[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5137

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF DEFENSE AND
CENTRAL INTELLIGENCE AGENCY

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT JUDICIAL WATCH, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Cir. R. 28(a)(1), counsel provides the following information as to parties, rulings, and related cases:

(A) Parties and Amici

The following parties, interveners, and amici curiae appeared, or sought to appear, below:

Plaintiff: Judicial Watch, Inc.

Defendant: U.S. Department of Defense

Defendant: Central Intelligence Agency

The following parties, interveners, and amici curiae are before this Court on appeal:

Plaintiff-Appellant: Judicial Watch, Inc.

Defendant-Appellee: U.S. Department of Defense

Defendant-Appellee: Central Intelligence Agency

(B) Ruling under Review

The ruling under review is the Opinion and Order of the United States District Court for the District of Columbia (Boasberg, J.) issued on April 26, 2012. The ruling can be found at Joint Appendix, page 208, and is published as *Judicial*

Watch, Inc. v. U.S. Department of Defense, 2012 U.S. Dist. LEXIS 58537 (D.D.C. 2012).

(C) Related Cases

Judicial Watch, Inc. does not believe that there are any related cases within the meaning of Local R. 28(a)(1)(C).

/s/ Michael Bekesha

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OTHER AUTHORITIES

GLOSSARY OF ABBREVIATIONS

CIA	Central Intelligence Agency
DoD	U.S. Department of Defense
The District Court	The U.S. District Court for the District of Columbia
EO 13526	Executive Order 13526
FOIA	Freedom of Information Act
JA	Joint Appendix
Opinion	Memorandum Opinion of U.S. District Judge James E. Boasberg

JURISDICTIONAL STATEMENT

Jurisdiction in the U.S. District Court for the District of Columbia ("the District Court") was based upon the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), and 28 U.S.C. § 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. This appeal is timely because the District Court entered its final judgment on April 26, 2012 (Joint Appendix ("JA") 237), and pursuant to Fed. R. App. 4(a)(1)(B), a timely notice of appeal was filed on April 26, 2012. JA 238.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the U.S. Department of Defense and the Central Intelligence Agency have satisfied their burden of demonstrating that all 52 unique records were properly withheld under FOIA Exemption 1.

2. Whether the U.S. Department of Defense and the Central Intelligence Agency have satisfied their burden of demonstrating that all 52 unique records were properly withheld under FOIA Exemption 3.

STATUTES AND REGULATIONS

See Addendum.

STATEMENT OF THE CASE

This appeal concerns a routine Freedom of Information Act ("FOIA") case in which the Court must determine whether the government has submitted

sufficient evidence to satisfy its burden of demonstrating that each responsive record was properly withheld under FOIA. In this case, the records sought are 52 video recordings or photographs of Osama bin Laden taken during and/or after the U.S. military operation in Pakistan on or about May 1, 2011. The FOIA exemptions claimed are Exemption 1 and 3. Yet, regardless of the historical significance of the underlying event and the need for a visual record of it, in the end, this case is about whether each of the responsive records fall within one of those FOIA exemptions and whether the government has satisfied its burden in demonstrating such.

Understanding what records are not at issue in the instant matter is essential to determining whether all 52 images are exempt under FOIA. Critically, Plaintiff does not seek any sensitive information such as images of the equipment or tools used during the May 1, 2011 raid. Nor does Plaintiff seek information about the identities of the members of the U.S. Navy SEAL team that carried out the raid, site exploitation tactics, techniques, or procedures used by the team, or methods used by the team or by other U.S. military personnel to identify bin Laden's body or used generally by Defendants to identify persons who have been captured or killed. Nor does Plaintiff seek any information about the CIA's facial recognition capabilities and techniques.

The District Court recognized that not all 52 records pertain to military plans or operations or intelligence activities or methods. In addition, the court specifically noted that not all 52 records reasonably could be expected to result in damage to national security by revealing intelligence activities and methods or classified military methods or equipment. Nevertheless, the District Court ruled that the records were exempt from production *in toto* as they pertained to foreign activities of the United States because they were the product of an "overseas operation." In addition, the court concluded that the release of these records reasonably could be expected to result in damage to national security because the images may inflame tensions among overseas populations, encourage propaganda, or lead to retaliatory attacks.

Both of these findings are unsupported by existing authority. Never before has this Court, or any court for that matter, determined that a record may be withheld because it was a product of an event that occurred outside the United States and that its release may result in it being used as propaganda. In addition, even if this Court were to conclude that the government's legal argument is correct, the government failed to submit sufficient evidence to support its contentions.

Plaintiff does not seek the production of any video recording or photograph that has been properly classified or would cause exceptionally grave harm to the

United States. Like all FOIA cases, Plaintiff only seeks to hold the government to the requirements of the law. It is therefore Plaintiff's contention that at least some of the 52 records were improperly withheld. This Court's precedent does not support the government's withholding of images only because they were the product of an event that occurred outside the United States and their release may be used as propaganda. [1]

STATEMENT OF FACTS

On May 1, 2011, President Obama ordered the now-historic raid on Osama bin Laden's compound in Abbottabad, Pakistan. Memorandum Opinion of U.S. District Court Judge James E. Boasberg ("Opinion"), dated April 26, 2012, at 2 (JA 209). Soon after the President announced the existence and success of the raid, it was widely reported that photographs and video recordings of bin Laden's body had been created. *Id*. at 3 (JA 210).

By letter dated May 2, 2011, Plaintiff submitted its FOIA request to the Department of Defense ("DoD") seeking access to copies of "all photographs

[1] At the end of the day, if the Court were to order the production of the records because they do not fall within one of the nine narrowly interpreted exemptions, the government could ask Congress to enact legislation preventing the release of these particular records. They have done so in the past. Subsequent to the U.S. Court of Appeals for the Second Circuit holding that photographs of detainees of Guantanamo Bay could not be withheld pursuant to Exemption 7, the government asked "some members of the House and Senate to insert language into[the Homeland Security appropriations bill] to make sure the photos stay secret." 155 CONG. REC. H11389 (daily ed. Oct. 15, 2009) (statement of Rep. Slaughter).

and/or video recordings of Osama (Usama) bin Laden taken during and/or after the U.S. military operation in Pakistan on May 1, 2011." Opinion at 4 (JA 211). By letter dated May 4, 2011, Plaintiff submitted a substantively identical FOIA request to the Central Intelligence Agency ("CIA"). *Id*. Because DoD and CIA (collectively "Defendants") failed to make a final determination within the timeframe mandated by statute, Plaintiff filed suit. *Id*. at 4-5 (JA 211-212). After commencement of this litigation, both agencies finished their processing of Plaintiff's FOIA request. *Id*. at 5 (JA 212). DoD informed Plaintiff that it had located no responsive records. *Id*. The CIA, on the other hand, located 52 responsive records. *Id*. These records were eventually described as consisting of the following five general categories of records: (1) images taken inside the compound in Abbottabad, Pakistan, where bin Laden was killed; (2) images taken as bin Laden's body was transported from the Abbottabad compound to the location where he was buried at sea; (3) images depicting the preparation of bin Laden's body for the burial; (4) images of the burial itself; and (5) images taken for purposes of conducting facial recognition analysis of the body in order to confirm that it was bin Laden. *Id*. at 5 (JA 212) (*quoting* Declaration of John Bennett, Director of the National Clandestine Service of the CIA ("Bennett Decl.") at ¶ 10 (JA 22)). The CIA withheld all 52 records in their entirety pursuant to Exemptions 1 and 3. Opinion at 6 (JA 213).

