaintiff's security clearance was not an issue in denying access to requested information); cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989) (stating that "the identity of the requester has no bearing on the merits of his or her FOIA request") (Exemption 7(C)); FOIA Update, Vol. X, No. 2, at 5 (advising that as general rule all FOIA requesters should be treated alike).

[115] See Exec. Order No. 12,958, as amended, 68 Fed. Reg. 15,315 (Mar. 28, 2003), reprinted in 50 U.S.C. § 435 note (2000 & Supp. III 2003) and summarized in *FOIA Post* (posted 4/11/03).

[116] See generally id.

[117] See Exec. Order No. 12,958, as amended (commenting in introductory statement that "our Nation's progress depends on the free flow of information"); see also Information Security Oversight Office Ann. Rep. 6 (2003) (explaining that "what is most notable about the new amendment is what did not change with respect to the fundamentals that make the security classification system work"); *FOIA Post*, "Executive Order on National Security Classification Amended" (posted 4/11/03) (discussing amendments to Executive Order 12,958).

[118] Exec. Order No. 12,958, as amended, § 1.1(a)(4); see also 32 C.F.R. § 2001.10(c) (2006) (ISOO directive explaining that ability of agency classifier to identify and describe damage to national security caused by un-
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necessary to demonstrate the contemplated damage under this standard have recognized that an agency's articulation of the threatened harm must always be speculative to some extent and that to require a showing of actual harm would be judicial "overstepping."[119] In the area of intelligence sources and methods, for example, courts are strongly inclined to accept the agency's position that disclosure of this type of information will cause damage to national security interests because this is "necessarily a region for forecasts in which [the agency's] informed judgment as to potential future harm should be respected."[120]

This standard is elaborated upon in section 1.4 of the amended order, which specifies the types of information that may be considered for classification. The information categories identified as proper bases for classification in the amended Executive Order 12,958 consist of:

(1) foreign government information;[121]

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[118](...continued)
authorized disclosure is critical aspect of classification system).

[119] Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980); see Aftergood v. CIA, No. 98-2107, 1999 U.S. Dist. LEXIS 18135, at *9 (D.D.C. Nov. 12, 1999) (declaring that "the law does not require certainty or a showing of harm" that has already occurred); cf. Snepp v. United States, 444 U.S. 507, 513 n.8 (1980) (articulating that "[t]he problem is to ensure, in advance, and by proper [CIA prepublication review] procedures, that information detrimental to the national interest is not published") (non-FOIA case); ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 30 (D.D.C. 2003) (reiterating that "'[t]he test is not whether the court personally agrees in full with the [agency's] evaluation of the danger -- rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the [agency] is expert'" (quoting Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982))).

[120] Gardels, 689 F.2d at 1106; see also Bassiouni v. CIA, 392 F.3d 244, 245 (7th Cir. 2004) (commenting that to protect sources, intelligence agencies must often protect "how" a document came to its records system, because "in the intelligence business, 'how' often means 'from whom'"), cert. denied, 545 U.S. 1129 (2005); Wash. Post v. DOD, 766 F. Supp. 1, 7 (D.D.C. 1991) (observing that disclosure of the working files of a failed Iranian hostage rescue attempt containing intelligence planning documents would "serve as a model of 'do's and don't's'" for future counterterrorist missions "with similar objectives and obstacles").

[121] See, e.g., Krikorian v. Dep't of State, 984 F.2d 461, 465 (D.C. Cir. 1993) (finding that telegram reporting discussion between agency official and high-ranking foreign diplomat regarding terrorism was properly withheld as foreign government information; release would "jeopardize 'reciprocal
(continued...)

(2) vulnerabilities or capabilities of systems, installations, projects, or plans relating to national security;[122]

(3) intelligence activities, sources, or methods;[123]

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[121](...continued)
confidentiality'" between governments) (decided under Executive Order 12,356); Pinnavaia v. FBI, No. 03-112, slip op. at 8 (D.D.C. Feb. 25, 2004) (holding that it was reasonable to classify "sensitive information gathered by the United States either about or by a foreign country," because the disclosure "could have negative diplomatic consequences"); McErlean v. Dep't of Justice, No. 97-7831, 1999 WL 791680, at *5 (S.D.N.Y. Sept. 30, 1999) (protecting identities and information obtained from foreign governments) (decided under original version of Executive Order 12,958); Ajluni v. FBI, No. 94-325, 1996 WL 776996, at *4 (N.D.N.Y. July 13, 1996) (rejecting plaintiff's assertion that for withheld information to qualify as foreign government information the agency "should be forced to identify at least which government supplied the information," because to do so would cause such sources of information "to dry up") (decided under Executive Order 12,356); Badalementi v. Dep't of State, 899 F. Supp. 542, 546-47 (D. Kan. 1995) (categorizing record reflecting negotiations among United States, Spain, and Italy regarding extradition of alleged drug smuggler as foreign government information) (decided under Executive Order 12,356). But see Weiner v. FBI, No. 83-1720, slip op. at 9 (C.D. Cal. Sept. 27, 2004) (opining that foreign government's request for confidentiality alone is "not sufficient to justify non-disclosure of foreign government information"), appeal dismissed per stipulation, No. 05-56652 (9th Cir. Jan. 3, 2007).

[122] See, e.g., Judicial Watch, Inc. v. United States Dep't of Transp., No. 02-566, 2005 WL 1606915, at *8 (D.D.C. July 7, 2005) (holding that disclosure of testing data, minimum detection rates, and false alarm rates for explosive-detection systems would harm national security by exposing vulnerabilities in airport security); Pub. Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 21 (D.D.C. 1995) (identifying videotapes made during raid by U.S. forces in Somalia as relating to vulnerabilities or capabilities of projects concerning national security) (decided under Executive Order 12,356); Gottesdiener v. Secret Serv., No. 86-576, slip op. at 5 (D.D.C. Feb. 21, 1989) (determining that agency had properly classified certain information related to government emergency-preparedness programs) (decided under Executive Order 12,356); cf. U.S. News & World Report v. Dep't of the Treasury, No. 84-2303, 1986 U.S. Dist. LEXIS 27634, at *3 (D.D.C. Mar. 26, 1986) (providing protection for information regarding armored limousines for the President) (Exemptions 1 and 7(E)) (decided under Executive Order 12,356).

[123] See, e.g., Schrecker v. U.S. Dep't of Justice, 254 F.3d 162, 166 (D.C. Cir. 2001) (protecting intelligence sources because release would harm national security by "dissuading current and future sources from cooperating"); Jones v. FBI, 41 F.3d 238, 244 (6th Cir. 1994) (protecting "numerical designators" assigned to national security sources) (decided under Execu-
(continued...)

(4) cryptology;[124]

(5) foreign relations or foreign activities, including confidential

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[123](...continued)
tive Order 12,356); Patterson v. FBI, 893 F.2d 595, 597, 601 (3d Cir. 1990) (protecting information concerning intelligence sources and methods FBI used in investigation of student who corresponded with 169 foreign nations) (decided under Executive Order 12,356); Rubin v. CIA, No. 01-CIV-2274, 2001 WL 1537706, at *3 (S.D.N.Y. Dec. 3, 2001) (holding that CIA properly refused to confirm or deny existence of records concerning two deceased British poets, because "intelligence collection may be compromised if sources are not confident that . . . their cooperation will remain forever secret"); Falwell v. Executive Office of the President, 158 F. Supp. 2d 734, 738 (W.D. Va. 2001) (protecting information that could hamper efforts to protect and recruit intelligence sources"); Halpern v. FBI, No. 94-CV-365A, 2002 WL 31012157, at *8 (W.D.N.Y. Aug. 31, 2001) (magistrate's recommendation) (protecting information about covert CIA intelligence stations in foreign country because disclosure could harm national security through "retaliation against American citizens or other American interests"), adopted (W.D.N.Y. Oct. 12, 2001); Cozier v. FBI, No. 99-0312, slip op. at 10-11 (N.D. Ga. Sept. 25, 2000) (finding that internal code, numerical designators, and identifiers for intelligence gathering units "clearly fall within category of intelligence activities, source[s], and methods"); Aranha v. CIA, No. 99-8644, 2000 WL 1051908, at *1 (S.D.N.Y. July 31, 2000) (finding that confirmation of any records concerning plaintiff's alleged employment as CIA case agent would "provide information about CIA's intelligence sources and methods"); Emerson v. CIA, No. 99-00274, slip op. at 5 (D.D.C. May 8, 2000) (holding that the "CIA's covert intelligence interest in a specific individual represents an intelligence activity, source, and/or method"); Blazy v. Tenet, 979 F. Supp. 10, 23 (D.D.C. 1997) (finding that former CIA employee's polygraphs constitute "intelligence method") (Exemptions 1 and 3) (decided under Executive Order 12,356), summary affirmance granted, No. 97-5330, 1998 WL 315583 (D.C. Cir. May 12, 1998); cf. Schrecker v. U.S. Dep't of Justice, 14 F. Supp. 2d 111, 117-18 (D.D.C. 1998) (observing that identities of intelligence sources are protectible pursuant to Exemption 1 regardless of whether individuals are alive or deceased), summary judgment granted, 74 F. Supp. 2d 26 (D.D.C. 1999), aff'd, 254 F.3d 162 (D.C. Cir. 2001).

