



Exemption 1

Exemption 1 of the Freedom of Information Act protects from disclosure information that has been deemed classified "under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is "in fact properly classified pursuant to such Executive order."¹ The Supreme Court has recognized that Congress intended for the President to bear immediate responsibility for protecting national security, which includes the development of policy that establishes what information must be classified to prevent harm to national security.² Exemption 1, in turn, is the provision of the FOIA which affords protection for such properly classified information.³ The role of the federal judiciary includes the de novo review of an agency's Exemption 1 claims in litigation, with appropriate deference given to the Executive Branch's special expertise in matters of national security.⁴

¹ 5 U.S.C. § 552(b)(1) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *FOIA Post*, "OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government" (posted 4/17/09).

² See, e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 527-30 (1988) (discussing responsibility for protecting national security entrusted in the President as Commander in Chief of the military and as head of Executive Branch) (non-FOIA case).

³ See, e.g., Larson v. Dep't of State, 565 F.3d 857, 861 (D.C. Cir. 2009) (acknowledging that Exemption 1 protects information properly classified under national security executive order); Morley v. CIA, 508 F.3d 1108, 1123-24 (D.C. Cir. 2007) (same); Wolf v. CIA, 473 F.3d 370, 373 & n.3 (D.C. Cir. 2007) (same); Campbell v. DOJ, 164 F.3d 20, 29 (D.C. Cir. 1998) (same).

⁴ See, e.g., Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 926-27 (D.C. Cir. 2003) (discussing deference shown to Executive Branch in national security matters) (Exemption 7(A)); Ray v. Turner, 587 F.2d 1187, 1190-95 (D.C. Cir. 1978) (discussing role of three branches of federal government in determining national security sensitivity); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 773 (E.D. Pa. 2008) (noting that courts have "neither the expertise nor the qualifications to determine the impact upon national security" and that a "court must not substitute its judgment for the agency's regarding national defense or foreign

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Each President, beginning with President Harry S. Truman in 1951,⁵ has established the uniform policy of the Executive Branch concerning the protection of national security information with the issuance of a new or revised national security classification executive order.⁶ This classification executive order provides the procedural and substantive legal framework for the classification decisions of the designated subject matter experts who have been granted classification authority by the President.⁷ Exemption 1 provides for protection from disclosure for all national security information that has been properly classified in accordance with the substantive and procedural requirements of the current executive order.⁸ As such, Exemption 1 does not protect information that is merely "classifiable" -- that is, meets the substantive requirements of the current such executive order but has not been actually reviewed and classified under it.⁹ Accordingly, to qualify for Exemption 1 protection, the information must actually satisfy all of the requirements for classification under the executive order.¹⁰

The executive order in effect as of June 2009 is Executive Order 12,958, as amended, which is an amendment of an executive order first issued by President William J. Clinton in

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policy implications" (citing Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980)).

⁵ See Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 24, 1951). But see 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").

⁶ 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); Exec. Order No. 12,958, 3 C.F.R. 333 (1996) (Clinton Administration order).

⁷ 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 (2006) and summarized in *FOIA Post* (posted 4/11/03); see also NARA Classification Directive, 32 C.F.R. § 2001 (2008) (directives issued by NARA's Information Security Oversight Office describing procedures that agencies must follow to classify information pursuant to Executive Order 12,958, as amended).

⁸ See 5 U.S.C. § 552(b)(1).

⁹ See, e.g., Schoenman v. FBI, 575 F. Supp. 2d 136, 151-52 (D.D.C. 2008) (explaining that agencies must follow procedural requirements of national security classification executive order to invoke Exemption 1); Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 8-9 (D.D.C. 2001) (same), aff'd, 334 F.2d 55 (D.C. Cir. 2003).

¹⁰ See Exec. Order No. 12,958, as amended, §§ 1.1-.4; see also NARA Classification Directive, 32 C.F.R. § 2001 (outlining procedural requirements for classification).

1995 and then revised by President George W. Bush on March 25, 2003.¹¹ The provisions of this executive order are discussed below. On May 27, 2009, President Barack Obama issued a memorandum directing the Assistant to the President for National Security Affairs to consult with the relevant Executive Branch departments and agencies and to submit to the President within ninety days recommendations and proposed revisions to Executive Order 12,958, as amended.¹²

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.¹³ The general rule is that 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.¹⁴

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."¹⁵ Only when "a reviewing court contemplates remanding the case to the agency to correct a deficiency in its classification determination is it necessary" to apply the standards of a superseding executive order.¹⁶ It also is important to note that some courts

¹¹ See Exec. Order No. 12,958, as amended; see also, e.g., Larson, 565 F.3d at 863 (applying Executive Order 12,958, as amended); ACLU v. FBI, 429 F. Supp. 2d 179, 188 (D.D.C. 2006) (same); Judicial Watch v. DOJ, 306 F. Supp. 2d 58, 64-65 (D.D.C. 2004) (same).

¹² Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Classified Information and Controlled Unclassified Information, 74 Fed. Reg. 26277 (May 27, 2009) (outlining six topics that shall be considered during revision process).

¹³ See FOIA Update, Vol. XVI, No. 2, at 3, 12 ("OIP Guidance: The Timing of New E.O. Applicability").

¹⁴ See Halpern v. FBI, 181 F.3d 279, 289-90 (2d Cir. 1999); Campbell, 164 F.3d at 29 ("[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."); cf. Summers v. DOJ, 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 to evaluate Exemption 1 withholdings), 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).

¹⁵ King v. DOJ, 830 F.2d 210, 217 (D.C. Cir. 1987).

¹⁶ 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); 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 (continued...)

have permitted agencies, as a matter of discretion, to reexamine their classification decisions under a newly issued or amended executive order in order to take into account "changed international and domestic circumstances."¹⁷

Standard of Review

In an early case that considered Executive Branch classification decisions made pursuant to a classification executive order, the Supreme Court held that records classified under proper procedures were exempt from disclosure per se, without the allowance for any further judicial review or in camera inspection.¹⁸ 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,¹⁹ an accepted doctrine that continues to this day.²⁰ Thereafter, however, 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

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Exemption 1").