Defendants subsequently moved for summary judgment, asserting that they had satisfied their statutory obligations under FOIA. *Id*. Plaintiff opposed Defendants' motion and simultaneously cross-moved for summary judgment, challenging the adequacy of Defendants' searches as well as the applicability of Defendants' claims of Exemptions 1 and 3. *Id*. On April 26, 2012, the District Court granted Defendants' motion for summary judgment and denied Plaintiff's cross-motion. Order, dated April 26, 2012, at 1 (JA 237). The District Court specifically found that the Defendants satisfied their burdens of establishing that they had conducted adequate searches and that they had withheld material properly pursuant to Exemption 1. Opinion at 14 (JA 221). Because Defendants claimed Exemption 1 over all of the withheld material, the District Court did not address whether Defendants properly withheld material pursuant to Exemption 3. *Id*. Plaintiff only appeals the District Court's determination with respect to Exemptions 1 and 3.

SUMMARY OF THE ARGUMENT

Plaintiff's argument is straightforward and clear. Defendants failed to demonstrate that all 52 records may be properly withheld pursuant to Exemptions 1 and 3.

With respect to Exemption 1, Defendants were required to demonstrate that each record pertains to one of the classification categories contained in Executive

Order 13526 ("EO 13526"), which prescribes a uniform system for classifying information and sets out procedures by which information may be classified, and that public disclosure of the withheld information reasonably could be expected to result in damage to national security. Defendants asserted, and the lower court concluded, that all 52 records pertained to foreign activities of the United States because they were the product of an overseas operation. In addition, Defendants contended, and the court found, that the release of these records could be expected to somehow result in damage to national security because the images might inflame tensions among overseas populations, encourage propaganda, or lead to retaliatory attacks.

These arguments and conclusions are unsupported by evidence or the law. Defendants failed to provide sufficient evidence to demonstrate that all 52 records pertain to "foreign relations or foreign activities of the United States." In addition, EO 13526 does not authorize the withholding of records merely because they may depict an operation that occurred outside the United States. Also, Defendants failed to provide sufficient evidence that the release of all 52 records could reasonably be expected to cause identifiable or describable damage to national security. Moreover, EO 13526 does not authorize the withholding of records merely because their release may result in them being used as propaganda. Finally,

Defendants failed to demonstrate that they properly complied with the classification procedures of EO 13526.

With respect to Exemption 3, Defendants similarly failed to demonstrate that all 52 records related to intelligence gathering. As Defendants have admitted, only some of the records concerned intelligence sources and intelligence methods that are related to the CIA's core function.

Because Defendants failed to demonstrate that all 52 records were properly withheld pursuant to Exemptions 1 and 3, the District Court's decision must be reversed. In addition, Defendants must be ordered to produce all images depicting nothing more than bin Laden's body.

ARGUMENT

I. Standard of Review.

District court decisions on summary judgment motions in FOIA cases are reviewed *de novo*. *Sussman v. United States Marshals Service*, 494 F.3d 1106, 1111-1112 (D.C. Cir. 2007) (*citing Sample v. Bureau of Prisons*, 466 F.3d 1086, 1087 (D.C. Cir. 2006)).

With respect to review of Exemption 1 claims, this Court has held that although substantial weight is given to a government agency's declaration in the context of national security, "deference is not equivalent to acquiescence; the declaration may justify summary judgment only if it is sufficient 'to afford the

FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding.'" *Campbell v. U.S. Department of Justice,* 164 F.3d 20, 30 (D.C. Cir. 1998). In addition, a declaration may be insufficient due to "lack of detail and specificity." *Campbell*, 164 F.3d at 30. In other words, despite the deference accorded to the government, a "declaration must meet certain standards in order to justify a grant of summary judgment." *Id*.

II. Defendants Failed to Demonstrate that All 52 Records Are Properly Withheld Under Exemption 1.

Defendants have withheld all 52 responsive records pursuant to Exemption 1. Exemption 1 protects from disclosure material that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [is] in fact properly classified pursuant to Executive order." 5 U.S.C. § 552(b)(1). The pertinent Executive Order is EO 13526, which "prescribes a uniform system for classifying, safeguarding, and declassifying national security information" and "sets out procedures by which information may be classified." Opinion at 14 (JA 221). To properly invoke Exemption 1, a government agency must "comply with the classification procedures established by EO 13526 and withhold only such material as conforms to EO 13526's substantive criteria for classification." *King v. U.S. Department of Justice*, 830 F.2d 210, 214 (D.C. Cir. 1987). In other words, withheld material

"must be classified in accordance with the procedural criteria of the governing Executive Order as well as its substantive terms." *Lesar v. U.S. Department of Justice*, 636 F.2d 472, 483 (D.C. Cir. 1980). In the instant matter, Defendants failed to demonstrate that they have properly complied with the classification procedures of EO 13526 and that all 52 withheld records conform to EO 13526's substantive criteria for classification.

Plaintiff will first address the issue of conformity to EO 13526's substantive criteria for classification, and, then, address the issue of compliance with the classification procedures of EO 13526.

A. Defendants failed to demonstrate that all 52 records conform to EO 13526's substantive criteria for classification.

To conform to EO 13526's substantive criteria for classification, a government agency must demonstrate that withheld records pertain to one of the classification categories contained in Section 1.4 of EO 13526 ***and*** that public disclosure of the withheld information reasonably could be expected to result in damage to national security. EO 13526, § 1.4; *see also ACLU v. U.S. Department of Defense*, 628 F.3d 612, 623-624 (D.C. Cir. 2011); *Larson v. Department of State*, 565 F.3d 857, 863-864 (D.C. Cir. 2009).

i. Defendants failed to demonstrate that all 52 records pertain to one or more of the classification categories of EO 13526, § 1.4.

EO 13526, § 1.4 requires that classified material pertain to one or more of seven specified categories. Of those seven categories, Defendants asserted that all 52 records pertain to the following three categories:

(a) Military plans, weapons systems, or operations;

(c) Intelligence activities (including covert action), intelligence sources or methods, or cryptology; and

(d) Foreign relations or foreign activities of the United States, including confidential sources.

Bennett Decl. at ¶ 21 (JA 22). Defendants, however, failed to demonstrate that each of the 52 records pertain to one or more of these three categories.

Although Defendants asserted that each of the 52 records pertained to all three of the identified classification categories, in support of its motion for summary judgment, Defendants submitted only one declaration that purportedly demonstrated that all 52 records pertain to military plans, weapons systems, or operations; only one declaration that purportedly demonstrated that some records pertain to intelligence activities (including covert action), intelligence sources or methods, or cryptology; and only one declaration that merely concluded that all 52

records pertain to foreign relations or foreign activities of the United States, including confidential sources.

In support of its motion for summary judgment, Defendants submitted the declaration of the CIA's Director of the National Clandestine Service John Bennett. In his declaration, Director Bennett testified that "the release of ***certain responsive records*** could reveal intelligence activities and methods that were employed during or after the operation." Bennett Decl. at ¶ 28 (JA 32-33) (emphasis added). In other words, Director Bennett only testified that ***some of the records*** pertain to intelligence activities, intelligence sources or methods. He did not describe which records they were. Nor did he describe how many there were. He simply stated that "the release of certain responsive records would reveal information about intelligence methods or activities by providing insight into the manner in which the photographs or video recordings were obtained as well as the purpose, utility, or manner in which the photographs or video recordings could be used by the CIA and the extent or limitations of such capabilities." *Id*. at ¶ 29 (JA 33-34).

Director Bennett then testified that "[b]y way of example, release of post-mortem photographs of [bin Laden] that were used to conduct facial recognition analysis could provide insight into the manner in which such analysis is conducted or the extent or limitation of such analysis." *Id*. (JA 34). However, there were at

least five unique categories of records withheld by Defendants. Only some of the 52 records were used to conduct facial recognition analysis. The other categories include: (1) images taken inside the compound in Abbottabad, Pakistan, where bin Laden was killed; (2) images taken as bin Laden's body was transported from the Abbottabad compound to the location where he was buried at sea; (3) images depicting the preparation of bin Laden's body for the burial; and (4) images of the burial itself. *See id.* at ¶ 11 (JA 22). In other words, Director Bennett described a specific subset of the records that must be withheld; he did not offer a full accounting of each and every record withheld. Director Bennett simply failed to demonstrate how these ***other records*** would reveal classified intelligence methods.

