ORAL ARGUMENT SCHEDULED FOR APRIL 16, 2012

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

D.C. Cir. No. 10-5161

JEFFERSON MORLEY,

Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,

Appellee

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DATED: December 12, 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JEFFERSON MORLEY	:	
	:	
Appellant,	:	
	:	
v.	:	D. C. Cir. No. 10-5161
	:	(C. A. No. 03-2545 RJL)
	:	
CENTRAL INTELLIGENCE AGENCY	:	
	:	
	:	
Appellee	:	

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Jefferson Morley, appellant in the above-captioned case, hereby submits this certificate of counsel as to parties, rulings, and related cases pursuant to Rule 28(a)(1) and this Court's order of June 3, 2010.

1. Parties and Amici

No amici appeared in this case below. The parties appearing below were Jefferson Morley, plaintiff, and the Central Intelligence Agency, defendant.

1. Rulings under Review. At issue in this are the Memorandum

Opinion and Judgment entered March 31,2010 by United States District Judge Richard J. Leon. This case has not previously been before this Court. There are no related cases in this or any other court.

/s/
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TABLE OF CASES

*Cases marked by asterisk are chiefly relied upon

Other Authorities

GLOSSARY

AMBARB	**DRE psywar propaganda project in Latin America**
AMHINT	**Project for support of DRE leaders in Latin America**
AMHINT-2	**DRE co-founder Juan Manuel Salvat**
AMHINT-53	**DRE Secretary General Luis Fernandez Rocha**
AMSPELL	**Project in support of DRE headquarters in Miami**
ARRB	**Assassination Records Review Board**
CCC	**Cuban Coordinating Committee**
Crozier, Ross	**DRE Chief os Station before Joannides; Pseudonym: Harold W. Noemayr**
DRE	**Directorio Revolucionario Estudantil, anti-Castro Cuban exile organization funded by CIA**
HSCA	**House Select Committee on Assassinations**
JM/WAVE	**CIA Headquaters in Miami; also "WAVE"**
KUBARK	**Central Intelligence Agency**
MOB	**Military Operations Branch of DRE**
NEWBY, Walter	**Pseudonym for George Joannides, also known as "Howard" or "Mr. Howard"**
Noemayr, Harold W.	**Pseudonym for Ross Crozier**
ODYOKE	**Code name for U.S.**

PBRUMEN	**Code name for Cuba**
Reuteman, Andrew K.	**Pseudonym for Ted Shackley**
SAS	**Special Affairs Staff**
Shackley, Ted	**Andrew K. Reuiteman**

UNITED STATES COURT OF APPEALS
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On appeal from the United States District Court for the District of Columbia, the Hon. Richard J. Leon, Judge

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES

1. Whether the District Court erred in ruling that defendant Central Intelligence Agency ("CIA") conducted an adequate search in response to plaintiff's Freedom of Information Act request.

2. Whether the District Court erred in sustaining the claims

of exemption asserted by the CIA pursuant to FOIA Exemptions 1, 2, 3, 5, and 6.

3. Whether the District Court erred in finding that the CIA justifiably invoked the "Glomar Defense," under which it refused to confirm or deny the existence of certain records.

STATUTES AND REGULATIONS

The provisions of the Freedom of Information Act, 5 U.S.C. § 552, et seq. are set forth in the Addendum to this brief.

JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1292(a). The trial court had jurisdiction under 5 U.S.C. § 552(a)(4)(B).

STATEMENT OF THE CASE

A. Procedural History

On July 4, 2003, appellant Jefferson Morley ("Morley") submitted a Freedom of Information Act ("FOIA") request for records pertaining to George Joannides ("Joannides"), a CIA officer who in 1962-1964 served as case officer for the Directorio Revolucionario Estudantil ("DRE"), a CIA-

financed anti-Castro Cuban exile organization whose members were in contact with alleged assassin Lee Harvey Oswald ("Oswald") prior to the assassination of President Kennedy, and who immediately after the assassination used information obtained from their contacts with Oswald to propagate worldwide the first JFK assassination theory—that Cuban Prime Minister Fidel Castro was behind the crime. See Complaint, Exh. 1. [JA 24] Later, as a result of disclosures made under the President John F. Kennedy Assassination Records Collection Act of 1992 ("JFK Act"), it was learned that in 1978 Joannides had been called out of retirement to act as liaison between the CIA and the House Select Committee on Assassinations ("HSCA"), which at that time was investigating JFK assassination. In that role, he hid from Congress that he was the CIA case officer the committee wanted to question about the DRE's pre-assassination contacts with Oswald, and he failed to turn over records on that association it had requested.

The CIA initially failed to respond to Morley's FOIA request at all. After four months of delay, it then claimed that the records he requested had been transferred to the National Archives and Records Administration ("NARA") to be part of the JFK Records Act Collection. Id., Exh. 2. [JA 28] After Morley filed suit, the CIA invoked its "Glomar" defense, refusing to confirm or deny the existence of records pertaining to any "covert

program, operation or assignment" regarding Joannides that was not previously acknowledged. Declaration of Marilyn A. Dorn ("Dorn Decl."), ¶ 40, and Exh. E thereto. [JA 221]

On cross-motions for summary judgment, the Court ruled in favor of the CIA. Morley appealed. This Court ruled that the CIA had to search the CIA's operational files. It also ordered the CIA to provide Morley with responsive records that had been transferred to NARA, and it remanded the case to the district court for further substantiation on several search and exemption issues. Morley v. C.I.A, 508 F.3d 1108 (D.C.Cir.2007).

On remand, the CIA conducted further searches, including a search of some operation files on Joannides. In August 2008, it released 293 operational records from its Directorate of Support and National Clandestine Services files. In so doing, the CIA, employing a new affiant, now acknowledged Joannides' "participation in two specific covert projects, operations, or assignments: JM/WAVE . . .from 1962 through 1964 and Joannides' service as a CIA representative to the [HSCA] from 1978 to 1979." Nelson Decl., ¶ 59. It also withheld 295 operational records in their entirety. It also advised that Joannides' assignment as liaison to the HSCA was undertaken in a covert capacity.

After making disclosures, the CIA again moved for summary judgment. Morley cross-moved, and the District Court award judgment to the CIA. This appeal followed.

B. Critical Nature of the Issues Raised

The issues raised in this case were before the Court in Morley v. CI.A., 508 F.3d 1108 (D.C.Cir.2007), but they now come into focus in a context which has greatly increased the tension between secrecy for reasons of national security and the people's right to have access to information which enables public accountability of governmental agencies.

In its prior decision, this Court instructed the CIA to search its operational files for records on George Joannides, the CIA case officer whose activities are the subject of Morley's FOIA request. As a result, the CIA acknowledged Joannides' "participation in two specific covert projects, operations, or assignments. The revelation that Joannides was working in a covert capacity when he was the CIA's liaison to the HSCA raises disturbing questions about the CIA's use of a covert operative to subvert the integrity of a congressional committee's investigation of the assassination of a president, since congressional committees are a hallmark of democratic accountability.

Professor G. Robert Blakey, who served as Chief Counsel and Staff Director of the HSCA, states that the CIA's conduct in inserting Joannides "undercover" into the HSCA's investigation "constituted not only a breach of the written memorandum of understanding the HSCA in good faith entered into with the Agency, . . ., but a manifest, and hardly minor matter, a criminal violation of 18 U.S.C. § 1505", which proscribes conduct that "'impedes . . . the due and proper exercise of the power of inquiry . . . of any committee of either House'). . . ." 2009 Declarationt of G. Robert Blakey ("Blakey ("2009 Blakey Decl."), ¶ 9). [JA 1071b]

Equally troubling, is the iron curtain which the CIA has erected around the 295 responsive operational records whose existence it has belatedly acknowledged. Thus, in reviewing its operational records on remand, the CIA has withheld 295 documents in their entirety, even though these records are nearly a half century old—or older—and are in form and substance and purpose intimately related to thousands of documents of the same nature which have been publicly disclosed and placed in the President John F. Kennedy Assassination Records Collection ("JFK Act Collection") at the National Archives and Research Administration ("NARA"). Secrecy on a scale this vast, concerning records so old, on a subject of extreme public interest, represents a formidable assault on the FOIA. .

In order to understand the context in which this frontal attack on the right of the public to obtain information about the JFK assassination occurs, it is necessary to sketch the relevant facts in some detail.

C. Factual Background

Morley's FOIA inquiry concerns the relationship between Lee Harvey Oswald ("Oswald") and the Directorio Revolucionario Estudantil ("DRE"), a CIA sponsored, CIA funded Cuban exile organization engaged in psychological warfare operations. There was considerable tension in the DRE's relationship with the Kennedy administration, particularly with its Military Operations Branch ("MOB"), a component which favored military action against Cuba. During the three and a half months preceding the assassination, Oswald was in contact with DRE representatives on several occasions. On November 19, 1963, the growing tension with DRE led the CIA to sever relations. Three days later, Kennedy was shot, allegedly by Oswald.

The complete story, as it is now known, is complex, but important to understand.

In April 1962, Joannides was transferred from Athens to the CIA station in Miami known as "JMWAVE" or "WAVE." He was a New York lawyer who had worked at the CIA since 1950 and served as an active duty officer in the Directorate of Operations ("DO") since 1958. In Miami, he

became deputy director of the Psychological Warfare (PW) branch of JMWAVE, which had a budget of $2.4 million a year, approximately $14.4 million in 2009 dollars. Sixth Declaration of Jefferson Morley ("6th Morley Decl."), ¶ 5. citing Exhibit 1. [JA 820, 856, 858]

On August 24, 1962, members of the DRE took credit for a cannon attack on a seaside hotel in Havana where Cuban communist leader Fidel Castro was thought to be visiting. The attack made front-page headlines in the Washington Post and other major newspapers. Id., ¶ 6, Exh. 2. [JA 859] At the time, the DRE was entirely dependent on CIA support, according to CIA contract officer Ross Crozier ("Crozier"), who handled the group. "In addition to direct financial support," Crozier told the HSCA in 1978, "*all* of the DRE's weapons and armaments were supplied through the CIA." Id , ¶ 7, Exh. 3 (emphasis added). [JA 821, 861]

On September 14, 196, Ted Shackley ("Shackley"), the chief of the CIA station in Miami, sent a 22-page monthly progress report to CIA head-quarters about the activities, budget and intentions of the DRE in August 1962. It was based on reports filed with Shackley by case officers working with the group. In this and other agency records, the DRE is referred to by the cryptonym AMSPELL. Shackley is identified as "Andrew K. Reuteman." Id , ¶ 8 [JA 821] (noting that ¶¶ 8-17 are based on Exhibit 4 [JA

870]. The August 1962 monthly report described the organization of the CIA's relationship with the DRE, stating AMSPELL is "comprised of AMBARB and AMHINT activities." Thus, AMSPELL encompassed two other CIA endeavors, AMBARB and AMHINT. Id., ¶ 9.