¹⁷ Baez v. DOJ, 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 v. DOJ, 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). 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 amended executive order 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).

¹⁸ See EPA v. Mink, 410 U.S. 73, 84 (1973).

¹⁹ Id. at 84, 94.

²⁰ See, e.g., James Madison Project v. CIA, 605 F. Supp. 2d 99, 109 (D.D.C. 2009) (reiterating that court grants deference to agency national security decisions and noting balance required between openness and national security); Miller v. DOJ, 562 F. Supp. 2d 82, 101 (D.D.C. 2008) (noting that courts "generally defer to agency expertise in national security matters"); Makky v. Chertoff, 489 F. Supp. 2d 421, 441 n.23 (D.N.J. 2007) (finding that court is generally "not in a position to second-guess agency decisions related to the segregability of non-exempt information when the information withheld implicates national security concerns").

appropriate.²¹ 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 correctness of agency classification determinations.²²

The Court of Appeals for the District of Columbia Circuit has refined the appropriate standard for judicial review of national security claims under Exemption 1, finding that summary judgment is entirely proper if an agency's affidavits are reasonably specific and there is no evidence of bad faith.²³ This review standard has been adopted by other circuit courts as well.²⁴

²¹ See Pub. L. No. 93-502, 88 Stat. 1561 (1974).

²² See H.R. Rep. No. 93-876, at 7-8 (1974).

²³ See, e.g., Larson v. Dep't of State, 565 F.3d 857, 865 (D.C. Cir. 2009) (holding that if agency affidavit contains "reasonable specificity" and "information logically falls within claimed exemption," then "court should not should not conduct a more detailed inquiry to test the agency's judgment"); 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); Halperin v. CIA, 629 F.2d 144, 147-48 (D.C. Cir. 1980) (finding that summary judgment was appropriate where agency affidavits are sufficient and there is no indication of bad faith); El Badrawi v. DHS, 583 F. Supp. 2d 285, 314 (D.Conn. 2008) (holding that summary judgment is appropriate where agency has provided "detailed and specific information demonstrating both why the material has been kept secret and why such secrecy is allowed by the terms of an existing executive order" (citing N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 510 (S.D.N.Y. 2007))); Schoenman v. FBI, 575 F. Supp. 2d 136, 153 (D.D.C. 2008) (suggesting that Court of Appeals for District of Columbia Circuit rule on reviewing propriety of agency's Exemption 1 assertion is "that little proof or explanation is required beyond a plausible assertion that information is properly classified"); N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 511 (S.D.N.Y. 2007) (concluding that multiple declarations provided by defendants together adequately support summary judgment by describing records withheld and demonstrating that records were properly classified); Makky, 489 F. Supp. 2d at 441 (approving agency declaration containing "specific categories of classified information that were redacted on each document" and demonstrating that disclosure could identify "specific type of intelligence activity directed at a specific target; targets of foreign counterintelligence investigation; and intelligence information about or from a foreign country"); Summers v. DOJ, 517 F. Supp. 2d 231, 238 (D.D.C. 2007) (approving agency declaration containing "an extremely detailed description of each document, its classification level, the location on the document of each deletion made, and a description (to the extent possible) of the content of the deleted material"); Edmonds v. DOJ, 405 F. Supp. 2d 23, 33 (D.D.C. 2005) (explaining that "this court must respect the experience of the agency and stay within the proper limits of the judicial role in FOIA review").

²⁴ 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"); 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
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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.²⁵ In Exemption 1 cases, courts are likely to require that the affidavit be provided by an agency official with direct knowledge of the classification decision.²⁶ Where agency affidavits have been found to be insufficiently detailed, courts have withheld summary judgment in Exemption 1 cases.²⁷ When an affidavit contains sufficient explanation, however,

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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").

²⁵ See El Badrawi, 583 F. Supp. 2d at 314 (noting that agency "must provide detailed and specific information" justifying classification decision); N.Y. Times Co., 499 F. Supp. 2d at 511 (concluding that multiple declarations provided by defendants together adequately describe records withheld and adequately demonstrate that it was properly classified); ACLU v. DOJ, 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 role'" (quoting Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982))).

²⁶ See Hudson v. DOJ, 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. DOT, 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").

²⁷ See 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. DOJ, 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. DOJ, 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

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it is generally accepted that "the court will not conduct a detailed inquiry to decide whether it agrees with the agency's opinions."²⁸

Deference to Agency Expertise

As indicated above, courts generally have heavily deferred to agency expertise in national security cases.²⁹ The Court of Appeals for the District of Columbia Circuit has articulated an expansive standard of deference in national security cases, noting that "little proof or explanation is required beyond a plausible assertion that information is properly

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that they consist of "boilerplate" explanations not "tailored" to particular information being withheld pursuant to Exemption 1); Singh v. FBI, 574 F. Supp. 2d 32, 50 (D.D.C. 2008) (withholding summary judgment in part because defendants failed to justify all exemption claims); 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 summary judgment); Coldiron v. DOJ, 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).

²⁸ 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, 629 F.2d at 148)); 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] affidavit both logically and plausibly suffices").

