UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEREMY BIGWOOD, Plaintiff, v. UNITED STATES DEPARTMENT OF DEFENSE and CENTRAL INTELLIGENCE AGENCY, Defendants.	Civil Action No. 1:11-cv-00602-KBJ The Honorable Ketanji Brown Jackson

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants United States Department of Defense and Central Intelligence Agency, by and through their undersigned counsel, respectfully move this Court for summary judgment pursuant to Federal Rule of Civil Procedure 56. In support of this motion, the Court is respectfully referred to the defendants' Memorandum in Support of Motion for Summary Judgment, Statement of Material Facts Not in Dispute, and the supporting declarations and exhibits.

Dated: January 28, 2014

Respectfully submitted,

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INTRODUCTION

This action arises out of two Freedom of Information Act (FOIA) requests submitted by Plaintiff to the United States Southern Command ("Southcom"), a component of the Department of Defense, and the Central Intelligence Agency ("CIA"). Plaintiff's request to Southcom seeks documents related to the coup against President Manuel Zelaya in Honduras in 2009 as well as Southcom records related to a Honduran military official. His request to the CIA seeks agency records related to a Honduran business group. Southcom conducted a reasonable search for responsive records and has produced all non-exempt information in the records produced by that search. Further, in light of the risks to national security and the foreign affairs interests of the United States that could result from disclosure related to this subject, Southcom has properly refused to produce certain information exempt from disclosure, and the CIA has properly declined to confirm or deny that it has records responsive to the request. The defendants, accordingly, hereby move for summary judgment pursuant to Federal Rule of Civil Procedure 56.

BACKGROUND

I. Plaintiff's FOIA Requests to Southcom

On July 1, 2009, Plaintiff submitted a FOIA request to Southcom seeking two categories of records. First, all records relating to "the coup against Honduras' President Manuel Zelaya," including, but not limited to, "any observations or reports about the activities of the Honduran Armed Forces with respect to the coup – as well as the coup itself"; "any records of the passage of the kidnapped president through any military bases, such as Soto Cano – which has a significant US presence"; any reports about the "coup d'etat before it actually took place"; and

"inter-agency communications to and from USSOUTHCOM, as US officers in Honduras may have been informing other US government entities about the coup"; Plaintiff included a second request for all records relating to General Romeo Vasquez Velasquez of the Honduran military. Attached Declaration of Major Lisa R. Bloom ("Bloom Declaration") ¶ 4.

Discussions between Southcom and Plaintiff established that the appropriate timeline for searches responsive to the first request was May 1, 2009 through the time of the agency's searches in April 2011.[1] *Id.* ¶ 7. Southcom FOIA personnel identified six offices as likely to have information responsive to Plaintiff's requests: the Intelligence Directorate, the Operations Directorate, the Plans Directorate, the Office of Public Affairs, the Security Cooperation Office at the U.S. Embassy in Tegucigalpa, and Joint Task Force-Bravo at Soto Cano Air Base in Honduras. *See id.* ¶ 9. Those offices located approximately 298 pages of material responsive to both FOIA requests, which Southcom produced to Plaintiff on June 6, 2011. *Id.* ¶¶ 5, 10.

In an effort to address certain concerns that Plaintiff expressed about locating additional records within Southcom, the agency agreed to conduct supplemental searches among certain subcomponents. *Id.* ¶¶ 11-12. These searches located additional records, primarily Intelligence Executive Highlights compiled by J2, Southcom's Intelligence Directorate. None of the records produced in either round of searching indicated that Southcom needed to expand its search to additional components. *Id.* ¶ 13.

The Intelligence Executive Highlights consist of reports and analysis of events and developments in Southcom's area of focus gathered from both public sources and intelligence documents. Due to the nature of these reports, much of the material was non-responsive to Plaintiff's request and also implicated the interests of other Department of Defense components

[1] Plaintiff filed his complaint against Southcom and the CIA on March 23, 2011. See Dckt. 1, Complaint. The agencies filed their answer on May 4, 2011. See Dckt. 9, Answer.

and intelligence agencies from which the information or analysis was obtained. The Department of Defense's regulation on FOIA policy, 32 C.F.R. § 286.4, provides at paragraph (n) that, if a requester does not consent to the deletion of non-responsive information, the agency will release non-exempt non-responsive information but may withhold other non-responsive information by advising the requester that the information, even if responsive, would likely be exempt from release under an applicable FOIA provision. *See* 32 C.F.R. § 286.4(n). Because of the large number of agencies and Department of Defense components with an interest in information contained within the Intelligence Executive Highlights, Southcom required approximately one year to process the documents and coordinate their release. *See* Bloom Declaration at ¶ 16. Southcom released the second production of records on or about September 26, 2013. *Id.* at ¶ 6.

II. Plaintiff's FOIA Request to the CIA

On December 2, 2010, Plaintiff submitted a FOIA request to the CIA seeking "any and all records . . . concerning . . . the Honduran National Business Council more commonly known by its acronym COHEP (Consejo Hondureno de la Empresa Privada). I am especially interested in any and all meetings between CIA officers, assets or agents and COHEP." Plaintiff requested that the CIA "search your digital and hard copy archives from January 1st, 2009 until the time your office initiates the processing of this request." *See* Ex. A to Attached Declaration of Martha M. Lutz ("Lutz Declaration").

CIA issued its final response on December 22, 2010, stating that "[i]n accordance with section 3.6(a) of Executive Order 13526, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of requested records is currently and properly classified and is intelligence sources and methods information that is protected from disclosure by section 6 of the CIA Act of 1949, as amended,

and section 102A(i)(1) of the National Security Act of 1947, as amended." The CIA accordingly denied Plaintiff's FOIA request, citing FOIA exemptions b(1) and b(3). *See* Ex. B to Lutz Declaration.

Plaintiff filed an administrative appeal of this decision on December 27, 2010. *See* Ex. C to Lutz Declaration. The CIA accepted the appeal on January 7, 2011. *See* Ex. D to Lutz Declaration. On March 7, 2011, the CIA's Agency Release Panel denied the appeal, having "determined that the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request because the 'fact of' the existence or nonexistence of records responsive to your request is currently and properly classified." The CIA again cited FOIA exemptions b(1) and b(3) as the basis for denying the Plaintiff's request. *See* Ex. E to Lutz Declaration.

ARGUMENT

I. Standard of Review

The Freedom of Information Act, 5 U.S.C. § 552, "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003). FOIA requires agencies to release documents responsive to a properly submitted request, except for those documents (or portions of documents) subject to any of nine statutory exemptions to the general disclosure obligation. *See* 5 U.S.C. §§ 552(a)(3), (b)(1)-(b)(9).

In discharging its obligations under FOIA, an agency generally must conduct a reasonable search for responsive documents. "In order to obtain summary judgment the agency must show that it made a good faith effort to conduct a search for the requested records, using

methods which can be reasonably expected to produce the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The agency's search is evaluated on the basis of affidavits, and "affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA." *Meeropol v. Meese*, 790 F.2d 942, 952 (D.C. Cir. 1986) (quoting *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982)).