AMBARB was the CIA's name for the DRE delegations that were organizing against Castroite communism on campuses throughout Latin America. "AMBARB serves only to promote propaganda activity in the Latin American countries where AMBARB delegates are assigned." Id , ¶ 10. [JA 822]

AMHINT was the Agency's cryptonym for a program of support for certain leaders of the DRE, a group that had first formed at the University of Havana and then been forced into exile by Castro's campus enforcers. The DRE leaders were identified in CIA communication with the AMHINT designation followed by a number. For examples, AMHINT-53 was DRE Secretary General Luis Fernandez Rocha ("Rocha"); AMHINT-2 was DRE co-founder Juan Manuel Salvat ("Salvat"). Id.,¶ 11.

AMSPELL also served as the cryptonym of a specific program of support for the DRE headquarters in Miami. Id.,¶ 12. [JA 822]

The August 1962 monthly report noted that the AMBARB section received $22,053 for salaries, operations and processing. The AMHINT

section received $3,000 for support. AMSPELL received $25,000 for salaries, overhead and operations. Thus, the three AMSPELL components received a total of $50,053. Id., ¶ 13.

The report also described how the agency handled its relationship with the Cuban students. According to Shackley's report, there was a case officer assigned to each AMSPELL component. These officers had regular contacts with members from all the sections. Thus, the AMHINT officer, known as STANLEY ZAMKA (identity unknown), met with a Cuban exile known as AMHINT-2 (Salvat) for regular PM [paramilitary] operational purposes. Id., ¶ 14. [JA 822-823]

The AMBARB officer, Robert Q. Nelander (identity unknown), met with a source known as AMBARB-84 (identity unknown) as "regular operational contact," with AMHINT-2 as "emergency AMBARB contact." Id., ¶ 15. [JA 823] The AMSPELL officer, Harold W. Noemayr (Ross Crozier), met with AMHINT-2 (Salvat) as "Regular overall AMSPELL control" and with AMBARB-54 (identity unknown) for "occasional legal/international" mat-ters. Id., ¶ 16.

The DRE/AMSPELL attack on Havana on August 24, 1962 raised the question of whether the Miami station controlled the group. According to Shackley, "[i]n spite of support at the Case Office level there is not JM-

WAVE control because of the conflict between AMSPELL objectives [for] PBRUMEN[1] liberation soonest and continued ODYOKE[2] lack of PBRUMEN policy," Shackley wrote. Id., ¶ 17 (stating also that ¶¶ 8-17 are based on Exhibit 4: DRE Progress Report 0862) [JA 823, 870-878]]

On October 9, 1962, Shackley sent a 73-page monthly progress report on DRE activities and intentions in September 1962. He reported continuing disputes between DRE leaders and CIA officers over questions of control. DRE leaders wanted to pursue military actions that were not consistent with President Kennedy's policy. The combined support for the AMBARB section ($20,960), the AMHINT section ($5,000) and the AMSPELL section ($25,000) amounted to $50,960. Shackley continued to express concern about CIA control of the group. "All planning phases of AMSPELL activities supported by JMWAVE at the present time are subject to the results of meeting with AMSPELL concerning increased control." Id., ¶ 18, citing Exh. 5. [JA 823, 879]

From October 16 to October 30 1962, the leaders of the United States, the Soviet Union and Cuba were entangled in the Cuban missile crisis. U.S. surveillance aircraft discovered that the Soviet Union was installing ballistic nuclear missiles in Cuba capable of striking American cities. President

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[1] Codename for Cuba.
[2] Code name for United States.

Kennedy imposed a naval quarantine and demanded the Soviet Union remove the missiles or face war. On October 29, the Soviet leadership relented, and announced the withdrawal of the missiles. In his telegram to Kennedy, Soviet Premier Nikita Khrushchev explained the Soviet Union was only seeking to defend Cuba from threat of invasion. "A piratical vessel had shelled Havana," he wrote. "They say that this shelling was done by irresponsible Cuban émigrés. Perhaps so, however, the question is from where did they shoot.... This means someone put into their hand the weapons for shelling Havana." Id., ¶ 20, Exhibit 6. [JA 824, 890]

On November 6, 1962, Jerry O'Leary, Jr., staff writer for the Washington Star newspaper, reported that according to the DRE, the Soviet missiles had not been removed, from Cuba. According to its leaders, Castro had stashed the missiles in caves outside of Havana. Id., ¶ 21, Exh. 7. [JA 825, 893]

President Kennedy read the story and asked CIA director John McCone about it. Kennedy suggested "an effort to persuade responsible editors to check such stories with the government before they printed them." Id., ¶ 22, Exh. 8. [JA 825, 892]

On November 8, 1962, Shackley sent a 4-page monthly report on DRE activities and intentions in October. "Problems in the JMWAVE

[deleted] relationship, as cited in last progress report, continued unresolved during October," he wrote. The three AMSPELL component AMSPELL received $49,383 for the month. Id., ¶ 23, Exh. 9. [JA 825, 894]

On November 12th, Rocha (AMHINT-53), the Secretary General of the DRE, repeated the "missiles in caves" story on NBC's nationally televised "Today Show." Id., ¶ 24, Exhs. 10-11. [JA 825-826, 898-899] Later that day, Kennedy mentioned the Today show in a meeting with his national security advisers. He asked that every Cuban refugee making claims about arms going to Cuba be interviewed within 24 hours. "The refugees are naturally trying to build up their story in an effort to get us to invade," Kennedy said. "We must get to the people the fact that the refugees have no evidence which we do not have." Id., ¶ 25, Exh. ¶ 13. [JA 826,904]

On November 13th, CIA Deputy Director Helms summoned DRE leaders Rocha and Jose Maria Lasa to his office to discuss the CIA's relationship with the group. Helms said that he was aware of the group's differences with U.S. policy toward Cuba and did not know what that policy would be in the future. He said the Agency wanted to continue to work with the DRE. To improve the relationship, Helms said he was going to assign the group a new CIA contact. "Regarding the new contact Mr. Helms stated he wanted . . . a man who would and could maintain the collaboration he had

outlined, and would be helpful and of assistance to the DRE. He also stated that this contact would be "personally responsible to him for the relationship." Id., ¶ 26, Exh. 14. [JA 826-827, 905-913]

On December 5th, Joannides met with Rocha. As Shackley reported, "Walter D. NEWBY [Joannides] was introduced to AMHINT-53 and succeeded Harold R. Noemayr [Crozier] as the case officer for the project." Id., ¶ 27, Exh.15.

In interviews, Rocha recalls that his new CIA contact introduced himself as "Howard." Other former DRE leaders came to know of "Howard" (or "Mr. Howard"). The records of the DRE, donated by Salvat to the University of Miami Library's Cuban Heritage Collection, contain numerous memos and letters in 1963 addressed to "Howard" or "Mr. Howard" concerning the DRE's struggle against communism in Cuba. Id., ¶ 28, Exh. 16. [JA 827, 918-933]

On December 8th, Helms informed National Security Adviser McGeorge Bundy that DRE was planning to issue an open letter to Kennedy calling on him to "fulfill his promises to liberate Cuba." Helms wrote "If the DRE goes through with its plan to present this letter to its CIA contact officer on 12 December, the office will make every attempt to dissuade the

DRE leadership from thus attempting to pressure the United States Government." Id., ¶ 29, Exh.17. [JA 827-828, 934-935]

On December 12th, Rocha gave a copy of the DRE's open letter to President Kennedy to his new contact, Joannides (a.k.a Walter K. Newby a.k.a. "Howard," or "Mr. Howard."). He asked that the letter "be reported to [Helms] immediately." Id., ¶ 30, Exh. 18. [JA 828, 936-939] On December 27th, JMWAVE Chief Shackley sent a monthly progress report on the DRE's activities and intentions in November. "Problems in the JMWAVE/ AMSPELL control relationship as cited in the last Progress Report, continued unresolved during November," he wrote. The agency's financial support for the month came $36,968.90. The AMBARB section received $22,134.90. For the first time in three months, the AMHINTs received no money. AMSPELL received $14,834. Id., ¶ 31, Exh. 19. [JA 828, 940-944]

On January 11, 1963, the State Department responded to the DRE's open letter by sending Rocha a copy of Kennedy's recent speech on Cuba. Id., ¶ 32, Exh. 20. [JA 828, 945-946]

On January 14th, "Newby reprimanded AMHINT-53 for failure [to] report unusual substance" of coded broadcast over WMIE, a Miami radio station." According to a JMWAVE cable to headquarters, Joannides "also

pointed out this flagrant violation FCC thus placing KUBARK[3] in embarrasssing position. A-53 apologized but said it [was] urgently necessary [to] alert PBRUMEN AMPSPELLs to penetration danger. This first time existence penetration reported by A-53 or other AMSPELL member." The cable concluded, "'JMWAVE now preparing independent report on AMSPELL apparat based on info collected from various sources including AMSPELL. Will use this for purposes comparison with A-53 report. At completion [of this] exercise, will forward current apparat picture plus plans for future exploitation.'" Id., ¶ 33, quoting Exh. 21. [JA 828-829, 947-949]]

On January 16, 1963, a CIA polygraph specialist wrote that just before the polygraph interviews of AMHINT-53 and AMBARB 65 the previous day AMHINT/53 brought up two points which he said he was thinking of mentioning to Newby sometime soon and which the examiner would like to make sure are brought to the attention of his case officer and the Chief of Station: (1) that AMHINT-53 "was thinking seriously of setting up a systematic program for the [polygraphing] of all members of AMSPELL"; and (2) that AMHINT-53 was "checking out some indications" that a Cuban national in the U.S. army was a "'communist." Id., ¶ 34, Exh. 22. [JA 829-830, 950-951]

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[3] Code for "Cuba."

