IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMNESTY INTERNATIONAL, et al.,	)	
	)	
Plaintiffs,	)	
	)	**ECF Case**
v.	)	
	)	07 CV 5435 (LAP)
CENTRAL INTELLIGENCE AGENCY, et al.,	)	
	)	
Defendants.	)	
	)	

SECOND DECLARATION OF WENDY M. HILTON
ASSOCIATE INFORMATION REVIEW OFFICER
NATIONAL CLANDESTINE SERVICE
CENTRAL INTELLIGENCE AGENCY

I, WENDY M. HILTON, hereby declare and say:

1. I am an Associate Information Review Officer (AIRO) for the National Clandestine Service (NCS) of the Central Intelligence Agency (CIA). I was appointed to this position in March 2007. I have held a variety of positions in the CIA since I became a staff officer in 1983.

2. Through the exercise of my official duties, I am familiar with this civil action. This declaration is based on my personal knowledge, information, and belief, and on information disclosed to me in my official capacity.

3. I am familiar with the declarations filed in this litigation on 21 April 2008 and 4 September 2008 by Ralph S. DiMaio (respectively, the "First DiMaio Declaration" and the "Second DiMaio Declaration"), the Information Review Officer for the National Clandestine Service, CIA, and incorporate those declarations as if fully stated herein.

4. This declaration is provided in support of the CIA's Motion for Partial Summary Judgment regarding the CIA's response to a FOIA request made by plaintiffs on 28 December 2007 (the "Plaintiffs' FOIA request"). I understand that plaintiffs joined their 28 December 2007 FOIA request into this litigation on 6 June 2008.

5. This declaration is divided into several parts. In Part I, I explain the relevant classification authority and markings contained within this declaration. In Part II, I describe plaintiffs' FOIA request and summarize the CIA's response. In Part III, I explain the CIA's search for records responsive to Categories 2 and 14 of plaintiffs' request. In Part IV, I explain the CIA's Glomar response to several categories within plaintiffs' request. In Part V, I describe the CIA's search for documents responsive to Category 12 of plaintiffs' request as well as the FOIA exemptions that apply to the documents the CIA located in response to Category 12.

I. Classification Authority

6. As a preliminary matter, I will explain the relevant classification authority. Although some of this information was presented in the First DiMaio Declaration, I will reiterate it here for the Court's ease of reference and to explain the classification of the specific documents at issue here.

7. The CIA was established by section 104(a) of the National Security Act of 1947 (the Act), as amended, 50 U.S.C.A. § 403-4. Section 104A of the Act, 50 U.S.C.A. § 403-4a, established the position of the Director of the Central Intelligence Agency (DCIA), whose duties and responsibilities include serving as head of the CIA and collecting information through human sources and by other appropriate means; correlating and evaluating intelligence related to the national security and providing appropriate dissemination of such intelligence; providing overall direction for coordination of the collection of national intelligence outside the United States through human sources by elements of the intelligence community authorized to undertake such collection; and performing such other functions and duties related to intelligence affecting the national security as the President, or the Director of National Intelligence (DNI), may direct. A more particularized statement of the authorities of the DCIA and

the CIA is set forth in sections 1.5, 1.6, and 1.7(a) of Executive Order 12333, as amended.[1]

8. Section 102A(i)(1) of the Act, 50 U.S.C.A. § 403-1(i)(1), provides that the DNI shall protect intelligence sources and methods from unauthorized disclosure. Under the direction of the DNI pursuant to section 102A of the Act, as amended, 50 U.S.C.A. § 403-1(i), and in accordance with section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C.A. § 403g, and sections 1.6(b) and 1.6(d) of Executive Order 12333, the DCIA is responsible for protecting CIA sources and methods from unauthorized disclosure. As explained in detail below, the documents responsive to the FOIA request at issue contain information that, if disclosed, would reveal intelligence sources and methods. For this reason, as stated in the First DiMaio Declaration at paragraph 131 and the Second DiMaio Declaration at paragraph 16, the DNI authorized the CIA to take all necessary and appropriate measures in this case to ensure that intelligence sources and methods are protected from disclosure.

9. Section 1.3(a) of Executive Order 12958, as amended,[2] provides that the authority to classify information originally

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[1] Exec. Order No. 12333, *reprinted as amended in* 50 U.S.C.A. § 401 note at 24 (West Supp. 2008) *and revised by* Exec. Order No. 13470, 73 Fed. Reg. 45325 (July 30, 2008).

may be exercised only by the President and, in the performance of executive duties, the Vice President; agency heads and officials designated by the President in the Federal Register; and United States Government officials delegated this authority pursuant to section 1.3(c) of the Order. Section 1.3(c)(2) provides that TOP SECRET original classification authority may be delegated only by the President; in the performance of executive duties, the Vice President; or an agency head or official designated pursuant to section 1.3(a)(2) of the Order.

10. In accordance with section 1.3(a)(2) of Executive Order 12958, the President designated the Director of the CIA as an official who may classify information originally as TOP SECRET.[3] Under the authority of section 1.3(c)(2), the Director of the CIA has delegated original TOP SECRET classification authority to me. Section 1.3(b) of the Executive Order provides that original TOP SECRET classification authority includes the authority to classify information originally as SECRET and CONFIDENTIAL. As an original classification authority, I am authorized to conduct classification reviews and to make original classification decisions.

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[2] Executive Order 12958 was amended by Executive Order 13292. *See* Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). All citations to Executive Order 12958 are to the Order as amended by Executive Order 13292. *See* Exec. Order No. 12958, *reprinted as amended in* 50 U.S.C.A. § 435 note at 193 (West Supp. 2008).

[3] Order of the President, Designation under Executive Order 12958, 70 Fed. Reg. 21609 (Apr. 21, 2005), *reprinted in* U.S.C.A. § 435 note at 199 (West Supp. 2007).

II. Plaintiffs' 28 December 2007 FOIA Request

11. Plaintiffs' FOIA request sought 17 categories of documents and specific documents and is attached hereto as Exhibit A.