While FOIA requires agency disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the public interest." *Baldridge v. Shapiro*, 455 U.S. 345, 352 (1982). FOIA provides nine exemptions that "reflect Congress' recognition that the Executive Branch must have the ability to keep certain types of information confidential." *Hale v. Dep't of Justice*, 973 F.2d 894, 898 (10th Cir. 1992), *vacated on other grounds*, 509 U.S. 918 (1993). To sustain its burden of justifying nondisclosure, *see* 5 U.S.C. § 552(a)(4)(B), an agency may submit a declaration or index describing the withheld material, explaining the reasons for nondisclosure, and demonstrating with reasonable specificity that reasonably segregable material has been released. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 753 (1989). A court reviews an agency's response to a FOIA request *de novo*, *see* 5 U.S.C. § 552(a)(4)(B), but given the unique nature of FOIA cases, an agency declaration is accorded substantial weight. *See Gardels v. CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 1982). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

In evaluating the applicability of FOIA exemptions in this case, it is important to note that the information sought by Plaintiff clearly "implicat[es] national security, a uniquely executive purview." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926-27. Courts have recognized the

"propriety of deference to the executive in the context of FOIA claims which implicate national security." *Id.* at 927-28 (*citing Zadvydas v. Davis*, 533 U.S. 678, 696 (2001)); *Salisbury v. United States*, 690 F.2d 966, 970 (D.C. Cir. 1982) ("[E]xecutive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure" and consequently, "courts are required to accord substantial weight to an agency's affidavit concerning the details of the classified status of a disputed record.") (internal quotations and citations omitted). Indeed, courts have routinely and repeatedly emphasized that "the judiciary is in an extremely poor position to second-guess the executive's judgment in [the] area of national security." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 928; *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("Judges . . . lack the expertise necessary to second-guess . . . agency opinions in the typical national security FOIA case."). Thus, in the FOIA context, courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 927; *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009) ("Today we reaffirm our deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security.").

Descriptions of the searches conducted by Southcom, as well as the factual predicate for the withholdings, are set out in detail in the Attached Declaration of Lisa R. Bloom. As explained below, and as amply demonstrated in these supporting documents, the agencies' searches were reasonable and adequate, and their withholdings are sound and well founded. Moreover, the CIA has appropriately responded to Plaintiff's separate request to that agency. Accordingly, the Court should enter summary judgment for the defendants.

II. Southcom Conducted a Reasonable Search for Responsive Records

An agency can show that it discharged its obligations under FOIA and is entitled to summary judgment by submitting declarations that demonstrate that the agency "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68. "The adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) (internal quotation omitted). As other courts in this district have recognized, "there is no requirement under FOIA that an agency's search be exhaustive, for 'the issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate.'" *Physicians for Human Rights v. U.S. Dep't of Defense*, 778 F. Supp. 2d 28, 32 (D.D.C. 2011) (quoting *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original)); *see also Meeropol*, 790 F.2d at 952-53 (search is not presumed unreasonable simply because it fails to produce all relevant material). Conducting a "reasonable" search is a process that requires "both systemic and case-specific exercises of discretion and administrative judgment and expertise" and is "hardly an area in which the courts should attempt to micro manage the executive branch." *Schrecker v. Dep't of Justice*, 349 F.3d 657, 662 (D.C. Cir. 2003) (internal quotation omitted).

An agency affidavit need not "set forth with meticulous documentation the details of an epic search for the requested records." *Perry*, 684 F.2d at 127. Instead, an agency may demonstrate the reasonableness of its search through an affidavit that is "relatively detailed, nonconclusory, and submitted in good faith." *Greenberg v. U.S. Dep't of Treasury*, 10 F. Supp. 2d 3, 12-13 (D.D.C. 1998). A sufficiently detailed declaration is presumed to be in good faith, a

presumption that can be rebutted only with clear evidence of bad faith. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

The declaration submitted by Southcom adequately explains the searches conducted. *See* Bloom Declaration ¶¶ 7-14. As that declaration details, Southcom first identified six different subcomponents – the Intelligence Directorate, the Operations Directorate, the Plans Directorate, the Office of Public Affairs, the Security Cooperation Office ("SCO") at the U.S. Embassy in Tegucigalpa, and Joint Task Force-Bravo at Soto Cano Air Base in Honduras – as likely to possess records responsive to Plaintiff's FOIA request. *See id.* ¶ 9. Those components maintained responsive information in multiple formats, including central computer files, paper files, and the Microsoft Outlook email files of personnel. *See id.* ¶ 10. The subcomponents were given search terms to aid in identifying responsive information contained in electronic records storage systems. *See id.* ¶ 7. To assist the components in Honduras with their search for responsive records, Southcom sent a contract worker with the FOIA office to Honduras to assist in searches. *Id.* ¶ 10. This first search produced approximately 298 pages of material responsive to both FOIA requests. *Id.*

In discussions with counsel for Southcom, Plaintiff expressed concerns about the possibility of locating additional responsive records. In an effort to resolve those concerns, Southcom agreed to conduct additional searches for responsive records within certain subcomponents, the Intelligence Directorate, the Operations Directorate, the SCO at the U.S. Embassy in Tegucigalpa, Honduras and Joint Task Force-Bravo. *See id.* ¶ 11. Those additional searches produced 88 additional documents, totaling 784 pages. *Id.* The vast majority of the additional documents were daily versions of "Intelligence Executive Highlights" produced by Southcom's Intelligence Directorate. *Id.* ¶ 12. Taken together, the components searched by

Southcom were those reasonably likely to have responsive materials; Southcom's assessment is that there are no additional components that were reasonably likely to have additional responsive material. *Id.* ¶ 13.

The foregoing discussion, and the additional details set forth in the attached declaration, demonstrate that Southcom searched those locations that it determined were reasonably likely to have responsive documents. Because the agency has "made a good faith effort to search for the records requested," and their "methods were reasonably expected to produce the information requested," *Kidd v. Dep't of Justice*, 362 F. Supp. 2d 291, 294 (D.D.C. 2005), the Court should enter summary judgment on this issue in favor of the defendants.

III. Southcom Properly Withheld Information From the Responsive Records

After reviewing the documents responsive to Plaintiff's request, Southcom determined that numerous documents contained information subject to one or more of FOIA's nine statutory exemptions to disclosure. The attached declarations of Thomas W. Geary, Martha M. Lutz, and Lisa R. Bloom and *Vaughn* Index demonstrate that the withholdings are proper, and the Court should enter summary judgment for the defendants on this issue.[2]

A. Southcom Properly Withheld Information Under Exemption 1

After the review of responsive documents, Southcom determined that certain portions of the documents were exempt under 5 U.S.C. § 552(b)(1). That provision, known as Exemption 1, allows agencies to withhold classified information that is protected in the interest of national

[2] As explained above, the records produced by Southcom include both responsive and non-responsive portions. In accordance with the Department of Defense's FOIA regulation, 32 C.F.R. § 286.4(n), Southcom also released the non-exempt non-responsive portions of those records, while stating that certain information was both non-responsive and likely exempt under an applicable FOIA provision. Southcom's declarations, *Vaughn* Index, and this summary judgment motion address only the responsive portions of those records, for which Southcom asserted an exemption (as opposed to stating that certain information is both non-responsive and likely subject to an exemption).

security and foreign policy. As detailed below, Southcom has met its burden under FOIA and established that it properly withheld information under Exemption 1.