On January 19th, Joannides received his fitness report for his work in 1962. His duties included serving as the deputy chief of the psychological warfare branch of the Miami station; serving as "case officer for a student project involving political action, propaganda, intelligence collection and hemisphere-wide apparatus," a reference to the AMSPELL, AMHINT and AMBARB projects. Joannides "has been successful in resolving complicated problems involving control of an unruly group," another reference to the Agency's conflictive relationship with the DRE. Joannides also had responsibility for a "teacher's organization," a "project producing news letter aimed at press outlets in Latin America"; and maintaining contacts with a "veteran's type organization." He received the highest possible rating for his performance on all of these assignments. Id., ¶ 35, Exh. 23. [JA 830, 952-953]

On February 21, 1963, Rocha told Joannides that the "present AM-SPELL mood favors action ops of Havana raid type. Planning currently well underway. A-53 declared AMSPELL feels so strong on necessity [of] action that intends proceed even if KUBARK were to discontinue AM-SPELL financial support. A-53 intends this alert on raid to constitute compliance with gentleman's agreement A-53 has with Fletcher Knight [Helms]." The cable added, "Newby reemphasized KUBARK opposition and warned that

appropriate ODYOKE [U.S.] elements could not look other way but would attempt intercept AMSPELL raiders." Id., ¶ 36, quoting Exh. 24. [JA 830-831]

On March 31, the Kennedy administration announced a crack-down on anti-Castro groups seeking to use U.S. territory to organize or launch attacks against Cuba, according to the New York Times. Id., ¶ 37, citing Exh. 25. [JA 831, 957-958] On April 3rd, the Cuban Coordinating Committee ("CCC"), which oversaw covert operations against the Castro government, met with Helms and representatives of the State and Defense Departments to discuss six proposed covert operations, including the "sabotage of Cuban shipping." The CCC "gave the CIA the option of using either its own Cubans or . . . the DRE as a cut out." Id., ¶ 38, Exh. 26. [JA 831,959]

On April 4, the New York Times quoted DRE's Secretary General Rocha's response to the crackdown. He said, "the United States has unjustly imposed imprisonment on some of our Cuban leaders and some of them are still confined to their homes." He said, "efforts to overthrow Castro have always culminated in abandonment, treachery, and broken promises." Id., ¶ 39, Exh. 27. [JA 831-832, 960]

On April 4, Shackley reported that AMSPELL had called a special meeting of its military section. "Speaker was AMHINT-5 [Isidro Borja, . . . who had served as chief of the DRE's military section]. He told Military section relations with KUBARK have come to impasse and no alternative for AMSPELL but break relations and continue without aid. Citing one reason, AMHINT-5 said KUBARK wanted military section dismantled, a condition AMSPELL could not accept." Id., ¶ 40, Exh. 28 [JA 832, 962]

Seymour Bolten, a senior Special Affairs Staff ("SAS") official with responsibility for Special Operations ("SO"), responded on behalf of Desmond Fitzgerald ("Fitzgerald"), the SAS Chief in Washington, the same day. "HQs does not desire KUBARK take initiative in withholding funds or terminating relationship until there evidence overt AMSPELL act, not merely AMSPELL expression of intent. Therefore request April ops advance be passed in normal manner and that simultaneously AMHINT-53 be advised subsidy will be terminated immediately if raid executed or attempted." Id., ¶ 41, Exh. 30. [JA 832, 965]

As of April 1963, the DRE was receiving $51,000 a month, according to a CIA memo to the CCC. The memo listed "average monthly payments" made to groups "guided and monitored" by the Agency. It stated that payments to the DRE subsidized "the headquarters of the organization in

Miami ($25,000 monthly)" while "CIA field stations are in direct contact with and fund representatives of the DRE in most Latin American countries." Id., ¶ 42, Exh. 31. [JA 833, 966-967]

On April 29th, SAS chief Fitzgerald again ordered JMWAVE not to cut off funding for AMSPELL without approval from headquarters. Id., ¶ 43, Exh. 32. [JA 833, 968]

On June 24th, the DRE propaganda section addresses a memo to "Howard." Id., ¶ 44, Exh. 33. [JA 833, 969] On June 28th, DRE member AMBARB-84 gave Joannides a memo about Soviet activity in Cuba. AMSPELL was going to use the information in a press release. Joannides inquired about the source of information. Id., ¶ 45, Exh. 34. [JA 833, 980]

According to DRE memos, in July 1963, Joannides gave the group money for a military operation and bought the group an air conditioner for their headquarters. Id., ¶ 46, Exh. 35. [JA 834, 981-984]

On July 31st, Joannides received a fitness evaluation for his work since March 27th. His boss stated that he had done an "excellent job in the handling of a significant student exile group which hitherto had successfully resisted any important degree of control." Joannides' handling of the DRE contrasted with his work on an "unproductive" group whose funding was cut

off. Joannides was promoted to the chief of PsyWar branch of the JMWAVE station. Id., ¶ 47, Exh. 36. [834, 985-986]

On August 5th, Oswald visited a store owned by Carlos Bringuier ("Bringuier") on Decatur Street in New Orleans. He headed the DRE in New Orleans. Oswald offered to help train DRE members for military operations in Cuba. Bringuier demurred. Oswald left his Marine Corps manual as a token of his good faith. Id., ¶ 48, Exh. 37. [JA 834, 987-998]

On August 8th, Joannides visited the DRE's headquarters in Miami to help resolve a dispute about the DRE's delegation in Costa Rica. Id., ¶ 49, Exh. 38. [JA 834, 999]

On August 9th, Oswald handed out pamphlets for a pro-Castro group called the Fair Play for Cuba Committee ("FPCC"), on a street corner not far from Bringuier's store. When Bringuier rounded up three other DRE members DRE--Celso Hernandez, Miguel Cruz, and Carlos Quiroga--the Cubans challenged Oswald for his apparent double-dealing and his support of Castro and got into a fight with him. Policemen arrested the four Cubans and Oswald. Id., ¶ 50, Exh. 37. [JA 835, 987-998]

On August 12th, Oswald and the DRE Cubans appeared in court. A TV news crew filmed the men coming and going and the local newspaper noted the incident and its resolution. Id., ¶ 51, Exh. 39. [JA 835, 1001] On

August 21st Bringuier, Oswald and two local journalists appeared on Latin Listening Post, a local radio program. Bringuier was identified as a representative of the DRE. The four men debated the Cuba issue for 30 minutes, with Oswald defending Castro and Bringuier asking if his organization should be called the Fair Play for Russia Committee. Id., ¶ 52, Exh. 40. [JA 1001-1005]

Afterwards, Bringuier issued a press release in the name of the DRE calling for congressional investigation of Oswald. "Write to your congress-man asking for a full investigation on Mr. Lee H. Oswald a confessed 'Marxist.'" Id., ¶ 53, Exh. 41. [JA 835]

Oswald's contacts with the DRE in New Orleans were reported to DRE headquarters in Miami and to the group's CIA contact, according to Isidro Borja, chief of the DRE's military section at the time. "'I know that Bringuier gave us information that that had happened and that we made a report to the CIA about it,'" Borja told the HSCA in 1978. Id., ¶ 54, Exh. 41a. [JA 836, 1006]

On August 26th Richard Cain, a Chicago Police Officer, reported to the CIA that a Cuban source told him that he had been recruited by the DRE to fight Castro in Cuba. The source said he would not join any effort not backed by the U.S. government "at which point the [DRE] representative []

placed a phone call to Miami and with the contact listening, spoke with a Senor Salvand (or Salvat), and asked if the group was sponsored by CIA." Salvat replied it was sponsored by "the Pentagon, which is in competition with CIA, and therefore all activities of the [DRE] must be kept secret." On September 4, 1963, the Domestic Contacts Division of the CIA circulated Cain's report on the DRE to the SAS in Washington. A notation on the routing sheet says "Sam, I talked to John Tilton about this. Mayo Stuntz" Id., ¶ 55, Exh. 42. [JA 836, 1011]

On September 6th, the Chief of the Military Operations Branch ("MOB") of the SAS, sent a cable, drafted by John Tilton of the MOB, saying "HQ concurs with REF per conversation with Newby." The SAS commented that the issue was "AMSPELL-AMBARB relations." Id., ¶ 56, Exh. 43. [JA 836-837, 1014]

On September 12th, Miami was notified that the DRE was mentioned prominently in a men's magazine cover story calling for Castro's assassination. The article stated the DRE was offering a $10 million reward for Castro's death. Id., ¶ 57, Exh. 44. [JA 837, 1016] The article appeared under the headline "We are going to kill Castro." The story described how the DRE was offering a $10 million cash reward "for the death of the Cuban

Tyrant Fidel Castro." Rocha, DRE's Secretary General, made the offer. Id., ¶ 58, Exh. 45. 837, 1017-1025]

On September 13th, Joannides gave five DRE leaders in Miami $660 to travel to New York City to challenge pro-Castro students and to Washington to meet with the House Un-American Activities Committee ("HUAC"). The expenses of Salvat and Lanuza were "Both paid by Congress." Id., ¶ 59, Exh. 46. [JA 837, 1026]

The pro-Castro students agreed to debate DRE members in New York, according to a page one Washington Post story. Id., ¶ 60, Ex. 47. [JA 837, 1027]

The confrontation between pro-and anti-Castro students in Times Square resulted in a near riot that paralyzed midtown Manhattan. The leader of the DRE students, was Rocha, DRE's Secretary General. Id., ¶ 61, Exh. 48. [JA 838, 1028]

Returning to Miami, DRE leaders stopped in Washington as planned. DRE co-founder Salvat met with HUAC's staff. HUAC picked up some of his expenses. Id., ¶ 62, Exh. 49. [JA 838, 1030]

On September 23rd, Fernando Garcia Chacon of the DRE responded to a JM/WAVE inquiry about the See magazine article. He addressed a note to "Howard." "Certainly what [is] stated in this article is false," he said. Id.,

¶ 63, Exh. 50. [JA 838, 1032]

On October 16th, JMWAVE informed Headquarters that AMHINT-53 [Rocha] said that DRE's military plan would be delivered to Newby [Joannides] on October 18, 1963. Id., ¶ 64, Exh. 51. [JA 838, 1033]

On October 22nd, the Caracas and Miami stations received a cable from CIA headquarters saying "HQS concern as to how TUTOR 1 [identity unknown] involvement with AMSPELLS may affect utilization TUTOR group in other station activities. Will discuss with Newby after his arrival HQS and advise." A comment from WH [the chief of the Western Hemisphere desk at CIA headquarters] suggests that "Newby come to HQS to discuss AMHINT-5 activities in Venezuela." Id., ¶ 65, Exh. 52. [JA 838-839, 1035]

On October 22nd, the DRE submitted to "Howard" a proposed military operation against Cuba called Operation Macao IV. Id., ¶ 66, Exh. 53. [JA 839, 1037]]

That same day Rocha gave Joannides a 40-page plan for military action in Cuba, written in Spanish. Shackley informed headquarters that Joannides would follow up and personally deliver his findings to head-quarters. "After study by WAVE followed by Conferences with AMHINT-2

[Salvat] and AMHINT-53 [Rocha], Newby will proceed to HQs for discussion." Id., ¶ 67, Exh. 54. [JA 839, 1078]

On November 6th, Shackley weighed in with a detailed cable about the DRE's plan. He said that the CIA had told the group if they had plans for military action, they should submit them for consideration. He noted that the group had been threatened with a cutoff of funding in March 1963, and this was their response. Shackley criticized the DRE leaders, saying they had an overblown view of their effectiveness. They regarded themselves as "the equals of generals and ambassadors," he said; they also had a "penchant for insecure behavior." He recommended cutting the group off financially. Id., ¶ 68, Exh. 55. [JA 839,840, 1040]

On November 13th, DRE submits expenses to "Howard" for "Operation Macao IV." Id., ¶ 69, Exh. 56. [JA 840, 1047]

On November 15th, SAS Chief Fitzgerald cabled Miami ordering the cutoff of the DRE military section, per Shackley's recommendation. Funding for the DRE's nonmilitary efforts was not affected. Id., ¶ 70, Exh. 57. [JA 840, 1048]

On November 19th, Joannides told Rocha that the CIA would not support the DRE military plan. As recounted in a CIA cable, "Newby told AMHINT-53 that he regretted to inform him that KUBARK was not

inclined [to] support any part [of] AMSPELL military plan, although support to AMSPELL for prop[aganda] and education of certain members would continue. NEWBY stated he was instructed [to] encourage AMSPELL to seek support of organization with which AMSPELL ideologically and military compatible. ... Parting was most amicable." Id., ¶ 71, Exh. 58. [JA 840, 1049]