12. Although the CIA does not agree with plaintiffs' characterization of Category 1 of their FOIA request, I have determined that the record requested in Category 1 refers to the Office of Inspector General's Special Review regarding counterterrorism detention and interrogation activities (the "Special Review"), the final report for which is dated 7 May 2004. I understand that, pursuant to the Stipulation and Order Between Plaintiffs and the Central Intelligence Agency Regarding Procedures for Adjudicating Summary Judgment Motions, dated 21 April 2008 (the "Stipulation"), the Special Review report is outside the scope of this litigation as it is being litigated in *ACLU v. DOD*, No. 04 Civ. 4151 (AKH) in the Southern District of New York. The CIA therefore referred plaintiffs to the version of this document that was released with redactions after rulings by United States District Judge Alvin K. Hellerstein in *ACLU v. DOD*, and is currently available on the ACLU's website.

13. The CIA determined that no records exist that are responsive to Categories 2 and 14 of plaintiffs' FOIA request. I describe the search for these two categories in detail in section III below.

14. The CIA determined that it was required to issue a Glomar response, indicating that it cannot confirm or deny the existence of responsive records, for Categories 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, and 17. I explain the necessity of this response in detail in section IV below.

15. The CIA searched for documents responsive to Category 12 of plaintiffs' FOIA request.[4] This search produced 49 responsive documents, all of which the CIA withheld in full. I describe the CIA's search for Category 12 documents and the basis for the CIA's withholding of these documents in section V below. The CIA did not search for or otherwise respond to Categories 11 and 13 of plaintiffs' request pursuant to this Court's Memorandum and Order, dated 24 September 2008, staying the CIA's search for, review of, and processing of these categories.

III. The CIA's Search for Documents Responsive to Items 2 and 14

16. As noted above, the CIA searched for but did not locate documents responsive to Categories 2 and 14 of plaintiffs' request. Cateogory 2 requested a list of "erroneous

[4] Operational cables such as those requested in Category 12 are typically exempt from FOIA search obligations, pursuant to the CIA Information Act, 50 U.S.C. § 431. However, this operational files exemption has exceptions, including files containing information that is the specific subject matter of certain investigations, including those conducted by the Department of Justice and the CIA OIG. 50 U.S.C. § 431(c)(3). In this instance, the CIA determined that the subject matter of Category 12 was within the scope of such investigations, and therefore searched for responsive documents.

renditions" compiled by the CIA OIG. To determine whether any such documents exist, the CIA officers conducting this FOIA search consulted with the Deputy Assistant Inspector General for Investigations within the OIG. This individual was, at the time the search was conducted, the head of the Investigations Staff within the OIG and was responsible for overseeing all investigations conducted by the OIG. This same individual was also involved in the search and review of closed OIG investigations files conducted for plaintiffs' initial FOIA requests that are at issue in this litigation. This individual therefore has detailed knowledge of the content of OIG investigations files, in particular regarding investigations of matters relating to the Terrorist Detention and Interrogation ("TDI") Program. In response to the search request for Category 2, the Deputy Assistant Inspector General for Investigations stated that no such document exists. Therefore, there are no responsive records for Category 2 of Plaintiffs' request.

17. Category 14 requests a 13 September 2007 notification from a CIA attorney to the United States Attorney for the Eastern District of Virginia regarding a video tape. This item relates to the criminal prosecution *United States v. Zacharias Moussaoui*. To search for any documents responsive to this request, the CIA officers conducting this search consulted with the attorneys in the CIA Office of General Counsel who were

familiar with the CIA's involvement in the *Moussaoui* case. These attorneys stated that no such written notification had been made; rather, the referenced notification was made telephonically. Therefore, there are no responsive records for Category 14 of plaintiffs' request.

IV. The CIA's Glomar Response to Items 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, and 17 of Plaintiffs' Request

18. As noted above, the CIA issued a Glomar response for Categories 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, and 17 of plaintiffs' request. These categories fall into three groups: (1) requests for communications regarding Maher Arar (Categories 3 and 4); (2) requests for documents concerning the use of specific interrogation techniques on detainees (Categories 5-10); and (3) requests for communications and documents regarding Mohammed Farag Ahmad Bashmilah and Salah Nasser Salim Ali (Categories 15-17). After providing a general explanation for the CIA's Glomar response, I will address the CIA's Glomar response with respect to each of these categories in turn.

19. A Glomar response in certain circumstances is provided for under Executive Order 12958, section 3.6(a):

> An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.

The requests made by Plaintiffs in the above-referenced categories of their request are just such circumstances, wherein

the mere confirmation or denial of the existence of responsive records would reveal classified facts relating to intelligence sources and methods. This information is therefore exempt from disclosure under FOIA pursuant to exemption b(1).

20. In addition, this information is exempt from disclosure under FOIA pursuant to exemption b(3), as it is protected by the National Security Act of 1947. As described above and in the First DiMaio Declaration at paragraphs 131 and 132, the National Security Act provides that the Director of National Intelligence (DNI) shall protect intelligence sources and methods from unauthorized disclosure,[5] and the DNI authorized the Director of the CIA in this case to take all necessary and appropriate measures to ensure that intelligence sources and methods are protected from disclosure. I have determined that the confirmation or denial of the existence of records responsive to Categories 3, 4, 5, 6, 7, 8, 9, 10, 15, 16, and 17 of plaintiffs' request would reveal intelligence sources and methods.

21. In a typical FOIA request, the CIA's response, either to provide or not to provide the records sought, confirms to the requester (and to the public, for that matter) the existence or non-existence of such CIA records. This confirmation typically

[5] *See* section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C.A. § 403-1(i)(1) (West Supp. 2008).

poses no harm to the national security or intelligence sources or methods, because the focus is on releasing or withholding specific substantive information. In typical cases, the fact that the CIA possesses or does not possess records is not itself a classified fact.

