UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON MORLEY	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action No. 03-2545 (RCL)
	:	
UNITED STATES CENTRAL INTELLI-GENCE AGENCY	:	
	:	
	:	
Defendant	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

March 6, 2006

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON MORLEY Plaintiff v. UNITED STATES CENTRAL INTELLIGENCE AGENCY Defendant	:	Civil Action No. 03-2545 (RCL)

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OTHER RELIEF

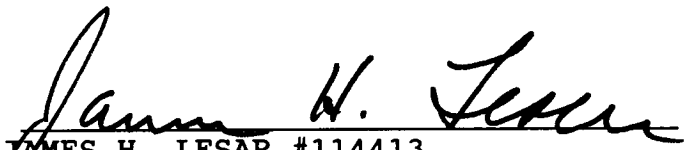
Comes now the plaintiff, Jefferson Morley, and moves this Court for summary judgment in his favor. This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiff further moves the Court to allow him to conduct discovery, to order that defendant conduct further searches, and process all responsive records under the standards of the JFK Act.

A memorandum of points and authorities in support of these motions and in opposition to defendant's motion for summary judgment, a proposed Order, plaintiff's Local Rule 7.1(h) State-ment, and the declarations of Jefferson Morley and Prof. John M. Newman are submitted in support of this motion.

The declarations of Judge John Tunheim and Mr. Prof. Anna Nelson, Mr. Jeremy Gunn and the First, Second, and Rule 56(f) declarations of Jefferson Morley are incorporatred herein by reference.

Respectfully submitted,



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DATED: March 1, 2006

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON MORLEY Plaintiff v. UNITED STATES CENTRAL INTELLIGENCE AGENCY Defendant	:	Civil Action No. 03-2545 (RCL)

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND D FOR ORDERS ALLOWING HIM TO CONDUCT DISCOVERY AND REQUIRING DEFENDANT TO PROCESS HIS REQUESTS IN ACCORDANCE WITH THE STANDARDS OF THE PRESIDENT JOHN F. KENNEDY ASSASSINATION RECORDS COLLECTION ACT

Comes now the plaintiff, Jefferson Morley, and moves this Court for summary judgment in his favor as to the adequacy of defendant's search for responsive records, as to the exemption claims asserted by defendant, and as to his claim that defendant should be required to apply the standards of the President John f. Kennedy Assassination Records Collection Act of 1992 (JFK Act), 44 U.S.C. § 4107, in response to plaintiff's request. This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiff further moves the Court to allow him to conduct further discovery, to order that defendant conduct further searches, and process all responsive records under the standards of the JFK Act.

A memorandum of points and authorities in support of these motions and in opposition to defendant's motion for summary judgment, the declarations of Jefferson Morley and James H. Lesar,

plaintiff's Local Rule 7.1(h) Statement, and a proposed Order are submitted herewith.

Respectfully submitted,

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Counsel for Plaintiff

DATED: March 1, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON MORLEY Plaintiff v. UNITED STATES CENTRAL INTELLIGENCE AGENCY Defendant	:	Civil Action No. 03-2545 (RCL)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BACKGROUND

In this Freedom of Information Act ("FOIA") case, plaintiff Jefferson Morley ("Morley") a columnist for washingtonpost.com, seeks records pertaining to George Joannides ("Joannides"), a deceased operations officer for the Central Intelligence Agency ("CIA"). Joannides was the case officer for the Directorio Revolucionario Estudantil (DRE) or "Student Revolutionary Directorate".

According to CIA records, he supplied the group with up to $25,000 a month at the time President Kennedy was assassinated. The DRE, a CIA-funded Cuban exile organization, was a target of the investigation conducted by the House Select Committee on Assassinations[1] ("HSCA") in 1976-1978. The DRE was of interest to the HSCA

[1] See Attachment 1 to Declaration of Jefferson Morley (First Morley Decl.) filed in support of Plaintiff's Opposition to Defendant's Motion for a Stay, which quotes the HSCA's Chief Counsel and Staff Director, Prof. G. Robert Blakey, as saying that the DRE "was one of the groups we had targeted for investigation."

because its members became involved with JFK's alleged assassin, Lee Harvey Oswald, in the late summer and fall of 1963. As case officer for the DRE, Joannides was supposed to report regularly to CIA Headquarters on the group's activities.

This required Joannides to report on Oswald. On August 5, 1963, Oswald contacted DRE's New Orleans headquarters. According to DRE's New Orleans delegate, Carlos Bringuier, Oswald tried to infiltrate the group by offering to train commandos to fight Cuban Prime Minister Fidel Castro. Id. Four days later, Bringuier engaged Oswald in fisticuffs when he found him distributing "Hands Off Cuba!" leaflets in front of the International Trade Mart, an activity he purportedly undertook on behalf of the Fair Play for Cuba Committee (FPCC), an organization sympathetic to Castro. Oswald, under the alias Alex Hidell, was the president and only member of the New Orleans "chapter" of the FPCC.

This scuffle led to Oswald's being arrested and briefly put in jail. It also resulted in a debate between Oswald and Bringuier on WDSU radio in New Orleans. During the debate, Bringuier brought forth evidence that Oswald was a former Marine who had defected to the Soviet Union in 1959. Bringuier duly reported all of these facts to DRE headquarters in Miami. He also sent a tape of the debate, which was eventually forwarded to Joannides.

In late September Oswald travelled to Mexico City where he came to the attention of Joannides' colleague, David Atlee Phillips. He was the chief of Cuba operations in Mexico City, and it was he who had recruited and funded the leaders of the DRE before

turning over the handling of the group to Joannides. Oswald visited the Cuban and Soviet embassies, purportedly in a quest to obtain a visa to Cuba, thus coming under photo and audio surveillance operations conducted by a CIA team which reported to Phillips.

After Kennedy was killed, Joannides had to report on the DRE's contacts with Oswald. He was immediately informed about them. When the DRE leaders heard that Oswald had been arrested, they recalled Bringuier's reports on Oswald's activities in New Orleans. At DRE headquarters they searched out Bringuier's memos regarding Oswald and the tape of his WDSU debate with him. A DRE leader then contacted Joannides for instructions. He told them not to do anything or contact anyone for an hour while he sought guidance from Washington. The DRE nonetheless released the explosive information within the hour. The result was that the next day's headlines in major newspapers focused on information portraying Oswald as a pro-Castro communist.

The DRE's story was also spread by Hal Hendrix, a friend of the DRE leaders, who would go to work for the CIA's clandestine operations division. According to Seth Kantor, a journalist working for Scripps-Howard when Kennedy was shot, he telephoned Charles Egger, the managing editor of the chain's Washington bureau, at 5:43 p.m. on November 22nd. He was told to contact Hendrix, who supplied him with information about Oswald, including his time spent in the Soviet Union, his connection to the New Orleans FPCC, and his debate with Bringuier on New Orleans radio station WDSU. In the late 1970s, Hendrix pled guilty to with-

holding information from the Senate Subcommittee on Multinational Corporations which investigated the actions of the CIA and International Telephone and Telegraph ("ITT") in the overthrow of the democratically-elected government of Salvatore Allende.[2]

Joannides' activities in 1963, and his financial relationship with Oswald's antagonists in the DRE, were hidden from the Warren Commission. It relied principally on the FBI and the CIA to conduct its probe. Initially, CIA Director Richard Helms named a veteran officer, John Whitten, Chief of Operations for Mexico and Central America, to review the CIA's information on Oswald. However, Helms kept vital information about Oswald's Cuba-related activities from Whitten. When Whitten tried to pursue related investigative leads, he was abruptly relieved of his job and replaced by James Jesus Angleton, Chief of Counterintelligence. See "The Good Spy," by Jefferson Morley.[3] "Oswald's Cuba-related political life, which Whitten wanted to pursue, went unexplored by the C.I.A." Id.