²⁹ 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. DOJ, 930 F.2d 350, 357 (4th Cir. 1991) (observing that "[w]hat fact . . . may compromise national security is best left to the intelligence experts"); Doherty v. DOJ, 775 F.2d 49, 52 (2d Cir. 1985) (accorded "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"); Azmy v. DOD, 562 F. Supp. 2d 590, 597 (S.D.N.Y. 2008) (reiterating that agencies have "unique insights" in area of national security); ACLU v. DOJ, 429 F. Supp. 2d 179, 188 (D.D.C. 2006) (holding that court must recognize "unique insights and special expertise" of Executive Branch concerning the kind of disclosures that may be harmful).

classified.³⁰ Such deference is based upon the "magnitude of the national security interests and potential risks at stake,"³¹ 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 national security.³² Indeed, courts ordinarily are very reluctant to substitute their judgment in place of the agency's "unique insights"³³ in the areas of national defense and foreign relations.³⁴ This is because courts have recognized that national security is a "uniquely

³⁰ Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007); see Larson v. Dep't of State, 565 F.3d 857, 862 (D.C. Cir. 2009) (noting that court need only examine whether agency's classification decision "appears 'logical' or 'plausible'" (citing Wolf v. CIA, 473 F.3d 370, 374-75 (D.C. Cir. 2007))); James Madison Project v. CIA, 605 F. Supp. 2d 99, 109 (D.D.C. 2009) (commenting that D.C. Circuit rule is "that little proof or explanation is required beyond a plausible assertion that information is properly classified" (citing Morley, 508 F.3d at 1124); Schoenman v. FBI, 575 F. Supp. 2d 136, 153 (D.D.C. 2008) (same); Summers v. DOJ, 517 F. Supp. 2d 231, 238 (D.D.C. 2007) (citing Wolf, 473 F.3d at 374-75, for proposition that court need only determine whether agency's classification decision is "'logical or plausible'").

³¹ Ctr. for Nat'l Sec. Studies v. DOJ, 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, 442 F. Supp. 2d 880, 899-900 (C.D. Cal. 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).

³² Sims, 471 U.S. at 179-80; see also, e.g., Zadvvydas v. Davis, 533 U.S. 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").

³³ Larson, 565 F.3d at 864; see also Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 58 (D.C. Cir. 2003).

³⁴ 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 v. Dep't of State, 984 F.2d 461, 464-65 (D.C. Cir. 1993) (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 v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980))); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 773 (E.D. Pa. 2008) (finding that courts have "neither the expertise nor the qualifications to determine the impact upon national security" and that "court must not substitute its judgment for the agency's regarding national defense or foreign policy implications"); Summers, 517 F. Supp. 2d at 238 (noting that

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executive purview"³⁵ and that "the judiciary is in an extremely poor position to second-guess the executive's judgment" on national security issues.³⁶

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.³⁷ However, the majority of courts have rejected the idea that judicial review is to serve as a quality-control measure to reassure a doubtful requester.³⁸ Further, courts have overwhelmingly rejected the notion that additional judicial

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assessing potential for harm to intelligence source from disclosure "is the duty of the agency, and not the court"); 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); 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"). 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. DOJ, 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) (upholding Exemption 1 excisions after in camera review of certain documents and classified Vaughn affidavit).

³⁵ Ctr. for Nat'l Sec. Studies, 331 F.3d at 927; see also L.A. Times Commc'ns, 442 F. Supp. 2d at 899 (echoing the belief that national security is "a uniquely executive purview" (citing Zadvydas, 533 U.S. at 696)).

³⁶ 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").

³⁷ 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"); Wiener v. FBI, No. 83-1720, slip op. at 3 (C.D. Cal. Sept. 27, 2004) (rejecting FBI's articulation of harm that would result from disclosure of classified information); ACLU v. DOD, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004) (finding that "[m]erely raising national security concerns [cannot] justify unlimited delay," and considering "the public's right to receive information on government activity in a timely manner").

³⁸ 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 (continued...)

review should be triggered by a requester's unsupported allegations of wrongdoing against the government.³⁹

When reviewing the propriety of agency classification determinations, courts have demonstrated deference to agency expertise by according little or no weight to opinions of persons other than the agency classification authority,⁴⁰ including persons who may have previously maintained some knowledge of the subject matter while employed within the Executive Branch.⁴¹

³⁸(...continued)

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).

³⁹ See 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'"); 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).

⁴⁰ See, e.g., 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); 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. 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. DOE, No. 88-CV-7635, 1991 WL 274860, at *1-2 (E.D. Pa. Dec. 18, 1991) (rejecting requester's contention 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").

⁴¹ See, e.g., Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989) (rejecting opinion of former admiral); Gardels v. CIA, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982) (rejecting opinion of former CIA agent); Berman v. CIA, 378 F. Supp. 2d 1209, 1219 (E.D. Cal. 2005) (rejecting opinions of retired member of CIA's Historical Advisory Committee and former Special Assistant to the President of the United States); Rush v. Dep't of State, 748 F. Supp. 1548, 1554 (S.D. Fla. 1990) (rejecting opinion of former ambassador who had personally prepared some of records at issue); Pfeiffer v. CIA, 721 F. Supp. 337, 340-41 (D.D.C. 1989) (rejecting opinion of former CIA staff historian).

In Camera Submissions and Adequate Public Record

Agencies that classify national security information are sometimes unable to explain the basis for the classification decision on the public record without divulging the classified information itself. In these instances, courts have permitted or sometimes required agencies to submit explanatory in camera affidavits in order to protect the national security information that could not be discussed in a public affidavit.⁴² In camera affidavits have also been employed when even acknowledging the existence of records at issue would pose a threat to national security and consequently the agency has used the "Glomar" response to neither confirm nor deny the existence of records.⁴³ If an agency submits an in camera affidavit, however, it is under a duty to "create as complete a public record as is possible" before doing so.⁴⁴ This public record is intended to provide a meaningful and fair opportunity for a plaintiff

⁴² See, e.g., Patterson v. FBI, 893 F.2d 595, 598-99 (3d Cir. 1990) (allowing in camera affidavit in order to supplement public affidavit and describe national security harm); Simmons v. DOJ, 796 F.2d 709, 711 (4th Cir. 1986) (same); Ingle v. DOJ, 698 F.2d 259, 264 (6th Cir. 1983) (same); Salisbury v. United States, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982) (same); Stein v. DOJ, 662 F.2d 1245, 1255-56 (7th Cir. 1981) (same); Robinson v. FBI, No. 06-3359, 2008 WL 2502134, at *2-3 (E.D. Pa. June 20, 2008) (commenting that FBI public affidavits may need to be supplemented with in camera affidavit to fully articulate withholdings for proper review by court); Elec. Frontier Found. v. DOJ, No. 07-00403, slip op. at 11 (D.D.C. Aug. 14, 2007) (noting that agency's filing of ex parte classified affidavit was appropriate, and would likely have been required by court had "agency not fortuitously proffered the classified declaration on its own"); Edmonds v. FBI, 272 F. Supp. 2d 35, 46 (D.D.C. 2003) (approving the use of an in camera affidavit, noting that "extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed"); Pub. Citizen v. Dept of State, 100 F. Supp. 2d 10, 27-28 (D.D.C. 2000) (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., Inc. v. DOD, 905 F. Supp. 19, 22 (D.D.C. 1995) (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)).