22. However, in certain cases a response that does not confirm or deny the existence of responsive records is necessary to safeguard intelligence sources and methods, as well as U.S. foreign relations. In cases such as these, whether or not records exist could reveal substantive information. For instance, consider a clandestine intelligence activity in which the CIA had participated but not acknowledged its interest or involvement. If a FOIA request asked for records regarding the CIA's involvement in that intelligence activity, the CIA's acknowledgement of responsive records would reveal that the CIA had in fact participated in the intelligence activity. If a FOIA request asked for records regarding the intelligence activity generally, the CIA's acknowledgement of responsive records would reveal that the CIA at minimum had an interest in the intelligence activity. Conversely, if the CIA had not participated in the intelligence activity but had purposefully not confirmed this fact, revealing the lack of responsive records to such FOIA requests would reveal that the CIA had not participated or did not have an interest in the activity.

23. In cases in which a request is made for information regarding a matter that has not been acknowledged by the CIA, the CIA must respond to requests for CIA records in a consistent manner. In order for a Glomar response to be credible and effective, the CIA must use it with every requester seeking such records, including in those instances where the CIA does not actually hold responsive records. If the CIA were to give a Glomar response only when it possessed responsive records, and inform requesters when it has no records, the Glomar response would effectively be an admission of records. Because the CIA will not provide a "no records" response when it actually does have records, the only means by which the CIA can protect intelligence sources and methods and intelligence activities in such cases is to routinely issue a Glomar response to requesters seeking information on a matter that the CIA has not acknowledged.

24. In each of the three groups of requests for which the CIA used a Glomar response in this instance, merely acknowledging the existence or lack of records would necessarily reveal information regarding intelligence sources and methods and intelligence activities that is properly classified. In each of these instances, the fact of the existence or non-existence of responsive records is properly classified at or above the SECRET level, meaning that disclosure could reasonably

be expected to cause at least serious damage to the national security.

25. The First DiMaio Declaration, at paragraphs 55-127, described intelligence sources and methods and intelligence activities and explained why they are properly classified and thus exempt from disclosure under FOIA exemptions b(1) and b(3). I refer the Court to this information while providing, to the maximum extent possible on the public record, specific examples of the intelligence sources and methods and intelligence activities implicated by the categories in plaintiffs' request for which the CIA used a Glomar response. As described in further detail below, the existence or non-existence of records responsive to these categories in plaintiffs' request concerns "intelligence activities . . . [and] intelligence sources or methods" pursuant to section 1.4(c) of Executive Order 12958. Such intelligence sources and methods are classified and therefore exempt from disclosure under FOIA exemption b(1) and are also protected from disclosure under FOIA exemption b(3) by the National Security Act of 1947.

A. Plaintiffs' Request for Information Regarding the Sharing of Information Regarding Maher Arar

26. The CIA cannot respond to the two categories of Plaintiffs' request seeking communications between the CIA and the Canadian intelligence services regarding Maher Arar without

revealing whether or not such communications exist. The CIA has never acknowledged whether or not it had any involvement in the detention and removal of Mr. Arar, much less whether it received and responded to a request for information regarding Mr. Arar from the Canadian government. If the CIA were to provide anything other than a Glomar response to these two categories, it would be forced to acknowledge, at minimum, (1) whether the CIA had an intelligence interest in Mr. Arar; and (2) whether it exchanged intelligence information regarding Mr. Arar with the Canadian government. This would reveal information regarding intelligence sources and methods and intelligence activities, which is classified and protected from disclosure under the NSA.

27. Whether the CIA had an intelligence interest in Mr. Arar and gathered information on him would reveal the intelligence gathering interests and capabilities of the CIA. The CIA's clandestine intelligence interest in a foreign national and its gathering of information on that individual represent an intelligence method and an intelligence activity. If the CIA were required to confirm or deny whether it gathered information about a specific individual, it would reveal whether it had an interest in that person related to the CIA's ongoing intelligence gathering function and the CIA's capabilities regarding such a collection. Such revelations would provide foreign intelligence services or other hostile entities with

information concerning the reach of the CIA's intelligence monitoring. It may also provide insight into the sources for the intelligence information that the CIA collected on the specific individual. For example, there might be a small number of possible sources of intelligence information on a specific individual. If anything regarding the timing or content of the intelligence information collected on that individual were revealed, individuals knowledgeable about the situation may be able to deduce the specific source of that information. The importance of protecting the CIA's intelligence interests from disclosure, as well as the ways in which the CIA's intelligence gathering interests and capabilities represent intelligence sources and methods, is further explained in the First DiMaio Declaration at paragraphs 105 through 109.

28. Moreover, whether the CIA exchanged intelligence information with the Canadian government regarding Mr. Arar similarly would disclose information regarding the CIA's relationship with a foreign liaison service. This would reveal information regarding the CIA's intelligence sources and methods. The importance of protecting liaison relationships as intelligence sources was described generally in the First DiMaio Declaration at paragraphs 65 through 75 and 98 through 99, and this is a specific example of that type of relationship. If the CIA were to confirm that communications responsive to the two

categories in Plaintiffs' FOIA request exist, the CIA would confirm an intelligence sharing relationship with the Canadian intelligence services and that such sharing had taken place in this instance. Such a confirmation would provide to foreign intelligence services and other hostile entities valuable information regarding the extent of the CIA's liaison relationships generally and in this specific instance. Similarly, a denial of responsive communications would provide such entities with the same type of information, specifically, that the reach of the CIA's liaison relationships did not extend to this instance.

29. For these reasons, the existence or non-existence of documents regarding communications between the CIA and the Canadian intelligence services regarding Maher Arar would concern "intelligence activities . . . [and] intelligence sources or methods" pursuant to section 1.4(c) of Executive Order 12958, the disclosure of which could reasonably be expected to cause at least serious damage to the national security. Therefore, the existence or non-existence of such documents is properly classified. Furthermore, disclosure of this information would likewise reveal intelligence sources and methods, and the information is therefore protected from disclosure by the National Security Act.

