

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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<b>DONALD FRIEDMAN,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil Action No. 06-2125 (RWR)</b>
	)	<b>ECF</b>
<b>U.S. SECRET SERVICE,</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

**DEFENDANT’S MEMORANDUM IN SUPPORT MOTION FOR SUMMARY  
JUDGMENT AND IN OPPOSITION TO PLAINTIFF’S MOTION TO COMPEL**

**I. INTRODUCTION**

The United States Secret Service (“Secret Service”), respectfully moves for summary judgment in this case, which arises under the Freedom of Information Act (“FOIA”). Plaintiff, seeks records pertaining to the development, acquisition, installation, deployment, testing and manufacture of directed energy weapons or systems. The Secret Service has released certain records, including some as recently as October 24, 2007, but withheld others pursuant to FOIA/Privacy Act (“PA”) exemptions (b)(1), (b)(2), (b)(5), (b)(6), (b)(7)(E) and (F). Accordingly, because the Secret Service has fully performed its statutory duty and there are no genuine issues of fact, the Secret Service is entitled to judgment as a matter of law. Fed R. Civ. P. 56(c).

**II. FACTUAL BACKGROUND**

Craig W. Ulmer, Special Agent in Charge of the Capitol Hill and Interagency Liaison and FOIA/PA officer, prepared the Secret Service’s declaration (“Ulmer Decl.”) summarizing

Plaintiff's FOIA request and the Secret Service's processing of same.<sup>1</sup> *Ex. A.* By letter dated September 18, 2006, received by the Secret Service on September 18, 2006, Plaintiff requested "any and all files, records, documents, information, photo, research materials... purchasing and any other contract-related information related to or referring to...directed energy weapons or systems...."<sup>2</sup> *Ulmer Decl.* at ¶5, *Ex. A.* By February 16, 2007, Plaintiff had modified his request and satisfied the requirements of a processable FOIA request, which was then processed for responsive documents. *Id.* at ¶¶6-16, *Exs. B-G.*

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<sup>1</sup> Department of Homeland Security Regulations, 6 C.F.R. §5.4, which apply to the Secret Service, vest authority to make initial determinations as to whether to grant FOIA/PA requests to Mr. Ulmer.

<sup>2</sup> On or about June 16, 2000, Plaintiff, a prolific FOIA filer, commenced what appeared to be a FOIA action and an injunction against the Secret Service from using secret microwave technology to transmit sounds and words into his brain to hypnotize him thereby causing him to perform involuntary acts and erase his memory. The Northern District of California dismissed that action as "frivolous as a matter of law." *Ex. B, Order Dismissing Case.* On February 9, 2001, Plaintiff commenced a FOIA action against the Secret Service seeking to compel it to produce documents related to his claims in the action that was dismissed. Again, the court dismissed Plaintiff's complaint on res judicata grounds and, with regard to Plaintiff's request for each and every civil and criminal suit against the Secret Service, on the grounds that the Secret Service has complied with Plaintiff's unreasonable request. *Ex. C, Order Dismissing Case.* On January 31, 2006, Plaintiff commenced a FOIA action in this District against the U.S. Non-Lethal Weapons Directorate and the U.S. Marine Corp seeking information about the Active Denial System and Active Denial Technology. After defendants filed their Motion for Summary Judgment, Plaintiff voluntarily dismissed his complaint.

Plaintiff also attempted to gather this information by violent means. On January 30, 2003, Plaintiff entered an FBI field Office and threatened to "torture" an agent until he got "records that the U.S. Secret Service has related to [him]." *United States v. Friedman*, 366 F.3d 975, 976-77 (9<sup>th</sup> Cir. 2004). Plaintiff believed that Secret Service agents had arranged to have him molested when he was 13 years old and fired an electromagnetic radiation weapon at him. *Id.* As a result of his actions, Plaintiff was charged with threatening to harm a federal officer. *Id.* at 977. Ultimately, the District Court found Plaintiff incompetent to stand trial because he suffered from paranoid schizophrenia that prevented him from assisting counsel in his defense. The Ninth Circuit affirmed. *Id.* at 980-81.