1. The Standard for Exemption 1

Exemption 1 of FOIA "protects maters 'specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . in fact properly classified pursuant to such Executive order.'" *Larson*, 565 F.3d at 861 (quoting 5 U.S.C. § 552(b)(1)). While agency decisions to withhold classified information under FOIA are reviewed *de novo*, *see* 5 U.S.C. § 552(a)(4)(B), courts must accord "substantial weight" to an agency's affidavits justifying classification because agencies have "unique insights" into the adverse effects that might result from public disclosure of classified information, *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). "[L]ittle proof or explanation is required beyond a plausible assertion that information is properly classified." *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). Because assessment of harm to national security is entrusted to the Executive Branch rather than the courts, "the government's burden is a light one;" "searching judicial review" is inappropriate, and "plausible" and "logical" arguments for nondisclosure will be sustained. *Am. Civil Liberties Union v. Dep't of Defense*, 628 F.3d 612, 624 (D.C. Cir. 2011).

An agency can establish that it has properly withheld information under Exemption 1 if it demonstrates that it has met the classification requirements of Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009). Section 1.1 of the Executive Order sets forth the following four requirements for the classification of national security information: (1) an original classification authority classifies the information; (2) the Government owns, produces, or controls the information; (3) the information is within one of eight protected categories listed in section 1.4 of

the Order; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of identifiable damage to the national security. E.O. 13526, § 1.1(a). In section 1.4, the Executive Order establishes eight categories of classification. Of relevance here, the order provides that information may be classified if it concerns: "(a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; [or] (d) foreign relations or foreign activities of the United States, including confidential sources." *Id.* § 1.4.

2. An Original Classification Authority Classified the Information

The defendants have provided a declaration from Brig. Gen. Thomas W. Geary, the Director of Southcom's Intelligence Directorate. Gen. Geary has affirmed that he is authorized to classify national security information. Attached Declaration of Thomas W. Geary ("Geary Declaration") ¶ 2. He determined that the withheld information is properly classified consistent with the requirements of Executive Order 13526. *Id.* ¶ 7.

3. The United States Owns, Produced, or Controls the Information

The declaration confirms that the information contained in the withheld documents is owned by and under the control of the United States. Geary Declaration ¶ 12.

4. The Information Falls Within the Protected Categories Listed in Section 1.4 of E.O. 13526, and an Original Classification Authority Has Properly Determined that the Government's Disclosure of the Information Could Be Expected to Result in Damage to National Security

Southcom has also determined, and articulated with reasonable specificity, that the information protected from disclosure falls squarely within the categories of information set forth in sections 1.4(a), (b), (c), and (d) of Executive Order 13526. Geary Declaration ¶¶ 14-23. In

the declaration, Southcom has explained that the release of the withheld information reasonably could be expected to cause harm to national security.

Section 1.4(a)

Section 1.4(a) of the Executive Order protects information pertaining to military plans, weapons systems or operations. This includes information "such as the strength and deployment of forces, troop movements, ship sailings, the location and timing of planned attacks, tactics and strategy, and supply logistics, is critical to maintaining national security. Likewise, information possessed by a government about other government's military activities or capabilities must be protected to preserve the ability to predict those activities or to neutralize those capabilities. Additionally, weapons systems and technology are exempt from disclosure in order to preserve the advantage of surprise in the first use of a new weapon; to prevent an adversary from developing effective countermeasures against a new weapon; and to prevent an adversary from using that technology against its originator (by developing a similar weapon)." Geary Declaration ¶ 14.

Southcom has determined that numerous documents contain such information.[3] For example, Southcom asserts section 1.4(a) over the documents at Southcom 177-220, which

[3] Southcom has asserted that the following documents contain information that is properly classified under section 1.4(a): Southcom 177-220, Southcom 373-382, Southcom 383-392, Southcom 393-400, Southcom 401-409, Southcom 429-436, Southcom 437-449, Southcom 464-472, Southcom 473-478, Southcom 479-487, Southcom 488-497, Southcom 498-507, Southcom 508-519, Southcom 520-532, Southcom 533-540, Southcom 541-550, Southcom 551-561, Southcom 562-575, Southcom 576-583, Southcom 584-592, Southcom 593-600, Southcom 601-606, Southcom 607-613, Southcom 621-625, Southcom 649-660, Southcom 661-668, 673-680, Southcom 696-706, Southcom 707-717, Southcom 718-730, Southcom 731-740, Southcom 741-750, Southcom 751-762, Southcom 763-772, Southcom 773-782, Southcom 783-792, Southcom 793-803, Southcom 813-821, Southcom 822-833, Southcom 839-843, Southcom 844-854, Southcom 855-865, Southcom 866-875, Southcom 876-888, Southcom 889-897, Southcom 907-917, Southcom 918-926, Southcom 927-937, Southcom 938-945, Southcom 946-957, Southcom 963-973, Southcom 974-984, Southcom 985-991, Southcom 992-998, Southcom 1002-1009,

discusses particular military operations, and over a number of the Intelligence Executive Highlights, including those produced at Southcom 383-392, Southcom 401-409, and Southcom 473-478, because those documents frequently contain discussions of military readiness or plans in response to particular events and developments. The release of this information would, in the assessment of Southcom, damage the military activities and capabilities of the Department of Defense. Accordingly, this material is covered by section 1.4(a) and properly withheld under exemption 1.

Section 1.4(b)

Section 1.4(b) of the Executive Order protects "foreign government information." That includes "information provided to the United States Government by a foreign government or governments . . . with the expectation that the information, the source of the information, or both, are to be held in confidence." E.O. 13526, § 6.1(s)(1). The protection of such information is critical because, as Southcom's declaration explains, the release of such information "would cause foreign officials to believe that U.S. officials are not able or willing to observe the confidentiality expected in such interchanges. Governments could reasonably be expected to be less willing in the future to furnish information important to the conduct of U.S. foreign relations, and in general less disposed to cooperate with the United States in the achievement of foreign policy objectives of common interest." Geary Declaration ¶ 17.

Here, Southcom has determined that numerous responsive documents contain such information.[4] For example, Southcom asserts section 1.4(b) over the documents produced at

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Southcom 1013-1019, Southcom 1020-1030, Southcom 1031-1039, Southcom 1040-1049, Southcom 1050-1060, Southcom 1073-1083, Southcom 1084-1091, Southcom 1092-1101.

[4] Southcom has asserted that the following documents contain information that is properly classified under section 1.4(b): Southcom 145-148, Southcom 149-151, Southcom 254-272,

Southcom 630-32, Southcom 669-672, and Southcom 149-151, because those documents contain information that was furnished to the United States under a promise of confidentiality. It is the agency's assessment that revealing this information would damage the United States' relationship with particular governments and overall foreign relations. Geary Declaration ¶ 17. These materials are plainly covered by section 1.4(b). *See, e.g., Gov't Accountability Project v. Dep't of State*, 699 F. Supp. 2d 97, 101-02 (D.D.C. 2010) (affirming withholding of State Department cables "conveying the views of foreign government officials").