Similarly, Director Bennett testified that the "[r]elease of ***other images*** could similarly reveal the types of equipment or other tools that were utilized (or not) during the execution of a highly sensitive intelligence operation." *Id*. at ¶ 29 (JA 34) (emphasis added). As stated above, Plaintiff only sought photographs and video recordings of bin Laden. Plaintiff did not seek all photographs and video recordings taken during or after the raid.[2] Therefore, it is not plausible that each

[2] To the extent that the records contain visuals of equipment and other tools, Defendants failed to demonstrate that those portions of those records cannot be segregated from the visual of bin Laden's body. *Sussman*, 494 F.3d at 1116 (A government agency "must demonstrate that, even where particular exemptions properly apply, all non-exempt material has been segregated and disclosed."); *see also Summers v. U.S. Department of Justice*, 140 F.3d 1077, 1081 (D.C. Cir. 1998) ("A segregability determination is absolutely essential to any FOIA decision.").

and every one of the 52 records contain visuals of equipment and other tools.[3] Because Director Bennett used the inherently imprecise phrase "certain responsive records" and "other images" to describe the records withheld because they could reveal equipment or other tools, he failed to provide sufficient evidence to satisfy Defendants' burden. *Campbell*, 164 F.3d at 30.

To support their claim that each and every record pertains to military plans, weapons systems, or operations, Defendants also submitted the Declaration of William H. McRaven, Commander of the United States Special Operations Command. Admiral McRaven testified that his declaration supplements the declaration of Director Bennett "to explain further how the responsive records contain sensitive information that pertains to military plans, weapons systems, or operations under Section 1.4(a)." Declaration of William H. McRaven ("McRaven Decl.") at ¶ 2 (JA 55). Under seal, Admiral McRaven purportedly testified that the release of all 52 records would "make the special unit that participated in this operation and its members more readily identifiable in the future, reveal classified Sensitive Site Exploitation Tactics, Techniques, and Procedures and other classified information specific to special operations, and reveal the methods that special operations forces use for identification of captured and killed personnel."

Mr. Bennett did no more than provide a conclusory statement that segregability cannot be done. Bennett Decl. at ¶ 36 (JA 38).

[3] *See* footnote 2 above.

Id. at ¶ 3 (JA 55-56). This assertion is largely beside the point as Plaintiff only sought photographs and video recordings of bin Laden, not records of the tactics, techniques, procedures, or personnel.[4] In addition, Admiral McRaven did not address the five categories of records and demonstrate how each one would pertain to military plans, weapons, or operations.[5] Even if some deference is given to the redacted testimony of Admiral McRaven, Defendants, at most, only satisfied their burden with respect to those records that actually pertain to military plans, weapons systems, or operations.

However, Defendants failed to demonstrate that the photographs that were taken as bin Laden's body was transported from the compound in Pakistan to the location where he was buried at sea, including any taken at Bagram Airbase, as well as the photographs that depict the preparation of bin Laden's body for the burial and the burial itself, pertain to military plans, weapons systems, or operations. In addition, Admiral McRaven also did not testify that any of the 52

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[4] Also, Admiral McRaven failed to address whether any portions of the records can be segregated. *Sussman*, 494 F.3d at 1116. Therefore, Defendants failed to provide any evidence that visuals of tactics, techniques, procedures, or personnel cannot be segregated from the visual of bin Laden's body.

[5] Besides those photographs taken for facial recognition purposes, the other categories are photographs that were taken inside the compound in Abbottabad, Pakistan, where bin Laden was killed; were taken as bin Laden's body was transported from the Abbottabad compound to the location where he was buried at sea; depict the preparation of bin Laden's body for the burial; and are of the burial itself.

records pertain to intelligence activities (including covert action), intelligence sources or methods, or cryptology and foreign relations or foreign activities of the United States, including confidential sources. Because Admiral McRaven failed to provide sufficient evidence as to which records were withheld because they pertain to military plans, weapons systems, or operations, Defendants failed to satisfy their burden of demonstrating that each and every record must be withheld. *Campbell*, 164 F.3d at 30.

Finally, Defendants asserted that the Declaration of Robert B. Neller, Lieutenant General in the U.S. Marine Corps, also provided evidence that the responsive records pertain to military plans, weapons systems, or operations. However, the declaration did no such thing. The declaration only addressed whether General Neller believed that the release of the responsive records reasonably could be expected to harm national security. *See generally* Declaration of Robert B. Neller ("Neller Decl.") (JA 63-70). Similarly, the declaration did not present any evidence that the 52 records pertain to intelligence activities (including covert action), intelligence sources or methods, or cryptology. Therefore, General Neller's testimony did nothing to satisfy Defendants' burden that the records pertain to one or more of the classification categories of EO 13526, § 1.4.

Significantly, the District Court stated that Plaintiff

> may be correct that the CIA has not demonstrated that the burial photos, for example, pertain to "intelligence methods." EO 13526

> §1.4(c). It may be similarly correct that the agency has not shown that the photographs or videos taken as the body was transported to the *USS Vinson* pertain to "military plans . . . or operations." *Id*. at 1.4(a).

Opinion at 22 (JA 229). In other words, the court recognized that Defendants failed to demonstrate that all 52 records pertain to (a) military plans, weapons systems, or operations; or (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology. Defendants only demonstrated that ***some*** of the 52 records fall into one of those two classification categories.

Besides those two classification categories, Defendants also asserted that all 52 records pertain to foreign relations or foreign activities of the United States, including confidential sources. However, Defendants essentially presented no evidence in support of their assertion. Defendants' sole evidence was in the form of a conclusory statement tacked on to an otherwise incongruous sentence. Director Bennett testified, "In this case, all of the responsive records are the product of a highly sensitive, overseas operation that was conducted under the direction of the CIA; accordingly, I have determined that all of the records pertain to intelligence activities and/or methods *as well as the foreign relations and foreign activities of the United States*." Bennett Decl. at ¶ 21 (JA 22). Defendants did not demonstrate how the records pertain to "foreign relations." Nor did they demonstrate how the records pertain to "foreign activities." The lower court

simply concluded that these records must pertain to "foreign activities" because the records were the product of an "overseas operation." Opinion at 22 (JA 229).

Although substantial weight is given to a government agency's declaration in the context of national security, "deference is not equivalent to acquiescence." *Campbell,* 164 F.3d at 30. In this instance, Defendants failed to provide sufficient specificity and the lower court improperly gave substantial weight to nothing more than a conclusory statement. *Allen v. Central Intelligence Agency*, 636 F.2d 1287, 1291-92 (D.C. Cir. 1980).

Even if Defendants submitted sufficient evidence, the District Court applied an imprecise standard. The court found the requirement that the records pertain to "foreign activities" is not "very demanding." Opinion at 23 (JA 230). This, however, does not appear to be supported by precedent. In fact, there appears to be no precedent of this Court, or any court for that matter, that permits the withholding of records merely because they were the product of an overseas operation.

The typical case addresses the classification in its entirety – pertaining to "foreign relations or foreign activities." *See e.g. Goldberg v. U.S. Department of State*, 818 F.2d 71, 78 (D.C. Cir. 1987) ("Information concerning the relationship between the United States mission and the host country, and the mission's priorities for dealing with difficulties they may be having, or with unsettled differences

concerning diplomatic reciprocity matters, addresses 'foreign relations or foreign activities of the United States,' Executive Order 13526, § 1.3(a)(5).''). In other words, the release of the information could reasonably impair relations between the United States and a foreign government. *Krikorian v. Department of State*, 984 F.2d 461, 465 (D.C. Cir. 1993); *see also Hetzler v. Record/Information Dissemination Section, Federal Bureau of Investigation*, 2012 U.S. Dist. LEXIS 126870, 17-18 (W.D.N.Y. Sept. 6, 2012). However, in this instance, Defendants submit no other evidence of how the records pertain to "foreign activities" except that they were the product of an "overseas operation."