⁴³ See Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (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 also Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992) (noting that court accepted in camera affidavits to explain basis for Glomar assertion); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 786-87 (E.D. Pa. 2008) (explaining that "court may examine classified affidavits in camera if the public record is not sufficient to justify the Glomar response"); cf. El Badrawi v. DHS, 583 F. Supp. 2d 285, 315 (D.Conn. 2008) (finding that FBI had not supported its Glomar response with regard to Exemptions 2 and 7(E), and directing it to submit in camera affidavit).

⁴⁴ Phillippi, 546 F.2d at 1013; see also Armstrong v. Executive Office of the President, 97 F.3d 575, 580 (D.C. Cir. 1996) (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. DOJ, 725 F.2d 1455, 1465 (D.C. Cir. 1984))); Patterson, 893 F.2d at 600; Simmons, 796 F.2d at 710; Elec. Frontier Found., No. 07-00403, slip op. at 12 (D.D.C. Aug. 14, 2007) (recognizing
(continued...))

to challenge, and an adequate evidentiary basis for a court to rule on, an agency's invocation of Exemption 1.⁴⁵

Courts have found that counsel for plaintiffs are not entitled to participate in such in camera proceedings.⁴⁶ This was the case even in one unusual situation where plaintiff's counsel had been issued a personnel security clearance for an unrelated purpose.⁴⁷ Many years ago, one court took the unprecedented step of appointing a special master to review and categorize a large volume of classified records.⁴⁸ In other instances involving voluminous records, courts have on occasion ordered agencies to submit samples of the documents at issue for in camera review.⁴⁹

⁴⁴(...continued)

need for full public record to allow operation of adversarial process, but accepting necessity of district court's review of in camera affidavits to protect sensitive national security data); 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").

⁴⁵ See Campbell v. DOJ, 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. DOJ, 830 F.2d 210, 218 (D.C. Cir. 1987))); Coldiron v. DOJ, 310 F. Supp. 2d 44, 49 (D.D.C. 2004) (finding that agency "must provide a basis for a FOIA requester to contest, and the court to decide, the validity of the withholding"); ACLU v. DOJ, 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); 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").

⁴⁶ 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).

⁴⁷ See El Badrawi v. DHS, 596 F. Supp. 2d 389, 400 (D. Conn. 2009) (finding that although plaintiff's counsel maintained personnel security clearance, he did not have a "need to know" the withheld information, and thus failed to satisfy second requirement for access to classified information).

⁴⁸ 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).

⁴⁹ 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).

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.⁵⁰ 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.⁵¹ 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 being withheld."⁵²

⁵⁰ See, e.g., 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); Azmy v. DOD, 562 F. Supp. 2d 590, 598-99 (S.D.N.Y. 2008) (finding that although much may now be known by the public about subject, there has been no indication that this specific information has been disclosed).

⁵¹ 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); Elec. Privacy Info Ctr. v. DOJ, 584 F. Supp. 2d 65, 71 (D.D.C. 2008) (ruling against waiver and rejecting contention that public availability of some information about Terrorist Surveillance Program diminishes government's argument for classification of remaining information); 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).

⁵² Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983); see also Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007) (ruling against waiver because plaintiff can not "point to specific information that was previously released and is now withheld"); 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 v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) (reaffirming that burden is on requester and 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); 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); 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); 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). 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).

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.⁵³ While this yields an especially narrow concept of "waiver" in the national security context, courts have recognized the importance of protecting sensitive national security information through such an approach.⁵⁴ Indeed, this approach comports

⁵³ See, e.g., 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"); 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"); 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"); 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"); Gerstein v. CIA, No. 06-4643, 2008 WL 4415080, at *6 (N.D. Cal. Sept. 26, 2008) (finding that agency is not required to confirm which particular reports of leaked information about satellite capabilities were accurate); Hiken v. DOD, 521 F. Supp. 2d 1047, 1059 (N.D. Cal. 2007) (ruling that agency not required to give "official confirmation" that information in public domain is classified); 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); Wash. Post Co. v. DOD, No. 84-3400, slip op. at 3 (D.D.C. Sept. 22, 1986) (refusing to find official disclosure through abandonment of documents in Iranian desert following tragic and aborted 1980 military mission to rescue American hostages or through government's introduction of them into evidence in espionage trial); Schlesinger v. CIA, 591 F. Supp. 60, 66 (D.D.C. 1984) (rejecting contention that CIA prepublication review of former employees' books and articles serves as an official disclosure); cf. Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 422 (2d Cir. 1989) (commenting that retired senior naval officer who was "no longer serving with an executive branch department cannot continue to disclose official agency policy" and "cannot establish what is agency policy"). 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").

⁵⁴ See Frugone, 169 F.3d at 774 (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. DOJ, 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

(continued...)

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."⁵⁵ (For a discussion of the requirements for such belated classification, see Exemption 1, Executive Order 12,958, as Amended, below.)

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.⁵⁶

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.⁵⁷ The Court of Appeals for the District of Columbia Circuit has 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.⁵⁸ Applying these criteria, the D.C. Circuit reversed the

⁵⁴(...continued)

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").

⁵⁵ Exec. Order No. 12,958, as amended, § 1.7(d).

⁵⁶ See Azmy, 562 F. Supp. 2d at 598-99 (finding that although much may now be known by the public about former detainee, there has been no indication that this specific information has been officially disclosed); Elec. Frontier Found. v. DOJ, 532 F. Supp. 2d 22, 24 (D.D.C. 2008) (holding that newspaper article generally referring to existence of records on subject is not specific enough to waive exemptions); cf. Simmons v. DOJ, 796 F.2d 709, 712 (4th Cir. 1986) (ruling that there had been no "widespread dissemination" of information in question).