At 12:30 p.m. on November 22nd, President Kennedy was shot and killed as his motorcade passed through downtown Dallas. At around 3:00 p.m. Central Time the wire services reported that a suspect had been arrested. His name was Lee Harvey Oswald. Id., ¶ 72. [JA 840]]

At 6:10 p.m. a CIA cable from Miami to headquarters reported that local radio stations were "carrying a report one Lee H. Oswald arrest as prime suspect in president assassination. AMHINT-53 reports AMSPELL delegate had radio debate with Lee H. Oswald of Fair Play for Cuba Committee sometime in August 63 on New Orleans station WDSU. According [to] AMSPELL files, Oswald former U.S. Marine who had traveled Moscow in 59 at which time [Oswald] renounced American citizenship and turned over passport to American consulate. Allegedly lived in the home Sov[iet] Foreign Minister for two months. In course radio

debate subj confessed he [was a] Marxist." Id., ¶ 73, Exh. 59. [JA 841, 1050]

Lanuza and Bringuier spoke to reporters extensively that night, recounting Oswald's pro-Castro activities in New Orleans. The story received prominent coverage in many leading newspapers the next day. "Suspect Denied Being a Communist on Aug. 20," said the Washington Post. Id., ¶ 74, Exh. 60. [JA, 841, 1051]

On Nov. 23rd, the DRE distributed a special edition of its newspaper Trinchera. The accompanying article described the DRE's encounters with Bringuier in New Orleans. Photographs of Oswald and Castro appeared under the headline, "The Presumed Assassins." Id., ¶ 75. Exh. 62. [JA 841,842, 1053]

On November 27th, the New York Times reported "A Cuban exile leader said tonight that Lee H. Oswald had boasted that if the United States attempted an invasion of Cuba he would defend Fidel Castro." Id., ¶ 76, Exh. 63. [JA 842, 1054]

That same day in Washington, HUAC designated a subcommittee to take testimony from "three young members of the [DRE]" at a hearing scheduled for December 10, 1963. On December 4, HUAC chief of staff Francis McNamara informed Committee members that the DRE leaders

could not give testimony until mid-January and that the hearing on Oswald and his Cuban activities had been postponed indefinitely. Id., ¶ 77, citing HUAC 120463.

On December 13th, Shackley forwarded a tape recording of the DRE radio debate with Oswald in New Orleans to the chief of the SAS. Shackley passed along the reel of tape, which came in a box addressed to "Howard." Rocha says the writing on the box is his. Id., ¶ 78, Exh. 65. [JA 842, 1056]

On April 1, 1964, the Warren Commission sent a letter to Bringuier saying a Commission attorney would like to interview him in the coming weeks. Id., ¶ 79, Exh. 66. [JA 843, 1058] That same day, according to a leave of absence form he signed, Joannides traveled to New Orleans. Id., ¶ 80, Exhs. 67-68. [JA 843, 1059-1060] On April 7-8, 1964, Bringuier testified under oath to the Warren Commission lawyers in New Orleans. Id.,¶ 81, Exh. 37. [JA 987-998]

On May 15th, Joannides signed his fitness report for his job performance since April 1, 1963. His specific duty Number 1 was to supervise and manage the Station's covert action branch; Duty Number 2 was to serve as "senior case officer for a student project which involves the distribution of printed propaganda, production of radio programs and the development of political action programs." He received the highest possible

rating for his performance of these duties. Station chief Ted Shackley stated that Joannides "managed a branch that had a yearly budget of two million four hundred thousand dollars. These funds were judiciously spent on printed propaganda, white and black radio program and on political action operations which were implemented via labor, *student* and professional groups." (Emphasis added) Id., ¶ 82, Exh. 1. [JA 843, 856-857]

On June 8, 1964, the new officer handling the DRE, known by cryptonym "Keith T. Bongirno," filed a monthly progress report on their activities. Id., ¶ 83, Exh. 69. [JA 844, 1061]

From 1964 to 1976, Joannides served as an operations officer. In April 1978 he was assigned to serve as "Principal Coordinator for the [HSCA]." Id., ¶ 84, Exh. 70. [JA 844, 1063] In July 1981, he received the Career Intelligence Medal. Id., ¶ 85, Exh. 71. [JA 844, 1066]

SUMMARY OF ARGUMENT

Plaintiff Jefferson Morley ("Morley") seeks records on CIA case officer George Joannides ("Joannides") who handled a Cuban exile organization, the Directorio Revolucionario Estdantil ("DRE") which was involved in activities with Lee Harvey Oswald in the three and a half month period preceding the assassination of President John F. Kennedy. On a

remand which included instructions to search its operational files, the CIA revealed that Joannides had worked in a covert capacity while acting as its liaison with the House Select Committee on Assassinations ("HSCA"). In that capacity the CIA concealed facts from Congress, including the fact that Joannides had been the DRE's case officer when he was liaison to the Congressional committee. In the view of the HSCA's former Chief Counsel, Prof. G. Robert Blakey, it violated both its Memorandum of Understanding with the HSCA and criminal law. See Blakey Affidavit, ¶9 [JA 1071b].

Although the CIA searched some pertinent operational files on remand, it did not search all of them. In did not, for example, search the records of the AMHIN, AMBARB, and MOB projects, which were components of the DRE project. It claimed, first, that these terms were not within the scope of Morley's request, even though his request specifically sought any materials on Joannides pertaining to any project in which he had participated. Second, it refused to concede that these projects had been officially acknowledged, despite the fact that it approved the release of scores of documents detailing them in disclosures made under the President John F. Kennedy Assassination Records Collection Act of 1991 ("JFK Act"). Neither of the CIA's positions passes legal muster and the District Court erred in sustaining them.

The adequacy of the CIA's search is called into question by the failure to search these (and other) terms. With respect to the 17 missing monthly reports, the CIA also claims that they never exist. It rests this claim on speculation which is based on error-laden memoranda written by a CIA employee who was unable to identify Joannides as the DRE's case officer even though there was abundant evidence of this in CIA files. Morley showed that the monthly progress existed before and after the 17-month period when Joannides was in charge. The CIA produced no evidence that they had been destroyed. The existence of such records is basic to democratic accountability and requires a thorough search if the Agency's operations are not to be run on an off-the-books basis. The facts put forward by Morley raised, contrary to the District Court's finding, a disputed issue of material fact precluding summary judgment.

The CIA has employed Exemptions 1 and 3 to erect and maintain an iron curtain of secrecy against the disclosure of 295 documents withheld in their entirety despite their age—three decades to half a century—and the vast public disclosure of JFK assassination records. The withholding of 295 documents in their entirety undermines the credibility of the CIA's claims that they must be withheld in the interest of national security. Morley placed in the record a very detailed account of the DRE's activities based on

officially disclosed records which have been released despite formerly having been classified. This creates a disputed issue of material fact with respect to whether or not release of such information can reasonably be expected to damage national security.

The credibility of the CIA's national security claims is further undercut by the bad faith conduct which the CIA has engaged in with respect to obtaining information on the DRE from congressional committees and the Assassination Records Review Board. Sectioin 1.8 of Executive Order 12958 provides that information may not be classified in order to prevent embarrassment, but the circumstances here suggest that that has occurred in this case.

Section 3.2(b) of E.O. 12958 provides that "the need to protect such information may be outweighed by the public interest in the disclosure of the information, and in these instances the information should be declassified." Section 3.2(b) also provides that when such questions arise, "they shall be referred to the agency head or the senior agency official "who will determine . . . whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure." Neither the CIA nor the District Court addressed this issue. The public interest in disclosure of these records on the assassination of President

Kennedy is at its zenith. The 50th anniversary of President Kennedy's assassination is rapidly approaching with major movies and plethora of new books on the way. A revived national debate on the assassination is beginning to heat up, yet the CIA is resisting disclosure of the records which remain withheld to the hilt and has avoided making the public interest determination required by the Executive order.

The CIA also seeks to hide everything under Exemption 3's "intelligence sources and methods" rubric. But its claim is too all-enveloping to be a workable exemption claim as required by FOIA. Instead, it destroys the framework of the FOIA, leaving the CIA able to withhold everything in the world without any effective judicial review.

The Supreme Court's decision in Milner v. Dep't of Navy, 131 Supr. Ct. 1259, 1264, 1265 (2011) reverses this Court's previous Exemption 2 holdings. Milner appears to have invalidated most if not all of the CIA's Exemption 2 claims. A remand is required to permit the CIA and the District Court to reevaluate these claims.

The District Court employed the wrong legal standard in ruling on the CIA's Exemption 6 claims. His ruling must therefore be reversed.

The CIA's Vaughn index is inadequate, failing even to account for the number of pages many documents contain and sweeping its determination to

determine if there are any nonsegregable portions of the 295 entirely withheld records. To effectuate this, it frequently asserts, without any substantiation, that any nonexempt material is not "meaningful." No attempt Is made to describe what kinds of nonexempt information are not "meaningful," and what percentage of a document they cover and where in it they are located.

ARGUMENT

I. THE CIA HAS FAILED TO MEET ITS BURDEN TO SHOW THAT IT CONDUCTED AN ADEQUATE SEARCH

A. Operational Files

The District Court asserts that "[t]he CIA has now explained with sufficient detail how it crafted its search of the three locations which comprise the statutory definition of the agency's operational files." Mem. Op. at five [JA 1095], citing Nelson Decl., ¶¶ 27-39 (footnote omitted). "Specifically, the CIA listed its initial search terms, described the amount of material returned by the initial search, and the criteria by which it determined whether the records it reviewed were responsive to plaintiffs request." Id.

Unfortunately, the "locations" specified are only the three directorates holding operational records and Nelson's affidavit did not specify which or

how many of the numerous components of these vast directorates had been searched.[4] They did not include the critically important AMHINT, AM-BARB or MOB.

The CIA contends that a search of the latter is not required. To avoid a search of operational files, it has invoked its "Glomar defense." This contention repeats the error corrected by this Court in the previous appeal.

"The CIA Information Act ("CIA Act"), 50 U.S.C. § 431, et seq., authorizes the head of the Agency to exempt operational files from the purview of the FOIA." ACLU v. DOD, 351 F.Supp.2d 265 (S.D.N.Y. 2005). "The Director of the Central Intelligence Agency ("DCI"), with the coordination of the Director of National Intelligence ("DNI"), may exempt operational files of the CIA from the provisions of [the FOIA"] . . ., which require publication or disclosure, or search or review in connection therewith." Id., citing 50 U.S.C. § 431(A).

Here, the DCI has not filed an affidavit stating that he, in coordination with the DNI, has determined that the files sought by Morley have been exempted from the FOIA's search and review requirements by the CIA Act. That Act "does not grant the CIA an automatic exemption of its operational

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[4] While it is normally presumed that the CIA's operational components are secret, as a result of the JFK Records Act, a large number of those pertinent to the time period of the records at issue have been officially disclosed.

files from the records it must search in response to a FOIA demand. Rather, the statute requires the Director of the CIA explicitly to claim an exemption with respect to specifically categorized files in order for the Agency to take advantage of the protections afforded by section 431(a)." ACLU v. DOD, 04Civ 4151 S.D.N.Y. (2011) at 9.