30. In their FOIA request for records responsive to these two categories, Plaintiffs cite a report by a Commission of Inquiry of the Canadian Government regarding the Arar matter. Such a report does not constitute an official disclosure by the CIA or the United States Government. Information contained within such a report, whether true or not, is akin to other statements and reports containing non-official disclosures that claim to reveal classified information. As with information within such statements and reports, the CIA has not confirmed or denied whether the information contained within the report of the Canadian Commission of Inquiry is correct. By not confirming or denying the veracity of this information, the CIA is able to continue to protect information regarding the reach of its liaison relationships and whether it collected intelligence on Mr. Arar.

B. Plaintiffs' Request for Information Regarding the Use of Specific Interrogation Techniques

31. The CIA likewise cannot confirm or deny the existence of documents responsive to Categories 5-10 of Plaintiffs' request. Each of these categories requests documents regarding the use of a specific interrogation technique on a specific individual. Anything other than a Glomar response would confirm that the CIA did or did not use the specified interrogation techniques and that they were or were not used on the specific

individuals included in Plaintiffs' request. This would reveal significant information regarding the CIA's intelligence methods and intelligence activities: specifically, details regarding the CIA's detention and interrogation program and the use of certain interrogation methods. Such information is classified and protected from disclosure by the NSA.

32. As discussed at paragraphs 118 through 121 of the First DiMaio Declaration, disclosure of the CIA's interrogation methods would permit al Qaeda and other terrorists to engage more effectively in counter-interrogation training. If these individuals knew what methods the CIA was likely to use and which methods the CIA would not use during an interrogation, the CIA's interrogations would be less effective and result in the collection of less valuable intelligence. As explained in the First DiMaio Declaration at paragraphs 119 through 120, the CIA's detention and interrogation program has produced intelligence that disrupted terrorist plots and led to the capture and questioning of senior al Qaeda operatives. Disclosure of the interrogation methods that the CIA does and does not use would lessen the effectiveness of this critical program.

33. For these reasons, the existence or non-existence of documents regarding the use of specific interrogation techniques on specific individuals concerns "intelligence activities . . .

[and] intelligence sources or methods" pursuant to section 1.4(c) of Executive Order 12958, the disclosure of which could reasonably be expected to cause at least serious damage to the national security including the defense against transnational terrorism. Therefore, the existence or non-existence of such documents is properly classified. Furthermore, disclosure of this information would reveal intelligence sources and methods and the information is therefore protected from disclosure by the National Security Act.

34. In their request for records responsive to these categories, Plaintiffs refer to statements made by a former CIA officer during a media interview. These statements do not constitute an official acknowledgement of information by the CIA or the U.S. Government. As stated in the Second DiMaio Declaration at paragraphs 20 through 21, the CIA does not typically confirm or deny media reports that claim to reveal classified information. As explained in paragraph 21 of the Second DiMaio Declaration, confirming an unauthorized disclosure would only exacerbate the harm of the initial disclosure, while routine denials of false reports would only serve to highlight instances where classified information was accurately revealed in media reports.

35. The referenced statements, if they did contain classified information, could not constitute official

acknowledgments simply because they were made by a former CIA officer. The former CIA officer does not have -- and has never had, even while employed by the CIA -- the authority to declassify information. His statements in no way constitute officially authorized disclosures by the CIA or the U.S. Government.

C. Plaintiffs' Request for Information Regarding Two Individuals

36. Categories 15 and 16 request documents regarding the capture, transfer, and/or detention of Mohamed Farag Ahmad Bashmilah, and Category 17 requests documents regarding Bashmilah and a second individual, Salah Nasser Salim Ali, that were provided to the Government of Yemen by the U.S. Government. The CIA cannot confirm or deny the existence of records responsive to these requests. To do so would require the CIA to specifically confirm or deny several facts: whether the CIA was involved or had an interest in the capture, transfer, and detention of Bashmilah; whether the CIA communicated with the U.S. Embassy in Yemen on this matter; whether Bashmilah was ever in U.S. custody; whether Bashmilah was transferred from the custody of the U.S. Government to the Government of Yemen; whether the U.S. Government was in communication with the Government of Yemen regarding the custody transfer of Bashmilah; whether the CIA and/or the U.S. Government generally had

collected information on Bashmilah and Ali; and whether the U.S. Government shared such information on these two individuals with the Government of Yemen. This information is classified and protected from disclosure under the NSA.

37. If true, these facts constitute clandestine intelligence activities that the CIA has not officially acknowledged. To the extent that the CIA engages in these activities, its involvement would be classified and would constitute intelligence sources and methods and intelligence activities of the CIA.

38. Specifically, as described in the First DiMaio Declaration in paragraphs 98 through 99, foreign liaison relationships are one type of intelligence method. Disclosure of any information sharing or coordination between the CIA and the Government of Yemen would disclose a CIA liaison relationship, which would reveal information regarding the CIA's intelligence sources and methods. If the CIA were to confirm that documents responsive to these categories in plaintiffs' FOIA request exist, the CIA would confirm an intelligence sharing relationship with the Government of Yemen and that such sharing had taken place in this instance. Such a confirmation would provide to foreign intelligence services and other hostile entities valuable information regarding the extent of the CIA's liaison relationships generally and with respect to these

individuals. Similarly, a denial of responsive documents would provide such entities with the same type of information, specifically, that the reach of the CIA's liaison relationships did not extend to these individuals.

39. In addition, as explained above with respect to the request for communications regarding Maher Arar, disclosing whether the CIA gathered intelligence information on specific individuals such as Bashmilah and Ali would reveal information regarding intelligence methods and intelligence activities. If the CIA were to confirm or deny whether it gathered information about these two individuals, it would reveal whether it had an interest in them related to the CIA's ongoing intelligence gathering function and the CIA's capabilities regarding such a collection. Such revelations would provide foreign intelligence services or other hostile entities with information concerning the reach of the CIA's intelligence monitoring. It may also provide insight into the sources for the intelligence information that the CIA collected on the specific individual, as described above in paragraph 27. More specifically, actions taken in connection with the terrorist detention and interrogation program also constitute intelligence activities. Such actions would include any involvement by the CIA in the capture, detention, and transfer of custody of the named individuals, if this occurred.