[124] See McDonnell v. United States, 4 F.3d 1227, 1244 (3d Cir. 1993) (upholding classification of cryptographic information dating back to 1934 when release "could enable hostile entities to interpret other, more sensitive documents similarly encoded") (decided under Executive Order 12,356); Gilmore v. NSA, No. C92-3646, 1993 U.S. Dist. LEXIS 7694, at *18-19, *22-23 (N.D. Cal. May 3, 1993) (finding mathematical principles and techniques in agency treatise protectible under this executive order category) (decided under Executive Order 12,356).

sources;[125]

(6) military plans, weapons, or operations;[126]

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[125] See, e.g., Bassiouni, 392 F.3d at 246 (observing that "[e]ven allies could be unpleasantly surprised" by disclosure of CIA espionage information involving one of its citizens); Wheeler v. U.S. Dep't of Justice, 403 F. Supp. 2d 1, 12 (D.D.C. 2005) (holding that "foreign relations between Cuba and the United States remain tenuous at best," and that it would follow that information about persons in Cuba who provided information to the United States could still be very dangerous and, if disclosed, result in "embarrassment or imprisonment, if not death"); ACLU v. DOD, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) (reasoning that "even if the only question was whether to recognize officially that which was informally or unofficially believed to exist, the niceties of international diplomacy sometimes make it important not to embarrass a foreign country or its leaders, and exemptions from FOIA protect that concern as well"); Wolf v. CIA, 357 F. Supp. 2d 112, 116 (D.D.C. 2004) (reasoning that the fact of the CIA's covert interest in a foreign citizen "could adversely affect relations with a foreign government because that government might believe that the CIA has collected intelligence information on or recruited one of its citizens or resident aliens"), aff'd in pertinent part & remanded on other grounds, 473 F.3d 370, 377-80 (D.C. Cir. 2007); Springmann v. U.S. Dep't of State, No. 93-1238, slip op. at 2-3 (D.D.C. Feb. 24, 2000) (accepting agency's judgment that disclosure of information about American employees' religiously offensive behavior in Saudi Arabia would adversely affect relations between United States and that country) (decided under original version of Executive Order 12,958); Linn v. U.S. Dep't of Justice, No. 92-1406, 1995 WL 631847, at *26 (D.D.C. Aug. 22, 1995) (finding Exemption 1 withholdings proper because the agency demonstrated that it has "a present understanding" with the foreign government that any shared information will not be disclosed) (decided under Executive Order 12,356); U.S. Comm. for Refugees v. Dep't of State, No. 91-3303, 1993 WL 364674, at *2 (D.D.C. Aug. 30, 1993) (holding that disclosure of withheld information could damage nation's foreign policy by jeopardizing success of negotiations with Haiti on refugee issues "[because] documents contain . . . frank assessments about the Haitian government") (decided under Executive Order 12,356); Van Atta v. Def. Intelligence Agency, No. 87-1508, 1988 WL 73856, at *2 (D.D.C. July 6, 1988) (protecting information compiled at request of foreign government for purpose of negotiations) (decided under Executive Order 12,356). But see Keenan v. Dep't of Justice, No. 94-1909, slip op. at 9-11 (D.D.C. Dec. 16, 1997) (ordering release of document segments withheld by the agency pursuant to Exemption 1, because the agency failed to show that the foreign governments named in documents more than thirty years old "still wish to maintain the secrecy of their cooperative efforts with" U.S.).

[126] See, e.g., Taylor v. Dep't of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (protecting combat-ready troop assessments) (decided under Executive Order 12,065); Tawalbeh v. U.S. Dep't of the Air Force, No. 96-6241, slip op. at

(continued...)

(7) scientific, technological, or economic matters relating to national security;[127] and

(8) government programs for safeguarding nuclear materials and facilities.[128]

The amendment of Executive Order 12,958 also added a new classification category protecting information concerning "weapons of mass destruction,"[129] and it further expanded two previously existing categories to in-

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[126](...continued)
10-11 (C.D. Cal. Aug. 8, 1997) (protecting information about military readiness and operational security related to operations Desert Shield and Desert Storm) (decided under original version of Executive Order 12,958); Pub. Educ. Ctr., 905 F. Supp. at 21 (protecting videotapes made during U.S. military action in Somalia) (decided under Executive Order 12,356); Wash. Post Co. v. DOD, No. 84-2403, slip op. at 3 (D.D.C. Apr. 15, 1988) (protecting foreign military information) (decided under Executive Order 12,356); Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 417 (2d Cir. 1989) (concluding that refusal to confirm or deny presence of nuclear weapons aboard warships in homeports under the FOIA does not conflict with requirements of National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2000), that agencies consider environmental impact) (decided under Executive Order 12,356).

[127] See Exec. Order No. 12,958, as amended, § 1.4(e).

[128] See id. § 1.4(f); see, e.g., Weinberger v. Catholic Action of Haw., 454 U.S. 139, 144-45 (1981) (protecting "information relating to the storage of nuclear weapons"); Abbots v. NRC, 766 F.2d 604, 607 (D.C. Cir. 1985) (protecting "the NRC's determination as to the number of attackers a nuclear facility should be able to defend against successfully," because release of this information would allow potential attackers to "compute the size of the assault force needed for optimum results") (decided under Executive Order 12,356); Loomis v. U.S. Dep't of Energy, No. 96-149, 1999 WL 33541935, at *6 (N.D.N.Y. Mar. 9, 1999) (protecting nuclear containment layout plan and referenced document on propagation of radiological requirements and procedures) (decided under original version of Executive Order 12,958), summary affirmance granted, 21 F. App'x 80 (2d Cir. 2001).

[129] See Exec. Order No. 12,958, as amended, § 1.4(h); see also White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security [hereinafter White House Homeland Security Memorandum] (Mar. 19, 2002), reprinted in *FOIA Post* (posted 3/21/02) (emphasizing "obligation to safeguard" homeland security-related records).

clude information regarding "defense against transnational terrorism."[130]

Under the original version of Executive Order 12,958, there was no presumption that disclosure of information in any of the above categories could harm national security; hence, there was no presumption that such information is classified.[131] However, Executive Order 12,958, as amended, established a presumption of harm to national security from the release of information provided by or related to foreign governments.[132]

The addition of this presumption of harm might ultimately help to resolve a conflict between two decisions in the District Court for the District of Columbia, in which two judges took opposing views as to what agencies must demonstrate to protect national security-related information exchanged with foreign governments.[133] In the first case, in which the agency's Vaughn Index contained no indication of an explicit promise of confidentiality between the agency and the foreign government, the court ordered the FBI to "disclose the circumstances from which it deduces, and from which the court might as well, that the information was shared in confidence."[134] Using the relatively stringent standard for the protection of foreign government information that is applied to the protection of confidential informants in the law enforcement context,[135] the court required the government to fully explain the circumstances from which confidentiality is inferred.[136] It imposed this burden despite the fact that this case was decided under Executive Order 12,356, which, like the amended Executive

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[130] See Exec. Order No. 12,958, as amended, § 1.4(e), (g); see also id. § 1.1(a)(4) (incorporating "defense against transnational terrorism" into classification standards).

[131] See Exec. Order No. 12,958, § 1.5, 3 C.F.R. 333 (1996), reprinted in 50 U.S.C. § 435 note and reprinted in abridged form in FOIA Update, Vol. XVI, No. 2, at 5-10.

[132] See Exec. Order No. 12,958, as amended, § 1.1(c).

[133] Compare Steinberg v. U.S. Dep't of Justice, 179 F.R.D. 357, 362-63 (D.D.C. 1998) (ordering FBI to submit further evidence to support confidentiality claim), with Billington v. Dep't of Justice, 11 F. Supp. 2d 45, 54-56 (D.D.C. 1998) (finding agency not required to demonstrate explicit confidentiality understanding), summary judgment granted in pertinent part, 69 F. Supp. 2d 128 (D.D.C. 1999), aff'd in part, vacated in part & remanded all on other grounds, 233 F.3d 581 (D.C. Cir. 2000) (Exemption 1 decision not challenged on appeal).

[134] Steinberg, 179 F.R.D. at 362-63.

[135] See U.S. Dep't of Justice v. Landano, 508 U.S. 165, 179 (1993) (requiring law enforcement agencies to demonstrate confidentiality basis for protecting law enforcement informants).

[136] Steinberg, 179 F.R.D. at 362.

Order 12,958, instructed agencies to presume harm to the national security in releasing foreign government information.[137] The court subsequently granted the FBI's motion for summary judgment based upon the agency's supplemental affidavit -- which demonstrated that the FBI's relationship with the foreign government was based on an express understanding of confidentiality.[138]

In the second case, the court specifically rejected the requester's argument that, in order to qualify for Exemption 1 protection, the agency's affidavit must demonstrate that there were explicit understandings of confidentiality between the agency and the foreign government regarding the information at issue.[139] In the court's view, "to compel the agency to supply more information would muddle the purpose of the exemption."[140] The court found no similarity between the protection of foreign government information for national security reasons and the protection of confidential informants in the law enforcement context.[141] It ruled that the government was not required to provide evidence of either an explicit or implicit confidentiality understanding with the foreign government, despite the fact that the information was classified under the original version of Executive Order 12,958, which did not permit agencies to presume harm to national security from the release of foreign government information.[142]

With the addition of a presumption of harm in the amended Executive Order 12,958, it now can be anticipated that future such decisions will adopt the latter court's view for the protection of foreign government information.[143] This latter view also corresponds more closely to the deferential approach that courts ordinarily take when reviewing cases involving Exemption 1. (For further discussions of the appropriate judicial standard in evaluating Exemption 1 claims, see Exemption 1, Standard of Review, above, and Exemption 1, Deference to Agency Expertise, above.)