Even if the DCI had filed declaration stating that the records sought by Morley remain operational records to this date, the CIA has again improperly invokes the "Glomar" defense. It avoided addressing the exceptions to the operational files exemption set forth in 50 U.S.C. § 431(c)(3) which this Court ruled in the prior appeal does not apply in this case. See Morley v. C.I.A., 508 F.3d 1108, 1116-1119 (D.C.Cir.2007).

The issue of whether the CIA must search operational files for records responsive to Morley's request is res judica. The CIA tries t o avoid the implications of this by asserting that Morley did not mention AMHINT or AMBARB in his request and that he "cannot amend his request at this stage of the litigation." CIA Opp. at 5 [Dkt 98]. It also takes the position that release of records on these projects under the JFK Records Act does not constitute official acknowledgment.

Each of these claims is baseless. The first one raises a question as to whether AMHINT, AMBARB, MOB records are within the scope of the

request. It is clear that they are. All that the FOIA requires is that the requester "reasonably described the records sought." Hemenway v. Hughes, 601 F.Supp. 1002, 1005 (D.D.C.1985), citing 5 U.S.C. § 552(a)(3). The 1974 amendments to the FOIA indicate that requester's description is sufficient if it enables a professional agency employee familiar with the subject area to locate the records with a "reasonable amount of effort." H.R. Rep. No. 93-876, 93 Cong., 2d Sess. (1974) at 6. There is no question but that Morley has met this standard here. In interpreting a FOIA request, an agency "must bear in mind that 'the fundamental objective of the FOIA is to foster disclosure, not secrecy", Hemenway at 1004, quoting Chrysler Corp. v. Brown, 441 U.S. 281, 290 n.10, (1979), quoting Dep't of Air Force v Rose, 425 U.S. 352 (1976, "and to provide information to the people on matters of public concern.. . ." Id., at 1004-1005. Thus, in construing a request, "the agency must be careful not to read the request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester. To conclude otherwise would frustrate the central purpose of the Act." Id. at 1005.

Morley's request for "[a]ll records" on Joannides plainly includes records that were generated by the AMBARB and AMHINT projects which were part of the CIA's clandestine operation involving the DRE. Indeed,

Item 10 of Morley's FOIA request specifically asks for "[a]ny and all records reflecting Joannindes' participation in or contacts with any covert project or operation." See Complaint, Exh. 1. [JA 24--27] Moreover, Morley documented that "Joannides had repeated contact with AMBARB and AMHINT personalities throughout 1963 and multiple discussions about the same with his superiors at CIA headquarters." 7th Morley Decl. ¶ 22, Exhs. 18, 21, 24, 28, 35, 51, 54, and 59. [JA 1088-89]

The CIA also argued that the fact that the AMHINT/AMBARB activities have been disclosed through records released under the JFK Act does not foreclose its Glomar defense because "[c]ourts have carefully distinguished between bona fide declassification or other official release . . . and unsubstantiated speculation lacking official confirmation . . ., refusing to consider public domain unless officially disclosed." CIA Opp. at 6 (citations omitted).

But the "AMBARB/AMHINT/MOB programs are revealed in CIA records officially released by the Agency pursuant to its obligations under FOIA and the JFK Records Act." 7th Morley Decl., ¶ 25 [JA 1089], citing 6th Morley Decl., Exh. 4, 5, 9, 21, 29, 34, 43, and 59. As Morley also notes, "[t]he CIA's position that it will neither confirm nor deny Joannides particij-pation in the AMBARB and AMHINT programs is fatally undermined by

the fact that it has already disclosed his participation in these activities." Id., ¶ 25. [JA 1090]

B. Monthly Progress Reports

George Joannides was the DRE's case officer for a period of 17 months. Before and after that period, the CIA's case officers for the DRE routinely submitted monthly progress reports. This Court directed that on remand "the CIA must supplement its explanation" for its failure to locate these records. Morley, supra, at 1121. On remand, the District Court ruled that "Morley's continued disbelief in the agency's explanation is not enough to create a material issue of fact on this point." It derided Morley's evidence that these monthly reports exist, saying that it was "'mere speculation' that as yet uncovered documents might exist,' which is 'not enough to undermine the determination that the agency conducted an adequate search for the requested records.'" Mem. Op. at 7-8, quoting Morley at 1120 (quoting Wilbur v. CIA, 355 F.3d 675,678 (D.C.Cir.1004).

The District Court disregarded the facts which Morley did establish and switched the burden of proof from the CIA to him.

The record establishes the following facts: (1) before Joannides became DRE's case officer, monthly progress reports were created; (2) after he ceased being case officer, DRE monthly progress reports were created;

(3) the CIA did not produce any evidence of the destruction of these records; (4) the CIA's "explanation" that these records probably never existed is speculative, error-ridden, and based on the hearsay of CIA officer Barry Harrelson, who was unable to identify Joannides as the DRE's case officer even though that information was evident in CIA files subsequently located by an ARRB staffer; (5) the CIA failed to search the files of the AMBARB, AMHINT, and MOB; (6) Prof. G. Robert Blakey, who served as Chief Counsel and Staff Director for the HSCA, which conducted an oversight investigation into the DRE, does not believe the CIA's claim that the records never existed. He bluntly states: "Money was involved. It had to be documented. Period. End of story." Affidavit of G. Robert Blakey, Exh. 1.[5] [JA 1071d] Also of relevance here is the fact that democratic accountability requires documentation of expenditures on behalf of taxpayers. The

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[5]In response to Nelson's speculation that the 17 missing monthly reports never existed, Blakey states: "I do not accept the simplistic conclusion of the Agency that "the most logical explanation" for the absence of written reporting by G.J.in Agency files in connection with DRE is that he did not prepare any. [cites Nelson Decl., ¶ 46]. Nonsense. It is equally logical (or more likely, and more plausible) that G.J., having access to them in connection with the investigation by the HSCA, removed them from the files and destroyed them." June 4, 2009 Affidavit of Prof. G. Robert Blakey, ¶ 13. [JA 1071c] The CIA has made no statement that it searched for any record that the monthly reports were destroyed. That, of course, would be important information for Kennedy assassination researchers to have.

CIA has not claimed that the DRE during Joannides tenure was an off-the - books operation.

In ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970). The reasonable inference to be drawn from the set of facts sketched above is that the monthly reports were created during Joannides tenure as DRE case officer and continue to exist, no evidence of destruction have been put forward.

The District Court did not analyze or discuss these facts as it should have done in evaluating whether they created a disputed issue of material fact. Instead, it said that "[r]egretably, Morley has read the Court of Appeals opinion as a broad invitation to once again mount his arguments as to why these reports must have been filed in the first place, why they should now be considered 'missing,' and why their absence indicates an inadequate search on the part of the CIA." Mem. Op. at 6-7. [JA 1096, 1097] It further says that the "actual reason the Court of Appeals remanded on the missing monthly reports point was that the CIA "failed to explain directly to the Court . . . its search for these reports and its resulting belief that they never

existed" Id. at 7, citing Morley at 1121. "Instead, the CIA had merely pointed to a memorandum it previously wrote to NARA which [it] claimed 'may' explain why the reports did not exist." Id. The Court then noted that "[w]hile the CIA continues to point to the NARA memorandum, it now details on the record its new search efforts to uncover the monthly records." Id. [JA 1097]

But neither of these two points warranted summary judgment. On the first issue, Nelson's declaration speculates that the 17 monthly reports never existed, but this claim is totally lacking in credibility. She relies on a January 20, 1998 memorandum from J. Barry Harrelson ("the Harrelson memo"), Senior reviewer for the JFK Project, to Jeremy Gunn, Executive Director of the Assassination Records Review Board ("ARRB") and an internal CIA memorandum dated January 28, 1998 ("2d Harrelson memo").

Nelson's reliance on Harrelson is misplaced. The ARRB told Harrelson that DRE's case officer was known as "Howard," but Harrelson then reported to it that the CIA could not identify anyone using the name "Howard" as the DRE's case officer and had concluded that the man known in CIA records as "Howard" did not exist. 6th Morley Decl., ¶ 96, citing Exhibits 72-72a. [JA 849] Harrelson wrote that "[k]nowledgeable case officers [who] were queried suggested that the use of 'to Howard' might

have been nothing more than a routing indicator to ensure that the documents go to the correct CIA office/officer.'" Id., citing Exhibits 72-72a. [JA 1067, 1068] Since "Howard" was not a "routing indicator" but a pseudonym for a DRE case officer who did exist and was in charge of a major CIA psychological warfare operation against Castro, this episode is potent metaphor for the CIA's current and past inability to locate the 17 missing monthly reports.

Not only was Harrelson unable to identify Joannides as DRE's case officer, but his memo to the ARRB is fraught with errors. As Morley notes, Nelson, via Harrelson, claims that the CIA reduced its funding of the DRE because a dispute over the direction of U.S. policy towards Cuba "'caused the Agency to reduce the level of funding for the DRE.'" Id., ¶ 91, quoting Harrelson. [JA 847] But, as Morley shows, this is not what happened. In April 1963, the CIA told the CCC that payments to DRE were at the same level as eight months before, even though "'[t]hose eight months saw profound policy differences between the hard-line DRE and the more dovish Kennedy administration.'" Id., ¶¶ 99-100. [JA 850] In April 1963, senior CIA officials in Washington twice rejected the idea of cutting off the DRE because of public policy differences.'" Id., ¶ 101, Exhibits. 30, 32. [JA 850, 851] CIA funding of the DRE was not significantly cut until November 15,

1963, more than a year after the policy differences had first surfaced. Id., 102, Exh. 57. [JA 851]

Second, the monthly reports did not "trail off," as Nelson claims. They ceased when Joannides became DRE's case officer and they resumed when his replacement took over. Id., 103. Morley notes that Nelson relies on Harrelson's speculation that "'it seems probable that these events are linked and that reporting in the form of such monthly reports simply stopped.'" Id., ¶ 104. Asserting these "these events were not linked," Morley observes that "[p]olicy differences did not prevent CIA officers from filing monthly progress reports . . . from June to November 1962." Id., Exhibits 18, 21, 24, 28, 35, 51, 54, 59.

Third, the Nelson/Harrelson account leaves the impression that the CIA and Joannides simply parted ways with the DRE in 1963 and had no need for reporting on their activities. However, the group's activities were repeatedly the focus of attention in the White House, the National Security Council, the Washington Post and the New York Times, the CIA's Special Affairs Staff and a congressional committee. Id. ¶ 105, citing Exhibits 14, 26, 27, 42, 48, 49, 51, 54, 55, 57, 60, and 64. [JA 851,852] To say that Joannides didn't report what he knew about these activities "would be to say

that he was not a professional intelligence officer. There is no basis for such an assumption." Id

In short, the CIA's "explanation" about the missing monthly reports lacks any credibility and does not qualify for an award of summary judgment.

The District Court also noted that the CIA had searched for the monthly reports with "three searched terms" which it found "were 'reasonably calculated to uncover all relevant documents.'" Mem. Op. at 7 (citations omitted). [JA 1097] Nelson identified the three search terms as "AMSPELL," "Directorio Estudantil," and "DRE." Nelson Decl., ¶ 47. [JA 154]

There are, however, multiple problems with this finding.