Joannides later played a leading role in the CIA's effort to block congressional investigation of the events involving Oswald in the DRE. Congress attempted to probe the possibility that pro- or anti-Castro Cubans were involved in Kennedy's death. Confronted by congressional investigators asking hard questions and seeking Agency documents, the CIA brought Joannides out of retirement to handle the HSCA's requests. Prof. G. Robert Blakey, HSCA's Chief

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[2]See Kantor, Seth, The Ruby Cover-Up (New York: Kensington Publishing Co. (Zebra Books), 1978), pp. 373-382.

[3]See First Morley Decl., Att. 2.

Counsel, says "I worked closely with Joannides." He adds, "None of us knew that he had been a contact agent for the DRE in 1963. That was one of the groups we had targeted for investigation."[4]

At first, the CIA cooperated with the HSCA. But when Joannides took over, cooperation ceased. See "The Perfect Man for the Job: George Joannides and the Kennedy Assassination Coverup," by Jefferson Morley.[5] The HSCA investigators had a standing request for the files on DRE. They were especially interested in reviewing its contacts with Oswald. Joannides did not disclose his role in these events. He provided no records on DRE for the critical period December 1962 to April 1964. Id.

In 1992 Congress enacted the President John F. Kennedy Assassination Records Collection Act (the JFK Act). It required all federal agencies to promptly identify all their records relating to the JFK assassination. Declaration of John R. Tunheim, ¶ 2.[6] The Act established a five-member Review Board to enforce its very strong mandate.

In passing the JFK Act, Congress strongly indicated that it wanted all JFK assassination-related information released quickly. In support of the Act, Congress made seven "findings." Four stress the need to disclose information pertaining to the JFK assassination quickly. The second finding made by Congress states that all

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[4]See First Morley Decl., Att. 1.

[5]Id., Att.

[6]Submitted in support of Plaintiff's Opposition to Defendant's Motion for a Stay and incorporated herein by reference.

Kennedy assassination records "should carry a presumption of immediate disclosure...." .

Despite this exceptionally strong congressional mandate, the CIA resisted the ARRB's efforts to obtain records pertaining to Joannides and the DRE. A handful of records released as a result of its efforts showed that DRE had reported to someone at the CIA named "Howard" in late 1963. In December 1997 the ARRB asked the Agency's Office of Historical Review to disclose Howard's real name. In January 1998 a CIA official named Barry Harrelson told the ARRB that "rather extensive efforts" to determine if "Howard" was "an actual person" had been unsuccessful. He said that even "knowledgeable case officers" could not identify "Howard." See Declaration of T. Jeremy Gunn.[7]

In March 1998, a Review Board archivist found Joannides' personnel file, which showed that he was the CIA officer who had handled DRE. The ARRB ordered it to be made public.

When the HSCA issued its report in 1979, it vouched for the CIA's cooperation. Its Chief Counsel, G. Robert Blakey, now rejects that statement. His top aide, Dan Hardway, who was directly in charge of investigating the Kennedy assassination, goes further, saying, "I am now certain that Joannides was hiding evidence of a conspiracy to kill Kennedy. This conspiracy involved CIA officers in the DRE and organized crime figures."[8]

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[7]Reproduced as Attachment A to Plaintiff's Opposition to Defendant's Motion for a stay and incorporated herein by reference.

[8]See Attachment 3 to Morley Declaration submitted in support of Plaintiff's Opposition to Defendant's Motion for a Stay.

Whether Hardway is correct, or whether there is some less culpable explanation for the CIA's coverup, the law requires the CIA to account for Joannides actions in late 1963. The passage of nearly four decades since Kennedy's assassination has made it much more difficult to determine the truth. It also gives special urgency to Morley's request for release of the records on Joannides which the CIA did not make available to the Warren Commission, hid from the HSCA, and did not disclose under the JFK Act.

ARGUMENT

I. THE CIA SHOULD BE REQUIRED TO PROCESS MORLEY'S REQUEST UNDER THE STANDARDS OF THE JFK ACT

The CIA responded to Morley's request by processing it under the FOIA. Act. Morley contends, however, that it should have been processed in accordance with the standards set forth in the JFK Act, 44 U.S.C. 2107 note (Supp. 1993)).

As the D.C. Circuit has explained:

> The [JFK] Act requires all government agencies to compile all of their records relating to the assassination of President Kennedy. § 5(c)(1), (c)(2)(A). It defines "assassination record", § 3(2), and establishes for such records "a presumption of immediate disclosure." § 2(a)(2). The Act provides for the postponement of disclosure given "clear and convincing evidence" of certain enumerated circumstances, § 6, but declares that "only in the rarest cases is there any legitimate need for continued protection of such records." § 2(a)(7). Furthermore, it directs that "all records should be eventually disclosed to enable to enable the public to become fully informed about the history surrounding the assassination". § 2(a)((2).

Assassination Archives v. Dept. of Justice, 43 F.3d 1542, 1543 (D.C.Cir. 1995)("AARC").

As this passage indicates, the JFK Act provides for far broader disclosures than does the FOIA. The JFK Act's search mandate is also far broader. Notably, under the JFK Act, there is no exemption from search of the CIA's operational files as there is under the FOIA. Thus, any search conducted under JFK Act standards would likely produce far more records than a FOIA request, and the disclosure of information would be far greater.

In AARC, the Court of Appeals ruled that (1) the JFK Act did not create a private right of action, and (2) the substantive provisions of the JFK Act were not enforceable through the FOIA. However, this case presents different considerations than were addressed by that court. The reasons for rejecting the AARC's claims in that lawsuit no longer apply.

First, as the CIA acknowledges, see Declaration of Marilyn A. Dorn (Dorn Decl.), ¶ 28, in September 1998, it entered into a Memorandum of Understanding (MOU) with the ARRB and the National Archives and Records Administration (NARA), regarding its continuing obligations under the JFK Act after the demise of the ARRB. The MOU provides: "With respect to the review of other agency documents referred to the CIA, the review of any new assassination records, or the periodic review of postponed assassination records, the CIA will, in good faith, continue to apply the postponement

criteria of the JFK Act as previously interpreted by decisions of the Review Board." See Exhibit 1.

The CIA's agreement with NARA and the ARRB to continue to apply JFK Act standards to JFK assassination-related records was not before the court in the AARC case; it was not even in existence as of then.

Secondly, the Court of Appeals rejected the AARC's arguments that JFK Act's standards should be applied to FOIA requests because "[t]h JFK Act and the FOIA are separate statutory schemes with separate sets of standards and separate (and markedly different) enforcement mechanisms." AARC, 43 F.3d at 1544. It noted that under the AARC's theories, "document requesters . . . could secure immediate judicial application of the substantive standards of the JFK Act without having to wait for that Act's procedures to run their course." Id., 1543.

Now, the JFK Act's procedures have run their course. The Review Board, the JFK Act's enforcement arm, is out of existence. The CIA has violated the JFK Act and its agreement with the Review Board and NARA. In so doing, it has violated the will of Congress.

In AARC, the Court of Appeals observed that "[i]t is true that the JFK Act arose in part out of Congress's concern that 'the Freedom of Information Act, as implemented by the executive branch, has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy. § 2(a)(5)." 43 F.3d at 1544. The circumstance now presented is that despite Congress's effort to see that all JFK assassination-related be made

available to the public as quickly as possible, this goal has been thwarted by the CIA's obstruction of the Review Board's efforts to obtain information on the subject of Morley's request and its failure to carry out its contract with NARA and the ARRB.