40. For these reasons, the existence or non-existence of documents regarding the capture, transfer, and detention of Mohamed Farag Ahmad Bashmilah and Salah Nasser Salim Ali concerns "intelligence activities . . . [and] intelligence sources or methods" pursuant to section 1.4(c) of Executive Order 12958, the disclosure of which could reasonably be expected to cause at least serious damage to the national security. Therefore, the existence or non-existence of such documents is properly classified. Furthermore, disclosure of this information would reveal intelligence sources and methods and this information is therefore protected from disclosure by the National Security Act.

41. In their request for records responsive to these categories, Plaintiffs reference two purported letters from the Government of Yemen. These letters do not constitute an official disclosure of information by the CIA or the U.S. Government. As with the Canadian Commission of Inquiry report referenced by Plaintiffs in their request for documents relating to Maher Arar, information in the Yemeni documents, whether true or not, is similar to other statements and reports containing non-official disclosures that claim to reveal classified information. As with such statements and reports, the CIA has not confirmed or denied the information contained within the Yemeni documents. By not confirming or denying the veracity of

this information, the CIA is able to continue to protect the intelligence methods and intelligence activities implicated by the information at issue.

V. The CIA's Search for and Withholding of Documents Responsive to Category 12

42. As noted above, the CIA searched for documents responsive to Category 12 of Plaintiffs' request and located 49 documents. To conduct a search for these documents, CIA officers searched within a word-searchable database of cables maintained by the NCS that was designed to aggregate all CIA cables concerning Khalid Sheikh Muhammad during the time of his detention and interrogation, among other individuals. The CIA officers conducting the search performed searches within this database that included the terms "waterboard," "water," and other variations of the term "waterboard." After consulting with NCS employees, they determined that it was not likely that any other files would contain additional responsive records. CIA thus searched all files likely to contain materials responsive to Category 12.

43. This search produced 49 classified intelligence cables between CIA Headquarters and the CIA field that are responsive to Category 12 of Plaintiffs' request. Six of the cables are from CIA Headquarters to the field, and vary in length from 1 to 15 pages. The remaining 43 cables are from the field to CIA

Headquarters, and vary in length from 2-5 pages. Each cable contains approximately half a page or more of routing and dissemination information at the beginning and end, as well as cable handling and administrative notations. The substance of each cable, as described below, is replete with details about the CIA's TDI Program and consists of information that is properly classified and protected from disclosure as intelligence sources and methods under the National Security Act. All 49 of these documents were withheld in their entirety on the basis of FOIA Exemptions b(1), b(2), and b(3).

44. The First DiMaio Declaration contains a thorough explanation of FOIA Exemptions b(1), b(2) and b(3). I will not reiterate those explanations herein, but will provide specific information to explain the CIA's determination that these exemptions are applicable to the 49 documents withheld in full.

A. Exemption b(1)

45. The First DiMaio Declaration, at paragraphs 43 through 53, explained the procedural requirements for documents classified pursuant to Executive Order 12958. I have reviewed the 49 documents and determined that they satisfy these procedural requirements.

1. Procedural Requirements

46. *Original classification* authority - As described above, the Director of the CIA has delegated original TOP SECRET

classification authority to me pursuant to Executive Order 12958. I have determined that all the information contained within the 49 responsive documents pertaining to intelligence sources and methods and intelligence activities is properly classified CONFIDENTIAL, SECRET and TOP SECRET. Furthermore, these documents all contain information that is within a Sensitive Compartmented Information (SCI) program, as described in paragraphs 114 through 116 of the First DiMaio Declaration.

47. *U.S. Government information* - I have determined that the information contained within the 49 responsive documents pertaining to intelligence sources and methods and intelligence activities is owned by the U.S. Government, was produced by the U.S. Government, and is under the control of the U.S. Government.

48. *Categories in Section 1.4 of Executive Order 12958* - I have determined that information contained within the 49 documents falls within the following classification categories in the Executive Order: "information . . . concern[ing] . . . intelligence activities . . . [and] intelligence sources or methods" (§ 1.4(d)). I describe this information and its relation to national security below.

49. *Damage to national security* - I have determined that much of the information contained within the 49 responsive documents pertaining to intelligence sources and methods and

intelligence activities is classified TOP SECRET because it constitutes information the unauthorized disclosure of which could reasonably be expected to result in exceptionally grave damage to the national security. I have also determined that much of this information is classified SECRET, because it constitutes information the unauthorized disclosure of which could reasonably be expected to result in serious damage to the national security. Some information is classified CONFIDENTIAL because it constitutes information the unauthorized disclosure of which could reasonably be expected to result in damage to the national security. The damage to national security that reasonably could be expected to result from the unauthorized disclosure of this classified information is described below.

50. *Proper purpose* - I have determined that the information contained within the 49 responsive documents pertaining to intelligence sources and methods and intelligence activities has not been classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security.

51. *Marking* - I have reviewed the 49 responsive documents and have determined that they are properly marked in accordance

with section 1.6 of the Executive Order. Each document bears on its face the classification level TOP SECRET; the identity, by name or personal identifier and position, of the original classification authority or the name or personal identifier of the person derivatively classifying the document in accordance with section 2.1 of the Executive Order; the agency and office of origin, if not otherwise evident; declassification instructions; and a concise reason for classification that, at a minimum, cites the applicable classification categories of section 1.4.[6] As noted above, these documents also contain markings for SCI programs. These markings themselves are classified.

52. *Proper classification* - I have reviewed the 49 responsive documents and determined that they have been classified in accordance with the substantive and procedural requirements of Executive Order 12958 and that, therefore, they are currently and properly classified.