The Secret Service's FOIA Office determined that five of its units would possess documents relevant to Plaintiff's request. *Id.* at ¶14. These units searched for responsive records on the Secret Service's Master Central Index ("MCI").<sup>3</sup> In addition, the Uniformed, Investigative Support and Intelligence Division searched paper records and a local electronic database but found nothing responsive. *Id.* at ¶16. The Technical Services search of its own papers and local electronic database yielded responsive documents that have been already provided to Plaintiff. *Id.* at ¶17. Under cover letters dated July 23, October 11, and October 24, 2007, the Secret Service produced responsive documents to Plaintiff. *Id.* at ¶17; 30; and 31, *Exs.* H, U and V.

These cover letters also informed Plaintiff that documents had been withheld pursuant to FOIA/PA exemptions. *Id.* Plaintiff was also informed that, pursuant to agency regulations, responsive documents that had been originated by other agencies were forwarded to those agencies to facilitate direct responses to Plaintiff's FOIA request, *id.* at ¶¶18-29, *Exs.* I-T, and that 454 pages of material were being withheld in their entirety. *Id.* ¶¶32-50.

### III. LEGAL STANDARDS

#### A. Standard for Summary Judgment

Where no genuine dispute exists as to any material fact, summary judgment is required. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A genuine issue of material fact is one that would change the outcome of the litigation. *Id.* at 247. "The burden on the moving party may be discharged by 'showing' -- that is, pointing out to the [Court] -- that there is an absence of

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<sup>3</sup> The MCI is a central repository of Secret Service information with records indexed by name or other personal identifiers. Ulmer Decl. at ¶15.

evidence to support the non-moving party's case.” *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987).

Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must instead proffer specific facts showing that a genuine issue exists for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, to avoid summary judgment, the Plaintiff must present some objective evidence that would enable the court to find he is entitled to relief. In *Celotex Corp. v. Catrett*, the Supreme Court held that, in responding to a proper motion for summary judgment, the party who bears the burden of proof on an issue at trial must "make a sufficient showing on an essential element of [his] case" to establish a genuine dispute. 477 U.S. 317, 322-23 (1986).

In *Anderson*, the Supreme Court explained under what circumstances summary judgment is appropriate:

If the evidence is merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted . . . [T]he mere existence of a scintilla of evidence in support of the Plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the Plaintiff.

*Anderson*, 477 U.S. at 252; *see also Laningham v. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (the non-moving party is “required to provide evidence that would permit a reasonable jury to find” in its favor). In *Celotex*, the Supreme Court further instructed that the “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

The summary judgment standards set forth above also apply to FOIA cases, which are typically decided on motions for summary judgment.<sup>1</sup> See *Cappabianca v. Commissioner, U.S. Customs Serv.*, 847 F. Supp. 1558, 1562 (M.D. Fla. 1994) ("once documents in issue are properly identified, FOIA cases should be handled on motions for summary judgment") (*citing Miscavige v. IRS*, 2 F.3d 366, 368 (11th Cir. 1993)). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, not withheld, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 833 (D.C. Cir. 2001); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and the Plaintiff with affidavits or declarations and other evidence which show that the documents are exempt from disclosure. *Hayden v. Nat. Sec. Agency Cent. Sec. Serv.*, 608 F.2d 1381, 1384, 1386 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1980). Summary judgment may be awarded to an agency in a FOIA case solely on the basis of agency affidavits [or declarations] "when the affidavits describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Trans Union LLC v. Federal Trade Comm'n*, 141 F. Supp. 2d 62, 67 (D.D.C. 2001) (*quoting Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)); *see also*

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<sup>1</sup> For purposes of summary judgment, an agency's decision to withhold information from a FOIA requester is subject to *de novo* review by the courts. *Hayden v. National Security Agency Cent. Sec. Serv.*, 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980).

*Public Citizen, Inc. v. Dep't of State*, 100 F. Supp. 2d 10, 16 (D.D.C. 2000); *McGhee v. Central Intelligence Agency*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Citizens Commission on Human Rights v. FDA*, 45 F.3d 1325, 1329 (9<sup>th</sup> Cir. 1995); *Bowen v. FDA*, 925 F.2d 1224, 1227 (9<sup>th</sup> Cir. 1991). When the pleadings, supplemented by affidavits or declarations, show no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law, summary judgment should be granted to the defendant. *Perry v. Block*, 684 F.2d 121 (D.C. Cir. 1982).