As with prior orders, the amended Executive Order 12,958 contains a

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[137] Exec. Order No. 12,356, § 1.3(c), 3 C.F.R. 166 (1983), excerpted in FOIA Update, Vol. III, No. 3, at 6.

[138] Steinberg, 179 F.R.D. at 368-69.

[139] See Billington, 11 F. Supp. 2d at 57-58.

[140] Id.

[141] Id. at 57.

[142] Id.

[143] But see Wiener v. FBI, No. 83-1720, slip op. at 9 (C.D. Cal. Sept. 27, 2004) (determining that "the FBI cannot merely rely on a foreign government request for confidentiality to justify non-disclosure"), reconsideration denied (C.D. Cal. Aug. 25, 2005).

number of distinct limitations on classification.[144] Specifically, information may not be classified in order to:

(1) conceal violations of law, inefficiency, or administrative error;[145]

(2) prevent embarrassment to a person, organization, or agency;[146]

(3) restrain competition;[147]

(4) prevent or delay the disclosure of information that does not require national security protection;[148] or

(5) protect basic scientific research not clearly related to the national

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[144] Exec. Order No. 12,958, as amended, § 1.7.

[145] Id. § 1.7(a)(1); see also Billington, 11 F. Supp. 2d at 57-58 (dismissing plaintiff's "unsubstantiated accusations" that information should be disclosed because FBI engaged in illegal "dirty tricks" campaign); Computer Prof'ls for Soc. Responsibility v. Nat'l Inst. of Standards & Tech., No. 92-0972, slip op. at 1-2 (D.D.C. Apr. 11, 1994) (finding no basis to conclude that NSA improperly classified computer security guidelines in violation of law to "conceal its role" in developing such guidelines) (decided under Executive Order 12,356), summary affirmance granted, No. 94-5153, 1995 WL 66803, at *1 (D.C. Cir. Jan. 13, 1995); cf. NARA v. Favish, 541 U.S. 157, 174 (reminding that "[a]llegations of government misconduct are 'easy to allege and hard to disprove'" (quoting Crawford-El v. Britton, 523 U.S. 574, 585 (1998)) (Exemption 7(C) case)), reh'g denied, 541 U.S. 1057 (2004).

[146] Exec. Order No. 12,958, as amended, § 1.7(a)(2); see also Billington, 11 F. Supp. 2d at 58-59 (rejecting plaintiff's argument that information was classified by FBI to shield agency and foreign government from embarrassment); Canning v. U.S. Dep't of Justice, 848 F. Supp. 1037, 1047-48 (D.D.C. 1994) (finding no credible evidence that the FBI improperly withheld information to conceal the existence of "potentially inappropriate investigation" of a French citizen, and noting that "if anything, the agency released sufficient information to facilitate such speculation") (decided under Executive Order 12,356); Wilson v. Dep't of Justice, No. 87-2415, 1991 WL 111457, at *2 (D.D.C. June 13, 1991) (rejecting requester's unsupported claim that information at issue was classified in order to prevent embarrassment to foreign government official, and holding that "even if some . . . information . . . were embarrassing to Egyptian officials, it would nonetheless be covered by Exemption 1 if, independent of any desire to avoid embarrassment, the information withheld [was] properly classified") (decided under Executive Order 12,356).

[147] Exec. Order No. 12,958, as amended, § 1.7(a)(3).

[148] Id. § 1.7(a)(4).

security.[149]

Additionally, the amendment of Executive Order 12,958 removed the requirement in the original version of the order that agencies not classify information if there is "significant doubt" about the national security harm.[150]

Following the amendment of Executive Order 12,958, and subject to strict conditions, agencies may reclassify information after it has been declassified and released to the public.[151] The action must be taken under the "personal authority of the agency head or deputy agency head," who must determine in writing that the reclassification is necessary to protect national security.[152] Further, the information previously declassified and released must be "reasonably recovered" by the agency from all public holders, and it must be withdrawn from public access in archives and reading rooms.[153] Finally, the agency head or deputy agency head must report any agency reclassification action to the Director of the Information Security Oversight Office within thirty days, along with a description of the agency's recovery efforts, the number of public holders of the information, and the agency's efforts to brief any such public holders.[154] Similarly, the amended Executive Order 12,958 also authorizes the classification of a record after an agency has received a FOIA request for it, although such belated classification is permitted only through the "personal participation" of designated high-level officials and only on a "document-by-document ba-

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[149] Id. § 1.7(b); see also White House Homeland Security Memorandum, reprinted in *FOIA Post* (posted 3/21/02) (directing agencies to review procedures for safeguarding information concerning "chemical, biological, radiological, and nuclear weapons, but at the same time emphasizing that "the need to protect such sensitive information from inappropriate disclosure should be carefully considered, on a case-by-case basis, together with the benefits that result from the open and efficient exchange of scientific, technical, and like information").

[150] Compare Exec. Order No. 12,958, as amended, § 1.1 (current version), with Exec. Order No. 12,958, § 1.2(b) (original version).

[151] See Exec. Order No. 12,958, as amended, § 1.7(c); see also Exec. Order No. 12,356, § 1.6(c).

[152] Exec. Order No. 12,958, as amended, § 1.7(c)(1); see also 32 C.F.R. § 2001.13(a) (2006) (directive issued by Information Security Oversight Office describing procedures for reclassifying information pursuant to section 1.7(c) of Executive Order 12,958, as amended).

[153] Exec. Order 12,958, as amended, § 1.7(c)(2); see also 32 C.F.R. § 2001.13(a)(1).

[154] Exec. Order 12,958, as amended, § 1.7(c)(3); see also 32 C.F.R. § 2001.13(b).

sis."[155] (For a further discussion of official disclosure, see Exemption 1, Waiver of Exemption Protection, above, and Discretionary Disclosure and Waiver, below.)

Executive Order 12,958, as amended, also contains a provision establishing a mechanism through which classification determinations can be challenged within the federal government.[156] Under this provision, "authorized holders of information" -- individuals who are authorized to have access to such information -- who, in good faith, believe that its classification is improper are "encouraged and expected" to challenge that classification.[157] Furthermore, agencies are required to set up internal procedures to implement this program, in order to ensure that holders are able to make such challenges without fear of retribution and that the information in question is reviewed by an impartial official or panel.[158] Additionally, an agency head or designee may authorize an "emergency" disclosure of information to individuals who are not eligible for access to classified infor-

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[155] Exec. Order No. 12,958, as amended, § 1.7(d); see also 32 C.F.R. § 2001.13(a); see, e.g., Pub. Citizen v. Dep't of State, 100 F. Supp. 2d 10, 26 (D.D.C. 2000) (finding that agency official had "power to classify documents" following receipt of FOIA request) (decided under original version of Executive Order 12,958), aff'd on other grounds, 276 F.3d 674 (D.C. Cir. 2002); Council for a Livable World v. U.S. Dep't of State, No. 96-1807, slip op. at 8-9 (D.D.C. Nov. 23, 1998) (ordering disclosure of documents where agency official did not have special classification authority under section 1.8(d) of Executive Order 12,958 and did not take classification action under direction of official with such authority) (decided under original version of Executive Order 12,958), summary judgment granted (D.D.C. June 27, 2000), case dismissed (D.D.C. Aug. 22, 2000) (upholding Exemption 1 claim and dismissing case following classification of records by different agency official with proper authority and subsequent submission of further declaration); see also White House Homeland Security Memorandum, reprinted in *FOIA Post* (posted 3/21/02) (directing heads of federal departments and agencies to ensure appropriate protection of sensitive homeland security-related information; distributing implementing guidance, in attached memorandum from Information Security Oversight Office and Office of Information and Privacy, to effect that such information should be classified or reclassified pursuant to requirements of section 1.8(d) (now 1.7(d)) of Executive Order 12,958, as appropriate, if it has been subject of prior access request).

[156] Exec. Order No. 12,958, as amended, § 1.8.

[157] Id. § 1.8(a).

[158] See id. § 1.8(b); see also id. § 5.3(b) (authorizing Interagency Security Classification Appeals Panel to "decide on [sic] appeals by persons who have filed classification challenges"); 32 C.F.R. § 2001.14 (directive issued by Information Security Oversight Office describing procedures that agencies must establish in order to consider classification challenges).

mation, as may be necessary under exceptional circumstances "to respond to an imminent threat to life or in defense of the homeland."[159]

In addition to satisfying the substantive criteria outlined in the applicable executive order, information also must adhere to the order's procedural requirements to qualify for Exemption 1 protection.[160] In other words, the information has to be more than "classifiable" under the executive order -- it has to be actually classified under the order.[161] This requirement recognizes that proper classification is actually a review process to identify potential harm to national security.[162] Executive Order 12,958, as amended, prescribes the current procedural requirements that agencies must employ.[163] These requirements include such matters as the proper markings to be applied to classified documents,[164] as well as the manner in which

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[159] See Exec. Order No. 12,958, as amended, § 4.2(b) (providing that an emergency disclosure does not constitute declassification); see also 32 C.F.R. § 2001.51 (describing transmission and reporting procedures for disclosure "in emergency situations, in which there is an imminent threat to life or in defense of the homeland").