2. Substantive Requirements

53. The 49 responsive documents contain classified information relating to intelligence activities, intelligence sources, and intelligence methods. Most significantly, the documents contain significant classified information relating to

[6] Although certain information contained within the documents may be classified at the SECRET or CONFIDENTIAL level, all of the documents contain TOP SECRET information. Because documents are marked at their highest level of classification, all of the documents are marked TOP SECRET.

the CIA's terrorist detention and interrogation program. Although I am limited in my ability to discuss the details of this information in an unclassified forum, I will describe, to the greatest extent possible on the public record specific examples of the intelligence activities, sources, and methods contained in these cables, and the damage to the national security that would result from the disclosure of this information.

a. The CIA's Terrorist Detention and Interrogation Program

54. The 49 responsive documents contain significant information concerning the TDI Program, the CIA's highly classified program to capture, detain, and interrogate terrorist leaders and operatives in order to help prevent terrorist attacks. Information about the TDI program includes information concerning intelligence activities, sources, and methods within the meaning of Section 1.4(c) of Executive Order 12958. As for intelligence activities, the First DiMaio Declaration in paragraphs 105 through 100 contains a description of intelligence activities generally and their value to the CIA's collection of foreign intelligence. I refer the Court to that discussion, as the 49 responsive documents all contain such information.

55. While certain limited official disclosures have been made regarding the Program, all remaining details of the Program remain classified and are of critical importance to the CIA's ability to collect intelligence regarding the activities and plans of terrorist organizations. The 49 responsive documents contain myriad such classified details.

56. On September 6, 2006, President George W. Bush delivered a speech in which he disclosed the existence of the Program. President Bush also disclosed that fourteen individuals formerly in CIA custody had been transferred to the United States Naval Base at Guantánamo Bay, Cuba.[7] One of these individuals was Khalid Sheikh Muhammad.

57. While the President publicly disclosed that the fourteen individuals, including Khalid Sheikh Muhammad, were detained and questioned outside the United States in a program operated by the CIA, he also explicitly stated that many specific details about the program, including where the detainees had been held and details about their confinement, could not be divulged and would remain classified. Among the details that cannot be publicly released are the conditions of the detainees' capture, conditions of detention, the interrogation methods used (including alternative interrogation

[7] Since the President's 6 September 2006 speech, the Government has disclosed that two additional individuals were transferred to Guantánamo Bay.

methods), the questions asked, the intelligence gained from interrogations, and other operational details. These details, which would reveal intelligence activities, sources, and methods, comprise the substance of, and are replete throughout, the 49 responsive documents.

58. The CIA also has acknowledged that the waterboard technique was used during the interrogation of Khalid Sheikh Muhammad. However, this acknowledgement is limited to that specific fact alone. The acknowledgement does not diminish the importance of protecting the additional details and substance of Khalid Sheikh Muhammad's interrogation, including the manner in which the waterboard was used, any other interrogation techniques that were used, the questions Khalid Sheikh Muhammad was asked during interrogation, and the statements that Khalid Sheikh Muhammad made during his interrogation. All of this information remains classified. Such information, which also would reveal intelligence activities, sources, and methods, appears throughout the 49 responsive documents.

59. In fact, all such details in the 49 responsive documents constitute TOP SECRET, Sensitive Compartmented Information (SCI). Information relating to the CIA terrorist detention program has been placed in a TOP SECRET//SCI program to enhance protection from unauthorized disclosure. The disclosure of the intelligence activities, sources, and methods

relating to the Program, including details regarding the conditions of capture, conditions of detention, and specific alternative interrogation procedures, reasonably could be expected to cause exceptionally grave damage to national security. Specifically, disclosure of such information is reasonably likely to degrade the CIA's ability to effectively question terrorist detainees and elicit information necessary to protect the American people. The First DiMaio Declaration at paragraphs 119 through 120 explains that the Program has proved to be one of the U.S. Government's most useful tools in combating terrorist threats to the national security.

60. President Bush made clear in his September 6, 2006 speech that operation of the CIA detention program would continue. The continued effectiveness of this program requires the cooperation of foreign governments, as further discussed in the First DiMaio Declaration at paragraphs 122 through 127, and the use of effective interrogation techniques, as further discussed below. Unauthorized disclosure of the details of the program would undermine both of these requirements.

61. Protection of the interrogation methods used, questions asked, and intelligence gained in the CIA's detention program are critical to its success. The U.S. Government is aware that al Qaeda and other terrorists train in counter-interrogation methods. Public disclosure of the questioning

procedures and methods used by the CIA as part of the detention program would allow al Qaeda and other terrorists to more effectively train to resist such techniques, which would result in degradation in the effectiveness of the techniques in the future. If detainees in the Program are more fully prepared to resist interrogation, it could prevent the CIA from obtaining vital intelligence that could disrupt future attacks. These interrogation methods are integral to the CIA's detention program and are therefore classified TOP SECRET//SCI.

62. In addition to interrogation methods generally, the types of questions asked and specific questions asked to particular detainees must be protected. This information is replete throughout the 49 responsive documents. The questions asked during interrogation could provide insight into the intelligence interests and knowledge of the CIA. Public disclosure of the specific questions that the CIA has asked detainees could reveal what the CIA knew at the time and allow others to infer what the CIA did not know at the time. This information would allow other terrorists to make judgments about the intelligence capabilities of the CIA and to anticipate the type of questioning they might undergo.

63. Intelligence information, such as that gained through the interrogation of Khalid Sheikh Muhammad, is currently used by the U.S. Government to conduct counterterrorism operations

and pursue known terrorists. If the CIA were to reveal intelligence information gained through its use of interrogation methods, the information would no longer be useful in counterterrorism efforts.