Section 1.4(c)

Southcom has also withheld information classified under section 1.4(c) of the Order. Section 1.4(c) protects "intelligence activities (including covert action), intelligence sources or methods, or cryptology."[5] E.O. 13526, § 1.4(c). As explained in Southcom's declaration, the information withheld under this section includes intelligence analyses related to events in

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Southcom 277, Southcom 280-298, Southcom 318-325, Southcom 401-409, Southcom 450, Southcom 630-632, Southcom 669-672, Southcom 707-717.

[5] Southcom has asserted that the following documents contain information that is properly classified under section 1.4(c): Southcom 145-148, Southcom 149-151, Southcom 152-154, Southcom 159-176, Southcom 177-220, Southcom 254-272, Southcom 273-275, Southcom 277, Southcom 280-298, Southcom 373-382, Southcom 383-392, Southcom 393-400, Southcom 401-409, Southcom 414-428, Southcom 429-436, Southcom 437-449, Southcom 450, Southcom 464-472, Southcom 473-478, Southcom 479-487, Southcom 488-497, Southcom 498-507, Southcom 508-519, Southcom 520-532, Southcom 533-540, Southcom 541-550, Southcom 551-561, Southcom 562-575, Southcom 576-583, Southcom 584-592, Southcom 593-600, Southcom 601-606, Southcom 607-613, Southcom 621-625, Southcom 626-629, Southcom 630-632, Southcom 644-648, Southcom 649-660, Southcom 661-668, Southcom 669-672, Southcom 673-680, Southcom 681-684, Southcom 685-690, Southcom 691-695, Southcom 696-706, Southcom 707-717, Southcom 718-730, Southcom 731-740, Southcom 741-750, Southcom 751-762, Southcom 763-772, Southcom 773-782, Southcom 783-792, Southcom 793-803, Southcom 813-821, Southcom 822-833, Southcom 839-843, Southcom 844-854, Southcom 855-865, Southcom 866-875, Southcom 876-888, Southcom 889-897, Southcom 903-906, Southcom 907-917, Southcom 918-926, Southcom 927-937, Southcom 938-945, Southcom 946-957, Southcom 963-973, Southcom 974-984, Southcom 985-991, Southcom 992-998, Southcom 1002-1009, Southcom 1013-1019, Southcom 1020-1030, Southcom 1031-1039, Southcom 1040-1049, Southcom 1050-1060, Southcom 1061-1072, Southcom 1073-1083, Southcom 1084-1091, Southcom 1092-1101.

Honduras contained in Southcom's Intelligence Executive Highlights. Geary Declaration ¶ 21. Southcom has determined that releasing this information could enable foreign entities with interests adverse to those of the United States to identify U.S. intelligence activities, sources, or methods, and to take countermeasures that would frustrate U.S. foreign policy. *Id.*

Similarly, the CIA concurs that information contained in the Southcom documents derived from CIA information is exempt from release under section 1.4(c). *See* Lutz Declaration ¶¶ 18-26. These documents are exempt from disclosure because their release would reveal intelligence activities, sources, and methods. *Id*. The information withheld concerns intelligence gathered by various intelligence agencies or sources, as well as agency experts' analysis of that information, and it is the assessment of the classification authorities from Southcom and the CIA that disclosure of the information would reveal the scope and conclusions of sensitive U.S. intelligence gathering operations and enable foreign governments or entities opposed to U.S. objectives to take action to frustrate those objectives.[6] Geary Declaration ¶¶ 19-21; Lutz Declaration ¶¶ 24-26. This material is thus properly exempted pursuant to section 1.4(c). *See, e.g.*, *Larson*, 565 F.3d at 863 (affirming agency's withholding under section 1.4(c) because "the agency described with reasonably specific detail the reason for nondisclosure: the importance for continuing intelligence operations of keeping intelligence sources and methods classified and confidential.").

Section 1.4(d)

[6] As the CIA explains in its declaration, its consultation with Southcom concerning the records responsive to Plaintiff's FOIA request to DOD does not mean that the CIA can acknowledge the existence or nonexistence of records responsive to Plaintiff's FOIA request to the CIA about an identified organization in Honduras. *See* Lutz Declaration ¶ 37 ("In this case, while the CIA can acknowledge that CIA information was included in the DOD's documents responsive to Plaintiff's broad FOIA request to the DOD, the CIA cannot confirm or deny whether it has any records responsive to Plaintiff's specific request to the CIA about an identified organization.).

Southcom has also withheld information classified under section 1.4(d) of the Executive Order. That section recognizes that the release of certain information would impair U.S. government relations with foreign governments, and thus permits the classification of certain information relating to "foreign relations or foreign activities of the United States, including confidential sources." E.O. 13526, § 1.4(d). For example, Southcom, in consultation with other agencies such as the State Department, determined that the documents produced at Southcom 177-220, Southcom 254-272, Southcom 277, and Southcom 464-472 contain information about foreign relations and foreign activities that must be classified under section 1.4(d).[7] Geary Declaration ¶¶ 22-23. The CIA, which was another agency Southcom consulted with in processing these documents, likewise avers that certain documents contain information about CIA activities that must be classified under section 1.4(d), and that release of this information would harm foreign relations. Lutz Declaration ¶ 27.

Based on the declarations provided by the defendants, the sensitive information contained in the responsive documents, and the deference owed to national security officials, *see Stillman*

[7] Southcom has asserted that the following documents contain information that is properly classified under section 1.4(d): Southcom 145-148, Southcom 149-151, Southcom 152-154, Southcom 159-176, Southcom 177-220, Southcom 254-272, Southcom 273-275, Southcom 277, Southcom 279, Southcom 280-298, Southcom 318-325, Southcom 373-382, Southcom 383-392, Southcom 393-400, Southcom 401-409, Southcom 410-413, Southcom 429-436, Southcom 437-449, Southcom 450, Southcom 464-472, Southcom 473-478, Southcom 479-487, Southcom 488-497, Southcom 498-507, Southcom 520-532, Southcom 551-561, Southcom 562-575, Southcom 576-583, Southcom 584-592, Southcom 593-600, Southcom 614-616, Southcom 626-629, Southcom 630-632, Southcom 644-648, Southcom 649-660, Southcom 661-668, Southcom 669-672, Southcom 673-680, Southcom 681-684, Southcom 685-690, Southcom 696-706, Southcom 707-717, Southcom 718-730, Southcom 731-740, Southcom 741-750, Southcom 751-762, Southcom 773-782, Southcom 783-792, Southcom 793-803, Southcom 804-812, Southcom 813-821, Southcom 822-833, Southcom 834-838, Southcom 839-843, Southcom 855-865, Southcom 866-875, Southcom 876-888, Southcom 889-897, Southcom 903-906, Southcom 918-926, Southcom 927-937, Southcom 938-945, Southcom 946-957, Southcom 963-973, Southcom 985-991, Southcom 992-998, Southcom 999-1001, Southcom 1002-1009, Southcom 1013-1019, Southcom 1020-1030, Southcom 1050-1060, Southcom 1061-1072, Southcom 1073-1083, Southcom 1084-1091.

v. CIA, 319 F.3d 546, 548 (D.C. Cir. 2003), the Court should uphold the Exemption 1 withholdings by Southcom.