[160] See, e.g., Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 8 (D.D.C. 2001) (finding that CIA properly classified subject records under procedures outlined in Executive Order 10,501, which was in force when classification decision was made), aff'd, 334 F.2d 55 (D.C. Cir. 2003); Tawalbeh, No. 96-6241, slip op. at 9 (C.D. Cal. Aug. 8, 1997) (ruling that classification procedures set forth in Executive Order 12,958 properly applied); Canning, 848 F. Supp. at 1048-49 (finding that agency adhered to appropriate classification procedures established by Executive Order 12,356).

[161] See, e.g., Exec. Order No. 12,958, as amended, §§ 1.1-.4, 1.6; see also 32 C.F.R. § 2001.10-.11, .20-.21, .23.

[162] See, e.g., Hayden v. NSA, 608 F.2d 1381, 1386-87 (D.C. Cir. 1979) (finding that information must have been classified according to procedures outlined in national security classification executive order); Peltier v. FBI, No. 02-4328, slip op. at 12, 15 (D. Minn. Oct. 24, 2006) (magistrate's recommendation) (same), adopted (D. Minn. Feb. 9, 2007); Riquelme v. CIA, No. 02-2382, 2006 U.S. Dist. LEXIS 70992, at *12 (D.D.C. Sept. 29, 2006) (same).

[163] See, e.g., Exec. Order No. 12,958, as amended, §§ 1.5, 1.6, 2.1; see also 32 C.F.R. § 2001.20-.24.

[164] See Exec. Order No. 12,958, as amended, § 1.6; see also Cohen v. FBI, No. 93-1701, slip op. at 5-6 (D.D.C. Oct. 11, 1994) (rejecting plaintiff's argument that subsequent marking of two documents during agency's second classification review rendered FBI's classification action ineffective; to require agencies "to perform every classification review perfectly on the first attempt" would be "a very strict and unforgiving standard") (decided under

(continued...)

agencies designate officials to classify information in the first instance.[165]

Regarding proper national security markings, Executive Order 12,958, as amended, requires that each classified document be marked with the appropriate classification level,[166] the identity of the original classification authority,[167] the identity of the agency and office classifying the document,[168] as well as with "a concise reason for classification" that cites the applicable classification category or categories.[169] It also requires that a date or event for declassification be specified on the document.[170] In addition, amended Executive Order 12,958 requires agencies to use portion markings to indicate levels of classification within documents,[171] and it advocates the use of classified addenda in cases in which classified informa-

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[164](...continued)
Executive Order 12,356).

[165] See Exec. Order No. 12,958, as amended, § 1.3; see, e.g., Presidential Order of Sept. 17, 2003, 68 Fed. Reg. 55,257 (Sept. 17, 2003), reprinted in 50 U.S.C. § 435 note (granting classification authority to Director of Office of Science and Technology Policy); Exec. Order No. 13,284, § 20, 68 Fed. Reg. 4075 (Jan. 23, 2003) (granting classification authority to Secretary of Homeland Security); Presidential Order of Sept. 26, 2002, 67 Fed. Reg. 61,463 (Sept. 26, 2002), reprinted in 50 U.S.C. § 435 note (granting classification authority to Secretary of Agriculture); Presidential Order of May 6, 2002, 67 Fed. Reg. 31,109 (May 6, 2002), reprinted in 50 U.S.C. § 435 note (granting classification authority to Administrator of Environmental Protection Agency); Presidential Order of Dec. 10, 2001, 66 Fed. Reg. 64,347 (Dec. 10, 2001), reprinted in 50 U.S.C. § 435 note (granting classification authority to Secretary of Health and Human Services); Presidential Order of Oct. 13, 1995, 3 C.F.R. 513 (1996), reprinted in 50 U.S.C. § 435 note (designating those executive branch officials who are authorized to classify national security information under Executive Order 12,958 in first instance).

[166] See Exec. Order No. 12,958, as amended, § 1.6(a)(1); see also id. § 1.2 (directing that information may be classified at: (1) the "Top Secret" level, when disclosure could be expected to cause "exceptionally grave damage" to the national security; (2) the "Secret" level, when disclosure could be expected to cause "serious damage" to the national security; and (3) the "Confidential" level, when disclosure could be expected to cause "damage" to the national security).

[167] Id. § 1.6(a)(2).

[168] Id. § 1.6(a)(3).

[169] Id. § 1.6(a)(5).

[170] Id. § 1.6(a)(4).

[171] Id. § 1.6(c) (specifying that only Director of ISOO is authorized to grant portion-marking waivers).

tion comprises only "a small portion of an otherwise unclassified document."[172] The Information Security Oversight Office (ISOO) has issued governmentwide guidelines on these marking requirements.[173]

Executive Order 12,958 also establishes a government entity to provide oversight of agencies' classification determinations and their implementation of the order. The Interagency Security Classification Appeals Panel consists of senior-level representatives of the Secretaries of State and Defense, the Attorney General, the Director of Central Intelligence, the Archivist of the United States, and the Assistant to the President for National Security Affairs.[174] Among other things, this body adjudicates classification challenges filed by agency employees and decides appeals from persons who have filed requests under the mandatory declassification review provisions of the order.[175]

Agencies with questions about the proper implementation of the substantive or procedural requirements of Executive Order 12,958, as amended, may consult with the Information Security Oversight Office, located within the National Archives and Records Administration, at (202) 357-5259, which holds governmentwide oversight responsibility for classification matters under the executive order.[176]

Duration of Classification and Declassification

Other important provisions of amended Executive Order 12,958 are those that establish (1) limitations on the length of time information may

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[172] Id. § 1.6(g).

[173] See 32 C.F.R. § 2001.20-.24 (ISOO directive providing detailed guidance on identification and marking requirements of amended Executive Order 12,958).

[174] See Exec. Order No. 12,958, as amended, § 5.3(a)(1); see also 32 C.F.R. pt. 2001 app. A (bylaws of Interagency Security Classification Appeals Panel); see also *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (referring to Chairman of Interagency Security Classification Appeals Panel).

[175] See Exec. Order No. 12,958, as amended, § 5.3(b); see also id. § 3.5 (establishing mandatory declassification review program as non-FOIA mechanism for persons to seek access to classified information generated or maintained by agencies, including papers maintained by presidential libraries not yet accessible under FOIA).

[176] See id. § 5.2; see also FOIA Update, Vol. XVI, No. 2, at 15 (describing responsibilities of ISOO Director under original version of Executive Order 12,958); FOIA Update, Vol. VI, No. 1, at 1-2 (describing responsibilities of ISOO under Executive Order 12,356).

remain classified,[177] and (2) procedures for the declassification of older government information.[178] The order requires agencies to "attempt to establish a specific date or event for declassification based upon the duration of the national security sensitivity."[179] The order also limits the duration of classification to no longer than is necessary in order to protect national security.[180] If the agency is unable to determine a date or event that will trigger declassification, however, then amended Executive Order 12,958 instructs the original classification authority to set a ten-year limit on new classification actions.[181] The classification authority alternatively may determine that the sensitivity of the information justifies classification for a period of twenty-five years.[182]

The amendment of Executive Order 12,958 also continues the automatic declassification mechanism that was established by the original version of the order in 1995.[183] Upon implementation of the first provision of that automatic declassification mechanism on December 31, 2006,[184] Executive Order 12,958 required the automatic declassification of information that is more than twenty-five years old,[185] with exceptions limited to

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[177] Exec. Order No. 12,958, as amended, § 1.5, 68 Fed. Reg. 15,315 (Mar. 28, 2003), reprinted in 50 U.S.C. § 435 note (2000 & Supp. III 2003) and summarized in *FOIA Post* (posted 4/11/03).

[178] See id. § 3.3.

[179] Id. § 1.5(a).

[180] See id.; see also 32 C.F.R. § 2001.12(a)(1) (2006) (establishing guidelines for the duration of the classification, and requiring that a "classification authority shall attempt to determine a date or event that is less than ten years from the date of the original classification and which coincides with the lapse of the information's national security sensitivity"); Information Security Oversight Office Ann. Rep. 6 (2003) (noting that "one of the principal procedures for maintaining the effectiveness of the classification system is to remove from the safeguarding system information that no longer requires protection").

[181] Exec. Order No. 12,958, as amended, § 1.5(b); see also 32 C.F.R. § 2001.12(a)(1).

[182] Exec. Order No. 12,958, as amended, § 1.5(b).

[183] Compare Exec. Order No. 12,958, as amended, § 3.3 (current version), with Exec. Order No. 12,958, § 3.4 (original version).

[184] See Exec. Order No. 12,958, as amended, § 3.3(a) (establishing December 31, 2006 as deadline for automatic declassification).

[185] Id. (applying twenty-five-year rule to classified information determined by Archivist of the United States to have "permanent historical value");

(continued...)

especially sensitive information designated as such by the heads of agencies.[186] These exceptions serve to narrow the categories of information that may be classified beyond twenty-five years.[187] As with an original classification decision, the application of these exceptions to automatic declassification requires a thorough review of the continued sensitivity of the information by an official with the expertise to make such determinations of national security harm.[188] This declassification mechanism did not exist under previous orders,[189] and its implementation certainly has taken longer than was originally anticipated.