In sum, Defendants failed to demonstrate that all records pertain to (a) Military plans, weapons systems, or operations; (c) Intelligence activities (including covert action), intelligence sources or methods, or cryptology; and (d) Foreign relations or foreign activities of the United States. In fact, the District Court recognized that some of the records only purportedly pertain to "foreign activities of the United States." However, Defendants failed to submit sufficient evidence to support the finding that all records were properly withheld as pertaining to "foreign activities." For this reason, the Court, at a minimum, should reverse the District Court's judgment and order Defendants to produce all records that purportedly pertain only to "foreign activities."

ii. Defendants failed to demonstrate that all 52 records reasonably could be expected to cause identifiable or describable "exceptionally grave damage" to national security.

Even if Defendants had shown – which they did not – that each and every record properly pertains to one or more classification categories, Defendants failed to demonstrate that the disclosure of all 52 records "could reasonably be expected to cause identifiable or describable damage to national security." EO 13526, § 1.4. In addition, because the records purportedly have been classified as "TOP SECRET," the type of identifiable or describable damage must be "exceptionally grave." EO 13526, § 1.2. In an attempt to support their claim that the release of each and every record reasonably could be expected to cause exceptionally grave damage to national security, Defendants relied on the declaration of Director Bennett, which described two types of records: (1) Harm to National Security from Release of Images of bin Laden and (2) Harm to National Security from Release of Information pertaining to CIA Intelligence Activities and Methods. *See* Bennett Decl. at ¶¶ 23-30 (JA 29-35)

Director Bennett asserted that "the release of [] graphic photographs and other images of [bin Laden's] corpse reasonably could be expected to inflame tensions among overseas populations that include al-Qa'ida members or sympathizers, encourage propaganda by various terrorist groups or other entities hostile to the United States, or lead to retaliatory attacks against the United States

homeland or United States citizens, officials, or other government personnel traveling or living abroad."[6] Bennett. Decl. at ¶ 23 (JA 29). He also stated that this was not mere conjecture because "since [bin Laden's] death, al-Qa'ida has already attempted to use the circumstances surrounding his death and burial as propaganda." *Id*. at ¶ 25 (JA 30-31). In addition, Defendants relied on General Neller's declaration as evidence that the release of all 52 photographs could be expected to cause exceptionally grave damage to national security. General Neller testified that because other events or incidents in the past have been used as propaganda and have incited violence, the release of each and every record would do the same. Neller Decl. at ¶¶ 5-6 (JA 66-67).

In essence, Defendants generally asserted that there are some individuals who do not like the United States. Director Bennett and General Neller did no more than paint a broad picture of this hatred. Based on their non-specific declarations, regardless of whether the photographs and video recordings of bin Laden are released, groups like al-Qa'ida may create propaganda, recruit new members, raise funds, inflame tensions, and even incite violence overseas. In fact,

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[6] Although Director Bennett purportedly testified that all records reasonably could be expected to inflame tensions, his testimony is ambiguous at best. Director Bennett referred to "graphic photographs and other images of [bin Laden's] corpse." It is unclear whether all non-graphic photographs would be "other images." As Plaintiff demonstrated above, there are at least five categories of records, which include images depicting the preparation of bin Laden's body for the burial and images of the burial itself. It is not apparent why these photographs reasonably could be expected to inflame tensions as well.

Director Bennett testified that even without the release of the records, such actions occurred. Bennett Decl. at ¶ 25 (JA 30-31) ("al-Qa'ida has already attempted to use the circumstances surrounding his death and burial as propaganda").

Defendants failed to demonstrate how the release of each and every record could reasonably be expected to cause identifiable and describable exceptionally grave harm to national security beyond the potential harm that already exists without the release of the responsive records. Moreover, as one federal court has recognized:

> Our nation has been at war with terrorists since their September 11, 2001 suicide crashes into the World Trade Center, the Pentagon, and a field in Shanksville, Pennsylvania, killing thousands and wounding our nation in ways that we still cannot fully recount-indeed, we were at war with terrorists since well before that event. American soldiers are fighting and dying daily in Afghanistan and Iraq. The morale of our nation is a vital concern and directly affects the welfare of our soldiers. How then to deal with the commands of FOIA and the strong policy it reflects "to promote honest and open government," "to assure the existence of an informed citizenry," and "to hold the governors accountable to the governed"? Of course, national security and the safety and integrity of our soldiers, military and intelligence operations are not to be compromised, but is our nation better preserved by trying to squelch relevant documents that otherwise would be produced for fear of retaliation by an enemy that needs no pretext to attack?
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> Our nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command. Indeed, the freedoms that we champion are as important to our success in Iraq and Afghanistan as the guns and missiles with which our troops are armed.

> The terrorists in Iraq and Afghanistan do not need pretexts for their barbarism; they have proven to be aggressive and pernicious in their choice of targets and tactics. They have driven exploding trucks into groups of children at play and men seeking work; they have attacked doctors, lawyers, teachers, judges and legislators as easily as soldiers. Their pretexts for carrying out violence are patent hypocrisies, clearly recognized as such except by those who would blur the clarity of their own vision. With great respect to the concerns expressed by General Myers, my task is not to defer to our worst fears, but to interpret and apply the law, in this case, the Freedom of Information Act, which advances values important to our society, transparency and accountability in government.

ACLU v. U.S. Department of Defense, 389 F. Supp. 2d 547, 575-76 (S.D.N.Y. 2005). Al-Qa'ida and other groups do not need a specific reason to incite violence. They will simply do so. Since May 1, 2011, any of the following circumstances could have – and probably has to some extent – caused groups like al-Qa'ida to create propaganda, recruit new members, raise funds, inflame tension, and incite violence: President Obama announcing to the world that U.S. forces killed Osama bin laden; President Obama attending a nationally televised basketball game on the U.S.S. Carl Vinson, the same aircraft carrier that buried bin Laden's body at sea;[7]

[7] Jennifer Epstein, *Obamas All Aboard for Basketball*, Politico.com (November 11, 2011), attached as Exhibit N to the Declaration of Michael Bekesha ("Bekesha Decl.") (JA 178-180).

the killing of senior al-Qa'ida leader Anwar al-Awlaki by a U.S. Predator drone;[8] the killing of 46 Pakistani soldiers by NATO forces;[9] and the use of drones by U.S. military and intelligence personnel to conduct surveillance without detection.[10] Groups may use the requested records for propaganda, but their use would not be exclusive and any future harm cannot and could not be directly identified to a particular source. In other words, Defendants failed to present any "identifiable" or "describable" evidence that the release of any of the 52 records would cause exceptionally grave damage to national security.

Defendants' assertion is, thus, speculative at best. Director Bennett and General Neller apparently believed that exceptionally grave damage to national security may occur because it has in the past. Yet, they presented no specific evidence that the release of these particular records would cause exceptionally grave harm to national security that does not already exist. Nor did they demonstrate that they personally have the expertise or qualifications to make such

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[8] *Islamist Cleric Anwar al-Awlaki Killed in Yemen*, BBC News Middle East (September 30, 2011), attached as Exhibit O to Bekesha Decl. (JA 181-185).

[9] Haris Anwar, *U.S. Withdraws Last Forces From Airbase Following Deaths in Pakistani Army*, Bloomberg (December 12, 2011), attached as Exhibit P to Bekesha Decl. (JA 186-188).