B. Southcom Properly Withheld Information Under Exemption 3

Some of the information withheld by Southcom pursuant to Exemption 1 is also protected from disclosure by Exemption 3. That exemption protects information that is "specifically exempted from disclosure by statute" under certain conditions. 5 U.S.C. § 552(b)(3). To qualify as a statute that permits the withholding of information pursuant to Exemption 3, a statute must "(i) require[] that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establish[] particular criteria for withholding or refer[] to particular types of matters to be withheld."[8] *Id.* "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage." *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978).

Four such statutes are at issue here. 10 U.S.C. § 424(a) protects from disclosure "the organization or any function of an organization of the Department of Defense named in subsection (b)" of the statute, and "the number of persons employed by or assigned or detailed to any such organization or the name, official title, occupational series, grade, or salary of any such person." The Defense Intelligence Agency is a covered organization under subsection (b) of section 424.[9] *Id.* § 424(b). 10 U.S.C. § 130b allows the Department of Defense to withhold,

[8] Additionally, statutes "enacted after the date of enactment of the OPEN FOIA Act of 2009" must specifically cite to the appropriate section of FOIA in order to qualify as withholding statutes pursuant to Exemption 3. 5 U.S.C. § 552(b)(3)(B).

[9] Southcom withheld portions of the following records under 10 U.S.C. § 424 and Exemption 3: Southcom 145-148; Southcom 152-154; Southcom 159-176; Southcom 373-382; Southcom 383-392; Southcom 429-436; Southcom 462-472; Southcom 473-478; Southcom 479-487; Southcom

"notwithstanding section 552 of title 5," "the public personally identifying information regarding: (1) any member of the armed forces assigned to an overseas unit, a sensitive unit, or a routinely deployable unit . . ." Courts in this district have held that "10 U.S.C. § 130b is an exemption 3 statute, because it '(B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.'" *Hall v. CIA*, 881 F. Supp. 2d 38, 66 (D.D.C. 2012) (citing 5 U.S.C. § 552(b)(3)). Section 102A(i)(1) of the National Security Act of 1947, as amended, provides that the Director of National Intelligence (DNI) "shall protect intelligence sources and methods from unauthorized disclosure."[10] 50 U.S.C. § 3024(i). Similarly, to "protect[] intelligence sources and methods from unauthorized disclosure," section 6 of the Central Intelligence Agency Act of 1949, codified as amended at 50 U.S.C. § 3507 (formerly

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488-497; Southcom 498-507; Southcom 520-532; Southcom 533-540; Southcom 614-616; Southcom 617-620; Southcom 626-629; Southcom 630-632; Southcom 644-648; Southcom 661-668; Southcom 673-680; Southcom 681-684; Southcom 696-706; Southcom 707-717; Southcom 718-730; Southcom 731-740; Southcom 741-750; Southcom 751-762; Southcom 763-772; Southcom 773-782; Southcom 783-792; Southcom 793-803; Southcom 927-937; Southcom 938-945; Southcom 985-991; Southcom 1013-1019; Southcom 1020-1030; Southcom 1031-1039; Southcom 1050-1060; Southcom 1061-1072;

[10] Southcom withheld portions of the following records under 50 U.S.C. § 3024(i) and Exemption 3: Southcom 373-382, Southcom 383-392, Southcom 393-400, Southcom 401-409, Southcom 414-428, Southcom 429-436, Southcom 437-449, Southcom 450, Southcom 462-472, Southcom 473-478, Southcom 479-487, Southcom 488-497, Southcom 498-507, Southcom 508-519, Southcom 520-532, Southcom 533-540, Southcom 541-550, Southcom 551-561, Southcom 562-575, Southcom 576-583, Southcom 584-592, Southcom 593-600, Southcom 607-613, Southcom 626-629, Southcom 661-668, Southcom 669-672, Southcom 673-680, Southcom 681-684, Southcom 691-695, Southcom 696-706, Southcom 707-717, Southcom 718-730, Southcom 731-740, Southcom 741-750, Southcom 751-762, Southcom 763-772, Southcom 773-782, Southcom 783-792, Southcom 793-803, Southcom 804-812, Southcom 813-821, Southcom 822-833, Southcom 834-838, Southcom 839-843, Southcom 844-854, Southcom 855-865, Southcom 866-875, Southcom 876-888, Southcom 889-887, Southcom 903-906, Southcom 907-917, Southcom 918-926, Southcom 927-937, Southcom 938-945, Southcom 946-957, Southcom 963-973, Southcom 974-984, Southcom 992-998, Southcom 999-1001, Southcom 1002-1009, Southcom 1013-1019, Southcom 1020-1030, Southcom 1031-1039, Southcom 1050-1060, Southcom 1061-1072, Southcom 1084-1091, Southcom 1092-1101.

codified at 50 U.S.C. § 403g), exempts the CIA from the provision of any law requiring the publication or disclosure of the organization, function, names, official titles, salaries, or numbers of personnel employed by the CIA.[11] These statutes satisfy the criteria for the withholding of information pursuant to Exemption 3. *See Morley*, 508 F.3d at 1125 (identifying 50 U.S.C. § 403g as an Exemption 3 statute); *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) ("Section 403 [of the National Security Act of 1947] is an Exemption 3 statute."); *Physicians for Human Rights*, 778 F. Supp. 2d at 36 ("[Section] 424 protects sensitive identifying information at issue, including the name, geographic location, and subject matter responsibilities of some of its offices, and is indeed a statute that falls within the scope of Exemption 3.") (internal citation and quotation omitted). In *CIA v. Sims*, 471 U.S. 159, 177, 180 (1985), the Supreme Court, noting the "wide-ranging authority" given to the Director of Central Intelligence to protect intelligence sources and methods, held that it was "the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process."

[11] Southcom withheld portions of the following records under 50 U.S.C. § 403(g) and Exemption 3: Southcom 373-382, Southcom 383-392, Southcom 393-400, Southcom 401-409, Southcom 414-428, Southcom 429-436, Southcom 437-449, Southcom 473-478, Southcom 479-487, Southcom 488-497, Southcom 498-507, Southcom 508-519, Southcom 520-532, Southcom 533-540, Southcom 541-550, Southcom 551-561, Southcom 562-575, Southcom 576-583, Southcom 584-592, Southcom 593-600, Southcom 607-613, Southcom 621-625, Southcom 626-629, Southcom 630-632, Southcom 644-648, Southcom 649-660, Southcom 661-668, Southcom 669-672, Southcom 673-680, Southcom 681-684, Southcom 685-690, Southcom 691-695, Southcom 696-706, Southcom 707-717, Southcom 718-730, Southcom 731-740, Southcom 741-750, Southcom 751-762, Southcom 763-772, Southcom 773-782, Southcom 783-792, Southcom 793-803, Southcom 813-821, Southcom 822-833, Southcom 834-838; Southcom 839-843, Southcom 855-865, Southcom 876-888, Southcom 889-897, Southcom 903-906, Southcom 918-926, Southcom 938-945, Southcom 946-957, Southcom 963-973, Southcom 974-984, Southcom 992-998, Southcom 999-1001, Southcom 1002-1009, Southcom 1020-1030, Southcom 1031-1039, Southcom 1050-1060, Southcom 1084-1091, Southcom 1092-1101.