Indeed, the original effective date for the automatic declassification mechanism under the original version of Executive Order 12,958 was October 17, 2001.[190] For certain identified records, however, the effective date for automatic declassification was extended to April 17, 2003 by Executive

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[185](...continued)
see also 32 C.F.R. § 2001.30 (Information Security Oversight Office directive explaining requirements of automatic declassification program).

[186] Exec. Order No. 12,958, as amended, § 3.3(b) (specifying categories of sensitive information qualifying for exception to twenty-five-year rule); see also id. § 3.3(c), (d) (specifying manner in which agencies are to notify President of, and receive approval for, exceptions to automatic declassification for specific file series); White House Homeland Security Memorandum (directing heads of federal departments and agencies to ensure appropriate protection of sensitive homeland security-related information; distributing implementing guidance, in attached memorandum, to effect that such information should be exempted from automatic declassification).

[187] Compare Exec. Order No. 12,958, as amended, § 1.4(a)-(h), with Exec. Order No. 12,958, as amended, § 3.3(b)(1)-(9).

[188] Exec. Order No. 12,958, as amended, §§ 2.2(b), 3.3(b); see also 32 C.F.R. § 2001.21(e), 2001.32(a).

[189] Compare Exec. Order No. 12,958, § 3.4(a) (mandating automatic declassification for twenty-five-year-old information), with Exec. Order No. 12,356, § 3.1(a) (specifying that passage of time alone does not compel declassification); see also Exec. Order No. 12,936, 3 C.F.R. 949 (1994) (separate executive order issued by President Clinton automatically declassifying millions of pages of old records held by NARA). But see 50 U.S.C. § 435 note (requiring Secretary of Energy and Archivist of the United States to ensure that information concerning atomic weapons and special nuclear material is not inadvertently released during automatic declassification of voluminous records under original version of Executive Order 12,958).

[190] Exec. Order No. 13,142, § 1, 64 Fed. Reg. 66089 (Nov. 23, 1999) (extending automatic declassification deadline).

Order 13,142.[191] The amended Executive Order 12,958 further extended the deadline for automatic declassification to December 31, 2006, in order to allow government agencies additional time to properly review millions of pages of classified materials.[192] The amended Executive Order provided that on that date, all classified records containing the equities of a single agency only -- i.e., those not requiring referral to another agency for an equity review -- that are more than twenty-five years old, and have been determined to have permanent historical value, were automatically declassified even if those records have not yet been reviewed for declassification.[193] On the other hand, it specifically grants agencies an additional three years, until December 31, 2009, to review referrals sent from other agencies for declassification review.[194] And it further provides that "special media information" -- such as, microfilm, electronic records, and audiotape and videotape materials -- is to be processed for automatic declassification by December 31, 2011.[195] Notably, in addressing automatic declassification, courts have refused to order disclosure of information more than twenty-five years old until the applicable automatic disclosure provision takes effect.[196]

The automatic declassification mechanism applies to information currently classified under any predecessor executive order[197] and is intended to ultimately lead to the creation of a governmentwide declassification database within the National Archives and Records Administration.[198] For

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[191] See id. § 2 (specifying that April 17, 2003, deadline pertains to "records otherwise subject to this paragraph for which a review or assessment conducted by the agency and confirmed by the Information Security Oversight Office has determined that they: (1) contain information that was created by or is under the control of more than one agency, or (2) are within file series containing information that almost invariably pertains to intelligence sources or methods").

[192] Exec. Order No. 12,958, as amended, § 3.3(a).

[193] Id.

[194] Id. at § 3.3(e)(3).

[195] Id. at § 3.3(e)(2).

[196] See Schrecker v. U.S. Dep't of Justice, 74 F. Supp. 2d 26, 30 (D.D.C. 1999), aff'd on other grounds, 254 F.3d 162 (D.C. Cir. 2001); Billington v. Dep't of Justice, 69 F. Supp. 2d 128, 134 (D.D.C. 1999), aff'd in part, vacated in part & remanded all on other grounds, 233 F.3d 581 (D.C. Cir. 2000) (Exemption 1 determination not challenged on appeal); Hall v. U.S. Dep't of Justice, 26 F. Supp. 2d 78, 80 (D.D.C. 1998).

[197] See Exec. Order No. 12,958, as amended, § 3.3(a).

[198] See id. § 3.7 (directing Archivist to establish database of information (continued...)

records that fall within any exception to amended Executive Order 12,958's automatic declassification mechanism, agencies are required to establish "a program for systematic declassification review" that focuses on any need for continued classification of such records.[199] In his 2005 Report to the President, the Director of the Information Security Oversight Office suggested "key elements of a better way" to handle declassification and noted that "challenges for full implementation by December 31, 2009, remain."[200]

As did prior executive orders, amended Executive Order 12,958 provides for a "mandatory declassification review" program.[201] This mechanism allows any person -- entirely apart from the FOIA context -- to request that an agency review its national security records for declassification.[202] Traditionally, the mandatory declassification review program has been used by researchers interested in gaining access to papers maintained by presidential libraries, some of which are not accessible under the FOIA; under this provision, however, any person may submit a mandatory review request to an agency.[203] Unlike under the FOIA, though, such requesters do not have the right to judicial review of the agency's action.[204] Instead, amended Executive Order 12,958 authorizes persons to appeal an agency's final decision under this program to the Interagency Security Classification Appeals Panel.[205] To alleviate some of the burden of this program, Executive Order 12,958 contains a provision that allows an agency to deny a mandatory review request if it has already reviewed the information for declassification within the past two years.[206]

For declassification decisions, amended Executive Order 12,958 authorizes agencies to apply a balancing test -- i.e., to determine "whether

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[198](...continued)
that has been declassified by agencies, and instructing agency heads to cooperate in this governmentwide effort).

[199] Id. § 3.4(a).

[200] See Information Security Oversight Office Ann. Rep. 1, 3 (2005) (commenting generally on the executive branch's efforts to meet the automatic declassification deadline).

[201] Id. § 3.5.

[202] See id.

[203] See id.

[204] Id.; cf. Miller v. Casey, 730 F.2d 773, 778 (D.C. Cir. 1984) (refusing to review CIA decision to deny access to records under agency's discretionary "historical research program").

[205] See Exec. Order No. 12,958, as amended, § 3.5(b)(4), (d).

[206] Id. § 3.5(a)(3).

the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure."[207] Though Executive Order 12,958, as amended, specifies that this provision is implemented solely as a matter of administrative discretion and creates no new right of judicial review, it is significant that no such provision existed under prior orders.[208] Although a few courts have attempted to apply the balancing test to the review of classification decisions in litigation,[209] most have firmly held that national security officials are responsible for applying this balancing test at the time of the original classification decision, and that these officials logically are in the best position to weigh the public interest in disclosure against the threat to national security.[210]

It is worth noting in this regard that government policy on national security classification receives even greater attention and scrutiny during times of crisis -- often focused on the inherent tension between national security and open government.[211] In his 2005 Report to the President, the Director of the Information Security Oversight Office reiterated his belief that a "responsible security classification system and a committed declassification program are the cornerstones of an open and efficient government that serves to protect and inform its citizens" and require "diligence and integrity with regard to the American ideals of providing for our national security

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[207] Id. § 3.1(b).

[208] See FOIA Update, Vol. XVI, No. 2, at 11 (chart comparing provisions of original version of Executive Order 12,958 with those of predecessor Executive Order 12,356).

[209] See, e.g., L.A. Times Commc'ns, LLC v. Dep't of the Army, No. CV 05-8293, 2006 WL 2336457, at *18 (C.D. Cal. July 24, 2006) (explaining that the court was attempting to achieve the "balance Congress sought to preserve between the public's right to know and the government's legitimate interest in keeping certain information confidential").

[210] See, e.g., ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 32 (D.D.C. 2003) (holding that even a "significant and entirely legitimate" public desire to view classified information "simply does not, in an Exemption 1 case, alter the analysis"); Kelly v. CIA, No. 00-2498, slip op. at 15 (D.D.C. Aug. 8, 2002) (observing that agency should factor in public interest at time that classification decision is made, and further noting that requester's asserted public interest in disclosure of requested information will not undermine proper classification because it certainly is in public interest to withhold information that would damage national security), modified in other respects, No. 00-2498, slip op. at 1 (D.D.C. Sept. 25, 2002), appeal on adequacy of search dismissed on procedural grounds, No. 02-5384, 2003 WL 21804101 (D.C. Cir. July 31, 2003).

[211] See, e.g., Information Security Oversight Office Ann. Rep. 2 (2003) (commenting on tension between informing and protecting American public and noting that classification system "is designed to promote" both).

within the context of a free and open society."[212]

Additional Considerations

Two additional considerations addressed initially by the original version of Executive Order 12,958, and then continued in the amended version, have already been recognized by the courts. First, the "Glomar" response is explicitly incorporated into the order: "An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the very fact of their existence or nonexistence is itself classified under this order."[213] (For a further discussion of this point, see Exemption 1, In Camera Submissions, above.)

Second, the "mosaic" or "compilation" approach -- the concept that apparently harmless pieces of information, when assembled together, could reveal a damaging picture -- is recognized in amended Executive Order 12,958.[214] It is also a concept that has been widely recognized by courts in Exemption 1 cases.[215] Compilations of otherwise unclassified information

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[212] See Information Security Oversight Office Ann. Rep. 1, 3 (2005).