### **B. Standards Governing the Search for Responsive Records**

In responding to a FOIA request, an agency is under a duty to conduct a reasonable search for responsive records. *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Cleary, Gottlieb, Steen & Hamilton v. Dep't of Health*, 844 F. Supp. 770, 776 (D.D.C. 1993); *Weisberg, supra*, 705 F.2d at 1352 (D.C. Cir. 1983). This “reasonableness” standard focuses on the method of the search, not its results, so that a search is not unreasonable simply because it fails to produce relevant material. *Cleary* 844 F. Supp. at 777 n.4. An agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *Oglesby*, 920 F.2d at 68. Simply stated, the adequacy of the search is “dependent upon the circumstances of the case.” *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

The search standards under FOIA do not place upon the agency a requirement that it prove that all responsive documents have been located. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995). It has been held that “the search need only be reasonable; it does not have to be exhaustive.” *Miller v. Dep't of State*, 779 F.2d 1378, 1383 (8<sup>th</sup> Cir. 1985), citing *National Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir.

1973). Even when a requested document indisputably exists or once existed, summary judgment will not be defeated by an unsuccessful search for the document so long as the search was diligent. *Nation Magazine*, 71 F.3d at 892 n.7. Additionally, the mere fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it. *Maynard v. CIA*, 982 F.2d 546, 564 (1st Cir. 1993).

The burden rests with the agency to establish that it has “made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby*, 920 F.2d at 68; *see SafeCard Servs., supra*, 926 F.2d at 1201 (D.C. Cir. 1991). “An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, non-conclusory and submitted in good faith.” *Miller*, 779 F.2d at 1383; *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978). Though the “affidavits submitted by an agency are ‘accorded a presumption of good faith,’” *Carney v. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (*quoting SafeCard Servs.*, 926 F.2d at 1200), the burden rests with the agency to demonstrate the adequacy of its search. Once the agency has met this burden through a show of convincing evidence, the burden shifts to the requester to rebut the evidence by a showing of bad faith on the part of the agency. *Miller*, 779 F.2d at 1383. A requester may not rebut agency affidavits with purely speculative allegations. *See Carney*, 19 F.3d at 813; *SafeCard*, 926 F.2d at 1200; *Maynard*, 986 F.2d at 559-560.

The fundamental question is not “whether there might exist any other documents responsive to the request, but rather whether the search for those documents was adequate.”

*Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

### C. Standards for A Proper *Vaughn* Index

In moving for summary judgment in a FOIA case, agencies must establish a proper basis for their withholding of responsive documents. "In response to this special aspect of summary judgment in the FOIA context, agencies regularly submit affidavits . . . in support of their motions for summary judgment against FOIA Plaintiffs." *Judicial Watch v. U.S. Dep't of Health & Human Servs.*, 27 F. Supp. 2d 240, 242 (D.D.C. 1998). These declarations or affidavits (singly or collectively) are often referred to as a *Vaughn* index, after the case of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S. C. 1564 (1974). There is no set formula for a *Vaughn* index. "[I]t is well established that the critical elements of the *Vaughn* index lie in its function, and not in its form." *Kay v. FCC*, 976 F. Supp. 23, 35 (D.D.C. 1997). "The materials provided by the agency may take any form so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege." *Delaney, Midgail & Young, Chartered v. IRS*, 826 F.2d 124, 128 (D.C. Cir. 1987). *See also Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 349 (D.C. Cir. 1987); *Hinton v. Dep't of Justice*, 844 F.2d 126, 129 (3d Cir. 1988).<sup>2</sup>

The *Vaughn* Index serves a threefold purpose: (1) it identifies each document withheld;

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<sup>2</sup> "All that is required, and that is the least that is required, is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure." *Id.* "The degree of specificity of itemization, justification, and correlation required in a particular case will, however, depend on the nature of the document at issue and the particular exemption asserted." *Information Acquisition Corp. v. Dep't of Justice*, 444 F. Supp. 458, 462 (D.D.C. 1978).