[10] Thomas Erdbrink, *Iran Demands U.S Apology for Drone Flight*, The Washington Post (December 13, 2011), attached as Exhibit Q to Bekesha Decl. (JA 189-192).

a determination. As Director Bennett and General Neller both testified to and another federal court recognized (*ACLU*, 389 F. Supp. 2d at 575-76), al-Qa'ida and similar terrorist groups do not need a specific reason to hate America. They simply do. Whether a specific incident or event will be used as a justification for violence is nothing more than speculation. For this reason alone, the District Court's belief that Plaintiff sought for the court to "substitute its own judgment about the national-security risks inherent in releasing these records for that of the executive-branch officials who determined that they should be released" (Opinion at 2 (JA 209)) is mistaken. Plaintiff did not ask the court to substitute its judgment for that of Defendants. Plaintiffs simply demonstrated that Defendants failed to provide sufficient evidence to support their claim. *Campbell,* 164 F.3d at 30.

Also of notable relevance, other graphic, post-mortem photographs of notable figures have been released in similar circumstances in the past, without any claim of harm to national security, much less an "exceptionally grave" harm. For example, on July 24, 2003, in the midst of the war in Iraq, the U.S. Department of Defense released graphic photographs of the deceased sons of Saddam Hussein, Uday and Qusay. *See Uday, Qusay Pictures Released*, FoxNews.com (July 25, 2003), attached as Exhibit R to Bekesha Decl. (with copy of graphic photographs) (JA 193-198). Similarly, the Department of the Army released a gruesome, post-mortem photograph of Abu Musab al-Zarqawi, the Iraqi insurgent leader. *See*

Philip Kennicott, *A Chilling Portrait, Unsuitably Framed*, The Washington Post (June 9, 2006), attached as Exhibit S to Bekesha Decl. (with copy of graphic photograph) (JA 199-202). In fact, the photograph was displayed at a press conference in a gold frame. *Id*. Defendants did not present any evidence that the release of these photographs resulted in "exceptionally grave" harm to national security. [11]

In sum, Defendants failed to demonstrate that the release of all 52 records would cause anything more than speculative harm to national security. Under EO 13526, the potential harm cannot be speculative; it must be identifiable and describable. Similarly, in a memorandum to all agencies, President Obama instructed that "the Government should not keep information confidential merely . . . because of speculative or abstract fears." Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, *Freedom of Information Act* (Jan. 21, 2009).

Even if Defendants provided "identifiable" or "describable" evidence that the release of each and every record would cause exceptionally grave damage to national security, Defendants' position is unprecedented. This Court has never

[11] Director Bennett only testified that "foreign editorials criticized the release" of the photographs of Abu Musab al-Zarqawi. Bennett Decl. at ¶ 26 (JA 31-32). That may be bad public relations, but it clearly is not exceptionally grave damage to national security. Director Bennett did not discuss the photographs of Uday and Qusay Hussein.

held that Exemption 1 properly allows a government agency to withhold material that may inflame tensions among overseas populations, encourage propaganda, or lead to retaliatory attacks. In fact, until the lower court's decision, no court had made such a decision. In *ACLU*, the government identified five reasons why the disclosure of the withheld information might harm national security. *ACLU*, 628 F.3d at 624. The defendants argued that the release of the requested records would reveal the CIA's needs, priorities, and capabilities; degrade the CIA's ability to effectively question terrorist detainees; provide terrorists with insight into the CIA's interrogation techniques, strategies, and methods; damage the CIA's relations with foreign governments; and provide al Qaeda with material for propaganda. *Id*. The plaintiff challenged the defendants' assertion that national security would be harmed by providing material for propaganda. This Court, however, did not decide whether that was a proper justification because the defendants "identified four other potential harms that the government argues also justify withholding the information under Exemption 1." *Id*.

Other decisions of this Court also highlight the fact that Defendants' assertion is unjustified. In *Miller v. Casey*, 730 F.2d 773 (D.C. Cir. 1984), at issue was "information concerning alleged efforts by the United States and other countries to infiltrate intelligence agents and potential guerrillas into Albania during the period 1945-53." *Id.* at 774. The Court held that the confirmation of a

covert intelligence mission reasonably could be expected to: (1) prevent foreign countries from participating in future covert missions; (2) hamper future relations with Albania; (3) permit hostile nations to piece together a catalog of U.S. covert missions; (4) enable the Soviet Union to ascertain the reliability of its double agent; (5) jeopardize sources and sympathizers still within Albania; (6) hamper future recruitment of sources; and (7) reveal the particular intelligence method allegedly used in the mission. *Id*. at 775-776. Release of images of bin Laden's body – particularly those images showing the body cleaned and prepared for burial and being buried at sea – would not reveal any previously unknown covert intelligence missions. Defendants have freely and repeatedly acknowledged that the May 1, 2011 raid took place, that bin Laden suffered a fatal bullet wound to his head, and that his body was washed in accordance with Islamic custom and buried at sea. Bennett Decl. at ¶ 11 (JA 22); Bekesha Decl. at Exhibit B (JA 78-86).

Similarly, in *Afshar v. Department of State*, 702 F.2d 1125 (D.C. Cir. 1983), at issue were records that would have confirmed or denied a covert relationship between intelligence officials in the United States and their counterparts in Iran. The Court concluded that the release of the requested records would reveal the existence of and details concerning activities that had not been officially acknowledged. In that instance, the government asserted and the Court agreed that a national security concern existed because "such intelligence relationships are

conducted on the understanding of absolute confidentiality, so that their official acknowledgment would jeopardize all existing and future cooperative relationships and would strain or disrupt United States relations with other countries." *Id*. at 1129. Obviously, the release of the images of bin Laden is different. It is undisputed that many aspects of the raid itself and the subsequent documenting of its success have been officially acknowledged. Therefore, in contrast to the information at issue in *Afshar*, the release of the records in the instant matter would provide no more than visual images of facts that have already been officially acknowledged.

Nor do images of bin Laden – especially those of his body being cleaned and prepared for burial or actually being buried at sea – present the typical scenario in which courts defer to agencies' assessments of harm to national security. *See ACLU*, 628 F.3d at 623-625. This Court is fully capable of reaching its own determination about the logic and plausibility of Defendants' assertions of harm, taking into account not only Defendants' declarations, but also the substantial information that Defendants have already released to the world about the May 1, 2011 raid, the death of bin Laden, and his burial at sea.

As stated above, Defendants asserted the propaganda justification for all 52 records. Yet, unlike the defendants' assertion in *ACLU*, Defendants did not

identify other potential harms to justify the withholding of each and every record. Significantly, the District Court agreed

> with Plaintiff that some of the declarants' testimony, by their own admission, applies only to certain of the fifty-two records at issue. For example, the risk of exposing military methods and equipment that McRaven describes and the risk of revealing intelligence techniques that Bennett explains only relates to some of the records in question. . . . The military- and intelligence-related risks, accordingly, cannot corroborate the CIA's claim that *each* of the fifty-two responsive records is properly classified.

Opinion at 25-26 (JA 232-233). Therefore, for some records, the only justification for withholding is that their release may inflame tensions among overseas populations, encourage propaganda, or lead to retaliatory attacks. For this reason, the Court, at a minimum, should reverse the District Court's judgment and order Defendants to produce all records that were withheld only because they may be used as propaganda.