[213] Exec. Order No. 12,958, as amended, § 3.6(a), 68 Fed. Reg. 15,315 (Mar. 28, 2003), reprinted in 50 U.S.C. § 435 note (2000 & Supp. III 2003) and summarized in *FOIA Post* (posted 4/11/03); see also Hogan v. Huff, No. 00-6753, 2002 WL 1359722, at *7 (S.D.N.Y. June, 21, 2002) (ruling that the executive order "authorizes agencies to refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence is itself classified") (decided under original version of Executive Order 12,958).

[214] See Exec. Order No. 12,958, as amended, § 1.7(e).

[215] See Edmonds v. U.S. Dep't of Justice, 405 F. Supp. 2d 23, 33 (D.D.C. 2005) (upholding the agency's mosaic argument, and finding that it "comports with the legal framework"); Berman v. CIA, 378 F. Supp. 2d 1209, 1215-17 (E.D. Cal. 2005) (observing that "numerous courts have recognized the legitimacy of the mosaic theory in the context of the FOIA," and holding that CIA's Presidential Daily Briefs could fairly be viewed as "an especially large piece of the 'mosaic' because it is the only finished intelligence product that synthesizes all of the best available intelligence" for the President (citing CIA v. Sims, 471 U.S. 159, 178 (1985))); ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 37 (D.D.C. 2004) (affirming that "this Circuit has embraced the government's 'mosaic' argument in the context of FOIA requests that implicate national security concerns"); Edmonds v. FBI, 272 F. Supp. 2d 35, 47-48 (D.D.C. 2003) (accepting that "some information required classification because it was intertwined with the sensitive matters at the heart of the case" and "would tend to reveal matters of national security even though the sensitivity of the information may not be readily apparent in isolation") (decided under original version of Executive Order 12,958);

(continued...)

may be classified if the "compiled information reveals an additional association or relationship that: (1) meets the [order's classification] standards, and (2) is not otherwise revealed in the individual items of information."[216] This "mosaic" approach was presaged by a decision of the Court of Appeals for the District of Columbia Circuit in 1980,[217] and it has been endorsed by courts consistently on a case-by-case basis since that time.[218] The D.C.

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[215](...continued)
ACLU v. U.S. Dep't of Justice, 265 F. Supp. 2d 20, 29 (D.D.C. 2003) (allowing the agency to withhold statistical intelligence-collection data, commenting that "even aggregate data is revealing," and concluding that disclosure "could permit hostile governments to accurately evaluate the FBI's counterintelligence capabilities") (decided under original version of Executive Order 12,958); see also Bassiouni v. CIA, 392 F.3d 244, 246 (7th Cir. 2004) (recognizing properly that "[w]hen a pattern of responses itself reveals classified information, the only way to keep secrets is to maintain silence uniformly"), cert. denied, 545 U.S. 1129 (2005); cf. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (accepting government's mosaic argument in context of a criminal terrorism investigation) (Exemption 7(A)).

[216] See Exec. Order No. 12,958, as amended, § 1.7(e); see also Billington v. Dep't of Justice, 11 F. Supp. 2d 45, 55 (D.D.C. 1998) (applying cited provision of executive order to rule that "aggregate result" does not need to be "self-evident" to qualify for Exemption 1 protection), summary judgment granted in pertinent part, 69 F. Supp. 2d 128 (D.D.C. 1999), aff'd in part, vacated in part & remanded all on other grounds, 233 F.3d 581 (D.C. Cir. 2000).

[217] Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) (observing that "[e]ach individual piece of intelligence information, much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself").

[218] See Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (explicitly acknowledging "mosaic-like nature of intelligence gathering") (decided under Executive Order 12,065); Loomis v. U.S. Dep't of Energy, No. 96-149, 1999 WL 33541935, at *7 (N.D.N.Y. Mar. 9, 1999) (finding that safety measures regarding nuclear facilities set forth in manuals and lay-out plans contain highly technical information and that "such information in the aggregate could reveal sensitive aspects of operations") (decided under original version of Executive Order 12,958), summary affirmance granted, 21 F. App'x 80 (2d Cir. 2001); see also Am. Friends Serv. Comm. v. DOD, 831 F.2d 441, 444-45 (3d Cir. 1987) (recognizing validity of "compilation" theory, and ruling that certain "information harmless in itself might be harmful when disclosed in context") (decided under Executive Order 12,356); Taylor v. Dep't of the Army, 684 F.2d 99, 105 (D.C. Cir. 1982) (upholding classification of compilation of information on army combat units) (decided under Executive Order 12,065); Nat'l Sec. Archive v. FBI, 759 F. Supp. 872, 877
(continued...)

Circuit has also reaffirmed that even if there is other information that if released "would pose a greater threat to the national security," Exemption 1 "'bars the court from prying loose from the government even the smallest bit of information that is properly classified.'"[219]

In one recent case, the United States District Court for the District of Columbia commented that while the mosaic argument may be seen to "cast too wide a net," it is today accepted that "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene."[220] The court held that situations may exist, in the national security context particularly, where even "'bits and pieces' of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance itself.'"[221] As with other agency decisions regarding harm to national security, it is also reasonable for courts to grant an agency the appropriate degree of deference with regard to the practical applicability of their mosaic analysis.[222]

Another aspect of invoking Exemption 1 is the FOIA's general requirement that agencies segregate and release nonexempt information, unless the segregated information would have no meaning.[223] The duty to

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[218](...continued)
(D.D.C. 1991) (adjudging that disclosure of code names and designator phrases could provide hostile intelligence analyst with "common denominator" permitting analyst to piece together seemingly unrelated data into snapshot of specific FBI counterintelligence activity) (decided under Executive Order 12,356); Jan-Xin Zang v. FBI, 756 F. Supp. 705, 709-10 (W.D.N.Y. 1991) (upholding classification of any particular source-identifying word or phrase that could by itself or in aggregate lead to disclosure of intelligence source) (decided under Executive Order 12,356); cf. Sims, 471 U.S. at 178 (recognizing that "the very nature of the intelligence apparatus of any country is to try to find out the concerns of others") (Exemption 3).

[219] Abbotts v. NRC, 766 F.2d 604, 608 (D.C. Cir. 1985) (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)) (decided under Executive Order 12,356).

[220] ACLU v. U.S. Dep't of Justice, 321 F. Supp. 2d 24, 37 (D.D.C. 2004) (quoting Sims, 471 U.S. at 178).

[221] Id. (quoting Ctr. for Nat'l Sec., 331 F.3d at 928).

[222] See Berman, 378 F. Supp. 2d at 1217 (holding, in context of Exemption 3, that agency's decision to employ a mosaic analysis is entitled to deference); see also Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at *12 (D.D.C. Aug. 10, 2005) (allowing that "the CIA has the right to assume that foreign intelligence agencies are zealous ferrets" (citing Gardels, 689 F.2d at 1106)).

[223] See, e.g., Doherty v. U.S. Dep't of Justice, 775 F.2d 49, 53 (2d Cir.
(continued...)

release information that is "reasonably segregable"[224] applies in cases involving classified information as well as those involving nonclassified information.[225] In recent years, the D.C. Circuit has reemphasized the FOIA's segregation requirement in a series of decisions,[226] two of which involved

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[223](...continued)
1985); Paisley v. CIA, 712 F.2d 686, 700 (D.C. Cir. 1983); ACLU v. DOD, 406 F. Supp. 2d 330, 333 (D.D.C. 2006) (holding that a court "'cannot simply assume, over the well-documented and specific affidavits of the CIA to the contrary, that revelation of seemingly innocent information . . . is required under the FOIA'" (quoting Phillippi v. CIA, 655 F.2d 1325, 1330 (D.C. Cir. 1981))); Edmonds, 272 F. Supp. 2d at 57 (holding that agency may properly determine that release of any portion of document would result in harm to national security and on that basis classify entire document); Armstrong v. Executive Office of the President, 897 F. Supp. 10, 17 (D.D.C. 1995) (finding that Vaughn Index and supporting affidavits demonstrate that limited number of country captions and source citations contained in intelligence summaries are so "inextricably intertwined" with text of summaries as to be exempt from disclosure); Bevis v. Dep't of the Army, No. 87-1893, slip op. at 2 (D.D.C. Sept. 16, 1988) (ruling that redaction is not required when it would reduce balance of text to "unintelligible gibberish"); Am. Friends Serv. Comm. v. DOD, No. 83-4916, 1988 WL 82852, at *4 (E.D. Pa. Aug. 4, 1988) (holding that very fact that records sought would have to be extensively "reformulated, re-worked and shuffled" prior to any disclosure in and of itself established that nonexempt material was "inextricably intertwined" with exempt material), aff'd, 869 F.2d 587 (3d Cir. 1989) (unpublished table decision).

[224] 5 U.S.C. § 552(b) (2000 & Supp. IV 2004) (sentence immediately following exemptions).

[225] See, e.g., Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 66 n.12 (D.C. Cir. 1990) (dictum) (citing failure of Army affidavit to specify whether any reasonably segregable portions of 483-page document were withheld pursuant to Exemption 1); Ray v. Turner, 587 F.2d 1187, 1197 (D.C. Cir. 1978) (remanding for greater specificity in affidavit because agency may not rely on "exemption by document" approach even in Exemption 1 context); see also Harper v. DOD, No. 93-35876, 1995 WL 392032, at *2 (9th Cir. July 3, 1995) (reversing part of district court order that permitted agency to withhold entire report under Exemption 1, because district court failed to make "necessary findings" on segregability).