⁵⁷ See, e.g., Elec. Privacy Info Ctr., 584 F. Supp. 2d at 71 (rejecting contention that public availability of some information about classified Terrorist Surveillance Program diminishes government's argument for classifying remaining information); 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").

⁵⁸ Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990); see also Morley, 508 F.3d at 1124 (ruling against waiver because plaintiff did not "point to specific information that was previously released and is now withheld"); 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

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lower 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.⁵⁹

In so ruling, the D.C. Circuit did not address the 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.⁶⁰ However, the D.C. Circuit had previously considered this question and had concluded that congressional publications do not constitute "official acknowledgment" for purposes of the FOIA.⁶¹

In a later decision, 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.⁶² 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

⁵⁸(...continued)

"specific information at issue," i.e. the existence of particular records, had been officially acknowledged by the agency during congressional testimony"); 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)); Elec. Frontier Found., 532 F. Supp. 2d at 24 (ruling against waiver because information in public domain is not as specific as information requested). But see Nat'l Sec. Archive, No. 99-1160, slip op. at 15-16 (D.D.C. July 31, 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).

⁵⁹ Fitzgibbon, 911 F.2d at 765-66.

⁶⁰ Id.

⁶¹ 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); 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).

⁶² Pub. Citizen v. Dep't of State, 11 F.3d 198, 199 (D.C. Cir. 1993).

in the documents was sufficiently "different" so as to not "negate" their "confidentiality."⁶³ Before the D.C. Circuit, 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.⁶⁴ 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.⁶⁵ 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."⁶⁶ 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."⁶⁷

The D.C. Circuit reasoned that 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."⁶⁸ Indeed, in an opinion following this D.C. Circuit decision, the 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."⁶⁹

In a case decided nearly a decade later, the D.C. Circuit once again visited the issue of claimed public disclosure of classified information. The district court earlier had rejected the plaintiff's waiver argument because the documents, while accessible, were not maintained

⁶³ Pub. Citizen v. Dep't of State, 787 F. Supp. 12, 13, 15 (D.D.C. 1992).

⁶⁴ Pub. Citizen, 11 F.3d at 201-03.

⁶⁵ Id. at 203.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Bassiouni v. CIA, 392 F.3d 244, 247 (7th Cir. 2004); see also ACLU v. DOD, 584 F. Supp. 2d 19, 25-26 (D.D.C. 2008) (holding that general public comment by agency officials on same topic did not waive Exemption 1 protection for more specific information on this topic); N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 512-14 (S.D.N.Y. 2007) (affirming agency classification of Terrorist Surveillance Program information despite official acknowledgment that program exists). But see Wolf, 473 F.3d at 379-80 (remanding for determination of whether CIA Director's 1948 testimony before Congress, which was found to constitute "official acknowledgment" of "existence" of requested records, had also waived exemption protection for their "contents").

in a public access area and were not likely to have been accessed by a researcher.⁷⁰ 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.⁷¹ Agreeing with this, the D.C. Circuit ruled that the party claiming prior disclosure must point to "specific information in the public domain that appears to duplicate that being withheld,"⁷² to prevent the defendant agency from unrealistically having to bear "the task of proving the negative."⁷³ 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."⁷⁴ (For a further discussion of this issue, see Discretionary Disclosure and Waiver, below.)

Finally, as one court has phrased it, classified information will not be released under the FOIA even to a requester of "unquestioned loyalty."⁷⁵ In another decision concerning this issue, a court specifically held that a government employee who requested information and who also held a current "Top Secret" security clearance was properly 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."⁷⁶

Executive Order 12,958, as Amended

As mentioned above, as of June 2009, Executive Order 12,958, which was amended on March 25, 2003,⁷⁷ sets forth the standards governing national security classification and the mechanisms for declassification. 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

⁷⁰ Pub. Citizen v. Dep't of State, 100 F. Supp. 2d 10, 29 (D.D.C. 2000).

⁷¹ Id. at 28-29.

⁷² Pub. Citizen, 276 F.3d at 645 (quoting Afshar, 702 F.2d at 1129).

⁷³ Id. (quoting Davis v. DOJ, 968 F.2d 1276, 1279 (D.C. Cir. 1992)).

⁷⁴ Id.

⁷⁵ Levine v. DOJ, No. 83-1685, slip op. at 6 (D.D.C. Mar. 30, 1984) (concluding that regardless of a requester's loyalty, the release of documents to him could "open the door to secondary disclosure to others").

⁷⁶ 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); 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. DOJ 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)).

⁷⁷ See Exec. Order No. 12,958, as amended, 68 Fed. Reg. 15,315 (Mar. 28, 2003), reprinted in 50 U.S.C. § 435 note (2006).

untimely disclosure.⁷⁸ Accordingly, under Executive Order 12,958, as amended, 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."⁷⁹ Courts have consistently recognized that an agency's articulation of the threatened harm to national security must always be speculative to some extent and that to require a showing of actual harm would be judicial "overstepping."⁸⁰ Courts have routinely accepted that certain types of information have national security sensitivity. 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."⁸¹

Section 1.4 of Executive Order 12,958, as amended, specifies the types of information that may be considered for classification.⁸² No other types of information may be classified pursuant to the executive order.⁸³ The information categories identified as proper bases for classification in the amended Executive Order 12,958 consist of:

- (1) foreign government information,⁸⁴

⁷⁸ See Exec. Order No. 12,958, as amended (commenting in introductory statement that "our Nation's progress depends on the free flow of information").

⁷⁹ Id. § 1.1(a)(4); see also NARA Classification Directive, 32 C.F.R. § 2001.10(c) (2008) (explaining that ability of agency classifier to identify and describe damage to national security caused by unauthorized disclosure is critical aspect of classification system).

⁸⁰ 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. ACLU v. DOJ, 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))).