64. Furthermore, the information gained through Khalid Sheikh Muhammed's interrogation is protected as human intelligence source information. In addition, the 49 responsive documents also contain information gathered from other human intelligence sources. As explained in detail in the First DiMaio Declaration in paragraphs 58 through 64, the CIA relies on human sources to collect foreign intelligence, with the promise that that the CIA will, among other things, keep their identities and/or the content of the information they provide secret and protected from public disclosure. The CIA recognizes that if the content of any information provided by a particular individual to the CIA is disclosed, the consequences could include not only harm to that individual, but harm to his associates. In addition, the intelligence provided by the individual could be diminished in value, as foreign intelligence services and other hostile entities will better understand the information that the CIA may have regarding their operations. Understanding what insights the CIA may have into the operations of foreign terrorist organizations allows such organizations to

take measures to counteract the CIA's ability to collect vital intelligence information.

65. The release of information identifying such intelligence sources and the content of the information provided would seriously damage the CIA's credibility with its current intelligence sources and undermine the CIA's ability to recruit future sources. Most individuals will not provide information to the CIA unless they have confidence that their identities and the content of the information they provide will remain secret. The CIA also has an interest in keeping this information secret, to demonstrate to other and future sources that these sources can trust the CIA to preserve the secrecy of the relationship.

66. If a human intelligence source has any doubts about the ability of the CIA to preserve secrecy, that is, if he or she were to learn that the CIA had disclosed the identity of other sources or the information they provided, his or her motivation to provide information to the CIA would likely diminish. In other words, intelligence sources will usually not cooperate with the CIA if they believe that the CIA may not protect their identities and the information they provide. The loss of such intelligence sources, and the accompanying loss of the critical intelligence that they provide, would seriously and adversely affect the national security of the United States.

67. Accordingly, the CIA has determined that the 49 responsive documents contain information about the TDI program that reasonably could be expected to identify intelligence activities, intelligence methods, and intelligence sources, including human intelligence sources, and the information those sources have provided to the CIA. For the reasons outlined above, this information is properly classified TOP SECRET pursuant to the criteria of Executive Order 12958. The unauthorized disclosure of this information could reasonably be expected to cause exceptionally grave damage to the national security of the United States.

68. In light of the limited official disclosures that have been made regarding the Program and the use of the waterboard during the interrogation of Khalid Sheikh Muhammad, I conducted a line-by-line review of the 49 responsive documents to identify any meaningful, reasonably segregable information contained within the documents. Based on this review I determined that any information that is no longer classified is so inextricably intertwined with the classified information contained within the documents that there are no meaningful, reasonably segregable, unclassified portions of the documents that can be released.

b. Additional Intelligence Methods

69. In addition to the intelligence methods that are integral to the TDI, the 49 responsive documents contain

information that would reveal other intelligence methods. The First DiMaio Declaration at paragraphs 76 through 83 contains a general description of these intelligence methods and their importance to the CIA's collection of foreign intelligence, and I refer the Court to that explanation. Specifically, I have determined that the information relating to intelligence methods contained in the 49 responsive documents includes information regarding field installations, cryptonyms and pseudonyms, and dissemination and control markings.

(1) Field Installations

70. The 49 responsive documents contain information that could reveal covert CIA installations abroad, known as field installations. Official acknowledgment that the CIA maintains an installation in a particular location abroad would likely cause the government of the country in which the installation is located to take countermeasures, either on its own initiative or in response to public pressure, in order to eliminate the CIA presence within its borders, or otherwise to retaliate against the United States Government, its employees, or agents. Revelation of this information also could result in terrorists and foreign intelligence services targeting that installation and persons associated with it.

71. The CIA has determined that the 49 responsive documents contain information that reasonably could be expected

to reveal covert CIA installations abroad and for the reasons outlined above is properly classified SECRET pursuant to the criteria of Executive Order 12958. The unauthorized disclosure of this information could reasonably be expected to cause serious damage to the national security of the United States. As a result, this information has been withheld in full because it is exempt from disclosure pursuant to FOIA Exemption b(1).

(2) Cryptonyms and Pseudonyms

72. The 49 responsive documents, all NCS operational cables, all contain cryptonyms and pseudonyms. The use of cryptonyms and pseudonyms is an intelligence method whereby words and letter codes are substituted for actual names, identities, or programs in order to protect intelligence sources and other intelligence methods. Specifically, the CIA uses cryptonyms in cables and other correspondence to disguise the true name of a person or entity of operational intelligence interest, such as a source, foreign liaison service, or a covert program. The CIA uses pseudonyms, which are essentially code names, solely for internal CIA communications.

73. When obtained and matched to other information, cryptonyms and pseudonyms possess a great deal of meaning for someone able to fit them into the proper framework. For example, the reader of a message is better able to assess the value of its contents if the reader can identify a source, an

undercover employee, or an intelligence activity by the cryptonym or pseudonym. By using these code words, the CIA adds an extra measure of security, minimizing the damage that would flow from an unauthorized disclosure of intelligence information.

74. In fact, the mere use of a cryptonym or pseudonym in place of plain text to describe a program or person is an important piece of information in a document. Use of such code words may signal to a reader the importance of the program or person signified by the codeword. By disguising individuals or programs, cryptonyms and pseudonyms reduce the seriousness of a breach of security if a document is lost or stolen.

75. Although release or disclosure of isolated code words may not in and of itself necessarily create serious damage to the national security, their disclosure in the aggregate or in a particular context could permit foreign intelligence services to fit disparate pieces of information together and to discern or deduce the identity or nature of the person or project for which the cryptonym or pseudonym stands. Such information is properly classified pursuant to section 1.7(e) of Executive Order 12958.

76. The CIA has determined that the 49 responsive documents contain cryptonyms and pseudonyms, the disclosure of which could reasonably be expected to cause damage or serious damage to the national security of the United States. For the

reasons set forth above, this information is therefore properly classified CONFIDENTIAL or SECRET pursuant to the Executive Order 12958. As such, this information has been withheld from release pursuant to FOIA exemption (b)(1).

(3) Dissemination-Control Markings

77. The 49 responsive documents also all contain dissemination-control markings. These are intelligence methods used by the CIA to protect and control the dissemination of information. These methods include procedures for marking documents to indicate procedures for and indicators restricting dissemination of particularly sensitive information contained in the documents. This also includes markings for Sensitive Compartmented Information.