Statutes dealing with the same subject or goals are referred to as statutes in pari materia and one may be construed and implemented in light of the other. Thus, "[p]rovisions in one act which are omitted in another on the same subject matter will be applied when the purposes of the two acts are consistent." Sutherland Stat. Const § 51.02 (citations omitted).

In enacting the JFK Act, Congress expressly found that the FOIA, as implemented by the executive branch, had prevented the timely public disclosure of JFK assassination records. To remedy that problem, it enacted a new disclosure law and created a citizen review board to enforce it. Now that board is out of existence and the CIA is failing to live up to its word that it would continue to process JFK assassination records under JFK Act standards. Under these circumstances, the FOIA is the only mechanism for seeing that the records which Congress intended be made public are in fact released. Not to apply JFK Act search and disclosure standards to a FOIA request for JFK-related records is to resurrect the very problem which Congress sought to solve when it unanimously passed the JFK Act.

This Court is not only a court of law but a court of equity as well. Equity doctrines specify that no wrong is without a remedy and that no party should be allowed to be the beneficiary of its

own wrongdoing. Given the circumstances in this case, this Court should require the CIA to search for and process all the requested records under the same standards set forth in the JFK Act.

II. THE CIA HAS FAILED TO MEET ITS BURDEN OF SHOWING THAT IT CONDUCTED AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS UNDER THE FREEDOM OF INFORMATION ACT

A. The Legal Standard Governing Searches

To prevail in a FOIA case, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable or is wholly exempt from the Act's inspection requirements." National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C.Cir.1973). Agency affidavits regarding the search for responsive records are inadequate to support summary judgment where they "do not denote which files were searched or by whom, do not reflect any systematic approach to 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).

When the adequacy of an agency's search is in dispute, summary judgment is inappropriate as to that issue. See Founding Church of Scientology, Etc. v. Nat. Sec. Agency, 610 F.2d 834, 836-837 (D.C. Cir.1979)("To accept its claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the Freedom of Information Act . . . and if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid

adversary scrutiny of its search techniques, the Act will inevitably become nugatory.").

It is a truism that the issue is not whether documents might exist that are responsive to the request but rather whether the search conducted by the agency was "adequate'." Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C.Cir.1984)(emphasis in original); McGehee v. CIA, 697 F.2d 1076, 1101 (D.C.Cir.1983). The test governing the adequacy of an agency's search under the FOIA is one of "reasonableness." Oglesby v. Department of the Army, 920 F.2d 57, 67 n.13 (D.C.Cir. 1990). Meeropol v. Meese, 790 F.2d 942, 956 (D.C.Cir.1986)("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request"). In Truitt v. Department of State, 897 F.2d 540 (D.C. Cir. 1990), the D.C. Circuit expatiated on this standard, stating that:

> It is elementary that an agency responding to a FOIA request must 'conduct[] a search reasonably calculated to uncover all relevant documents,' and, if challenged, must demonstrate 'beyond material doubt' that the search was reasonable. "'The issue is **not** whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate.' The adquacy of an agency's search is measured by a 'standard of reasonableness,' and is 'dependent upon the circumstances of the case.'"

Id., at 542 (footnotes omitted)(emphasis added). If such "doubt" exists as to the adequacy of the search, Truitt counsels, "summary judgment for the agency is not proper." Id. (footnote omitted). Where "the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not

in order[,]" Founding Church, supra, 610 F.2d at 836, and the plaintiff is entitled to take discovery on the adequacy of the search. Weisberg, supra, 627 F.2d at 371.

Here, the CIA has not demonstrated "beyond material doubt," that the search that it conducted was reasonable. And, as will be shown below, there are positive indications in the record of the inadequacies of the CIA's search efforts.

B. The CIA's Has Failed to Conduct an Adequate Search

As Morley demonstrates below, the CIA's search is clearly deficient in several respects.

1. Operational Files

The CIA admits that it did not search the "operational files" of the Directorate of Operations (DO), the Directorate of Science and Technology (DS&T), and the Security Center. See Dorn Decl., ¶ 97. As justification for not having searched the records of these components, the CIA invokes the CIA Information Act of 1984. While that law does exempt designated operational files from search in response to a FOIA request, there are three exceptions to this provision. This portion of the statute states as follows:

> Provided further, That the designation of any operational files shall not prevent the search and review of such files for information concerning any operational activity the existence of which is not exempt from disclosure under the provisions of the Freedom of Information Act, or for information reviewed and relied upon in an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Department of Justice, the Office of the General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Director of the

> Office of Central Intelligence for any impropriety or violation of law, Executive Order, or Presidential directive in the conduct of an intelligence activity.

Clearly, the records sought by Morley qualify under this provision. The assassination of President Kennedy has been investigated by "intelligence committees of Congress," specifically the Senate Select Committee on Intelligence Activities with Respect to Governmental Operations (the Church Committee) and the House Select Committee on Assassinations (HSCA). It has also been the subject of investigations by the Department of Justice and the CIA's Office of General Counsel and Office of the Director of Central Intelligence.

In passing the JFK Act, Congress gave the ARRB the power to further define what constitutes a record pertaining to the assassination of President Kennedy. Mr. Jeremy Gunn served from 1994-1998 as General Counsel, Director of the ARRB. Gunn Decl., ¶ 2. As he has stated, the information about Joannides "is without any question an extremely important part of the larger story of the assassination. Records related to Joannides' activities in 1962-64 and 1978, unquestionably fall within the scope of the JFK Act as was consistently held by the Review Board that had statutory responsibiliy for interpreting the scope of the Act." Id., ¶ 11.

In John Kelly v. Central Intelligence Agency, Civil Action No. 00-2498 (TFH), this Court confronted the same issue in the context of a FOIA request for records concerning the CIA's MK/ULTRA project. While the CIA maintained that it did not have to search its operational files, this Court held that: "The MK-ULTRA program

has been the subject of numerous investigations. *** Therefore, the Court finds that 50 U.S.C. § 431(c) requires the CIA to search and review its operational files for information concerning the MKULTRA project and will accordingly order the CIA to conduct such a search and review, making all releasable information available to Kelly." Id., Memorandum Opinion (August 8, 2002), at 30-31. See Exhibit 2. The same result should follow here.

2. JFK Act Records Transferred to NARA

The CIA initially tried to fob Morley's FOIA request off on NARA by advising him in its November 3, 2003 response to his FOIA request that its records on the assassination of President Kennedy had been transferred there. See Dorn Decl., ¶ 32. The search which the CIA eventually conducted did not include a search of records that had been transferred to NARA. Id., ¶ 44.

The fact that NARA also may have copies of pertinent records does not exempt the CIA from having to produce them in response to Morley's FOIA request. The FOIA has no exemption which excepts such records from being searched and produced.

3. Files of the Office of General Counsel

The CIA asserts that in response to Morley's request it did task the Office of General Counsel (OGC) to search for responsive records. Whether it located any responsive documents there is unclear. See Dorn Decl., ¶ 44. What is clear is that Morley has not been provided with relevant OGC records that should have been located.

Item 16 of Morley's request seeks ""all records in the Office

of General Counsel pertaining to the selection of George Joannides as liaison to the House Select Committee on Assassinations." "Among such records would be memoranda, minutes, or notes related to a series of meetings concerning the HSCA described by Scott Breckinridge, the late General Counsel of the Agency, on pages 256-257 of his book The CIA and the U.S. Intelligence System (Westview 1986)." Second Morley Decl, ¶ 11.[9]

Breckinridge wrote that he wanted two officers to be attached to the Office of Legislative Counsel who would be assigned to HSCA-related duties. As Morley describes what happened:

> [Breckenridge] arranged for a "key person to be designated in each of the agency's areas where [Breckenridge] would have occasion to seek support. . . . [He] had the first of several meetings with those people, some of whom [he] dealt with very frequently during the HSCA's operations. . . . [He] was also given a number of personnel files from the Clandestine Services, where we probably would have our major work, and picked George J., an experienced senior officer who knew his way around that area."