⁸¹ Gardels v. CIA, 689 F.2d 1100, 1106 (D.C. Cir. 1982); 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'"); 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").

⁸² See Exec. Order No. 12,958, as amended, § 1.4(a)-(g).

⁸³ See id.

⁸⁴ See id. § 1.4(b); see also Peltier v. FBI, 218 F. App'x 30, 31 (2d Cir. 2007) (holding that disclosure of foreign government information "would breach express promises of (continued...)

(2) vulnerabilities or capabilities of systems, installations, projects, or plans relating to national security;⁸⁵

(3) intelligence activities, sources, or methods;⁸⁶

⁸⁴(...continued)

confidentiality made to a foreign government, on which the provision of the information was expressly contingent"); Miller v. DOJ, 562 F. Supp. 2d 82, 102 (D.D.C. 2008) (finding that disclosure of foreign government information would show that government's cooperation, capabilities and vulnerabilities, and would lead to negative diplomatic consequences and diminished intelligence capabilities); Azmy v. DOD, 562 F. Supp. 2d 590, 600 (S.D.N.Y. 2008) (holding that agency properly classified foreign government information and that disclosure could be expected to "impair DOD's ability to obtain information from foreign governments in the future, who will be less likely to cooperate with the United States if they cannot be confident that the information they provide will remain confidential").

⁸⁵ See Exec. Order No. 12,958, as amended, § 1.4(g); see also Miller 562 F. Supp. 2d at 101 (holding that disclosure of records concerning "noncombatant evacuation operation" of American citizens from foreign nation could harm future attempts to evacuate or protect citizens abroad); Judicial Watch, Inc. v. DOT, 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); 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).

⁸⁶ See Exec. Order No. 12,958, as amended, § 1.4(c); see also Schrecker v. DOJ, 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 Executive 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); Singh v. FBI, 574 F. Supp. 2d 32, 42-43 (D.D.C. 2008) (holding that FBI properly classified "numerical designator, which serves as a singular identifier for an intelligence source" because disclosure could permit hostile intelligence operation to glean source's identity); Schoenman v. FBI, 575 F. Supp. 2d 136, 153, 156 (D.D.C. 2008) (noting that intelligence sources "can be expected to furnish information only when confident that they are protected from retribution," and finding that disclosure of source information "regardless of whether they are active or inactive, alive or deceased, can reasonably be expected to jeopardize' the safety of the source or his or her family"); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 774 (E.D. Pa. 2008) (agreeing that agency had properly classified information received through confidential sources because disclosure of source-provided data could "circumvent current and future investigations of known and suspected terrorists"); Azmy, 562 F. Supp. 2d at 599 (finding that agency properly withheld "intelligence

(continued...)

(4) cryptology;⁸⁷

(5) foreign relations or foreign activities, including confidential sources;⁸⁸

⁸⁶(...continued)

assessments and conclusions" because disclosure would reveal which sources they find credible and which sources they discredit, and how they reach their intelligence conclusions"); Miller, 562 F. Supp. 2d at 105 (finding that FBI properly classified detailed information provided by human intelligence source, and noting that "[i]n certain parts of the world, the consequences of public disclosure to an individual that has served as a U.S. source are often swift and far reaching, from economic reprisals to possible harassment, imprisonment, or even death"); 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"); cf. Schrecker v. DOJ, 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).

⁸⁷ See Exec. Order No. 12,958, as amended, § 1.4(c); see also 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).

⁸⁸ See Exec. Order No. 12,958, as amended, § 1.4(d); see also Peltier, 218 F. App'x at 31 (finding that disclosure would "reveal an intelligence relationship and could threaten the flow of information" between governments); 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); Schoenman, 575 F. Supp. 2d at 153 (holding that intelligence agency properly classified "deliberative descriptions, commentary, and analysis on [foreign] government and defense establishment" because disclosure would damage "working relationship" and lead to less effective foreign intelligence collection); Miller, 562 F. Supp. 2d at 102-04, 107 (finding that declarants had properly demonstrated potential for harm to foreign relations in disclosing information concerning foreign cooperation in plans to evacuate American citizens and an assessment of that foreign government's military and police capabilities); Wheeler v. DOJ, 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

(continued...)

- (6) military plans, weapons, or operations;⁸⁹
- (7) scientific, technological, or economic matters relating to national security;⁹⁰ and
- (8) government programs for safeguarding nuclear materials and facilities.⁹¹

The amendment of Executive Order 12,958 also added a new classification category protecting information concerning "weapons of mass destruction,"⁹² and it further expanded two previously existing categories to include information regarding "defense against transnational

⁸⁸(...continued)

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); Linn v. DOJ, 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). But see Keenan v. DOJ, 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.).

⁸⁹ See Exec. Order No. 12,958, as amended, § 1.4(a); see also 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 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).

⁹⁰ See Exec. Order No. 12,958, as amended, § 1.4(e).

⁹¹ See id. § 1.4(f); see also 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. DOE, 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).

⁹² See Exec. Order No. 12,958, as amended, § 1.4(h).

terrorism.¹⁹³

Executive Order 12,958, as amended, also established a presumption of harm to national security from the release of information provided by or related to foreign governments.⁹⁴

As with prior orders, the amended Executive Order 12,958 contains a number of distinct limitations on classification.⁹⁵ Specifically, information may not be classified in order to:

- (1) conceal violations of law, inefficiency, or administrative error;⁹⁶
- (2) prevent embarrassment to a person, organization, or agency;⁹⁷
- (3) restrain competition;⁹⁸
- (4) prevent or delay the disclosure of information that does not require national security protection;⁹⁹ or
- (5) protect basic scientific research not clearly related to the national security.¹⁰⁰

Additionally, the amendment of Executive Order 12,958 removed the requirement in the original version of the order that agency classification authorities not classify information if

⁹³ See id. § 1.4(e), (g); see also id. § 1.1(a)(4) (incorporating "defense against transnational terrorism" into classification standards).

⁹⁴ See id. § 1.1(c).

⁹⁵ See id. § 1.7.

⁹⁶ See 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).

⁹⁷ See 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. DOJ, 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).