(2) it states the statutory exemption claimed; and (3) it explains how disclosure would damage the interests protected by the claimed exemption. *Citizens Commission on Human Rights v. FDA*, 45 F.3d 1325, 1326 (9th Cir. 1995). "Of course the explanation of the exemption claim and the descriptions of withheld material need not be so detailed as to reveal that which the agency wishes to conceal, but they must be sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

#### **D. Legal Standards for Applicable Exemptions to Release under FOIA**

##### Exemption (b)(1)

FOIA Exemption 1 applies to matters "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). The benchmark for determining whether an agency has properly relied on exemption 1 is set forth in this Court's decision in *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980). Summary judgment for the agency is appropriate if its declarations are reasonably specific and are not called into question by contradictory evidence or evidence of bad faith. *Id.* at 148. Ultimately, it is the agency withholding information pursuant to exemption 1, not the FOIA requester, which bears the responsibility for determining whether harm to national security may occur, so the Court should accord substantial weight to the agency's expert judgment. *See id.* at 147-48.

Exemption 1 of the FOIA allows for the withholding of material which are:

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

. . . .5 U.S.C. § 552(b)(1). The executive order in effect at the time the classification decisions were made in this case was Executive Order (“EO”) 12958, as amended, 68 Fed. Reg. 15,315 (March 28, 2003), reprinted in 50 U.S.C.A. § 435 note (West Supp. 2003) and summarized in FOIA Post (posted April 11 2003). Ulmer Decl. ¶ 37.

For information to be properly classified and thus to be properly withheld from disclosure pursuant to Exemption 1, the information must meet the requirements set forth in E.O. 12958, § 1.2:

- (1) an original classification authority is classifying the information;
- (2) the information is owned by, produced by or for, or is under the control of the United States Government;
- (3) the information falls within one or more of the categories of information in § 1.5; and
- (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damage.

In addition to the substantive requirements of E.O. 12958, certain procedural and administrative requirements of E.O. 12958 must be followed before information can be considered to be properly classified, including proper identification and marking of documents.

These requirements are:

- (a) each document was marked as required and stamped with the proper classification designation;<sup>3</sup>
- (b) each document was marked to indicate clearly which portions are classified, which portions are exempt from declassification as set forth in E.O. 12958 § 1.6(d), and which portions are unclassified;<sup>4</sup>

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<sup>3</sup> E.O. 12958 §§ 1.7(a)(1)-(5).

<sup>4</sup> E.O. 12958 § 1.7(a)(5)(c).

- (c) the prohibitions and limitations on classification specified in E.O. 12958 § 1.8, were adhered to;
- (d) the declassification policies set forth in E.O. 12958 §§ 3.2 were followed; and
- (e) any reasonably segregable portion of these classified documents that did not meet the standards for classification under E.O. 12958 were declassified and marked for release, unless withholding was otherwise warranted under applicable law.

In determining whether an agency has fully discharged its obligations under FOIA, a district court reviews an agency's determinations *de novo*. 5 U.S.C. § 552(a)(4)(B); *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). In reviewing classification determinations under Exemption 1, however, this Court repeatedly has stressed that "substantial weight" must be accorded agency affidavits concerning the classified status of the records at issue. *See, e.g., Krikorian v. Dep't of State*, 984 F.2d 461, 464 (D.C. Cir. 1993); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). According to this Circuit's jurisprudence, "Judges . . . lack the necessary expertise to second-guess such national security opinions in the typical national security case." *Halperin, supra*, 629 F.2d at 148. Clear precedent has established that courts are reluctant to substitute their own judgment in place of the agency's in the areas of national defense and foreign relations. *See Miller*, 779 F.2d at 1387; *see also McDonnell v. United States*, 4 F.2d 1227, 1242-44 (3d Cir. 1993); *Maynard, supra*, 986 F.2d at 556 n.9; *Bowers v. United States Dep't of Justice*, 930 F.2d 350, 357 (4<sup>th</sup> Cir. 1991); *Doherty v. United States Dep't of Justice*, 775 F.2d 49, 52 (2d Cir. 1985). "[C]ourts must 'recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record.'" *Salisbury v. United States*, 690 F.2d 966, 970 (D. C. Cir. 1982) (quoting S. Conf. Rep. No. 1200, 93rd Cong., 2d Sess. 12 (1974)). Thus, the D.C. Circuit has

held that courts must give "substantial weight" and "utmost deference," while conducting a de novo review of agency determinations, that information requested under FOIA is classified and barred from disclosure. *Id.* at 970 ("[C]ourts are to 'accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.'").