[226] See Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1028 (D.C. Cir. 1999); Kimberlin v. Dep't of Justice, 139 F.3d 944, 950 (D.C. Cir. 1998); Army Times Publ'g Co. v. Dep't of the Air Force, 998 F.2d 1067, 1068, 1071-72 (D.C. Cir. 1993); PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 252-53 (D.C. Cir. 1993); Schiller v. NLRB, 965 F.2d 1205, 1210 (D.C. Cir. 1992).

records withheld pursuant to Exemption 1.[227] In the first of these two decisions, the D.C. Circuit, although upholding the district court's substantive determination that the records contained information qualifying for Exemption 1 protection, nonetheless remanded the case to the district court because it had failed to "make specific findings of segregability for each of the withheld documents."[228] In the second decision, the D.C. Circuit observed that although the agency might have been "aware of its duties under FOIA to disclose all nonsegregable information," it did not provide the court with an "adequate explanation" on which to base such a finding.[229] Accordingly, the D.C. Circuit also remanded the case to the district court for a more detailed description of the information withheld.[230] (For a further discussion of this point, see Litigation Considerations, "Reasonably Segregable" Requirements, below.)

Additionally, agencies should also be aware of the FOIA's "(c)(3) exclusion."[231] This special records exclusion applies to certain especially sensitive records maintained by the Federal Bureau of Investigation, which concern foreign intelligence, counterintelligence or international terrorism matters: Where the existence of such records is itself a classified fact, the FBI may, so long as the existence of the records remains classified, treat the records as not subject to the requirements of the FOIA.[232] (See the discussion of this provision under Exclusions, below.)

"Operational Files" Statutes

It is commonplace for intelligence agencies of the federal government to maintain entire systems of records that contain almost exclusively rec-

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[227] See Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1180-81 (D.C. Cir. 1996); Krikorian v. Dep't of State, 984 F.2d 461, 466-67 (D.C. Cir. 1993); see also Canning v. U.S. Dep't of Justice, 848 F. Supp. 1037, 1049 n.2 (D.D.C. 1994) (applying Krikorian standard to specifically find that agency "carefully and methodically . . . respect[ed FOIA's segregation] principle"); Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State, No. C89-1843, slip op. at 7-8, 11-12 (N.D. Cal. June 4, 1993) (applying same standard).

[228] Krikorian, 984 F.2d at 467; see also Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 14-15 (D.D.C. 1998) (ordering that CIA "more specifically" explain in subsequent Vaughn Index why portions of records withheld in full are not reasonably segregable); FOIA Update, Vol. XIV, No. 3, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation").

[229] Oglesby, 79 F.3d at 1181.

[230] Id.

[231] 5 U.S.C. § 552(c)(3).

[232] Id.; see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 24-25 (Dec. 1987).

ords classified under Executive Order 12,958, as amended. Due to the sensitivity of these records systems, and owing to the fact that the information contained within them would be expected to be exempt from disclosure pursuant to Exemption 1, Congress has granted certain intelligence agencies special protections from disclosure through the enactment of specific "operational files" statutes implemented through Exemption 3 of the FOIA.[233] These "operational files" statutes remove records systems from the search and review requirements of the FOIA under well-defined circumstances when the system predominantly holds classified operational records.[234]

The rationale behind these special statutory provisions is that it would be a waste of time and money for the agency to conduct a search for and review of information that will almost invariably be exempt from disclosure under Exemption 1.[235] In eliminating the search and review requirement for records most unlikely to yield any releaseable information to a FOIA requester, Congress also sought to provide for the faster processing of unclassified material requested from intelligence agencies.[236] As these "operational files" statutes are predicated upon the classification status of the information, there is a close relationship between the protections offered "operational files" by Exemption 1 and Exemption 3. The distinction is that with "operational files" records systems, the five intelligence agencies that have been granted such FOIA protection through one of these special Exemption 3 statutes may determine as a preliminary, administrative matter that essentially the entire system would be exempt from disclosure under Exemption 1.[237]

While the Central Intelligence Agency was the first intelligence

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[233] See, e.g., FOIA Update, Vol. V, No. 4, at 1-2 (explaining that an underlying principle of the Central Intelligence Agency Information Act of 1984, 50 U.S.C.A. § 431 (2003 & West Supp. 2006), is to free "the CIA of the burden of processing FOIA requests for" records that "would be almost entirely withholdable anyway, upon application of the FOIA's national security exemption, Exemption 1, together with the CIA's other statutory nondisclosure provisions under Exemption 3").

[234] Id.

[235] Id.; see also ACLU v. DOD, 351 F. Supp. 2d 265, 273 (S.D.N.Y. 2005) (commenting that Congress sought to eliminate the "unproductive process of searching and reviewing CIA operational records systems which contain little, if any, information releasable under the FOIA [and] absorbs a substantial amount of the time of experienced CIA operational personnel and scarce tax dollars" (citing H.R. Rep. No. 98-726, pt. 1, at 5 (1984))).

[236] Id. at 274.

[237] See *FOIA Post*, "Agencies Rely on Wide Range of Exemption 3 Statutes" (posted 12/16/03).

agency to receive "operational files" FOIA status in 1984,[238] four additional intelligence agencies have been granted such status relatively recently: the National Geospatial-Intelligence Agency;[239] the National Reconnaissance Office;[240] the National Security Agency;[241] and the Defense Intelligence Agency.[242] Each of their special statutes clearly outlines certain limited exceptions to its removal of file systems from the FOIA's search and review requirement,[243] and each requires the head of the agency to identify which "operational files" are considered to fall within the coverage of the statute in the first place.[244]

To date courts have had occasion to consider the application of these special national security-related Exemption 3 statutes in but a handful of cases,[245] and in so doing have suggested that there are varying degrees of deference that will be granted to agencies employing such special FOIA

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[238] See 50 U.S.C.A. § 431 (removing from search and review provisions of FOIA certain files from the Directorate of Operations, Directorate for Science and Technology, and Office of Personnel Security); see also FOIA Update, Vol. V, No. 4, at 1-2.

[239] See 50 U.S.C.A. § 432 (West Supp. 2006) (removing agency's operational files from search and review provisions of FOIA).

[240] See 50 U.S.C.A. § 432a (removing agency's operational files from search and review provisions of FOIA).

[241] See 50 U.S.C.A. § 432b (removing from the search and review provisions of the FOIA certain files from the Signals Intelligence Directorate and the Research Associate Directorate "that document the means by which foreign intelligence or counterintelligence is collected through technical systems").

[242] See 50 U.S.C.A. § 432c (removing from search and review provisions of FOIA certain files from Directorate of Human Intelligence).

[243] See 50 U.S.C.A. § 431(b), (c), (d) (Central Intelligence Agency "operational files" definitions and limitations); id. § 432(a)(2)-(6) (National Geospatial-Intelligence Agency "operational files" definitions and limitations); id. § 432a(2)-(6) (National Reconnaissance Office "operational files" definitions and limitations); id. § 432b(b)(2), (c) (National Security Agency "operational files" definitions and limitations); id. § 432c(b)(2), (c) (Defense Intelligence Agency "operational files" definitions and limitations).

[244] See 50 U.S.C.A. § 431(a); id. § 432(a)(1); id. § 432a(a)(1); id. § 432b(a); id. § 432c(a).

[245] See Aftergood v. Nat'l Reconnaissance Office, No. 05-1307, 2006 WL 2048461, at *1 (D.D.C. July 24, 2006); ACLU v. DOD, 351 F. Supp. 2d 265, 271-72 (S.D.N.Y. 2005); Davy v. CIA, 357 F. Supp. 2d 76, 82 (D.D.C. 2004).

protection.[246] In the most recent case to address the use of an "operational files" statute, the agency was denied any sort of special deference by the court, based upon its failure to properly identify what it considers to be operational files, as is required by each of these statues.[247] In that case involving the National Reconnaissance Office, the court ultimately determined that while the agency's "operational files" statute validly protected certain material from the search and review provisions of the FOIA, the budget data at issue in this litigation triggered an exception to its "operational files" statutory provision.[248] In a second recent decision, also involving a distinct statutory exception to "operational files" coverage, the same court held that such an exception to another agency's "operational files" statute was not triggered and that the special protection was properly applied.[249]

Although this is still a developing area of FOIA law, recent reviews by the courts suggest that intelligence agencies seeking to apply their special "operational files" protections granted by Congress should be aware that they will be held to the procedural requirements of and the particular exceptions within their "operational files" statutes. (For a further discussion of "operational files," see Exemption 3, "Operational Files" Provisions, below.)

Homeland Security-Related Information

Due to the horrific events of September 11, 2001, and their aftermath throughout the world, no discussion of national security would be complete without emphasizing the efforts of the federal government to protect sensitive national security information, particularly regarding matters of critical infrastructure, weapons of mass destruction, and the general threat of terrorism. In response to the attacks of September 11, 2001, the federal

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[246] See Aftergood, 2006 WL 2048461, at *6 (rejecting usual grant of deference to agencies in national security cases, and advising that "courts should exercise a certain level of caution in reviewing an agency's written statements regarding the content of files for which the defendant claims § 432a's operational files exemption"); ACLU v. DOD, 351 F. Supp. 2d 265, 269 (S.D.N.Y. 2005) (determining that agency is not entitled to any special deference in its decision to handle "operational files" in relation to FOIA).