First, the District Court's ruling is flawed in light of Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C.Cir.1990), which held that "the agency cannot limit its search to only one records system if there are others that are likely to turn up the information requested." AMSPELL AMSPELL was comprised of AMHINT and AMBARB activities. 6th Morley Decl., ¶ 88, quoting DRE progress report from August 1962. [JA 845] Thus, it cannot be contended that while AMSPELL was a "likely" location or term to be searched, AMHINT and AMBARB are not.

Second, the CIA does not say how it conducted the search of the large project files it did search. Nelson gives no specifics as to whether it was manual or electronic, or which CIA's databases were searched.

The CIA also does not indicate what search terms were used other than the three it lists. But those terms only direct the search to large operational projects, and without manual inspection of all records retrieved under these subjects, this is meaningless. Further search instructions are required. The Harrelson memorandum provides an example of a search term which could have been used, as describes the monthly reports that were submitted before Joannides became DRE's case officer as "Monthly Operational Reports." Nelson Decl., ¶ 46, Exh. K. [JA 816--818] There is no indication that the CIA's search included this term of variations of other search terms which might have been used.

The CIA's search efforts were also apparently limited to a search of indices. But the FOIA may require more where indices are insufficient to enable identification and retrieval of important records.

The CIA also failed to indicate any systematic effort to identify how and where such reports are usually filed and with which officers or officers. Were the files of accounting or financial offices searched?

C. Discovery

This case is like Weisberg v. United States Dept. of Justice, 627 F.2d 365, 371 (D.C.Cir.1980), where this Court found that "the agency affidavits before us "do not note which files were searched or by whom, do not reflect any systematic document location, and do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized." Weisberg v. United States Dept. of Justice, 627 F.2d 365, 371 (D.C.Cir.1980). In addition to not indicating which components of the operational directorates were searched, or by whom, or which terms other than three project names were searched in response to the request for the missing 17 monthly reports, the searches that were done do not "reflect any systematic document location."

To show an adequate search has been done, the CIA must describe in detail not only which computer databases were searched, and which CIA components were searched, but also which operations or projects were searched. In order to accomplish this, the appropriate crypts or pseudonyms must be known, otherwise the search will be ineffective. Thus, John Whitten, a former high-ranking CIA officer, testified in his deposition to the HSCA, that to retrieve information on a CIA agent, one needs to go to the Central Registry or the appropriate CIA desk and obtain the cryptonym of the agent. The desk handling that cryptonym would have the relevant files.

With respect to CIA officers, who are generally not agents, pseudonyms, not cryptonyms are used. See RCMS, Attachment A, which is pp. 105-109 from the Scelso deposition, pp. 105-109.[6] The CIA failed to indicate whether, or to what extent, it had complied with the procedures indicated by Whitten.

Morley also submitted an affidavit by a noted historian indicating that the CIA's search procedures appear to be grievously flawed. Prof. David Kaiser filed a FOIA request seeking (1) 320 specific documents pertaining to the Vietnam War taken from withdrawal sheets at the President John F. Kennedy Library, and (2) "'documents relating to conversations between [Ngo Dinh] Nhu and [William] Colby and between Nhu and [John Richardson] during the period June 1960 and October 1962.'" Declaration of David Kaiser, ¶ 2 [JA 1070] Nhu was the brother-in-law of South Vietnam' President Ngo Dinh Diem. Colby and Richardson had been CIA station chiefs in Vietnam during that period.

It took six years for the CIA to act on Kaiser's request. He received 13 of the 320 of the specific documents he had requested, with some redactions. He writes:

> With respect to the second part of the request, regard-

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[6] "Scelso" was a pseudonym assigned to John Whitten, a top CIA official who was initially assigned to be liaison with the Warren Commission until his pursuit of leads in Mexico City caused the Chief of CIA Counterintelligence, James Jesus Angleton, to be selected as replacement liaison.

> ing Nhu's talks with Colby and Richardson, the Information and Privacy Coordinator informed me that "the Agency components involved in the processing of your request have determined that their record systems are not constituted in such a manner to search for the the records you have requested based on the information provided in line 2 of your request."

Id. Subsequently, however, Prof. Kaiser learned that CIA had published six internal histories of the Vietnam War on its website. One of them "draws extensively on exactly the documents I requested and which I was denied—Colby and Richardson's accounts of their talks with Ngo Dinh Nhu. Apparently, the Agency had no trouble providing them to their own contract historian." Id., ¶ 4. [JA 1071]

The District Court gave no indication that it took this evidence into account in evaluating the adequacy of the CIA's search or the existence of a material fact in dispute. This and the deficiencies in the CIA's search pointed out above warrant a remand to permit Morley to take discovery.

A recent case makes clear the importance of discovery in FOIA cases. Thus, through discovery a FOIA requester learned that the FBI had for decades been searching only one file systems when in fact there were nine different sources of searchable records systems, including one that was full-text searchable. See Negly v. F.B.I., 658 F.Supp.2d 50, 56-57 (D.C.C.2009). The CIA, too, should be subject to the illumination provided by discovery.

II. THE CIA HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF REGARDING ITS EXEMPTION 1 and 3 CLAIMS

A. Exemption 1

On remand, the CIA processed its operational records on Joannides as instructed by this Court and withheld 295 documents in their entirety pursuant to Exemptions 1, 2, 3, 5, and 6. Nelson Decl., ¶ 25 [JA 141] The CIA has deployed an iron curtain of secrecy against the disclosure of information that is both ancient and of utmost public interest. It continues to maintain this iron curtain thwarting access to information pertaining to the JFK assassination in spite of a national policy which, while providing that some matters must be kept secret for a period of time, increasingly recognizes the importance of the countervailing values of transparency and accountability.[7]

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[7]This policy is reflected in the "Openness Directive" which President Barack Obama announced on his first day in office, in his new Executive Order 13526, 75 Fed. Reg. 707 (Jan. 5, 2010), and in the National Declassification Center he established to hasten the declassification of approximately 400 million pages of historical records.

The District Court noted that this Court stated with respect to Exemption 1 claims that "little proof or explanation is required beyond a plausible assertion that information is properly classified." Mem. Op. at 11, quoting Morley, 508 F.3d at 1124. The District Court did not explain why withholding all 295 documents in their entirety was a "plausible assertion" given the fact that the activities of Joannides and the DRE were extensively set forth in Morley's Sixth Declaration, which was based on official disclosures of information made under the JFK Act with the CIA's approval. Clearly, the disclosures Morley set forth in detailing Joannides' activites are inconsistent with the blanket withholding of all information in the 295 entirely withheld records. This disparate treatment created an issue of material fact in dispute.

The District Court noted that when an agency invokes Exemption 1, "courts have been instructed by Congress to give 'substantial weight' to agency determinations concerning national security." Mem. Op. at 10, citing Halperin at 147-148. It did not discuss what is meant by this term. It simply gave total deference to the CIA's determinations. But as this Court has noted, "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.'" Camp-

bell v. U.S. Dept. of Justice, 164 F.3d 20, 30 (D.C.Cir.1999), citing King v. U.S. Dept. of Justice, 830 F.2d 210, 218 (D.C.Cir.1987). Here the District Court simply adopted the CIA's determinations without engaging in any examination of whether blanket withholding was plausible in light of the age, changed national security circumstances, and massive prior divulgence of the same or same kinds of information on the same subject matter.

"Summary judgment may be granted on the basis of agency affidavits if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." Halperin v. Central Intelligence Agency, 629 F.2d 144, 148 (D.C.Cir.1980)(citations omitted). Each of these factors is present in this case.

The CIA's claim that these 295 documents remain properly classified in their entirety because disclosure would harm national security is called into question by the passage of time and the voluminous public disclosure of related materials without any evidence of damage to national security resulting from such disclosures.

Evidence of agency bad faith is all-pervasive where the matters under consideration—Joannides, the DRE and Oswald's pre-assassination activities—are concerned. The following examples illustrate the point: (1) the CIA's provision of records to the Warren Commission was "deficient,"

as the Church Committee found; (2) the CIA undermined the HSCA's probe by assigning Joannides to serve as liaison to it without disclosing he had served as case officer to the DRE, even though it was seeking information on the DRE, a target of the congressional investigation, and who its case officer was; (3) the CIA responded to inquiries by the ARRB in 1998 about the identity of DRE's case officer with information that it knew or should have known was false, saying that it could not identify "Howard," a pseudonym for Joannides; (4) it initially failed to respond to Morley's FOIA request at all, seeking to foist it off on NARA; (5) after suit was filed it denied Morley access to records of operations involving Joannides, even though those operations had previously been officially acknowledged; and (6) as a result of this lawsuit belatedly disclosed that it sent Joannides to act as liaison to the HSCA in an a covert capacity in violation of its Memorandum of Understanding with the HSCA and U.S. criminal law.

Under these circumstances, the CIA's declaration in this case is not entitled to the credibility which it must have to sustain summary judgment. The District Court's grant of summary judgment on Exemption 1 grounds was in error.

As noted above, the District granted summary judgment because it felt acquiescence in the Agency's determinations was warranted. In granting

this degree of deference given the facts in this case, it misapplied what Congress meant by "substantial weight" when it amended Exemption 1 in 1974.

Exemption 1 was amended to overturn EPA v. Mink, 410 U.S. 73 (1973). Mink held that Exemption 1 claims were not subject to judicial review, a district court was compelled to accept an agency's claim that information had been classified in the interests of national security.

The amendments to Exemption 1 "reflect legislative intent to authorize the courts to engage in "`a full review of agency action' with respect to information classified under an executive order." Freedom of Information: Judicial Review of Executive Security Classifications," XVIII University of Florida Law Review 551, 554 (1976), citing H.R. Rep. No. 1380, 93d Cong., 2d Sess. (974). The House Report recommending passage of the amendments "states that under the (b)(1) Exemption. A district court 'may look at the reasonableness and propriety of the determination to classify the records under the terms of the Executive order.'" Id.

While the FOIA places the burden of proof on an agency to sustain its action, 5 U.S.C. § 552(a)(B), it is "silent . . . as to the evidential weight to be accorded executive determinations pursuant to established national defense and foreign relations criteria." Id. at 557. In response to a specific objection

by President Gerald Ford, the Conference Report which accompanied the amended Act noted that "Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record." As a result, the conferees stated their expectation that "Federal courts, in making de novo determinations (under the executive order exemption) . . . will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." Id. at 558, quoting H.R. Rep. No. 1380.

As University of Florida Law Review analyses it:

> This suggestion by the conferees is merely a reminder that those within the executive branch authorized to make security classifications will often be in a better position to evaluate the need for classification than the party seeking disclosure. The conferees have not suggested that the evidence of the party seeking disclosure should be afforded any less "substantial weight." In fact, the legislative history indicates that it was Congress' intent that the evidence of both parties be accorded equal weight, commensurate with the degree of expertise, credibility, and persuasiveness underlying it. More fundamentally, the "substantial weight" suggestion of the conferees should in no way be taken to suggest the imposition of a presumption; Congress in its initial consideration of the 1974 amendments, specifically rejected a similar presumption contained in the Senate draft of the bill.