To prevail at summary judgment, the agency must demonstrate that 1) the agency followed proper classification procedures and 2) that, by its description, the document logically falls within the claimed exemption. *Salisbury*, 690 F.2d at 970-72; *Military Audit Project*, 656 F.2d at 737; *Hayden*, 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). Once this burden is met, courts must "not ... conduct a detailed inquiry to decide whether [they] agree[] with the agency's opinions." *Halperin*, 629 F.2d at 148. If the agency's affidavits describe the withheld information and the justification for withholding with "reasonable specificity, demonstrating a logical connection between the information and the claimed exemption," and "if the affidavits evidence neither bad faith on the part of the agency nor a conflict with the rest of the record," the agency is entitled to summary judgment. *Id.* at 147-48; see also *Military Audit Project*, 656 F.2d at 738; *Allen v. CIA*, 636 F.2d 1287, 1291 (D.C. Cir.1980); *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980).

Perhaps no withholding exemplifies the purpose of this exemption than a disclosure that could endanger the lives of the President and Vice President. The Secret Service is a protective law enforcement and security agency operating under the provisions of 18 U.S.C. §3056. Ulmer Decl. at ¶43. It is responsible for the protection of various individuals, including the President and the Vice President. *Id.* The information being withheld under (b)(1) consists of four reports totaling 270 pages that outline security measures in place at the White House and

countermeasures against attacks on the White House. *Id.* at ¶36. Secret Service officials have reviewed these documents again recently and have determined that they continue to be classified under Executive Order 12948. The Secret Service has satisfied the requirements to withhold these records under this provision and should be granted summary judgment accordingly.

Exemption (b)(5)

Exemption 5 protects this material because it exempts from disclosure both inter- and intra-agency communications which would not be available by law to a party other than an agency in litigation with the particular agency. 5 U.S.C. § 552(b)(5). In other words, Exemption 5 allows agencies to withhold documents which would normally be privileged in the context of civil discovery. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184-85 (D.C. Cir. 1987) (making clear that all civil discovery privileges apply through Exemption 5).

The deliberative process privilege is for the purpose of protecting the “quality of agency decisions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). The policy underlying this privilege is to encourage open, frank discussions of policy matters between subordinates and supervisors, to protect against premature disclosure of proposed policies before they become final, and to protect against public confusion by disclosing reasons and rationales that were not in fact the ultimate grounds for the agency's action. *Mink v. EPA*, 410 U.S. 73, 87 (1973) (privilege designed to promote "frank discussion of legal and policy matters") (*quoting* S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); *id.* at 89); *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc),

overruled in part on other grounds, *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir.1981) (en banc).

This privilege protects documents that are both pre-decisional and deliberative, including “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Indeed, the mere status of an agency decision within an agency decision making process may be protectible if the release of that information would have the effect of prematurely disclosing “the recommended outcome of the consultative process...as well as the source of any decision.” *Wolfe v. HHS*, 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc).

Under (b)(5), the Secret Service withheld a two-page document regarding the opinion of a technical services employee regarding the current state of development of acoustical weaponry. Ulmer Decl. ¶39. This report contains pre-decisional opinions of a technical Secret Service employee, the disclosure of which could adversely affect the free-flow of candid discussions between decision-makers. Such an outcome could adversely affect the Secret Service’s duties to protect individuals, including the President and Vice President. Therefore, the Court should approve the Secret Service’s withholdings under Exemption 5.

Exemption (b)(2) and (b)(7)(E)

Exemption 2 under FOIA exempts from mandatory disclosure records that are “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2). Not long after FOIA was passed, the Supreme Court declared that Exemption 2 was intended to relieve agencies of the burden of assembling and providing access to any “matter in which the public

could not reasonably be expected to have an interest” and matters of public interest “where disclosure may risk circumvention of agency regulation.” *Department of Air Force v. Rose*, 425 U.S. 352, 369-70 (1976). Subsequently, courts have approved two general categories of withholdings under Exemption 2: (1) internal matters of a relatively trivial nature (sometimes referred to as “low-2”); and (2) more substantial internal matters for which disclosure would risk circumvention of a legal requirement (sometimes called “high-2”). *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992); see *Crooker v. ATF*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (setting forth a two part test for high-2 material).