B. Defendants failed to demonstrate that they complied with the classification procedures of EO 13526.

It is of no less import for Defendants to demonstrate that the withheld records were classified in accordance with the procedural criteria of EO 13526 for classification. *Lesar*, 636 F.2d at 483; *see also Schoenman v. Federal Bureau of Investigation*, 575 F. Supp. 2d 136, 152 (D.D.C. 2008) (Whether a government agency has "compli[ed] with the procedural requirements of [the governing Executive Order] is of great importance."); *Washington Post v. U.S. Department of*

Defense, 766 F. Supp. 1, 7 (D.D.C. 1991) ("In the first place, in addition to showing that the agency's classification decisions meet the substantive criteria of [the governing Executive Order], [a government agency] must also demonstrate that its determinations have satisfied the order's procedural criteria."). In addition, an agency may not rely on declarations that are conclusory, merely recite statutory standards, or are vague or sweeping. *Allen,* 636 F.2d at 1291-92 (rejecting affidavits that "indicate[d] neither the identity of the original classifier nor the date or event for declassification or review").

Contrary to this established precedent, the District Court found that "any possible procedural errors plainly do not warrant release." Opinion at 20 (JA 227). However, this Court held differently in a similar situation. In *Allen*, the Court held that there was no basis to conclude that the procedural requirements of the governing Executive Order had been satisfied because the two affidavits submitted by the CIA "indicate neither the 'identity of the original classifier' nor 'the date or event for declassification or review.'" *Allen,* 636 F.2d at 1291-92. The Court therefore remanded the case to the district court for additional proceedings. *Id*. at 1300.

In support of its motion for summary judgment, Defendants relied on Director Bennett's declaration to support their claim that Defendants have satisfied EO 13526's procedural criteria. In opposition, Plaintiff demonstrated the

inadequacy of Defendants' submission. Director Bennett failed to identify who made the original classification decision, when the original classification decision was made, the date or event on which the records will be declassified, and whether the records were properly identified and marked. Opinion at 14 (JA 221). Subsequently, Defendants submitted the declaration of National Clandestine Service Information Officer Elizabeth Anne Culver to cure any defect. *Id*. at 15 (JA 222). Although Ms. Culver's declaration clarified a few points, her declaration does not address the operative event – the original classification decision.

Prior to the submission of Ms. Culver's declaration, Defendants had not raised the existence of a derivative classification decision. Although Director Bennett did not testify to the specific circumstances concerning the original classification decision, he testified to original classification in general. Yet, it was unclear why Director Bennett did not identify who made the original classification decision, when the original classification decision was made, the date or event on which the records will be declassified, and whether the records were properly identified and marked. Upon reading Ms. Culver's declaration, the reason became apparent. Ms. Culver's testimony made clear that the classification review conducted by Director Bennett was limited to a review of the derivative classification decision. Declaration of Elizabeth Anne Culver, Information Review Officer, National Clandestine Service, Central Intelligence Agency ("Culver

Decl.") at ¶ 8 (JA 206-207). Similarly, Director Bennett did not testify to whether the records were properly identified and marked. Ms. Culver clarified this omission by testifying to the fact that that when Director Bennett reviewed the records, the records did not contain the "markings" required by Executive Order 15326 for both original classification determinations and for derivative classification determinations. *See* Executive Order 13526, §§ 1.6 and 2.1(b). Ms. Culver testified, "At the time of Mr. Bennett's declaration, these records were marked 'TOP SECRET' . . . ." Culver Decl. at ¶ 7 (JA 205-206). She continued, "Since then, the CIA has, out of an abundance of caution, take additional steps to ensure that each of these records contains all of the markings required by the Executive Order . . . ." *Id*. In other words, Defendants did not even attempt to comply with the "marking" requirements of Executive Order 13526 until at some point after September 26, 2011, nearly five months after Plaintiff served its FOIA requests.

Although Ms. Culver clarifies which classification decision Mr. Bennett reviewed and that the required markings were placed on the records after-the-fact, Ms. Culver does not testify to any of the other procedural requirements of the original classification. She only testified to the derivative classification. Culver Decl. at ¶ 8 (JA 206-207) (The CIA "derivatively classified" the 52 unique records identified as being responsive to Plaintiff's FOIA only "after the CIA received

these records."). This, however, is insufficient to satisfy Defendants' burden. A derivative classification must observe and respect the original classification. EO 13526, § 2.1(b)(2) (An official who derivatively classifies information is required to "observe and respect original classification decisions."). Therefore, to determine whether records were properly withheld under FOIA Exemption 1, the operative event is the original classification for at least two reasons.

First, EO 13526 requires that "an original classification authority is classifying the information" and that "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to national security." EO 13526, § 1. Ms. Culver did not testify to who purportedly served as the "original classification authority" for each of the records. Nor did she testify to whether this person determined that the unauthorized disclosure of these records "reasonably could be expected to result in damage to national security," or that he or she satisfied the numerous other requirements of EO 13526 in originally classifying the records.

Second, as stated above, EO 13526 contains additional procedural requirements when a FOIA request has been made for records before the records have been classified. Unclassified records requested under FOIA may subsequently be classified "only if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal

participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order." EO 13526, § 1.7(d). Similar to Director Bennett's declaration, Ms. Culver's declaration did not state when either the original or derivative classification decisions were made. Defendants therefore only presented evidence that as of September 26, 2011, the records were properly classified. Yet, the date of original classification is of much import. Since Plaintiff sent its FOIA request on May 2, 2011, it is unclear whether the records were originally classified before May 2, 2011 or after May 2, 2011 and prior to September 26, 2011. Defendants simply failed to present any evidence as to when the original classification occurred. In addition, if the records were classified after a FOIA request was received, Defendants failed to demonstrate that the 52 records were classified ***on a document-by-document basis***. Also, as stated above, Defendants failed to present any evidence of who classified the records. Therefore, Defendants also failed to demonstrate whether the records were classified ***with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order.***

In sum, Defendants failed to satisfy their burden of demonstrating that they complied with the classification procedures of EO 13526. Although Ms. Culver's testimony fleshed out some additional information, details concerning the two most

important aspects of the original classification remain unknown. Defendants did not provide any evidence as to who conducted the original classification and when the original classification occurred. Nor did they demonstrate that the original classification followed EO 13526's procedural requirements. In fact, Defendants failed to provide any evidence to demonstrate that an original classification even occurred. Because derivative classification can only "observe and respect the original classification," contrary to the view of the district court, a derivative classification cannot cure procedural defects in the original classification. Opinion at 16 (JA 223).

In the instant matter, Defendants failed to demonstrate that they satisfied the procedural requirements of EO 13526. They did not provide any evidence of who made the original classification decision, whether that individual determined that the unauthorized disclosure of the information reasonably could be expected to result in damage to national security, or whether the original classification occurred before or after receipt of Plaintiff's FOIA. For this reason alone, the lower court's decision should be reversed, and Defendants should be ordered to produce all responsive records that were not properly classified pursuant to the procedural requirements of EO 13526.

III. Defendants Fail to Demonstrate that All 52 Records Are Properly Withheld under Exemption 3.

As stated above, because Defendants claimed Exemption 1 over all of the withheld material, the District Court did not address whether Defendants properly withheld material pursuant to Exemption 3. Opinion at 14. However, Exemption 3 only permits a government agency to withhold material "specifically exempted from disclosure by certain statutes." 5 U.S.C. § 552(b)(3). In the instant matter, Defendants relied on 50 U.S.C. § 403-1(i) and 50 U.S.C. § 403g. Section 403-1(i) charges the Director of National Intelligence with protecting intelligence sources and methods from unauthorized disclosure, and Section 403g authorizes the CIA to withhold intelligence sources and intelligence methods that are related to the CIA's core function. *James Madison Project v. Central Intelligence Agency*, 605 F. Supp. 2d 99, 113 (D.D.C. 2009). Plaintiff does not challenge Defendants' reliance on the two sections; Plaintiff only challenges Defendants' assertion that each and every record falls within the scope of either 50 U.S.C. § 403-1(i) or 50 U.S.C. § 403.