Id. at 558-559 (footnotes omitted).

Here, the record suggests that the CIA's determinations lack sufficient credibility to warrant the degree of deference given them. The credibility of the CIA's asseverations is further eroded by the fact that it has not only withheld the 295 documents in their entirety under Exemption 1, it has also engaged in total withholding under Exemption 3.

Nelson made her determinations under E.O. 12958, which was in effect at the time the records at issue were reviewed.[8] Section 1.8(a)(2), provides that "[iln no case shall information be classified in order to: "prevent embarrassment to a person, organization, or agency. . . ." Without question, the information regarding Joannides that has come to light is highly embarrassing to the CIA. The circumstances surrounding the Joannides/DRE relationship at issue in this case suggest embarrassment may be a reason underlying the CIA's desire to keep this information hermetically sealed. This is indicated by the repeated actions to avert scrutiny by the Warren Commission, the Church Committee, the House Select Committee on Assassinations and the ARRB. It encompasses the CIA's violation of its Memorandum of Understanding with the HSCA, a federal criminal offense, failure to provide Congress with critical information pertinent to its investigation of the DRE/Oswald relationship, and

[8] The current Executive Order is E.O. 13526. Should this case be remanded to district court, it is the executive order that would apply.

assignment of a CIA officer as liaison to the HSCA who was working in a covert capacity.

Section 3.2(b) of E.O. 12958 provides that while it is presumed that information that continues to meet classification requirements requires continued protection, "the need to protect such information may be outweighed by the public interest in the disclosure of the information, and in these instances the information should be declassified." Section 3.2(b) also provides that when such questions arise, "they shall be referred to the agency head or the senior agency official "who will determine . . . whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure."

Clearly, the circumstances presented here raise a question as to whether the public interest in disclosure outweighs the fact that it is allegedly classified. The public interest is indicated by the fact that Congress, in unanimously passing the JFK Act, required the prompt disclosure of virtually all JFK assassination-related records. The public interest was noted in a declaration filed in this case by United States District Judge John R. Tunheim, formerly Chairman of the ARRB, referring to the records on Joannides sought by Morley, stated: "The public interest in these records is extremely high and no reason exists for delay, particularly with

records that are as old as the records being sought." Declaration of John R. Tunheim, ¶ 7. [JA 49] In another declaration filed in this case, Prof. Anna K. Nelson, who served as a member of the Review Board, stated:

> Utilizing disclosures made under the JFK Act, [Morley] has learned that the CIA undermined the investigation which the House Select committee on Assassinations made of the JFK assassination in 1976-1978. By its actions, the CIA has thus destroyed the integrity of the probe made by Congress, influenced the ARRB which was required by the legislation to use the records of that investigation and cast additional doubt upon itself. It is important that all additional information which bears upon the CIA's conduct regarding both the congressional investigation and itself be made public as soon as possible so that Mr. Morley and others may continue to research these matters. Moreover, Congress itself may wish to investigate the CIA's alleged corruption of its inquiry into the Kennedy assassination.

Declaration of Anna K. Nelson, ¶ 7. [JA 39]

The CIA made no reference to the "public interest" provision in E.O. 12598 and did not refer this issue to the head of the agency or a senior official for a determination whether the public interest in these records outweighed the putative harm to national security. Because this was required but not done, summary judgment was improper.

B. Exemption 3

The CIA invokes Exemption 3 in tandem with Exemption 1 for

virtually every one of the 295 documents withheld in their entirety. The primary focus of this exemption claim is 50 U.S.C. § 403(d)(3), which instructs the DCI to protect against the unauthorized disclosure of intelligence sources and methods.[9]

There is doubt that the phrase "intelligence sources and methods was broadly defined in CIA v. Sims, 471 U.S.159 (1985), but that does not mean that it is without limitation. Sims states that "Congress simply and pointedly protected all sources of intelligence that provide, or are engaged to provide, information that the Agency needs to perform its statutory duties." Id. at 169-170. Sims also notes, however, that "Congress did not mandate the withholding of information that may reveal the identity of an intelligence source; it made the Director of Central Intelligence responsible only for protecting against unauthorized disclosure." Id. at 180 (emphasis added). Congress did not legislate withholding of such information where there is no current national security need to withhold it, nor did it provide that it could

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[9] The CIA also invokes 50 U.S.C. 403(g) as an Exemption 3 statute to protect the names, titles, and functions of CIA officers and employees despite the fact that their identities have been disclosed by the hundreds, if not the thousands under the JFK Act and are freely available on a number of web sites. The scope of such protection, and whether it applies to deceased persons, is unclear. Many such persons appear on television these days, and nearly every week The Washington Post runs an obituary of such an officer or employee.

be withheld forever. Indeed, Sims asserted that "[t]he national interest sometimes makes it advisable, or even imperative, to disclose information that may lead to the identity of intelligence sources." Id.

Ultimately, Sims held that "the FOIA does not require the Director to disclose the institutional affiliations of the exempt researchers in light of the record which supports the Agency's determination that such disclosure would lead to an unacceptable risk of disclosing the sources' identities." Id. at 181 (emphasis added). Here, the circumstances are far different than those presented by Sims. Here, the CIA has presented no evidence of the need to protect the sources and methods at issue and that there is an unacceptable risk that their disclosure would damage national security. There is also every reason to believe that the disclosure of many of the sources and methods have been the subject of previously authorized disclosures under the JFK Act or elsewhere. The CIA has not established the need for suppression or the risk to national security in light of such prior disclosures.

In Sims, the CIA was seeking to protect the identities of persons who had performed mind-control research as part of the CIA's notorious MKULTRA project. The record there showed that "MKULTRA research was related to the Agency's intelligence-gathering function in part because it

revealed information about the ability of foreign governments to use drugs and other biological, chemical, or physical agents in warfare or intelligence operations against adversaries." Id. at 173. This is a far cry from the circumstances presented by this case at this point in time. Here, the sources and methods involved in CIA and Cuban exile participation in anti-Castro operations have been revealed in extraordinary detail as a result of the unprecedented disclosures forced by the JFK Act. Former Cuban and American officials involved in the Bay of Pigs and the Cuban Missile crisis have met in Cuba to discuss such matters. Given the vast array of intelligence sources and methods regarding these subjects that has been released officially, there is no apparent reason to withhold them in this case. It makes no sense to construe FOIA as permitting this universal withholding under the circumstances presented here.

The sweep of "intelligence sources and methods" is broad, but it needs to be Milner related to a real need to protect such sources. That has not been shown here. The Supreme Court recently emphasized that FOIA exemptions must be construed narrowly. "FOIA mandates that an agency disclose records on request, unless they fall within one of nine exemptions. These exemptions are 'explicitly made exclusive,' . . . and must be narrowly construed." Milner v. Dept. of the Navy, 562 U.S. 162 (2011), quoting FBI

v. Abrahamson, 456 U.S. 615, 630 (1982). The CIA's construction of the term in this case is anything but narrow.

The CIA in this case has applied Exemption 3 to cover every conceivable intelligence source and method without making a showing that there is a current need to do so and regardless of whether the information already is public. Morley has provided a lengthy but far from exhaustive list of intelligence sources and methods that have been released under the provisions of the JFK Records Act. See RCMSJ at 37-38, citing Sixth Morley Declaration, Exs. 1, 4, 5, 11, 24, 36, and 42. These examples are drawn from officially disclosed records maintained at NARA's JFK Records Act Collection and they pertain to the same subject matter as the withheld materials. Having shown this much, Morley has met his "initial burden of pointing to information in the public domain that appears to duplicate that being withheld." Davis v. U.S. Dept. of Justice, 968 F.2d 1276, 1279 (D.C.Cir.1992). The CIA has failed to meet its burden of proof to show that such information is properly withheld. .

In Mink, Justice Douglass opined that "My brother Stewart, with all deference, helps make a shambles of the Act by reading § 552(b)(1) as swallowing all the other eight exemptions." Mink at 109 (Justice Douglas, dissenting). This application of Exemption 3 violates the FOIA's carefully-

drawn distinct categories so as to swallow up all information under this one unreviewable claim. This is a profound and unacceptable violation of the FOIA.

As applied in this case, the CIA's interpretation of its "intelligence sources and methods" Exemption 3 statute is all-encompassing. Navasky v. Central Intelligence Agency, 499 F. Supp. 269 (S.D.N.Y.1980), involved a request for information on the CIA's clandestine book publishing activities, the existence of which had been disclosed by the Church Committee Report. The Court ruled that the CIA had not made a sufficient showing which would enable the court to conclude that "release of the withheld materials can reasonably be expected to lead to the disclosure of intelligence sources and methods." Id. at 277-278 (citations omitted).

If no limitations on the scope of "intelligence sources and methods are established, then two consequences follow logically. First, § 403(d)(3) no longer qualifies as an Exemption 3 statute because under Exemption 3(B) "the agency has the burden , of justifying nondisclosure by showing that there is an Exemption 3(B) statute which applies. The Exemption 3 statute based on the CIA's §403(d)(3) must qualify under Exemption 3(B), which provides that it is a statute which "establishes particular criteria for withholding or refers to particular types of matters to be withheld." Hayden

v. National Sec. Serv. Agcy/Cent. Sec. Serv.., 608 F.2d 1381, 1389 (D.C. Cir.1979). But as the CIA is applying it, this statute does not apply to "particular types of matters," it applies to anything and everything.

The second logical consequence of the CIA's application of Exemption 3 in this case is that it destroys the basic framework of the FOIA. As Justices Marshall and Brennan pointed out "Congress, it is clear, sought to assure that the Government would not operate behind a veil of secrecy, and it narrowly tailored the exceptions to the fundamental goal of disclosure." Sims at 182 (Justices Marshall and Brennan concurring in the result). Justices Brennan/Marshall notes in their concurrence that shortly after Mink, Congress overrode a Presidential veto in order to overturn it. The lengthy Brennan/Marshall concurrence provides a detailed analysis of the ways in which the Congressional amendments sought to protect FOIA's balanced statutory scheme which provided workable, judicially enforceable standards. See id. at 181-189. Their concerns need to be addressed in dealing with the problems arising from the CIA's application of Exemption 3 to the documents at issue in this case.

III. THE SUPREME COURT'S DECISION IN MILNER REQUIRES THAT EXEMPTION 2 BE REMANDED TO DISTRICT COURT

Many years ago this Court held that information fell within Exemption 2, 5 U.S.C. § 552(b)(2), if it was "used for predominantly internal purposes," Crooker v. Bureau of Alcohol Tobacco & Firearms, 670 F.2d 1051, 1073 (D.C.Cir.1981)(en banc), and either its "disclosure [might] risk circumvention of agency regulation" or it "relate[d] to trivial administrative matters of no genuine public interest." Schwaner v. Dept. of Air Force, 898 F.2d 793, 794 (D.C.Cir.1990)(internal quotation marks omitted). "Predominantly internal documents the disclosure of which would risk circumvention of agency regulations" were said to be "protected by the so-called 'high 2' exemption," while "[p]redominantly internal documents that deal[t] with trivial administrative matters" were said to "fall under the 'low 2' exemption." Schiller v. N.L.R.B., 964 F.2d 1205, 1207 (D.C.Cir.1992).