Declarants from both Southcom and the CIA have stated that the documents produced by Southcom include information that is protected from disclosure under Exemption 3 because of 10 U.S.C. § 424, 10 U.S.C. § 130b, the National Security Act of 1947, and the CIA Act of 1949. Bloom Declaration ¶ 21-27; Lutz Declaration ¶¶ 28-31. As the agencies' declarants explain, release of the information withheld under Exemption 3 would reveal intelligence sources and/or methods. Bloom Declaration ¶ 26-27; Lutz Declaration ¶¶ 28-31. Further, certain information withheld under Exemption 3 is protected from disclosure by 10 U.S.C. § 424(a) because it would reveal the "organization or . . . function" of a covered entity within the Department of Defense, or the identity of certain personnel, contrary to 10 U.S.C. § 130b. Bloom Declaration ¶¶ 22-25. Because the information withheld is protected from disclosure by Exemption 3, its withholding is proper.

C. Southcom Properly Withheld Information Under Exemption 5

Southcom also moves for summary judgment on its Exemption 5 withholdings from three documents. Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Records are exempt from disclosure if they would be "normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus incorporates the privileges that are available to an agency in civil litigation, including the deliberative process privilege. *Id.* at 148-50; *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 601 (D.C. Cir. 2001).

"Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this

process." *Sears*, 421 U.S. at 151 n.18. To protect agency deliberation, the deliberative process privilege generally protects "'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008) (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)). "In deciding whether a document should be protected by the privilege [courts] look to whether the document is 'predecisional' [–] whether it was generated before the adoption of an agency policy [–] and whether the document is 'deliberative' [–] whether it reflects the give-and-take of the consultative process." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). "There should be considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take – of the deliberative process – by which the decision itself is made'" because the agency is best situated "to know what confidentiality is needed 'to prevent injury to the quality of agency decisions.'" *Chem. Mfrs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting *Sears*, 421 U.S. at 151; *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975)).

Southcom's withholdings under Exemption 5 concern the deliberative process privilege. All three documents over which Southcom has asserted Exemption 5 are daily situation reports prepared by the Security Coordination Office, a Southcom component attached to the U.S. embassy in Honduras.[12] These are documents in which agency personnel discuss possible courses of action in response to ongoing events surrounding the coup in Honduras and "the likelihood of resumed military-to-military engagement with Honduras." Bloom Declaration ¶ 30.

[12] See the *Vaughn* Index entries for Southcom 12-14, Southcom 89-91, Southcom 141-142.

This information falls within the deliberative process protection because it was "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). Proposals and briefing papers generally constitute deliberative process, as the disclosure of "work plans, *status reports,* briefings, opinion papers, and proposals" would "stifle the candor necessary in an agency's policy making process." *Hornbostel v. Dep't of the Interior*, 305 F. Supp. 2d 21, 31 (D.D.C. 2003) (emphasis added). *See also Hunt v. U.S. Marine Corps*, 935 F. Supp. 46, 52 (D.D.C. 1996) (finding that "point papers" prepared in the "midst of [agency's] deliberative process to assist officers in their formulation of a final decision" are exempt from disclosure). DOD's employees must be able to engage in frank and open discussions regarding sensitive policy matters, and the disclosure of the withheld information would have a chilling effect on such candid deliberations. *Cf. Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1195 (D.C. Cir. 1991) (The "key question" in identifying deliberative material is whether disclosure would "discourage candid discussion within the agency.") (citations and internal formatting omitted). Given Southcom's assessment that protection of the information in these documents is necessary to protect the confidentiality of candid views and advice of U.S. Government officials in their pre-decisional deliberations respecting military operations, Southcom's withholdings under Exemption 5 are proper and should be upheld.

D. Southcom Properly Withheld Information Under Exemption 6

Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Supreme Court has adopted a broad construction of the privacy interests protected by Exemption 6, *see Reporters Comm. for Freedom of the Press*, 489 U.S. at 763, and

privacy is of particular importance in the FOIA context because a disclosure under FOIA is a disclosure to the public at large, *see Painting & Drywall Work Pres. Fund, Inc. v. HUD*, 936 F.2d 1300, 1302 (D.C. Cir. 1991).

This exemption requires an agency to balance an individual's right to privacy against the public's interest in disclosure. *See Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). The agency must determine whether disclosure of the information threatens a protectable privacy interest; if so, the agency must weigh that privacy interest against the public interest in disclosure, if any. *See Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991). The "only relevant public interest to be weighed in this balance is the extent to which the disclosure would serve the core purpose of FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government." *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (internal citation and quotation marks omitted). The requester bears the burden of demonstrating that the release of the withheld information would serve this interest. *See Carter v. Dep't of Commerce*, 830 F.2d 388, 391-92 nn.8 & 13 (D.C. Cir. 1987).

Southcom withheld information from its response to Plaintiff under Exemption 6. The agency weighed the privacy interest of the concerned individuals against the public interest in disclosure, and determined that the Government's release of the information would result in a clearly unwarranted invasion of personal privacy without contributing significantly to the public's understanding of the Government's operations or activities. *See* Bloom Declaration ¶ 31. The information withheld under Exemption 6 included, among other things, the names and identifying information of military personnel from Joint Task Force Bravo stationed at Soto Cano Air Force Base, and at the SCO in Honduras. *Id.*

Those withholdings were proper. The D.C. Circuit has long recognized that federal employees and personnel have a protectable privacy interest in their identities. *See Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 152-53 (D.C. Cir. 2006) (upholding agency's decision to withhold the names of agency personnel, private individuals, and companies who worked on the approval of a particular drug). In light of this privacy interest, the Department of Defense regularly withholds from FOIA releases personally identifying information about all military personnel and civilian employees with respect to whom disclosure would raise security or privacy concerns. Courts in this district have consistently upheld this practice. *See Schoenman v. FBI*, 575 F. Supp. 2d 136, 160 (D.D.C. 2008) ("the Air Force members whose names and other identifying information was redacted from the Intelligence Information Reports have a significant – i.e., more than *de minimis* – privacy interest in that information, particularly in light of a Department of Defense policy change after the terrorist attacks of September 11, 2001"); *Kimmel v. Dep't of Defense*, Civ. A. No. 04–1551(HHK), 2006 WL 1126812, *3 (D.D.C. Mar. 31, 2006); *see also O'Keefe v. Dep't of Defense*, 463 F. Supp. 2d 317, 327 (E.D.N.Y. 2006) ("Here, the probative value of this personally identifying information is nominal and does not overcome the privacy interest of the employees involved.").