Id, ¶ 12 and Attachment F, quoting Breckinridge's book

"George J" is clearly a reference to George Joannides, a clandestine services officer whose 1979 job evaluation describes him as the Agency's "Principal Coordinator" with the HSCA. "These meetings were undoubtedly memorialized by one or more of the participants." Id., ¶ 13. "Yet the CIA has not provided me any records of Breckinridge's selection of or meetings with George Joannides in 1978." Id.

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[9]Filed with Plaintiff's Opposition to Defendant's Motion for a Protective Order (April 26, 2005).

4. Office of Legislative Counsel

The files of the Office of Legislative Counsel (OLC) also have not been adequately searched. As Breckinridge noted in his book, the Office of Legislative Counsel played a central role in the Agency's work with the HSCA. It kept a "daily diary" of the office's activity as concerned the HSCA. As Morley points out, "[A]t the same time, Joannides was responsible for Clandestine Services issues, the area that Breckinridge affirmed was the 'major' focus of the HSCA investigation. Id. In fact, Joannides was the CIA's principal coordinator with the HSCA. Id., ¶ 13.

It strains credulity that the OLC records, including the daily diary, contain no references to the officer who handled 'major' responsibilities on behalf of the OLC. It is unclear whether the CIA is claiming that it located OLC records pertaining to Joannides or not. See Dorn Decl., ¶ 44. What is clear is that it has not provided materials from the "daily diary" or other materials which the functions performed by Joannides should have generated.

5. Missing Monthly Progress Reports

As the deputy and chief of the Psychological Warfare (PW) branch of the CIA's station in Miami, Joannides "had a variety of operational duties according to his January 19, 1963 fitness report." First Morley Decl., ¶ 3 and Attachment A thereto. Furthermore, Joannides was the case officer for the DRE, for a teacher's organization, and for a project producing a "newsletter aimed at press outlets in Latin America." In addition, he maintained

contacts with key elements of a veteran's type organization as a development project. Id., ¶ 4.

Although "Joannides understood well his obligation to report in detail about these projects, and his superiors in this time period praised his "'firm adherence to valid reporting techniques,' the Agency has not provided [Morley] with a single document on any student, teacher, newsletter or veteran's projects." Id., ¶ 5.

Item 12 of Morley's FOIA request, asked for "all records pertaining to Joannides' contacts with 'individuals or officers' of the Cuban Student Directorate." As Morley notes, such contacts would be memorialized in the Monthly Progress Reports routinely filed by that case officer working with the Cuban Student Directorate." Id., ¶ 6.

Both before and after Joannides' tenure as case officer for DRE, its case officers filed monthly progress reports. Id., ¶ 7, Attachments B-C, D-E, respectively. These reports are available at NARA today. Yet the CIA has not provided Morley with a single Monthly Progress Report written by Joannides on the DRE in the 17 months (December 1962 to April 1964) that he worked with the group.

6. The CIA's Declaration Does Not Show that It Has Searched for "Soft" files and Other Specific Items of His Request

The CIA fails to show that an adequate search has been conducted on specific items of Morley's request. For example, per Item 5 of Morley's request, the CIA states that searches were done for "George E. Joannides." However, the request specifies that searches be done for the names "Howard" or "Mr. Howard," which are

names he used with his contacts in the DRE, and "Walter Newby," his CIA file name. The CIA fails to state that it conducted searches for references to these identities used by Joannides. Id., ¶ 24.

Item 6 of Morley's request asked for all index references for "George Joannides," "Howard," "Mr. Howard," or "Walter Newby." The CIA does not describe any search for these records. Id., ¶ 25.

Morley also requested a search of "soft" files. If this was done, Dorn does not say so. That "soft" files are a relevant place to search for materials pertaining to Joannides is shown by Vaughn document 94, whose distribution list shows that a copy of it was sent to "[deleted] Soft File. See Exhibit 3. Presumably the material deleted is the acronym for the component to whose soft file the document was sent. That component's copy of the document has not been produced, nor is there any indication that that file was searched for other relevant materials.

7. The 1,100 Entirely Withheld Documents

The CIA asserts that "[a]ll CIA JFK-related documents have been released in full or in part, except for approximately 1,100 documents that have been denied in full until 2017." Dorn Decl., ¶ 29. The CIA does not make clear whether these records were included in the search done in response to Morley's request. Nor does the CIA explain whether some or all of these entirely withheld records were reviewed by the Review Board prior to its expiration.

This body of records must, of course, be searched for any documents responsive to Morley's request.

8. References to Files Not Searched and Records Not Provided

The documents released to Morley refer to other documents not provided and to places where copies were distributed without provision of the copies of those units or any indication that they have been searched for other responsive records. For example, Vaughn Document to an Attachment D, which is not provided, a "chrono" file, the Trans and Records Branch, and the "CPD." Vaughn Document 97 refers to Joannides' "day-to-day follow-ups . . . by telephone with the DDO focal point as well as throughout the DDO," but no telephone message slips or records reflecting such calls have been provided. Vaughn Document 109 refers to attachments that are not provided.

9. The CIA Has Failed to Adequately Describe Its Search

The CIA has failed to adequately describe its search. As a consequence, its claim to have conducted an adequate search cannot be sustained. The few statements Dorn makes regarding the nature of the search are of a very general nature and are an insufficient basis for this Court to evaluate the adequacy of the search.

In evaluating the adequacy of the search, it is obviously critical that the CIA provide details about the way in which the search was conducted. But no information about this crucial issue has been provided by the CIA. For example, the CIA has failed to provide the search terms that were used. Thus, although Morley's request specified that George Efythron Joannides was also known as "Howard" and "Mr. Howard" and "Walter Newby," Morley does not know whether searches were made under these names, nicknames or pseudo-

nyms, nor does he know whether variations (and variant spellings) of the name George Joannides were used.

Because the CIA has a multitude of separate records systems rather than a single centralized system, it is necessary that information be provided about the kinds of search methods used by each of the components to which the request was referred. Without knowing the search methods employed with respect to various records systems, this Court cannot evaluate whether the search methods used were appropriate and effective. A computer search of a database would be meaningless if the wrong terms were searched or if the record system sought to be searched is not indexed in a manner which will retrieve the kind of information sought. For some kinds of records systems, a page-by-page search may be necessary. Without knowing more about the records systems searched, the kind of records involved, the search terms and methods employed, this Court cannot properly evaluate the adequacy of the CIA's searches.

Although Ms. Dorn states that she tasked Morley's request to various components, she does not identify all of those components, state which of them responded that they had done a search, or indicate what the results of each component's search was. Nor does she identify the persons who conducted the searches or state whether they were involved in the searches which the CIA initially did for the ARRB without finding the records which the Review Board itself later uncovered. This is important information needed to evaluate the bona fides of the CIA's search because those who failed egre-

giously before to carry out this search cannot be trusted to have done it right this time.

10. The Need for Discovery

Morley has presented enough evidence that this Court can and should order that it conduct further searches. However, the nature of the problem confronting the Court is such that further searches will not resolve all the issues present. For example, discovery in other cases has shown that the CIA sometimes interprets a FOIA request in way which limits its scope, and does so without informing the requester. To get at this and a number of other search issues, this Court should permit Morley to take discovery.