Exemption 7(E) of the FOIA provides protection for all information compiled for law enforcement purposes when release "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."<sup>5</sup> 5 U.S.C. § 552(b)(7)(E). The first clause of Exemption 7(E) affords "categorical" protection for "techniques and procedures" used in law enforcement investigations or prosecutions. *Smith v. Bureau of Alcohol, Tobacco and Firearms*, 977 F. Supp. 496, 501 (D.D.C. 1997), citing *Fisher v. United States Dep't of Justice*, 772 F. Supp. 7, 12 n. 9 (D.D.C. 1991), aff'd, 968 F.2d 92 (D.C. Cir. 1992). While Exemption 7(E)'s protection is generally limited to techniques or procedures that are not well known to the public, even commonly known procedures may be protected from disclosure if the disclosure could reduce or nullify their effectiveness. See, e.g., *Coleman v. FBI*, 13 F. Supp. 2d. 75, 83 (D.D.C. 1998) (applying 7(E) to

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<sup>5</sup> The Secret Service compiled this information for law enforcement purposes. Ulmer Decl. ¶43.

behavioral science analysis and details of polygraph examination); *Butler v. Treasury*, 1997 WL 138720 at \*4 (D.D.C. 1997) (applying 7(E) to types of monitoring and type of equipment used in surveillance); *Perrone v. FBI*, 908 F. Supp. 24, 28 (D.D.C. 1995) (applying 7(E) to type of polygraph test, type of machine used, polygraph questions and sequence). In justifying the application of Exemption 7(E) the agency may describe the general nature of the technique while withholding the full details. *See e.g. Bowen v. FDA*, 925 F.2d 1225, 1228 (9th Cir. 1991). The agency is not, however, required to describe secret law enforcement techniques, even in general terms, if the description would disclose the very information sought to be withheld. *Coleman*, 13 F. Supp. 2d at 83; *Smith*, 977 F. Supp. at 501; *Butler*, 1997 WL 138720 at \*4.

Exemption 7(E)'s second clause separately protects "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Accordingly, this clause of the Exemption protects any "law enforcement guideline" that pertains to the prosecution or investigative stage of a law enforcement matter whenever its disclosure "could reasonably be expected to risk circumvention of the law." *See, e.g., PHE, Inc. v. United States Dep't of Justice*, 983 F.2d 248, 251 (D.C. Cir. 1993) ("release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus inhibit investigative efforts"); *Jimenez v. FBI*, 938 F. Supp. 21, 30 (D.D.C. 1996) (applying Exemption 7(E) to gang-validation criteria used by Bureau of Prisons to determine whether individual is gang member).

Invoking both of these provisions, the Secret Service also withheld strictly internal e-mail addresses of Secret Service employees. Ulmer Decl. ¶45. This is an appropriate withholding

under (b)(2) and (7)(E) because the disclosure of this information could enable hackers to break into federal databases. *Id.* The Secret Service also withheld information on security systems used by the Secret Service to protect the President and the Vice President the disclosure of which would reveal "techniques and procedures for law enforcement investigations...or would disclose guidelines for law enforcement investigations....." *Id.* at ¶¶44-46.

Exemption (b)(6) and (b)(7)(C)

Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). "The Supreme Court has interpreted the phrase 'similar files' to include *all information* that applies to a particular individual." *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999), (emphasis supplied), quoting *Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). The Court has also emphasized that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989).