⁹⁸ See Exec. Order No. 12,958, as amended, § 1.7(a)(3).

⁹⁹ See id. § 1.7(a)(4).

¹⁰⁰ See id. § 1.7(b).

there is "significant doubt" about the national security harm.¹⁰¹

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.¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ 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 basis."¹⁰⁶ (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.¹⁰⁷ 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.¹⁰⁸ Additionally, an agency head or designee may authorize an "emergency" disclosure

¹⁰¹ See id.

¹⁰² See id. § 1.7(c).

¹⁰³ Id. § 1.7(c)(1); see also NARA Classification Directive, 32 C.F.R. § 2001.13(a) (2008) (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).

¹⁰⁴ Exec. Order 12,958, as amended, § 1.7(c)(2); see also NARA Classification Directive, 32 C.F.R. § 2001.13(a)(1).

¹⁰⁵ See Exec. Order 12,958, as amended, § 1.7(c)(3); see also NARA Classification Directive, 32 C.F.R. § 2001.13(b).

¹⁰⁶ Exec. Order No. 12,958, as amended, § 1.7(d); see also NARA Classification Directive, 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).

¹⁰⁷ See Exec. Order No. 12,958, as amended, § 1.8.

¹⁰⁸ 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
(continued...)

of information to individuals who are not eligible for access to classified information, as may be necessary under exceptional circumstances "to respond to an imminent threat to life or in defense of the homeland."¹⁰⁹

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.¹¹⁰ In other words, the information has to be more than "classifiable" under the executive order -- it has to be actually classified under the order.¹¹¹ This requirement recognizes that proper classification is actually a review process to identify potential harm to national security.¹¹² Executive Order 12,958, as amended, prescribes the current procedural requirements that agencies must employ.¹¹³ These requirements include such matters as the proper markings to be applied to classified documents,¹¹⁴ as well as the manner in which agencies designate officials to classify information in the first instance.¹¹⁵

Regarding proper national security markings, Executive Order 12,958, as amended,

¹⁰⁸(...continued)

challenges"); NARA Classification Directive, 32 C.F.R. § 2001.14 (describing procedures that agencies must establish in order to consider classification challenges).

¹⁰⁹ See Exec. Order No. 12,958, as amended, § 4.2(b) (providing that an emergency disclosure does not constitute declassification); see also NARA Classification Directive, 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").

¹¹⁰ See, e.g., Schoenman, 575 F. Supp. 2d at 151-52 (holding that agencies asserting Exemption 1 are required to "show both that the information was classified pursuant to the proper procedures, and that the withheld information substantively falls within the scope of [the applicable] Executive Order").

¹¹¹ See, e.g., Exec. Order No. 12,958, as amended, §§ 1.1-.4, 1.6; see also NARA Classification Directive, 32 C.F.R. § 2001.10-.11, .20-.21, .23.

¹¹² 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).

¹¹³ See, e.g., Exec. Order No. 12,958, as amended, §§ 1.5, 1.6, 2.1; see also NARA Classification Directive, 32 C.F.R. § 2001.20-.24.

¹¹⁴ See Exec. Order No. 12,958, as amended, § 1.6; see also Cohen v. FBI, No. 93-1701, 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 Executive Order 12,356).

¹¹⁵ See Exec. Order No. 12,958, as amended, § 1.3.

requires that each classified document be marked with the appropriate classification level,¹¹⁶ the identity of the original classification authority,¹¹⁷ the identity of the agency and office classifying the document,¹¹⁸ as well as with "a concise reason for classification" that cites the applicable classification category or categories.¹¹⁹ It also requires that a date or event for declassification be specified on the document.¹²⁰ In addition, amended Executive Order 12,958 requires agencies to use portion markings to indicate levels of classification within documents,¹²¹ and it advocates the use of classified addenda in cases in which classified information comprises only "a small portion of an otherwise unclassified document."¹²² The Information Security Oversight Office (ISOO) has issued governmentwide guidelines on these marking requirements.¹²³

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.¹²⁴ 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.¹²⁵

¹¹⁶ See id. § 1.6(a)(1); see also id. § 1.2 (authorizing classification at the following levels, and using these descriptive terms only: (1) "Top Secret" level, when disclosure could be expected to cause "exceptionally grave damage" to the national security; (2) "Secret" level, when disclosure could be expected to cause "serious damage" to the national security; and (3) "Confidential" level, when disclosure could be expected to cause "damage" to the national security).

¹¹⁷ See id. § 1.6(a)(2).

¹¹⁸ See id. § 1.6(a)(3).

¹¹⁹ Id. § 1.6(a)(5).

¹²⁰ See id. § 1.6(a)(4).

¹²¹ See id. § 1.6(c).

¹²² Id. § 1.6(g).

¹²³ See NARA Classification Directive, 32 C.F.R. § 2001.20-.24 (providing detailed guidance on identification and marking requirements of amended Executive Order 12,958).

¹²⁴ See Exec. Order No. 12,958, as amended, § 5.3(a)(1); see also NARA Classification Directive, 32 C.F.R. pt. 2001 app. A (bylaws of Interagency Security Classification Appeals Panel).

¹²⁵ 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
(continued...))

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, which holds governmentwide oversight responsibility for classification matters under Executive Order 12,958, as amended, by telephone at (202) 357-5250.¹²⁶

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 remain classified,¹²⁷ and (2) procedures for the declassification of older government information.¹²⁸ The order requires agencies to "attempt to establish a specific date or event for declassification based upon the duration of the national security sensitivity."¹²⁹ The order also limits the duration of classification to no longer than is necessary in order to protect national security.¹³⁰ 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.¹³¹ The classification authority alternatively may determine that the sensitivity of the information justifies classification for a period of twenty-five years.¹³²

The amendment of Executive Order 12,958 also continues the automatic declassification mechanism that was established by the original version of the order in 1995.¹³³ The automatic declassification mechanism applies to information currently classified under any predecessor

¹²⁵(...continued)

maintained by presidential libraries not yet accessible under FOIA).