E. Southcom Properly Withheld Information Under Exemption 7

Southcom also withheld portions of certain records pursuant to Exemption 7. The relevant portion of that exemption protects from disclosure "records or information compiled for law enforcement purposes" to the extent that the production of such information:

> (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source

> (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law

Exemption 7(D) requires no balancing of public and private interests. *See Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 575-76 (D.C. Cir. 1990). Exemption 7(D) applies if an agency establishes that a source has provided information under either an express or implied promise of confidentiality. *See Williams v. FBI*, 69 F.3d 1155, 1159 (D.C. Cir. 1995). An implied assurance of confidentiality could be found "when circumstances such as the nature of the crime investigated and the witness' relation to it support an inference of confidentiality." *Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993). Here, Southcom applied Exemption 7(D) to two documents: In Southcom 50-52, Exemption 7(D) was applied to a line from a situation report from the SCO to protect the identity of a source who provided information about the security situation in Tegucigalpa; in Southcom 59-61, Exemption 7(D) was applied in the "Commander's Comments" section of a situation report to protect the identity of a confidential source regarding the security of the U.S. embassy. *See* Bloom Declaration ¶ 32.

"Exemption 7(E) shields information if 'disclosure could reasonably be expected to risk circumvention of the law.'" *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1192 (D.C. Cir. 2009) (quoting 5 U.S.C. § 552(b)(7)(E)). The D.C. Circuit has explained that, "[e]xemption 7(E) sets a relatively low bar for the agency to justify withholding: 'Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law.'" *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (quoting *Mayer Brown*, 562 F.3d at 1194) (alteration in original). The range of law enforcement purposes

falling within the scope of Exemption 7 includes government national security and counterterrorism activities. *See, e.g., Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926.

Southcom applied Exemption 7(E) to withhold information concerning the "Force Protection Condition" in various editions of the daily Situation Reports from the SCO in Honduras.[13] The Force Protection Condition is set by the various combatant commands (including Southcom) and specifies the degree of measures that need to be taken in response to terrorist threats to military facilities. Whether one chooses to characterize it as a "guideline," "technique" or "procedure," disclosure of the various Force Protection Conditions in the daily situation reports submitted by the SCO in Tegucigalpa would disclose information that Southcom uses in responding to threats to military bases and personnel. Accordingly, Southcom determined that disclosing this information risked circumvention of the law by releasing information that could be used to thwart a Force Protection Condition. This information is properly withheld under Exemption 7(E).

IV. The CIA Responded Properly to Plaintiff's FOIA Request

In response to Plaintiff's FOIA request to the CIA, the agency refused to confirm or deny the existence of responsive records. This response is rooted in Exemptions 1 and 3 of FOIA, and is a proper response to a request for information of the type at issue here. Section 3.6(a) of Executive Order 13526 expressly provides for this style of response to a FOIA request, as it

[13] See the *Vaughn* Index entries for Southcom 47-49, Southcom 50-52, Southcom 53-55, Southcom 56-58, Southcom 59-61, Southcom 62-64, Southcom 65-67, Southcom 68-70, Southcom 71-73, Southcom 74-76, Southcom 77-79, Southcom 80-82, Southcom 83-85, Southcom 86-88, Southcom 89-91, Southcom 92-93, Southcom 94-96, Southcom 97-99, Southcom 100-102, Southcom 103-105, Southcom 106-108, Southcom 109-111, Southcom 112-114, Southcom 115-117, Southcom 118-120, Southcom 121-123, Southcom 124-126, Southcom 127-128, Southcom 129-130, Southcom 131-132, Southcom 133-134, Southcom 135-136, Southcom 137-138, Southcom 139-140, Southcom 141-142, Southcom 143-144, Southcom 520-532, Southcom 876-888.

recognizes that "[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." E.O. 13526, § 3.6(a).[14] The invocation of a *Glomar* response is appropriate when "to confirm or deny the existence of records . . . would cause harm cognizable under a FOIA exemption." *Gardels*, 689 F.2d at 1103.

Courts have consistently upheld *Glomar* responses where, as here, confirming or denying the existence or nonexistence of records would either reveal classified information protected by Exemption 1 or disclose information protected by statute pursuant to Exemption 3. *See, e.g.*, *Larson*, 565 F.3d at 861-82 (upholding the National Security Agency's use of the *Glomar* response to FOIA requests regarding past violence in Guatemala pursuant to Exemptions 1 and 3); *Frugone v. CIA*, 169 F.3d 772, 774-75 (D.C. Cir. 1999) (finding that the CIA properly refused to confirm or deny the existence of records concerning plaintiff's alleged employment relationship with the CIA pursuant to Exemptions 1 and 3, despite the allegation that another government agency seemed to confirm plaintiff's status as a former CIA employee); *Wheeler v. CIA*, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (ruling that the CIA properly invoked a *Glomar* response to plaintiff's request for records concerning plaintiff's activities as a journalist in Cuba during the 1960s pursuant to Exemption 1).

Plaintiff's request seeks records related to a discrete group in Honduras, including records of intelligence activities and contacts with the group. As explained below, this request for information concerning a specific group of foreign individuals is sufficiently discrete that the

[14] The refusal to confirm or deny whether an agency has records responsive to a FOIA request is commonly referred to as a "*Glomar*" response, under terminology derived from the case *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), in which the CIA successfully defended its refusal to confirm or deny the existence or nonexistence of records regarding a ship, the "Hughes Glomar Explorer." *Id.* at 1011

mere confirmation or denial of the existence or nonexistence of responsive records would reveal classified information – namely, whether the CIA has or has not conducted intelligence activities with respect to that specific group, among other things. By acknowledging whether it does or does not have responsive records, the CIA could expose whether it has or had an intelligence interest in that group, as well as where and when the agency did or did not operate.

Accordingly, as set forth below and in the attached declaration, whether the CIA possesses records responsive to Plaintiff's request is a fact that is protected from disclosure pursuant to Exemption 1. Additionally, Plaintiff's request seeks information that has been exempted from disclosure by statute: the National Security Act of 1947, 50 U.S.C. § 403-1, and the Central Intelligence Act of 1949, 50 U.S.C. § 403(g). Thus, Exemption 3 also supports the CIA's *Glomar* response to the request. Accordingly, the CIA has responded appropriately to Plaintiff's request and is entitled to summary judgment.

A. The CIA's *Glomar* Response Is Appropriate Under Exemption 1

As discussed above, Exemption 1 protects from disclosure records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Section 1.4 of Executive Order 13526 provides that information may be classified if it concerns, among other subject matters, "(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology" or "(d) foreign relations or foreign activities of the United States, including confidential sources." E.O. 13526, § 1.4.

Here, the Plaintiff's request seeks CIA records concerning the discrete subject matter of whether the CIA has met with COHEP or otherwise maintains information related to the group.

The Chief of the litigation support unit of the CIA, an individual who holds original classification authority pursuant to section 1.3(c) of Executive Order 13526, has determined that acknowledging the existence or nonexistence of information responsive to Plaintiff's FOIA request "could be expected to cause serious damage to U.S. national security." Lutz Declaration ¶¶ 42-46 . Because the fact of the existence or nonexistence of responsive information is properly classified pursuant to section 1.4 of Executive Order 13526, section 3.6 of the Order expressly authorizes the agency to "refuse to confirm or deny the existence or nonexistence" of the records. E.O. 13526, § 3.6(a).