III. THE CIA HAS FAILED TO MEET ITS BURDEN OF SHOWING THAT THE WITHHELD MATERIALS ARE EXEMPT FROM DISCLOSURE

A. Inadequacy of Vaughn Index

As noted in King v. United States Department of Justice, 830 F.2d 210, 218 (D.C.Cir.1987) "[t]he significance of agency affidavits in a FOIA case cannot be underestimated." The reason for this is that ordinarily the agency alone possesses knowledge of the precise content of documents withheld. Thus, "the FOIA requester and the court both must rely upon its representations for an understanding of the material sought to be protected." Id. The agency's asseverations are critical because "'[t]his lack of knowledge by the party see[k]ing disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution,' with the result that '[a]n appellate court, like the trial court, is completely without the controverting illumination

that would ordinarily accompany a lower court's factual determination.'" Id., quoting Vaughn v. Rosen, 484 F.2d 830, 824-825 (D.C. Cir.1973), cert. denied, 415 U.S. 977 (1974).

As King also notes:

> Specificity is the defining requirement of the Vaughn index and affidavit; affidavits cannot support summary judgment if they are "conclusory, merely reciting statutory standards or sweeping." To accept an inadequately supported exemption claim "would constitute an abandonment of the trial court's obligation under the FOIA to conduct a de novo review."

Id., at 219 (citations omitted).

Before any deference is accorded to an agency's exemption claims, the agency must submit an index of all withheld material. Vaughn, supra. This index "must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information." King, at 223-224 (emphasis in original).

The Vaughn index submitted by the CIA in this case does not measure up and must be re-done. The fundamental problem is that the exemption claims asserted for a particular document are not tied to particular redactions, with the result that it is frequently impossible to know which exemption claim or claims is being invoked for a particular redaction. For example, with regard to Vaughn Document 12 (Exhibit 4), a three-page Supplemental Personal History Statement, the upper lefthand corner of the first page lists Exemptions 1, 2, 3, 6 and 7(C) as being claimed. However, none of these exemption claims is specifically tied to any of the man redactions made on page one. On page two, although there are

a number of redactions, no exemption claims are set forth. Presumably one or more or even all five of the exemption claims listed on page one apply to page two, but to which redactions they apply is anybody's guess. This situation, which applies to all of the partially redacted and fully redacted Vaughn documents, cannot be reconciled with the standards of King set forth above.

Given this basic flaw in the Vaughn index submitted by the CIA, it must be done over.

B. Segregability

The FOIA requires disclosure of any reasonably segregable nonexempt portions. 552 U.S.C. § 552(b). The D.C. Circuit has held that a district court "has an affirmative duty to consider the segregability issue sua sponte." Transpacific Policing Agreement v. U.S. Customs, 177 F.3d 1022, 1028 (D.C.Cir.1999).

While the CIA makes a claim that no reasonably segregable portions of fully exempt documents exists, Dorn Decl., ¶ 7, it does not go beyond making this statement. More is required. An agency must reasonably describe the exempt material, "correlating the claimed exemption to particular passages in the document." Schiller v. NLRB, 964 F.2d 1205, 1209 (D.C.Cir. 1992). The CIA's Vaughn Index fails to do this.

Occasionally, the CIA claims that "no meaningful information can be segregated for release," as it does for Vaughn Document 134, a five-page lowly-classified document described as "an evaluation of Joannides job' performance on a certain assignment. See Exhibit 6. It is difficult to imagine why any nonexempt information re-

garding his job performance would not be meaningful. Moreover, even the date of this document is withheld, presumably. Whether this is because it is classified, a very dubious proposition, or because it is not exempt but is not considered "meaningful," an even more dubious proposition, is not clear.

Vaughn document 54 (Exhibit 7) is a one-page memo which "confirms that a portion of Joannides' service is creditable for retirement purposes" and is withheld entirely under Exemption 3. While the CIA declares that that no "meaningful" information can be segregated for release, it is difficult to understand why the period under consideration is not releasable. And the amount of his "compensation," which has been released in other documents.

Vaughn Document 32 (Exhibit 8) is a one-page Memorandum for the Record which "contains information about a third party's espionage trial at which Joannides testified." If the trial was public or reported in the press, there is no reason why the name of the third-party should be deleted, particularly since the exemptions claimed are 1 and 3, not 6 or 7(C).

C. Exemption 1

Exemption 1 provides that the mandatory disclosure provisions of the Act do not apply to matters that are:

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order.

Thus, under Exemption 1, an agency must demonstrate that the information is in fact properly classified pursuant to both procedural

and substantive criteria contained in the Executive Order.

1. Procedural Classification

The CIA makes no effort to show that the allegedly classified information has been properly classified procedurally. It hasn't. The current Executive Order is E.O. 12958, as amended by E.O. 13292. Section 1.6 of the amendment provides that each classified document shall have certain required markings indicating the classification level and the identity of the original classification authority, the agent and office of origin, certain declassification instructions, and a concise reason for classification. Virtually all of the documents at issue are lacking all of these except the level of classification stamp.

2. Substantive Classification

The current Executive order is intended to take account of the end of the Cold War, and thus to bring about broadscale declassification of antiquated secrets. As the D.C. Circuit has stated, E.O. 12958 "differs considerably from its predecessor. . . ." Summers v. Department of Justice, 140 F.3d 1077, 1082 (D.C.Cir.1998, 1998), It added:

> Significantly, the newer order is less restrictive, reflecting what it refers to as "dramatic changes" in national security concerns in the late 1980s following the United States' victory in the Cold War.

Id.

Under the current executive order, the minimum test for classifying information is whether its unauthorized disclosure "reasonably could be expected to cause damage to the national

security that the original classification authority is able to identify or describe." Id., § 1.2(3).

Here, the CIA makes only a conclusory assertion that "disclosure could reasonably be expected to cause serious damage to U.S. national security" and fails to support it with any details. Dorn Decl., ¶ 48. However, this Circuit requires that the agency "explain how disclosure of the material in question would cause the requisite degree of harm to the national security." King v. U.S. Dept. of Justice, 830 F.2d 210, 224 (D.C.Cir.1987)(emphasis added). This requirement is especially pertinent here because of the antediluvian nature of the materials at issue. They range from 27-44 years old. As Judge Kessler has noted, in the context of a case arising under the predecessor order, "[t]his Circuit holds a strong presumption against prolonged withholding of information whose sensitivity may have diminished with age." Keenan v. Dept. of Justice, Civil Action No. 94-1909 (D.D.C. March 24, 1997), Mem. Op. at 11 (reproduced as Exhibit 5 hereto), citing King, supra, 830 F.2d at 227-28.

But the passage of time, although a factor clearly made relevant under the current Executive order, which places time limits on the duration of classification, see E.O. 12958, § 1.6, is not the only circumstance, or even the most important circumstance, undercutting the credibility of the CIA's claims that these records are properly classified. The sensitivity of information regarding Cuban operations has, of course, diminished because the former Soviet Union is no longer allied with Cuba in the way it once was and

they no longer present a nuclear threat the way they once did. Moreover, the United States has ceased its efforts to assassinate or overthrow Prime Minister Fidel Castro by military means.

Even more significant, however, is the fact that an enormous amount of long secret information concerning the CIA's operations against Cuban has been released under the JFK Act. About 300,000 pages of records that the CIA made available to the House Select Committee on Assassinations during its investigation of President Kennedy's assassination have been released under the JFK Act.. A very high percentage of this volume of documents concerns Cuba, Cuban exiles, and Cuban exile organizations. All of this material, with minimal redactions, has been released to the public. Declaration of Prof. John M. Newman, ¶ 4.