"When analyzing whether the defendant is entitled to invoke Exemption 3, the court need not examine 'the detailed factual contents of specific documents' withheld; rather, 'the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage.'" *James Madison Project*, 605 F. Supp. 2d at 113-114 (*quoting Morley v. Central Intelligence Agency*, 508 F.3d 1108, 1126 (D.C. Cir. 2007)). In other words, the

Court's sole task is to determine whether all 52 records relate to intelligence sources and methods. *Fitzgibbon v. Central Intelligence Agency*, 911 F.2d 755, 761 (D.C. Cir. 1990).

To demonstrate that Defendants are properly withholding records under Exemption 3, Director Bennett testified that "the information withheld pursuant to exemption (b)(3) is ***the same as*** the information described above relating to intelligence methods and activities withheld pursuant to exemption (b)(1)." Bennett Decl. at ¶ 34 (JA 37) (emphasis added). Yet, as demonstrated above, Director Bennett's declaration was ambiguous at best in describing which records were withheld because they would reveal intelligence activities and methods. *Id*. at ¶ 28 (JA 32-33) ("***certain responsive records*** could also reveal intelligence activities and methods") (emphasis added).

Therefore to the extent that Exemption 3 applies to any records, it would only apply to the subset of records that the District Court found to pertain to intelligence methods and activities. *See generally* Opinion at 25-26 (JA 232-233).

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully requests that this Court reverse the District Court's order granting Defendants' motion for summary judgment and denying Judicial Watch's cross-motion for summary judgment and remand for further proceedings.

Dated: October 16, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 8, 878 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Michael Bekesha

ADDENDUM

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5 U.S.C. § 552(b):

This section does not apply to matters that are –

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) are in fact properly classified pursuant to such Executive order;

(3) specifically exempted from disclosure by statute (other than section 552b of this title [5 USCS § 552b]), if that statute--

(A)

(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009 [enacted Oct. 28, 2009], specifically cites to this paragraph.

Executive Order 13526 of December 29, 2009 (Parts 1 And 2):

This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information both within the Government and to the American people. Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security and demonstrating our commitment to open Government through accurate and accountable application of classification standards and routine, secure, and effective declassification are equally important priorities.

NOW, THEREFORE, I, BARACK OBAMA, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

PART 1--ORIGINAL CLASSIFICATION

Section 1.1. *Classification Standards.* (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

(1) an original classification authority is classifying the information;

(2) the information is owned by, produced by or for, or is under the control of the United States Government;

(3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

(b) If there is significant doubt about the need to classify information, it shall not be classified. This provision does not:

(1) amplify or modify the substantive criteria or procedures for classification; or

(2) create any substantive or procedural rights subject to judicial review.

(c) Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.

(d) The unauthorized disclosure of foreign government information is presumed to cause damage to national security.

Sec. 1.2. *Classification Levels.* (a) Information may be classified at one of the following three levels:

(1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to national security that the original classification authority is able to identify or describe.

(2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.

(3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to national security that the original classification authority is able to identify or describe.

(b) Except as otherwise provided by statute, no other terms shall be used to identify United States classified information.

(c) If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level.

Sec. 1.3. *Classification Authority.* (a) The authority to classify information originally may be exercised only by:

(1) the President and the Vice President;

(2) agency heads and officials designated by the President; and

(3) United States Government officials delegated this authority pursuant to paragraph (c) of this section.

(b) Officials authorized to classify information at a specified level are also authorized to classify information at a lower level.

(c) Delegation of original classification authority.

(1) Delegations of original classification authority shall be limited to the minimum required to administer this order. Agency heads are responsible for ensuring that designated subordinate officials have a demonstrable and continuing need to exercise this authority.

(2) "Top Secret" original classification authority may be delegated only by the President, the Vice President, or an agency head or official designated pursuant to paragraph (a)(2) of this section.

(3) "Secret" or "Confidential" original classification authority may be delegated only by the President, the Vice President, an agency head or official designated pursuant to paragraph (a)(2) of this section, or the senior agency official designated under section 5.4(d) of this order, provided that official has been delegated "Top Secret" original classification authority by the agency head.

(4) Each delegation of original classification authority shall be in writing and the authority shall not be redelegated except as provided in this order. Each delegation shall identify the official by name or position.

(5) Delegations of original classification authority shall be reported or made available by name or position to the Director of the Information Security Oversight Office.

(d) All original classification authorities must receive training in proper classification (including the avoidance of over-classification) and declassification as provided in this order and its implementing directives at least once a calendar year. Such training must include instruction on the proper safeguarding of classified information and on the sanctions in section 5.5 of this order that may be brought against an individual who fails to classify information properly or protect classified information from unauthorized disclosure. Original classification authorities who do not receive such mandatory training at least once within a calendar year shall have their classification authority suspended by the agency

head or the senior agency official designated under section 5.4(d) of this order until such training has taken place. A waiver may be granted by the agency head, the deputy agency head, or the senior agency official if an individual is unable to receive such training due to unavoidable circumstances. Whenever a waiver is granted, the individual shall receive such training as soon as practicable.

(e) Exceptional cases. When an employee, government contractor, licensee, certificate holder, or grantee of an agency who does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with this order and its implementing directives. The information shall be transmitted promptly as provided under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within 30 days whether to classify this information.

Sec. 1.4. *Classification Categories.* Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to national security in accordance with section 1.2 of this order, and it pertains to one or more of the following:

(a) military plans, weapons systems, or operations;
(b) foreign government information;

(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;

(d) foreign relations or foreign activities of the United States, including confidential sources;

(e) scientific, technological, or economic matters relating to national security;

(f) United States Government programs for safeguarding nuclear materials or facilities;

(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to national security; or (h) the development, production, or use of weapons of mass destruction.

Sec. 1.5. *Duration of Classification.* (a) At the time of original classification, the original classification authority shall establish a specific date or event for declassification based on the duration of national security sensitivity of the information. Upon reaching the date or event, the information shall be automatically declassified. Except for information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, the date or event shall not exceed the time frame established in paragraph (b) of this section.

(b) If the original classification authority cannot determine an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority otherwise determines that the sensitivity of the information requires that it be marked for declassification for up to 25 years from the date of the original decision.

(c) An original classification authority may extend the duration of classification up to 25 years from the date of origin of the document, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under this order are followed.

(d) No information may remain classified indefinitely. Information marked for an indefinite duration of classification under predecessor orders, for example, marked as "Originating Agency's Determination Required," or classified information that contains incomplete declassification instructions or lacks declassification instructions shall be declassified in accordance with part 3 of this order.

Sec. 1.6. *Identification and Markings.* (a) At the time of original classification, the following shall be indicated in a manner that is immediately apparent:

(1) one of the three classification levels defined in section 1.2 of this order;

(2) the identity, by name and position, or by personal identifier, of the original classification authority;

(3) the agency and office of origin, if not otherwise evident;

(4) declassification instructions, which shall indicate one of the following:

(A) the date or event for declassification, as prescribed in section 1.5(a);

(B) the date that is 10 years from the date of original classification, as prescribed in section 1.5(b);

(C) the date that is up to 25 years from the date of original classification, as prescribed in section 1.5(b); or

(D) in the case of information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, the marking prescribed in implementing directives issued pursuant to this order; and

(5) a concise reason for classification that, at a minimum, cites the applicable classification categories in section 1.4 of this order.

(b) Specific information required in paragraph (a) of this section may be excluded if it would reveal additional classified information.

(c) With respect to each classified document, the agency originating the document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are unclassified. In accordance with standards prescribed in directives issued under this order, the Director of the Information Security Oversight Office may grant and revoke temporary waivers of this requirement. The Director shall revoke any waiver upon a finding of abuse.

(d) Markings or other indicia implementing the provisions of this order, including abbreviations and requirements to safeguard classified working papers, shall conform to the standards prescribed in implementing directives issued pursuant to this order.