[247] See Aftergood, 2006 WL 2048461, at *6 (denying deference because "defendant has not yet publicly promulgated any official interpretation of § 432a's operational files exemption").

[248] See id. at 9 (finding that agency could not circumvent exceptions to "operational files" exemption contained within statute).

[249] See Davy v. CIA, 357 F. Supp. 2d 76, 83 (D.D.C. 2004) (holding that records had not been subject of investigation as outlined in agency's "operational files" statute and therefore were properly removed from FOIA's search and review requirement).

government has undergone its largest and most wide-ranging reorganization in more than fifty years.[250] This reorganization -- and the creation of the Department of Homeland Security, under the Homeland Security Act of 2002,[251] in addition to the Homeland Security Council within the White House[252] -- centralized the federal government's domestic national security efforts in order to protect Americans from the ever-increasing threat of terrorism. These changes have greatly impacted many aspects of the operation of the federal government, including the administration of the FOIA.[253] Today -- more than five years after the September 11, 2001 attacks -- the changes in how the federal government operates to protect national security continue.[254] Much greater emphasis is now placed on the protection of information that could expose the nation's critical infrastructure, military, government, and citizenry to an increased risk of attack.[255] As a result of these changes, federal departments and agencies should carefully consider the sensitivity of any information the disclosure of which could reasonably be expected to cause national security harm.[256]

On March 19, 2002, the White House Chief of Staff issued a directive

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[250] See *FOIA Post*, "Homeland Security Law Contains New Exemption 3 Statute" (posted 1/27/03); *FOIA Post*, "Guidance on Homeland Security Information Issued" (posted 3/21/02); see also *FOIA Post*, "Annual Report Guidance for DHS-Related Agencies" (posted 8/8/03).

[251] See Homeland Security Act of 2002, 6 U.S.C. § 483 (2000 & Supp. IV 2004); see also Homeland Security Act Amendments of 2003, Pub. L. 108-7, 117 Stat. 526.

[252] See Exec. Order No. 13,228, § 5, 66 Fed. Reg. 51812 (Oct. 8, 2001) (creating Homeland Security Council).

[253] See *FOIA Post*, "Critical Infrastructure Regulations Issued by DHS" (posted 2/27/04); *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03); *FOIA Post*, "Homeland Security Law Contains New Exemption 3 Statute" (posted 1/27/03).

[254] See, e.g., USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (amending USA PATRIOT Act and authorizing creation of National Security Division within Department of Justice).

[255] See Information Security Oversight Office Ann. Rep. 6 (2003) (cautioning that "if we are not attentive, the demands of war can distract us from doing what is necessary today to ensure the continued efficacy of the security classification system"); *FOIA Post*, "Guidance on Homeland Security Information Issued" (posted 3/21/02).

[256] See Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in *FOIA Post* (posted 10/15/01) (reminding agencies of importance of "safeguarding our national security" in FOIA decisionmaking).

to the heads of all federal departments and agencies addressing the need to safeguard and wherever appropriate protect such information.[257] This directive is implemented by an accompanying memorandum.[258] The implementing guidance contains two points that are especially relevant to amended Executive Order 12,958, though it was issued prior to the most recent amendment.

The first of these points concerns sensitive homeland security-related information that is currently classified; the classified status of such information should be maintained in accordance with applicable provisions of the amended Executive Order 12,958.[259] This includes extending the duration of classification as well as exempting such information from automatic declassification as appropriate.[260] The second point concerns previously unclassified or declassified information,[261] which may be classified or re-classified, as appropriate, pursuant to the amended executive order.[262] In this regard, if the information has been the subject of a previous access demand, such as a FOIA request, any such classification or re-classification is subject to the special requirements of section 1.7(d) of amended Executive Order 12,958.[263]

As a final note, agencies should be aware that although various government agencies today might use newly created terms to refer to catego-

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[257] See White House Memorandum for Heads of Executive Departments and Agencies Concerning Safeguarding Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security [hereinafter White House Homeland Security Memorandum] (Mar. 19, 2002), reprinted in *FOIA Post* (posted 3/21/02).

[258] See Memorandum from Acting Director of Information Security Oversight Office and Co-Directors of Office of Information and Privacy to Departments and Agencies [hereinafter ISOO/OIP Homeland Security Memorandum], reprinted in *FOIA Post* (posted 3/21/02) (citing Attorney General Ashcroft's FOIA Memorandum).

[259] See ISOO/OIP Homeland Security Memorandum (referring to sections 1.5, 1.6, and 3.4(b)(2) of original version of Executive Order 12,958 (authorizing information concerning weapons of mass destruction to be exempted from automatic declassification)).

[260] See id. (referring to sections 1.6(d)(2) and 3.4(b)(2) of original version of Executive Order 12,958).

[261] See id.

[262] See id. (explaining that initial classification or reclassification should be undertaken in accordance with Executive Order 12,958).

[263] See id.; Exec. Order No. 12,958, §§ 1.8(d); see also 42 U.S.C. § 2162 (2000) (governing classification of information concerning atomic weapons and other special nuclear material).

ries of homeland security-related information -- such as "Sensitive Homeland Security Information" (commonly referred to as "SHSI"),[264] "Sensitive But Unclassified Information" (sometimes referred to as "SBU information"),[265] or "Critical Infrastructure Information" (commonly referred to as "CII")[266] -- these categorical labels do not indicate classification pursuant to Executive Order 12,958.[267] Terms such as "SHSI" and "SBU" describe broad types of potentially sensitive information that might not even fall within any of the FOIA's exemptions.[268] It is significant to note that none of these new homeland security-related terms is included in Executive Order 12,958, as amended, and that the use of these labels alone does not provide for any protection from disclosure under any exemption, let alone Exemption 1.[269] A separate statute implements protections for "CII," and

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[264] *FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04) (describing Department of Homeland Security report to Congress of February 20, 2004, which addresses development of policy and governmentwide procedures for handling "sensitive homeland security information"); see also *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (discussing FOIA officers conference conducted by Department of Justice on subject of homeland security-related FOIA issues).

[265] White House Homeland Security Memorandum, reprinted in *FOIA Post* (posted 3/21/02); see also ISOO/OIP Homeland Security Memorandum, reprinted in *FOIA Post* (posted 3/21/02).

[266] 6 U.S.C. § 131(3) (Supp. IV 2004) (defining "critical infrastructure information"); see also *FOIA Post*, "Critical Infrastructure Regulations Issued by DHS" (posted 2/27/04) (explaining implementation of section 214 of Homeland Security Act, which prohibits disclosure of certain "critical infrastructure information" and triggers protection of Exemption 3).

[267] Exec. Order No. 12,958, as amended, § 1.2(b) (providing that "no other terms shall be used to identify United States classified information").

[268] *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (emphasizing also that "primary emphasis [should be] on the safeguarding of information, where appropriate due to its particular sensitivity rather than on the basis of any catch-all label"); see also *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 04/27/06) (Part I.21.) (suggesting "[i]n-house training on 'safeguarding label'/FOIA exemption distinctions" as potential improvement area for agencies to address in their plans developed pursuant to Executive Order 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005)).

[269] See *FOIA Post*, "FOIA Officers Conference Held on Homeland Security" (posted 7/3/03) (discussing "safeguarding" of information with identifying terms unrelated to classification); see also Presidential Memorandum for the Heads of Executive Departments and Agencies Concerning Guidelines and Requirements in Support of the Information Sharing Environment

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these protections are incorporated into the FOIA through Exemption 3.[270] Indeed, it is worth reiterating in this regard that the protections afforded classified information under Exemption 1 can be applied only to information that has been properly classified under Executive Order 12,958, as amended. (For a further discussion of "safeguarding labels," see Exemption 2, Homeland Security-Related Information, below.)

EXEMPTION 2

Exemption 2 of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency."[1] It is unique among the FOIA exemptions in that the courts have interpreted this one statutory phrase to encompass two very different categories of information:

(a) internal matters of a relatively trivial nature -- often referred to as "low 2" information; and

(b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement -- often referred to as "high 2" information.[2]

In light of the threats posed by worldwide and domestic terrorism, this second category has come to play an essential role in providing necessary protection of information related to both national security most gener-

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[269](...continued)
(Dec. 16, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051216-10.html (setting out general guidelines for standardization of procedures related to "acquisition, access, retention, production, use, management, and sharing of Sensitive But Unclassified (SBU) information"), implemented by Information Sharing Environment Implementation Plan 94 (Nov. 16, 2006), available at http://www.ise.gov/docs/ISE-impplan-200611.pdf (speaking of future plans to address existing difficulties with "the growing and non-standardized inventory of SBU designations and markings").

[270] 6 U.S.C. § 133 (2000 & Supp. IV 2004); see also *FOIA Post*, "Homeland Security Law Contains New Exemption 3 Statute" (posted 1/27/03) (summarizing provisions and operation of new Exemption 3 statute).

[1] 5 U.S.C. § 552(b)(2) (2000 & Supp. IV 2004).

[2] See FOIA Update, Vol. X, No. 3, at 3-4 ("OIP Guidance: Protecting Vulnerability Assessments Through Application of Exemption Two"); see, e.g., Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (describing "low 2" and "high 2" aspects of exemption).