The materials which the CIA has released under the JFK Act contain thousands of pages of records that reveal the Agency's intelligence sources and methods, including the use of mail intercepts, phone intercepts, penetrations of Cuban diplomatic missions and other sources and methods used to collect information on Cuban personalities. In many instances, the CIA cryptonyms for these operations have been released. Id., ¶ 5.

The CIA has withheld a great deal of information on the grounds that it will disclose intelligence sources and methods, including cryptonyms, pseudonyms and codenames, the location of CIA facilities, countries in which the CIA conducted intelligence activities, CIA internal organizational data, the names of CIA employees and their signatures and official titles. All of this

kind of information has been revealed copiously in records released under the JFK Act pertaining to Cuba, Cuban exiles, Cuban exile organizations, and the CIA officers, employees, assets, and agents who were involved in the CIA's Cuban projects. Id., ¶ 7.

These massive disclosures must be taken into account in evaluating whether or not serious harm to the national security could reasonably be expected to result from future disclosure of the same kinds of material, particularly where there is no evidence that national security has been harmed by the voluminous JFK Act releases. The CIA's declarant gives no indication that she took into account the passage of time, the change in the nature of the threat posed by Cuba when it was allied with the Soviet Union, or the massive disclosures of information concerning the CIA's Cuban operations made under the JFK Act. This severely undermines the credibility of her assertion that these records are properly classified.

3. The CIA's Glomar Response

In response to Morley's request, the CIA asserted that with respect to that portion of his request "seeking records regarding Mr. Joannides' participation in any covert project, operation, or assignment, unless of course previously acknowledged, the CIA can neither confirm or deny the existence or nonexistence of records responsive to your request." Dorn Decl., ¶ 40, quoting letter of December 22, 2004 to Mr. James H. Lesar.

In Phillippi v. Central Intelligence Agency, 546 F.2d 1009, 1013 (D.C.Cir.1974), the Court of Appeals held that where an agency refuses to confirm or deny the existence of responsive records, the

District Court "should attempt to create as complete a public record as possible." Specifically, the agency asserting the "Glomar" defense is required "to provide a public affidavit explaining in as much detail as possible the basis for its claim that it can be required neither to confirm nor deny the existence of the requested records." Id. Once this has been accomplished, however, the agency's arguments "should then be subject to testing" by the party asking disclosure, "who should be allowed to seek appropriate discovery when necessary to clarify the Agency's position or to identify the procedures by which that position was established." Id.

The CIA should be required to publicly explain why in light of its original obligations under the JFK Act and its continuing obligations under the MOU with NARA and the ARRB, it can refuse to confirm or deny the existence of records on Joannides. It must be required to show whether it has identified such records to the Review Board and to NARA, and if it did, why it may now invoke the "Golmar" defense. Morley should then be permitted to take discovery on this issue as contemplated in the Phillippi decision.

B. Exemption 2

Exemption 2 excepts matters that are "related solely to the internal personnel rules and practices of an agency" from mandatory disclosure. 5 U.S.C. § 552(b)(2). In Schwaner v. Department of Air Force, 898 F.2d 793, (D.C.Cir.1990), the Court of Appeals set forth a two-step test for determining whether materials are exempt under this rubric: "'First, the material withheld should fall within the terms of the statutory language.'" Id., quoting

Founding Church of Scientology, Wash. D.C. v. Smith, 721 F.2d 828, 830 n.4 (D.C. Cir.1983). If it does, then the agency may defeat disclosure by proving: (a) that "disclosure may risk circumvention of agency regulation," Department of the Air Force v. Rose, 425 U.S. 352, 369 (1976); or (b) that "the material relates to trivial administrative matters of no genuine public interest." Founding Church, 721 F.2d at 830 n.4.

To determine whether the requested information is related sufficiently to the internal concerns of the agency to fall within the statutory language ("solely related to"), the D.C. Circuit employs a test of "predominant internality." Schwaner, 898 F.2d at 795, citing Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1074 (D.C.Cir.1981)(en banc). In Schwaner, the Court of Appeals held that materials relating to the practice of collecting data did not pass muster under this test. 898 F.2d at 795-798.

Exemption 2 "does not shield information on the sole basis that it is designed for internal agency use." Fitzgibbon v. U.S. Secret Service, 747 F.Supp. 51, 56 (D.D.C.1990). citing Schwaner, 898 F.2d at 794, 796. Fitzgibbon held Exemption 2 inapplicable to "pages bearing Secret Service administrative markings, numbers which classify information based on a Secret Service data collection system," noting that "[t]he numbers are used to index, store, locate, retrieve, and identify information." Id.

The CIA has invoked Exemption 2 for "citation to or discussion of personnel rules and practices (including administrative routing information)." Dorn Decl., ¶ 51. However, the administrative

routing information, file numbers, and distribution lists, all of which seem to be covered by the CIA's Exemption 2 claims, provide exactly the kind of information which Fitzgibbon held were not protected by Exemption 2.

In addition, the CIA asserts that "t]here is no public interest in the disclosure of such internal procedures and clerical information that would justify the administrative burden that would be placed upon CIA." Id. This is not true. The JFK Act disclosures contain such "internal procedures and clerical information" precisely because the House Select Committee on Assassination asked for them when it was investigating the JFK case.

Moreover, as Prof. John Newman points out, "the public has an interest in knowing the extent of knowledge and awareness that existed in both the Plans and Intelligence Directorates not only about Lee Oswald's interactions with Cubans and Cuban groups and Cuban operations, but also Cubans, Cuban groups and Cuban operations in general." As he also states, "[t]his information goes directly to the veracity and credibility of Agency officials' various sworn statements and public declarations of the past decades, in particular with regard to the actions of Mr. Joannides in these matters." Newman Decl., ¶ 11.

Additionally, "[b]ecause Mr. Joannides was the case officer for the . . . DRE, a Cuban exile organization funded by the CIA which became involved with Lee Harvey Oswald before President Kennedy's assassination, the public has an interest in knowing what his personnel records show about his activities and job perform-

ance." Id., ¶ 12. There is also a public interest in distribution lists, file numbers and the like because "they show who at CIA was aware of and involved in his activities and because they indicate locations where additional information on Mr. Joannides that has not yet been provided may be found." Id.

Since these materials do not relate to trivial administrative matters of no genuine public interest," the CIA would have to show that "disclosure may risk circumvention of agency regulation" in order to protect them. It hasn't even made that claim.

E. Exemption 3

The CIA has invoked Exemption 3 to protect what it says are telligence sources, as well as methods and organizational data, official titles, employee names and salaries and the like. Advised that the CIA has withheld a great deal of information on the grounds that it will disclose intelligence sources and methods, including cryptonyms, pseudonyms and codenames, the location of CIA facilities, countries in which the CIA conducted intelligence activities, CIA internal organizational data, the names of CIA employees and their signatures and official titles, Prof. Newman states: "All of this kind of information has been revealed copiously in records released under the JFK Act pertaining to Cuba, Cuban exiles, Cuban exile organizations, and the CIA officers, employees, assets, and agents who were involved in the CIA's Cuban projects." Newman Decl., ¶ 5.

Given the massiveness of the disclosures under the JFK Act, it seems likely that much of the information which the CIA tries to

protect under Exemption 3 already has been "disclosed." The CIA cannot justifiably rely upon statutes which seek to protect against unauthorized disclosure when such disclosure already has occurred.

Moreover, the CIA's definition of "intelligence methods" is too broad and too vague to serve as the basis for an Exemption 3 claim. Dorn defines intelligence methods as "means by which an intelligence agency accomplishes its mission." Dorn Decl., ¶ 62. Under this definition, there is virtually no information that is not exempt from disclosure. The CIA's Exemption 3 swallows the FOIA. It is designed not to keep information from hostile intelligence agencies but from the American people. It cannot be sustained.