(e) Foreign government information shall retain its original classification markings or shall be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the entity that furnished the information. Foreign government information retaining its original classification markings need not be assigned a U.S. classification marking provided that the responsible agency determines that the foreign government markings are adequate to meet the purposes served by U.S. classification markings.

(f) Information assigned a level of classification under this or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings. Whenever such information is used in the derivative classification process or is reviewed for possible declassification, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings.

(g) The classification authority shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document or prepare a product to allow for dissemination at the lowest level of classification possible or in unclassified form.

(h) Prior to public release, all declassified records shall be appropriately marked to reflect their declassification.

Sec. 1.7. *Classification Prohibitions and Limitations.* (a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:

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

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

(3) restrain competition; or

(4) prevent or delay the release of information that does not require protection in the interest of national security.

(b) Basic scientific research information not clearly related to national security shall not be classified.

(c) Information may not be reclassified after declassification and release to the public under proper authority unless:

(1) the reclassification is personally approved in writing by the agency head based on a document-by-document determination by the agency that reclassification is required to prevent significant and demonstrable damage to national security;

(2) the information may be reasonably recovered without bringing undue attention to the information;

(3) the reclassification action is reported promptly to the Assistant to the President for National Security Affairs (National Security Advisor) and the Director of the Information Security Oversight Office; and

(4) for documents in the physical and legal custody of the National Archives and Records Administration (National Archives) that have been available for public use, the agency head has, after making the determinations required by this paragraph, notified the Archivist of the United States (Archivist), who shall suspend public access pending approval of the reclassification action by the Director of the Information Security Oversight Office. Any such decision by the Director may be appealed by the agency head to the President through national security Advisor. Public access shall remain suspended pending a prompt decision on the appeal.

(d) Information that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (*5 U.S.C. 552*), the Presidential Records Act, *44 U.S.C. 2204(c)(1)*, the Privacy Act of 1974 (*5 U.S.C. 552a*), or the mandatory review provisions of section 3.5 of this order only if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order. The requirements in this paragraph also apply to those situations in which information has been declassified in accordance with a specific date or event determined by an original classification authority in accordance with section 1.5 of this order.

(e) Compilations of items of information that are individually unclassified may be classified if the compiled information reveals an additional association or relationship that:

(1) meets the standards for classification under this order; and

(2) is not otherwise revealed in the individual items of information.

Sec. 1.8. *Classification Challenges.* (a) Authorized holders of information who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status of the information in accordance with agency procedures established under paragraph (b) of this section.

(b) In accordance with implementing directives issued pursuant to this order, an agency head or senior agency official shall establish procedures under which authorized holders of information, including authorized holders outside the classifying agency, are encouraged and expected to challenge the classification of information that they believe is improperly classified or unclassified. These procedures shall ensure that:

(1) individuals are not subject to retribution for bringing such actions;

(2) an opportunity is provided for review by an impartial official or panel; and

(3) individuals are advised of their right to appeal agency decisions to the Interagency Security Classification Appeals Panel (Panel) established by section 5.3 of this order.

(c) Documents required to be submitted for prepublication review or other administrative process pursuant to an approved nondisclosure agreement are not covered by this section.

Sec. 1.9. *Fundamental Classification Guidance Review.* (a) Agency heads shall complete on a periodic basis a comprehensive review of the agency's classification guidance, particularly classification guides, to ensure the guidance reflects current circumstances and to identify classified information that no longer requires protection and can be declassified. The initial fundamental classification guidance review shall be completed within 2 years of the effective date of this order.

(b) The classification guidance review shall include an evaluation of classified information to determine if it meets the standards for classification under section 1.4 of this order, taking into account an up-to-date assessment of likely damage as described under section 1.2 of this order.

(c) The classification guidance review shall include original classification authorities and agency subject matter experts to ensure a broad range of perspectives.

(d) Agency heads shall provide a report summarizing the results of the classification guidance review to the Director of the Information Security Oversight Office and shall release an unclassified version of this report to the public.

PART 2--DERIVATIVE CLASSIFICATION

Sec. 2.1. *Use of Derivative Classification.* (a) Persons who reproduce, extract, or summarize classified information, or who apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority.

(b) Persons who apply derivative classification markings shall:

(1) be identified by name and position, or by personal identifier, in a manner that is immediately apparent for each derivative classification action;

(2) observe and respect original classification decisions; and

(3) carry forward to any newly created documents the pertinent classification markings. For information derivatively classified based on multiple sources, the derivative classifier shall carry forward:

(A) the date or event for declassification that corresponds to the longest period of classification among the sources, or the marking established pursuant to section 1.6(a)(4)(D) of this order; and

(B) a listing of the source materials.

(c) Derivative classifiers shall, whenever practicable, use a classified addendum whenever classified information constitutes a small portion of an otherwise unclassified document or prepare a product to allow for dissemination at the lowest level of classification possible or in unclassified form.

(d) Persons who apply derivative classification markings shall receive training in the proper application of the derivative classification principles of the order, with an emphasis on avoiding over-classification, at least once every 2 years. Derivative classifiers who do not receive such training at least once every 2 years shall have their authority to apply derivative classification markings suspended until they have received such training. A waiver may be granted by the agency head, the deputy agency head, or the senior agency official if an individual is unable to receive such training due to unavoidable circumstances. Whenever a waiver is granted, the individual shall receive such training as soon as practicable.

Sec. 2.2. *Classification Guides.* (a) Agencies with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information. These guides shall conform to standards contained in directives issued under this order.

(b) Each guide shall be approved personally and in writing by an official who:

(1) has program or supervisory responsibility over the information or is the senior agency official; and

(2) is authorized to classify information originally at the highest level of classification prescribed in the guide.

(c) Agencies shall establish procedures to ensure that classification guides are reviewed and updated as provided in directives issued under this order.

(d) Agencies shall incorporate original classification decisions into classification guides on a timely basis and in accordance with directives issued under this order.

(e) Agencies may incorporate exemptions from automatic declassification approved pursuant to section 3.3(j) of this order into classification guides, provided that the Panel is notified of the intent to take such action for specific information in advance of approval and the information remains in active use.

(f) The duration of classification of a document classified by a derivative classifier using a classification guide shall not exceed 25 years from the date of the origin of the document, except for:

(1) information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction; and

(2) specific information incorporated into classification guides in accordance with section 2.2(e) of this order.

50 U.S.C. § 403-1(i):

(i) Protection of intelligence sources and methods.

(1) The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure.

(2) Consistent with paragraph (1), in order to maximize the dissemination of intelligence, the Director of National Intelligence shall establish and implement guidelines for the intelligence community for the following purposes:

(A) Classification of information under applicable law, Executive orders, or other Presidential directives.

(B) Access to and dissemination of intelligence, both in final form and in the form when initially gathered.

(C) Preparation of intelligence products in such a way that source information is removed to allow for dissemination at the lowest level of classification possible or in unclassified form to the extent practicable.

(3) The Director may only delegate a duty or authority given the Director under this subsection to the Principal Deputy Director of National Intelligence.

50 U.S.C. § 403g:

Protection of nature of Agency's functions

In the interests of the security of the foreign intelligence activities of the United States and in order further to implement section 102A(i) of national security Act of 1947 [*50 USCS § 403-1(i)*] that the Director of National Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of sections 1 and 2, chapter 795 of the Act of August 28, 1935 (49 Stat. 956, 957; *5 U. S. C. 654*), and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: *Provided*, That in furtherance of this section the Director of the Office of Management and Budget shall make no reports to the Congress in

connection with the Agency under section 607, title VI, chapter 212 of the Act of June 30, 1945, as amended (*5 U. S. C. 947(b)*).

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October 2012, I filed via the CM/ECF system the foregoing **BRIEF OF APPELLANT JUDICIAL WATCH, INC.** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused eight copies to be delivered to the Clerk of Court via hand delivery.

/s/ Michael Bekesha