¹²⁶ See id. § 5.2.

¹²⁷ See 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 (2006).

¹²⁸ See Exec. Order No. 12,958, as amended, § 3.3.

¹²⁹ Id. § 1.5(a).

¹³⁰ See id.; see also NARA Classification Directive, 32 C.F.R. § 2001.12(a)(1) (2008) (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").

¹³¹ See Exec. Order No. 12,958, as amended, § 1.5(b); see also NARA Classification Directive, 32 C.F.R. § 2001.12(a)(1).

¹³² See Exec. Order No. 12,958, as amended, § 1.5(b).

¹³³ Compare Exec. Order No. 12,958, as amended, § 3.3 (current version), with Exec. Order No. 12,958, § 3.4 (original version).

executive order¹³⁴ and is intended to ultimately lead to the creation of a governmentwide declassification database within NARA.¹³⁵ For 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.¹³⁶

As did prior executive orders, amended Executive Order 12,958 provides for a "mandatory declassification review" program.¹³⁷ This mechanism allows any person -- entirely apart from the FOIA context -- to request that an agency review its national security records for declassification.¹³⁸ Unlike under the FOIA, though, such requesters do not have the right to judicial review of the agency's action.¹³⁹ 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.¹⁴⁰ 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.¹⁴¹

For declassification decisions, amended Executive Order 12,958 authorizes agencies to apply a balancing test -- i.e., to determine "whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure."¹⁴² 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

¹³⁴ See Exec. Order No. 12,958, as amended, § 3.3(a).

¹³⁵ See id. § 3.7 (directing Archivist to establish database of information that has been declassified by agencies, and instructing agency heads to cooperate in this governmentwide effort); see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Classified Information and Controlled Unclassified Information, 74 Fed. Reg. 26277 (May 27, 2009) (directing Assistant to the President for National Security Affairs to address, in revisions to Executive Order 12,958, as amended, the creation of a National Declassification Center within NARA).

¹³⁶ See Exec. Order No. 12,958, as amended, § 3.4(a).

¹³⁷ Id. § 3.5.

¹³⁸ See id.

¹³⁹ See 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").

¹⁴⁰ See Exec. Order No. 12,958, as amended, § 3.5(b)(4), (d).

¹⁴¹ See id. § 3.5(a)(3).

¹⁴² Id. § 3.1(b).

judicial review, it is significant that no such provision existed under prior orders.¹⁴³ Although a few courts have attempted to apply the balancing test to the review of classification decisions in litigation,¹⁴⁴ most have held that national security officials are responsible for applying this balancing test at the time of the original classification decision, and that these officials are in the best position to weigh the public interest in disclosure against the threat to national security.¹⁴⁵

Glomar Response and Mosaic Approach

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."¹⁴⁶ The use of this response has been routinely upheld by the courts.¹⁴⁷

¹⁴³ See FOIA Update, Vol. XVI, No. 2, at 11 ("Executive Order Comparison Chart") (providing chart comparing provisions of original version of Executive Order 12,958 with those of predecessor Executive Order 12,356).

¹⁴⁴ See, e.g., L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 902 (C.D. Cal. 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").

¹⁴⁵ See, e.g., ACLU v. DOJ, 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).

¹⁴⁶ 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 (2006); 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).

¹⁴⁷ See Moore v. Bush, 601 F. Supp. 2d 6, 14-15 (D.D.C. 2009) (affirming use of "Glomar" response by National Security Agency to first-party request for surveillance records); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 788-89 (E.D. Pa. 2008) (allowing use of "Glomar" response in national security context by law enforcement component of Department of Treasury); ACLU v. DOD, 406 F. Supp. 2d 330, 333 (D.D.C. 2006) (allowing agency to assert "Glomar" response despite limited disclosure in news reports); Wheeler v. CIA, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (allowing agency to give "Glomar" response to
(continued...)

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 12,958.¹⁴⁸ It is also a concept that has been widely recognized by courts in Exemption 1 cases.¹⁴⁹ Compilations of otherwise unclassified information 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."¹⁵⁰ This "mosaic" approach has been

¹⁴⁷(...continued)

request for records concerning plaintiff's activities as journalist in Cuba during 1960s); Marrera v. DOJ, 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); cf. 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). 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 than revelatory of intelligence sources or methods").

¹⁴⁸ Exec. Order No. 12,958, as amended, § 1.7(e).

¹⁴⁹ See Bassiouni, 392 F.3d at 246 (recognizing properly that "[w]hen a pattern of responses itself reveals classified information, the only way to keep secrets is to maintain silence uniformly"); Edmonds v. DOJ, 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. DOJ, 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); ACLU v. DOJ, 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).

¹⁵⁰ See Exec. Order No. 12,958, as amended, § 1.7(e); see also Billington v. DOJ, 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 (continued...)

consistently endorsed by the courts.¹⁵¹ The Court of Appeals for the District of Columbia 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."¹⁵²

In another decision, 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."¹⁵³ 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."¹⁵⁴ 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.¹⁵⁵

¹⁵⁰(...continued)

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).

¹⁵¹ See, e.g., 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"); Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (explicitly acknowledging "mosaic-like nature of intelligence gathering"); 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); 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"); Loomis v. DOE, 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"), summary affirmance granted, 21 F. App'x 80 (2d Cir. 2001); Nat'l Sec. Archive v. FBI, 759 F. Supp. 872, 877 (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).

¹⁵² 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)).

¹⁵³ ACLU, 321 F. Supp. 2d at 37 (quoting Sims, 471 U.S. at 178).

¹⁵⁴ Id. (quoting Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003)).

¹⁵⁵ 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 v. CIA, 689 F.2d 1100, 1106 (D.C. Cir. 1982))).

Exclusion Considerations

Additionally, agencies should also be aware of the FOIA's "(c)(3) exclusion."¹⁵⁶ 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.¹⁵⁷ (See the discussion of this provision under Exclusions, below.)

¹⁵⁶ 5 U.S.C. § 552(c)(3).

¹⁵⁷ Id.; see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 24-25 (Dec. 1987).