The CIA's Exemption 3 claims are also appear to be inconsistent. Vaughn Document 53 (Exhibit 8) refers to five insurance plans and provides information on four of them. However, it deletes the identity of and all information concerning the fifth under Exemption 3.

F. Exemption 5

Exemption 5, 5 U.S.C. § 552(b)(5), provides that the FOIA does not apply to matters that are:

> 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.

Exemption 5 was intended to incorporate the government's common law privilege from discovery in litigation. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 29 (1965); S. Rep. No. 1219, 88th Cong., 2d Sess. 607, 13-14

(1964). However, the Supreme Court has cautioned that discovery rules be applied to FOIA cases only "by way of rough analogies." EPA v. Mink, 410 U.S. 73, 86 (1973).

Congress enacted this proviso because "many agencies" feared that "frank discussions of legal or policy matters in writing" would be chilled if all such materials were disclosable. The Senate Committee which considered S. 1160, the bill which became the FOIA, explained that:

> It was argued, and with merit, that efficiency of government would be greatly hampered if, with respect to legal and policy matters, all government agencies were prematurely forced to "operate in a fishbowl." The Committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operations.

S.Rep.No. 813, 89th Cong., 1st Sess. 9 (1965)(emphasis added).

The CIA invokes the "deliberative process" privilege. The ultimate burden which an agency must carry under this privilege is to show that "the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C.Cir. 1980). Congress intended to confine Exemption 5 "as narrowly as [is] consistent with efficient Government operation." Id. at 868, quoting S. Rep.No. 813, 89th Cong., 1st Sess. at 9 (1965). The agency must show "'by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA.'" Senate of Puerto Rico v. U.S. Dept. of Justice, 823 F.2d 574, 585

(D.C.Cir.1987), quoting Mead Data Central, Inc. v. Dep't of the Air Force, 566 F.2d 242, 258 (D.C.Cir. 1977).

An agency invoking Exemption 5's deliberative process privilege bears the burden of demonstrating that the material at issue is predecisional and deliberative. Schlefer v. United States, 702 F.2d 233, 237 (D.C.Cir.1983), citing 5 U.S.C. § 552(a)(4)(B), Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C.Cir.1975); Paisley v. C.I.A., 712 F.2d 687, 698 (D.C.Cir.1983)("The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process."). The privilege is to be construed narrowly. Schlefer, 702 F.2d at 237, citing Coastal States, supra, 617 F.2d at 862, 868.

In order to uphold an Exemption 5 claim on grounds that the document is predecisional, "a court must be able 'to pinpoint an agency decision or policy to which the document contributed.'" Senate of Puerto Rico, 823 F.2d at 585, quoting Paisley v. CIA, 712 F.2d 686, 698 (D.C. Cir.1983), vacated in part on other grounds, 724 F.2d 201 (D.C.Cir. 1984). "If there is no definable decision-making process that results in a final agency decision, then the documents are not predecisional." Paisley v. C.I.A., 712 F.2d 686, 698 (D.C.Cir.1983), citing Vaughn v. Rosen, 523 F.2d 1136, 1146 (D.C.Cir.1975).

Moreover, "[p]redecisional communications 'are not exempt merely because they are predecisional; they must also be part of the agency give-and-take . . . by which the decision itself is

made.'" Senate of Puerto Rico, 823 F.2d at 585, quoting Vaughn v. Rosen, 523 F.2d at 1144.

Finally, where an agency in making a final decision "chooses expressly to adopt or incorporate by reference" a predecisional recommendation, that document loses its protection under Exemption 5. NLRB v. Sears, supra, 421 U.S. at 161. This principle applies to a wide range of agency recommendations, , and to "formal or informal adoption." Coastal States, supra, 617 F.2d at 866.

The CIA has failed to make a showing that the two documents for which it has invoked Exemption 5 protection warrant it. The two documents are Vaughn pages 26 and 61 (Nos. 26 and 61). Dorn does not state in her declaration that the information being withheld is "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications within the agency." Coastal States, supra, 617 F.2d at 866.

The possibility that disclosure will be "likely in the future to stifle honest and frank communications within the agency" depends on the identities of the author and recipient of the communication being disclosed. Here such damage cannot occur because the identities of the author and recipient of these communicatons have been deleted. See Hoch v. C.I.A., 593 F. Supp. 675, 689 (D.D.C. 1984)("given the anonymity of [blind memorandum], [the CIA] has failed to show by specific and detailed proof that disclosure of this document would defeat rather than further the purposes of FOIA").

Normally, a communication which is protected by the deliberative process privilege is from a subordinate to a superior officer. Vaughn Document No. 28, which is withheld in its entirety, apparently does not comply with this criterion. It is described as an "MFR" (Memorandum for Record) with no addressee or addressor specified. Thus, it also appears not to be a part of the "give and take" that is essential to the deliberative process privilege.

Finally, Dorn fails to indicate in her declaration whether the recommendations expressed in these documents were adopted.

G. Exemption 6

Exemption 6, 5 U.S.C. § 552(b)(6), permits nondisclosure of matters "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The language "clearly unwarranted," it has been held, "instructs the court to tilt the balance in favor of disclosure." Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir.1971). The privacy invasion must be tangible and substantial: ". . . Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." Rose, supra, 5 U.S. at 380 n.19. Moreover, it is the "production" of the records, not the resultant speculation to which they may give rise, by which the invasion of privacy must be measured. Arieff v. Department of Navy, 712 F.2d 1462, 1469 (D.C.Cir.1983).

In view of these constraints upon the scope and application of Exemption 6, the agency normally faces a difficult task in overcoming the statutory presumption in favor of disclosure. As the First Circuit has said, the Exemption 6 case in which "the calcu-

lus unequivocally supports withholding [is] a rare case because Congress has weighted the balance so heavily in favor of disclosure. . . ." Kurzon v. Department of HHS, 649 F. 2d 65, 67 (1st Cir.1981). Accord: Local 598 v. Department of Army Corps of Engineers, 841 F.2d 1459, 1463 (9th Cir.1988)("particularly under Exemption [6], there is a strong presumption in favor of disclosure"); Washington Post Co. v. U.S. Dept. of Health, Etc., 690 F.2d 252, 261 (D.C.Cir.1982)(". . . under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act").

If a privacy interest exists, the court must balance the privacy interests against the public interest in disclosure. Rose, supra, at 372; Washington Post Co., 690 F.2d at 258 (D.C.Cir.1982). In order for a cognizable privacy invasion to exist under Exemption 6, the withheld material must concern the "personal" or "intimate" details of a person's life, S.Rep. 813, supra, at 9; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), such that disclosure of the facts might "subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends. Brown v. Federal Bureau of Investigation, 658 F.2d 71, 75 (2d Cir. 1981).

Moreover, to the extent that the withheld material already is public, there is generally no expectation of confidentiality and thus no clearly unwarranted invasion of privacy. At the very least, the fact that the information is public diminishes, even if it does not necessarily eliminate, a cognizable privacy interest. Washington Post, 690 F.2d at 259, 261 (availability of information

from other sources strengthens the case for disclosure by suggesting that disclosure will not seriously invade personal privacy); Radowich v. United States Atty, 501 F. Supp. 284, 288 (D.Md.1980), rev'd on other grounds, 658 F.2d 957 (4th Cir.1981)(prior public disclosure prevents information from being exempted). Indeed, even if the information is not yet public, a privacy interest may not exist if there is no expectation that it will remain secret. Miami Herald Pub. Co. v. U.S. Small Bus. Admin., 670 F.2d 610, 615-616 (5th Cir.1982)(no privacy interest in records of delinquent loans and outstanding balances because the borrower's only realistic expectation is that the lender will commence legal proceedings that will result in full public disclosure of the borrower's default).