Recently, however, the Supreme Court overturned Crooker and its progeny. It explained that the "key word" in Exemption 2 is "personnel," and that "[a]n agency's 'personnel rules and practices' are its rules and practices dealing with employee relations or human resources." Milner v. Dep't of Navy, 131 Supr. Ct. 1259, 1264, 1265 (2011)(quoting 5 U.S.C. § 552(b)(2). It held that in order to be withheld under Exemption 2, a record must "concern the conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and

benefits." Id. at 1265. The Court stressed that records withheld under Exemption 2 "must 'relat[e] solely'—meaning, as usual, 'exclusively or only,'—to the agency's 'personnel rules and practices'" Id. at 1265 n.4 (alteration in original)(quoting 5 U.S.C. § 552(b)(2)(first and third quotations) and RANDOM HOUSE DICTIONARY 1354 (1966)(second quotation)). Finally, the Court said that the records withheld "must be 'internal'; that is, the agency must typically keep the records to itself for its own use. An agency's human resources documents will often meet these conditions." Id. (quoting 5 U.S.C. § 552(b)(2)(internal citation omitted).

Thus, the "High 2" interpretation of Exemption 2 was struck down , and the "Low 2" interpretation limited to the terms of the statute. Id.

In view of Milner, it would appear that virtually all, if not all, of the CIA's Exemption 2 claims in this case have been rendered invalid. In any case, it is clear this issue needs to be remanded so that the CIA and the District Court can reevaluate the claims in light of Milner.

IV. THE DISTRICT COURT ERRED IN SUSTAINING THE CIA'S EXEMPTION 5 CLAIMS

This Court remanded Exemption 5 for the District Court to determine whether Exemption 5's deliberative process privilege applied because the Agency had not offered enough of an explanation to show that the material

"'reflect[ed] the personal opinions of the writer rather than the policy of the agency.'" Morley at 1127, quoting Coastal States Gas Corporation v. Department of Energy. 617 F.2d 854, 866 (D.C.Cir.1980). The District Court found the explanation tendered by Nelson on remand sufficient, sketchy though it was to sustain the Exemption 5 claim with respect to the two documents which were part of the pre-remand 2004 release of documents.

The District Court's ruling is in error for several reasons. First, it rejected Morley's argument that given the passage of thirty years since their creation, release of the documents did not threaten "prematurely" to force the CIA to "operate in a fishbowl." It ruled that the privilege "is not intended merely to prevent embarrassment to those who took part in a given deliberation; rather . . . it is also intended to prevent chilling *future* government employees from engaging in frank discussions during the deliberative process." Mem. Op. at 16 (emphasis in original), citing Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C.Cir. 1980). This ruling violates the principle that FOIA exemptions are to be narrowly construed by construing the temporal reach of the exemption as having no limit. In effect, it amounts to a per se exemption. If the information is deliberative process material, it qualifies as exempt forever.

This runs counter to "the narrow scope of Exemption 5 and the strong policy of the FOIA that the public is entitled to know what its Government is doing and why. The exemption is to be applied as 'narrowly as consistent with Government operation.'" Coastal States at 868, quoting S.Rep. No. 813, 89th Cong., 1st Sess., 9 (1965).

The District Court's ruling also does not comport with what Coastal States actually said. It nowhere states that the deliberative process is intended to prevent chilling future government employees from engaging in frank discussions during the deliberative process. While it does indicate that the privilege applies to a document that is "so candid or personal in nature that disclosure is likely in the future to stifle honest and frank communication within the agency," id., at 866, there is no indication that this applies to all future government employees of the agency. To the contrary, Coastal States made it clear that it was the impact on the authors of the documents at issue in that case, not the impact on authors of future documents, that concerned the Court. Thus, it noted that "public knowledge of the documents will not subject the writer either to ridicule or criticism. Id., at 869.

The District Court also ruled that "Morley is simply too speculative when he argues that the appearance of the term 'OK' on one of the documents renders it final rather than pre-decisional." Mem. Op. at 16. [JA

1106] This improperly places the burden on Morley, not the CIA, as the FOIA requires. This followed the CIA's lead, which also accused Morley of speculating that recommendation at issue was adopted and threw up a flurry of distractions, arguing that the "a mere written 'O.K.' on the document alone is not dispositive of a final decision because [Morley] has not provided any evidence that the redacted material on the same document has anything to do [with] the written 'O.K.', or even whether the 'O.K.' in this instance was an indication of agreement at all." This is a classic nondenial denial. The CIA does not address whether this "O.K." adopted a policy or not.

On remand, the CIA has cited Exemption 5 for several documents withheld in their entirety. The Nelson Declaration and the accompanying Vaughn index make no attempt to set forth a basis for the Exemption 5 claims. For example, Document No. 0000404 is a 1956 document which cites Exempt 5 but makes no attempt to substantiate the claim.

Exemption 3 is also cited for the two Exemption 5 documents. However, no deference to this determination is warranted (1) because this information is not being withheld as classified, and (2) these two documents involve the CIA's placing Joannides in a covert relationship with the HSCA, a violation of criminal law, which he then used to undermine the congressional investigation into President Kennedy's murder. A claim of

exemption cannot be sustained under these circumstances, in which there is an overriding public interest in disclosing the full scope of the CIA's activities in this regard.

On remand, the CIA asserted Exemption 5 information in several documents withheld in their entireties. See Nelson Decl., ¶ 118 [JA 190-191]. These documents are more than half a century old, making premature disclosure of embarrassing information unlikely. Both the originators and the recipients of the communications are unknown. The documents are described is as consisting of "various" pages of no page length is given. Aside from a bare assertion that the information is predecisional, no descriptive information is provided. There is no indication whether the documents flowed from a superior to a subordinate or vide versa. Nor is there any indications whether the recommendations were adopted. There is simply insufficient information on which to base an award of summary judgment under Exemption 5.

V. THE DISTRICT COURT MISAPPLIED EXEMPTION 6

Morley withdrew all his Exemption 6 claims with the exception of a couple pertaining to two documents. With respect to document 1153616, he challenged the withholding of Exemption 6 for "the names . . . for

Joannides' supervisors, references. . . ." Nelson Decl., ¶ 124. [JA 193] With respect to document 1214747, he challenged the withholding of Joannides' "co-workers . . . and supervisors." Nelson Decl., ¶ 128. [JA 195]

Exemption 6 permits nondisclosure of matters "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). This involves a balancing of privacy interests against the public interest in disclosure, but it instructs a court to "tilt the balance in favor of disclosure." Getman v. NLRB, 450 F.2d 670, 674 (D.C.Cir.1971).

The District Court did not specifically address the kind of information which Morley restricted his Exemption 6 challenge to, but rendered a finding that appeared to apply almost entirely, if not entirely, to the alleged Exemption 6 information that Morley had excluded. See Mem. Op. at 18. [JA 1108] Additionally, it applied the wrong legal standard, upholding the withholding of this kind of information because "the consequences to flow from its release could be damaging." Id. (emphasis added). The legal standard requires that disclosure "would constitute a clearly unwarranted invasion of personal privacy." The information at issue in these documents is more than 30 years old, there have been massive releases of such information as a result of various executive and congressional investigations,

and there has been an extraordinary release of personal information regarding CIA officers and employees as a result of the implementation of the JFK Records Act, all of which erodes their expectation of privacy. Because they are on the public payroll and engaged in work that is historically significant, there is a considerable public interest in such information.

VI. THE CIA'S VAUGHN INDEX WAS INADEQUATE

Although the District Court upheld the CIA's Vaughn index, this ruling cannot be sustained. To begin with, it is impossible to even determine the number of pages which comprise the index, as with respect to many documents the CIA simply gives the number of pages as "various." With respect to the requirement that an agency and the district court must find that no segregable nonexempt portions have been withheld, the CIA does not go beyond simply stating that there are no segregable nonexempt portions, except that it sometimes states that it "could not segregate any meaningful information for release." More is required. An agency must reasonably describe the exempt material, "correlating the claimed exemption to particular passages in the document. Schiller v. N.L.R.B., 964 F.2d 1205, 1209 (D.C.Cir.1992).

With respect to many documents, the CIA states that it could not segregate any "meaningful information." This, of course, concedes that nonexempt material has been withheld. It is hard to conceive of nonexempt information that is not meaningful in the context of a covert operation which has some bearing on the assassination of a president. Dates are meaningful, forms, such as letterheads or routing sheets, or cable formats are meaningful. Yet since all are withheld in their entirety, this kind of information has been withheld. Nonexempt cryptonyms, pseudonyms, official titles, sources and methods, may all be of some significance to an historical researcher.

Also at odds with the CIA's segregability claim is the fact that it has withheld 295 documents in their entirety even though they are 32 to almost 50 years old.

CONCLUSION

For the reasons set forth above, the decision of the District Court should be reversed and the case remanded to it for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of December, 2011, mailed a copy of the foregoing Appellant's Brief to AUSA Benton Peterson, 555 4th Street, N.W., Washington, D.C. 20530.

/S/
JAMES H. LESAR

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellant complies with the type and volume limitations set for FRAP 32(a)(7)(B)(i). It does not contain in excess of 14,500 words.

/s/
JAMES H. LESAR

ADDENDUM 1

The Freedom of Information Act, 5 U.S.C. § 552, et seq.

The Freedom of Information Act, 5 U.S.C. § 552, As Amended By Public Law No. 110-175, 121 Stat. 2524, and Public Law No. 111-83, § 564, 123 Stat. 2142, 2184

Below is the full text of the Freedom of Information Act in a form showing all amendments to the statute made by the "Openness Promotes Effectiveness in our National Government Act of 2007" and the "OPEN FOIA Act of 2009." All newly enacted provisions are in boldface type.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of an index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on,

used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines

which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term 'news' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause is shown.

[(D) Repealed. Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)**(i)** The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

> **(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—**
>
> > **(I) a judicial order, or an enforceable written agreement or consent decree; or**
> >
> > **(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.**

(F)**(i)** Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible

for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

> **(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or**
>
> **(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.**

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

> (ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. **To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. [Effective one year from date of enactment].** Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless

the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing

under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(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;

(2) related solely to the internal personnel rules and practices of an agency;

~~(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;~~

(3) specifically exempted from disclosure by statute (other than section 552b of this title), 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; and

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

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (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 a 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, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, **and the exemption under which the deletion is made,** shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, **and the exemption under which the deletion is made,** shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize the withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), **the number of occasions on which each statute was relied upon,** a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median **and average** number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, **based on the date on which the requests were received by the agency**;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency—

> **(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;**
>
> **(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;**
>
> **(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and**
>
> **(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;**

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

~~(F)~~ **(N)** the total amount of fees collected by the agency for processing requests; and

~~(G)~~ **(O)** the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

~~(2)~~ **(3)** Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. **In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.**

~~(3)~~ **(4)** The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

~~(4)~~ **(5)** The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

~~(5)~~ **(6)** The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

~~(2) "record and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.~~

(2) 'record' and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's

annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.