In the attached declaration of Martha M. Lutz, the agency's classification authority has identified and described in detail the reasons underlying her determination that confirmation of the existence or nonexistence of records responsive to Plaintiff's FOIA request would reveal classified information. Lutz Declaration ¶¶ 42-46. Specifically, if the CIA were forced to acknowledge the existence or nonexistence of records responsive to Plaintiff's FOIA request, it "would expose whether or not the CIA has an intelligence interest in the specified organization, COHEP. It would also reveal where the CIA does or does not operate and who its intelligence partners may be." Lutz Declaration ¶ 42. The same need to protect intelligence sources and methods underlies the CIA's determination that it must issue a *Glomar* response to Plaintiff's broad request for "all records" concerning COHEP. *Id.* ¶¶ 42-43. If the CIA were to acknowledge that it has no records concerning COHEP, "then foreign intelligence services could infer that the CIA has no intelligence interest in COHEP or that the CIA's efforts to collect such intelligence have failed." *Id.* ¶ 43. It is the CIA's assessment that an official confirmation of the existence or nonexistence of records responsive to the Plaintiff's FOIA request would reveal

information concerning intelligence activities, sources, and methods – information that is covered by section 1.4(c) of E.O. 13526. *Id.* ¶ 46.

Generally speaking, "[w]hen a foreign intelligence service or adversary nation learns that a particular foreign national or group has been targeted for intelligence collection by the CIA, it will seek to glean from the CIA's interest what information the CIA has received, why the CIA is focused on that type of information, and how the CIA will seek to use that information for further intelligence collection efforts and clandestine intelligence activities." *Id.* ¶ 25. The disclosure of even seemingly innocuous information, such as the disclosure of the existence or nonexistence of an intelligence interest in a specific individual or group, could have adverse effects because "[i]f terrorist groups, foreign intelligence services, or other hostile entities were to discover what the CIA has or has not learned about certain individuals or groups, this information could be used against the CIA to thwart future intelligence operations, jeopardize ongoing human sources, and otherwise derail the CIA's intelligence collection efforts." *Id.* Thus, to collect and analyze intelligence effectively, and to protect against possible harm to U.S. foreign relations, the CIA must prevent disclosing to our adversaries the specific individuals or groups upon which it focuses its methods and resources.

The CIA's assessment is thus that a *Glomar* response is the only appropriate response to Plaintiff's request. The agency's determination is supported by the courts that have recognized that similar circumstances warrant a *Glomar* response under Exemption 1. For example, in *Wolf v. CIA*, 473 F.3d at 370, the D.C. Circuit upheld the CIA's *Glomar* response to a request for information regarding a foreign national, holding that "[i]t is plausible that either confirming or denying [the CIA's] interest in a foreign national reasonably could damage sources and methods by revealing CIA priorities, thereby providing foreign intelligence sources with a starting point

for applying countermeasures against the CIA and thus wasting Agency resources." *Id.* at 376-77; *accord Riquelme v. CIA*, 453 F. Supp. 2d 103, 109 (D.D.C. 2006) (upholding the CIA's *Glomar* response to a request for records relating to a foreign national under Exemption 1 because, *inter alia*, "officially acknowledging that the CIA has . . . collected intelligence information on a foreign national . . . may . . . qualify for classification on the ground that it could hamper future foreign relations with the government of that country" and a "denial that the CIA has records . . . could serve to damage national security by alerting certain individuals that they are not CIA intelligence targets") (internal quotations and citations omitted).

Ultimately, "an official confirmation or denial of the existence or nonexistence of the requested records – which is the unavoidable result of any response other than a *Glomar* response – would reveal information that concerns intelligence activities, intelligence sources and methods, foreign government information, and U.S. foreign relations, which, in turn, reasonably could be expected to cause serious damage to U.S. national security." Lutz Declaration ¶ 44. Thus, a *Glomar* response to Plaintiff's request is appropriate under Exemption 1.

B. The CIA's *Glomar* Response Is Appropriate Under Exemption 3

The CIA's *Glomar* response is also independently justified by Exemption 3. As explained above, Exemption 3 protects from disclosure information that is "specifically exempted from disclosure by statute" under certain conditions. 5 U.S.C. § 552(b)(3). As with the withholdings addressed *supra*, Exemption 3 applies here by means of section 102A(i)(1) of the National Security Act of 1947, 50 U.S.C. § 403-1(i)(1), and section 6 of the Central Intelligence Agency Act of 1949, codified as amended at 50 U.S.C. § 403g.

When the CIA provides a *Glomar* response to a FOIA request pursuant to Exemption 3, the only question for the Court is whether the CIA has demonstrated that answering the request "can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods." *Halperin*, 629 F.2d at 147. Indeed, several courts have upheld a *Glomar* response to a request for information from the CIA concerning particular foreign nationals under Exemption 3. *See, e.g.*, *Wolf*, 473 F.3d at 374 (relying on the National Security Act in holding that the CIA's affidavits "establish that disclosure of information regarding whether or not CIA records of a foreign national exist would be unauthorized under Exemption 3 because it would be reasonably harmful to intelligence sources and methods"); *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992) (same).

Here, as explained above, the CIA has determined that acknowledging the existence or nonexistence of the requested records would reveal information concerning intelligence sources and methods as well as core functions of the agency. Lutz Declaration ¶¶ 41-44. The CIA has thus determined that acknowledging the existence or nonexistence of CIA records regarding COHEP would result in the disclosure of information that falls squarely within the scope of the protective mandate under the National Security Act of 1947 and the Central Intelligence Act of 1949. *Id.* ¶ 48. The fact of the existence or nonexistence of records responsive to the request is, therefore, properly exempt from disclosure pursuant to Exemption 3.

C. The CIA Has Not Officially Acknowledged the Existence or Nonexistence of Records Responsive to Plaintiff's FOIA Request

In his Complaint in this case, the Plaintiff alleged that the CIA has previously described COHEP as "among the handful of 'powerful political pressure groups and leaders' in Honduras." Dckt. 1, Compl. ¶ 13. The quotation in the Complaint comes from the CIA's World Factbook. As described in more detail in the Lutz Declaration, the World Factbook listing of COHEP

among "Political pressure groups and leaders" in Honduras is not necessarily based on information from the CIA. Lutz Declaration ¶ 50. The World Factbook is compiled from information from numerous government agencies and other private and public sources. *Id.* It certainly is not an official confirmation of the existence or nonexistence of CIA records related to a specific group listed in the World Factbook itself. *Id.* ¶ 51. Plaintiff also cited to a Wikileaks document in his complaint. Dckt. 1, Compl. ¶ 13. As the CIA explains in its declaration, however, Wikileaks documents "by themselves are not officially authorized and confirmed disclosures of information." Lutz Declaration ¶ 52.

Nor does Southcom's consultation with the CIA in processing Plaintiff's separate FOIA request to Southcom constitute an official acknowledgement of the existence or nonexistence of records responsive to his FOIA request to the CIA. As the CIA explains in its declaration, "[w]hile the CIA can acknowledge that CIA information was included in DOD's documents responsive to Plaintiff's broad FOIA request to the DOD, the CIA cannot confirm or deny whether it has any records responsive to Plaintiff's specific request to the CIA about an identified organization." Lutz Declaration ¶ 37.

CONCLUSION

For the foregoing reasons, the defendants respectfully request that the Court grant their motion for summary judgment and enter final judgment for them in this matter.

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Respectfully submitted,

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