For Exemption 6 to support withholding, the privacy invasion must be very strong. National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C.Cir.1989) (privacy interest at stake must be significant or substantial). For there to be a cognizable privacy interest, the material must usually be "personal" or "intimate details" of one's life. Rose, supra; Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73 (D.C.Cir.), reh'g denied, 502 F.2d 1179 (1974).

The Court of Appeals has held that for Exemption 6 to apply disclosure must "compromise a substantial as opposed to a de minimis privacy interest." National Association of Retired Federal Employees v. Horner, 879 F.2d 873, 875 (D.C.Cir.1989) ("NARFE"). The privacy interest is balanced against the public interest only if there is a substantial privacy interest at stake.

Otherwise, the information must be disclosed because of the inherent public interest in disclosure.

The CIA has failed to properly apply Exemption 6. It does not assert that the personal interest at stake is "substantial" as opposed to "de minimis." Rather, it rests its case on its determination that "no overriding public interest requires the disclosure of the names of, or identifying information about, the third parties at issue." Dorn Decl., ¶ 88. But unless it has established more than a de minimis privacy interest, and it hasn't, then the inherent public interest in disclosure overrides the de minimis interest. In addition, its finding that there is no substantial public interest in disclosure is also erroneous. The United States Court of Appeals for the District of Columbia has recognized the strong public interest in the disclosure of JFK assassination records. Allen v. Central Intelligence Agency, 636 F.2d 1287, 1300 (D.C.Cir. 1980). Congress did, too, in unanimously passing the JFK Act.

The CIA's Vaughn index reflects the folly of its approach to the application of Exemption 6. With respect to Vaughn documents 28 and 29, it says that it is withholding "Joannides' personal information" from both documents. However, Joannides is dead, as Morley pointed out when he submitted his request and as the CIA's own documents released to him in this action show. Joannides' personal privacy interest does not survive his death in the circumstances presented here. The same is also true of his wife and mother, who are also deceased.

Similarly, with regard to Vaughn document 52, it appears that Exemption 6 is claimed to withhold "a third-party organization's affiliation with Joannides." But an organization has no privacy interest protectable under the FOIA. Only individuals have cognizable privacy interests. "[C]orporations, businesses and partnerships have no privacy interest whatsoever under Exemption 6." Washington Post Co. v. Department of Agriculture, 943 F.Supp. 31, 37 n.6 (D.D.C.1996);

Finally, for Vaughn Document 35, the CIA apparently claims Exemption 6 for information of Joannides' family "and other third parties" but states only that disclosure would result in "an unwarranted invasion of personal privacy," not the "clearly unwarranted invasion" required for an Exemption 6 showing.

H. Exemption 7(C)

Exemption 7(C) exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

Exemption 7(C) involves a balancing of the public interest in disclosure against the degree of privacy invasion which could reasonably be expected to result from release of the information. Lesar v. Department of Justice,. 636 F.2d 472, 486 (D.C.Cir.1980); Congressional News Syndicate v. Department of Justice, 438 F.Supp. 538, 542 (D.D.C.1977).

The exemption applies to matters that are of "'an intimate personal nature' such as marital status, legitimacy of children, medical condition, welfare payments, alcoholic consumption, family fights and reputation. Washington Post Co. v. U.S. Dept. of Justice, 863 F.2d 96, 100 (D.C.Cir. 1988), citing Sims v. CIA, 642 F.2d 562, 574 (D.C.Cir. 1980). "Information relating to business judgments and relationships does not qualify for exemption[,] even if disclosure might tarnish someone's professional reputation." Id., citing Sims at 575, Cohen v. EPA, 575 F. Supp. 425, 429 (D.D.C. 1983).

Although information in a law enforcement agency's file which indicates that a named individual has been investigated for suspected criminal or other wrongful activity is sufficient, as a threshold matter, to implicate privacy concerns under Exemption 7(C), the district court must still conduct a balancing of the public and private interest involved. See, e.g., Emerson v. Department of Justice, 603 F.Supp. 459 (D.D.C.1985); Lame v. U.S. Department of Justice, 654 F.2d 917, 923 n.6 (3rd Cir.1981)(there is no per se rule that the mere connection of an individual with a criminal investigation constitutes unwarranted invasion of privacy); Common Cause v. National Archives and Records Service, 628 F.2d 179, 184 (D.C.Cir.1980). In appropriate circumstances, the public interest in disclosure may override even the strong privacy interest belonging to a person suspected of criminal or other wrongful activity. See Cohen, supra. Emerson, supra.

The CIA's showing that an invasion of privacy could reasonably

be expected to result from disclosure of the withheld information is conclusory. It makes no representation that the information it is withholding is in any fashion negative or derogatory or embarrasing to those concerned or discloses intimate details about them.. As with Exemption 6, it invokes this exemption for Joannides and family members, Dorn Decl., ¶ 91, but Joannides is dead, as are his wife and his mother.

The CIA contends that the information sheds no light on government functions. Dorn Decl., ¶ 92. However, this is not true. It shows, for example, what information the CIA thought it should collect and who it relied upon to provide the information.

I. **Exemption 7(E)**

Exemption 7(E) permits an agency to withhold law enforcement materials, but only to the extent that the production of such materials "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." 5 U.S.C. § 552(b)(7)(E).

In order for Exemption 7(E) to apply, the information in question must pertain to a law enforcement technique and also be generally unknown to the public. Malloy v. U.S. Department of Justice, 457 F.Supp. 543, 545 (D.D.C. 1978), cited in Albuquerque Publishing Co. v. U.S. Dep't of Justice, 726 F.Supp. 851, 857 (D.D.C. 1989)

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The CIA claims that the records for which it has asserted an Exemption 7(E) claim "are records containing information on George Joannides' security clearances and background investigations. The information that has been withheld could reasonably be expected to provide insight into CIA Security Center's clearance and investigatory processing, as well as certain techniques and procedures used by law enforcement agencies in coordination with CIA during those processes." Dorn Decl., ¶ 95.

The CIA's showing fails the test for Exemption 7(E) claims. Dorn makes no representation that the techniques involved are "generally unknown to the public." The records provided suggest that one a polygraph. But this, of course, is a technique well known to the public.

CONCLUSION

For the reasons set forth above, defendant's motion for summary judgment should be denied and plaintiff's cross-motion for summary judgement should be granted. Further searches should be ordered and plaintiff should be permitted to take discovery on the adequacy of the searches and defendant's "Glomar" defense.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFERSON MORLEY Plaintiff v. UNITED STATES CENTRAL INTELLIGENCE AGENCY Defendant	: : : : : : : : : : :	Civil Action No. 03-2545 (RCL)

O R D E R

Upon consideration of the pending cross-motions for summary judgment, the opposition and replies thereto, and the entire record herein, it is by this Court this ____ day of _____, 2006, hereby

Ordered, that defendant's motion for summary shall be, and hereby is, DENIED; and it is further

ORDERED, that plaintiff's motion for summary judgment shall be, and hereby is, GRANTED; and it is further

ORDERED, that defendant is directed to conduct new searches for responsive documents and to document them in an affidavit to be filed within _____ days of the date of this order; and it is further

ORDERED, that defendant shall file and serve on plaintiff's counsel, within ____ days of the date of this order, an affidavit explaining in as much detail as possible why it cannot be required to either confirm or deny the existence of certain records on George Joannides and identifying the procedures by which it arrived

at that position; and it is further

ORDERED, that plaintiff shall be permitted to take discovery on the issues of the adequacy of defendant's search and its "Glomar" defense.

UNITED STATES DISTRICT COURT