78. Although such markings, standing alone, may sometimes be unclassified, when placed in the context of specific intelligence collection or analysis they may reveal or highlight areas of particular intelligence interest, sensitive collection sources or methods, or foreign sensitivities. In such instances, this information is properly classified pursuant to section 1.7(e) of Executive Order 12958. To avoid highlighting information that reveals such matters, the CIA withholds dissemination control markings and markings indicating the classification levels and controls of individual paragraphs or specific bits of information. Otherwise, if the CIA were to

withhold dissemination control and classification markings only in cases where the accompanying information indicates a special intelligence interest, a particularly sensitive method, or a foreign liaison relationship, the CIA would focus public attention on those sensitive cases.

79. Additionally, as a practical matter, deleting dissemination control markings (other than the overall classification level) rarely deprives a requester of the information he or she is actually seeking.

80. The CIA has determined that the 49 responsive documents contain dissemination-control markings, the disclosure of which reasonably could be expected to cause damage or serious damage to the national security of the United States. For the reasons set forth above, this information is therefore currently and properly classified CONFIDENTIAL or SECRET pursuant to Executive Order 12958. Thus, this information has been withheld from release pursuant to Exemption (b)(1). In addition, such dissemination markings when not classified are properly withheld under exemption b(2), as explained below.

B. FOIA Exemption b(2)

81. FOIA Exemption (b)(2) states that FOIA does not apply to matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Exemption (b)(2) encompasses two distinct categories of

information: (a) internal information of a less significant nature, such as administrative routing notations and agency rules and practices, sometimes referred to as "low 2" information; and (b) more substantial internal information, the disclosure of which would risk circumvention of a legal requirement, sometimes referred to as "high 2" information.

129. The CIA has invoked Exemption (b)(2) in this case to withhold the following "low 2" information: cable routing information, dissemination information, handling notations, and other administrative notations on all of the 49 responsive documents. There is no public interest in the release of this internal, clerical information. The CIA is not withholding any information on the basis of (b)(2) "high 2" information.

C. FOIA Exemption b(3)

82. FOIA Exemption (b)(3) provides that the FOIA does not apply to matters that are:

> 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 . . .

5 U.S.C. § 552(b)(3). I have reviewed the 49 responsive documents and determined that there are two relevant withholding

statutes: the National Security Act of 1947 and the Central Intelligence Agency Act of 1949.

83. *National Security Act of 1947* - As noted above, Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C.A. § 403-1(i)(1) (West Supp. 2008), provides that the Director of National Intelligence (DNI) shall protect intelligence sources and methods from unauthorized disclosure, and the DNI authorized the Director of the CIA in this case to take all necessary and appropriate measures in this case to ensure that intelligence sources and methods are protected from disclosure. I have reviewed the 49 responsive documents and determined that they contain information that if disclosed would reveal intelligence sources and methods. The CIA, therefore, relies on the National Security Act of 1947 to withhold any information that would reveal intelligence sources and methods.

84. In contrast to Executive Order 12958, the National Security Act's statutory requirement to protect intelligence sources and methods does not require the CIA to identify or describe the damage to national security that reasonably could be expected to result from their unauthorized disclosure. In any event, the information relating to intelligence sources and methods in these documents that is covered by the National Security Act is the same as the information relating to intelligence sources and methods that is covered by the

Executive Order for classified information. Therefore, the damage to national security that reasonably could be expected to result from the unauthorized disclosure of such information relating to intelligence sources and methods is co-extensive with the damage that reasonably could be expected to result from the unauthorized disclosure of classified information. This damage is described above.

85. *Central Intelligence Agency Act of 1949* - Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C.A. § 403g (West Supp. 2008), provides that in the interests of the security of the foreign intelligence activities of the United States and in order to further implement section 403-1(i) of Title 50, which provides that the DNI shall be responsible for the protection of intelligence sources and methods from unauthorized disclosure, the CIA shall be exempted from the provisions of any law which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the CIA. As a result, CIA employees' names and personal identifiers (for example, employee signatures, employee numbers or initials), titles, file numbers, and internal organizational data are absolutely protected from disclosure by law.

86. With respect to the 49 responsive documents, I have reviewed these documents and determined that many of them

contain information regarding the organization, functions, and official titles of personnel employed by the CIA. Again, the CIA Act's statutory requirement to further protect intelligence sources and methods by protecting CIA functions does not require the CIA to identify or describe the damage to national security that reasonably could be expected to result from their unauthorized disclosure. In any event, the information relating to CIA functions and intelligence sources and methods that is covered by the CIA Act's statutory requirement is the same as the information relating to intelligence sources and methods that is covered by the Executive Order for classified information. Therefore, the damage to national security that reasonably could be expected to result from the unauthorized disclosure of CIA functions and intelligence sources and methods is co-extensive with the damage that reasonably could be expected to result from the unauthorized disclosure of classified information, which is described above.

87. In light of the official acknowledgements discussed above, I conducted a line-by-line review of the 49 responsive documents to identify any meaningful, reasonably segregable information contained within the documents. Based on this review I determined that any information that is no longer protected from disclosure under the NSA or CIA Act is so inextricably intertwined with information that is protected

within the documents that there are no meaningful, reasonable segregable, unprotected portions of the documents that can be released.

* * * *

D. Segregability

88. As referenced above in paragraphs 68 and 87, all 49 documents were withheld in full because I have determined that no meaningful, reasonably segregable portion of those documents could be released. I made this determination of segregability based on a careful review of the documents, both individually and as a whole. Indeed, I conducted a line-by-line review of all the documents at issue to identify any meaningful, reasonably segregable, non-exempt portions of the documents. I determined that any non-exempt information is so inextricably intertwined with the exempt information that there are no meaningful, reasonably segregable, non-exempt portions of information that can be released.

* * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of November, 2008.

Wendy M. Hilton

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Associate Information Review Officer
National Clandestine Service
Central Intelligence Agency