In order to determine whether there would be a "clearly unwarranted invasion of personal privacy," the court must balance the interests of protecting "an individual's private affairs from unnecessary public scrutiny," and "the public's right to governmental information." *Lepelletier*, 164 F.3d at 46 (interior quotation marks omitted), citing *United States Dep't of Defense Dep't of Military Affairs v. FLRA*, 964 F.2d 26, 29 (D.C. Cir. 1992), quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976). In determining how to balance the private and public interests involved, the Supreme Court has sharply limited the notion of "public interest" under the FOIA:

"[T]he *only* relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Lepelletier*, 164 F.3d at 46 (editing by the court, emphasis supplied, interior quotation marks omitted), quoting *United States Dep't of Defense v. FLRA*, 510 U.S. 487, 497 (1994). *See also Reporters Comm.*, 489 U.S. at 773. Information that does not directly reveal the operation or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Id.* at 775. Further, "something, even a modest privacy interest, outweighs nothing every time." *Nat. Ass'n of Ret. Fed. Empl. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989); *but see Lepelletier*, 164 F.3d at 48 (in extraordinary circumstance where the individuals whose privacy the government seeks to protect have a "clear interest" in release of the requested information, the balancing under Exemption 6 must include consideration of that interest).

Exemption 7(C) of the FOIA exempts from mandatory disclosure information compiled for law enforcement purposes when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Secret Service records are compiled for law enforcement purposes. Ulmer Decl. ¶ 43 (discussing the Secret Service's law enforcement mission). When a criminal law enforcement agency invokes Exemption 7, it "warrants greater deference than do like claims by other agencies." *Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987), citing *Pratt*, 673 F.2d at 418. A criminal law enforcement agency must simply show that "the nexus between the agency's activity . . . and its law enforcement duties" is "based on information sufficient to support at least 'a colorable claim' of its rationality." *Keys*, 830 F.2d at 340, quoting *Pratt*, 673 F.2d at 421.

Once the agency has demonstrated that the records were compiled for law enforcement purposes, the Court must next consider whether the release of information withheld "could reasonably be expected to constitute an unwarranted invasion of personal privacy." This determination necessitates a balancing of the individual's right to privacy against the public's right of access to information in government files. *See, e.g., U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776-80 (1989).

The Supreme Court has made clear that "whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny,' *Dep't of Air Force v. Rose*, [425 U.S. 352, 372 (1976)], rather than on the particular purpose for which the document is being requested." *Reporter's Committee*, 489 U.S. at 772 (internal quotation marks omitted). Information that does not directly reveal the operations or activities of the government "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Id.* at 775. That public interest is to "shed[] light on an agency's performance of its statutory duties." *Id.* at 772. The plaintiff bears the burden of establishing that the "public interest in disclosure is both significant and compelling in order to overcome legitimate privacy interests." *Perrone v. FBI*, 908 F. Supp. 24, 26 (D.D.C. 1995), citing *Senate of Puerto Rico v. Department of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987).

Significantly, it is the "interest of the general public and not that of the private litigant" that matters. *Brown v. FBI*, 658 F.2d 71, 75 (2d Cir.1981). "[T]he only public interest relevant for purposes of Exemption 7(C) is one that focuses on 'the citizens' right to be informed about what their government is up to.'" *Davis v. Department of Justice*, 968 F.2d 1276, 1282 (D.C.

Cir.1992) (quoting *Reporters Committee*, 489 U.S. at 773) (internal quotation marks omitted). Further, courts have explicitly recognized that the privacy interests of third parties mentioned in law enforcement files are "substantial," while "[t]he public interest in disclosure [of third-party identities] is not just less substantial, it is insubstantial." *SafeCard Serv.*, *supra*, 926 F.2d at 1205. Our court of appeals has held "categorically" that "unless access to names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *SafeCard Services*, 926 F.2d at 1206.

Exemption 7(C) consistently has been held to protect the identities of suspects and other persons of investigatory interest who are identified in agency records in connection with law enforcement investigations. *Reporters Committee*, 489 U.S. at, 780); *Computer Prof. for Social Responsibility v. U.S. Secret Service*, 72 F.3d 897, 904 (D.C. Cir. 1996) (noting "'strong interest of individuals, whether they be suspects, witnesses, or investigators, in not being associated unwarrantedly with alleged criminal activity,'" quoting *Dunkelberger v. Dep't of Justice*, 906 F.2d 779, 781 (D.C. Cir. 1990)). Indeed, an agency may categorically assert Exemption 7(C) to protect the identities of witnesses or other persons mentioned in law enforcement files in such a way as to associate them with criminal activity. *Reporters Committee*, 489 U.S. at 780; *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 893, 895-96 (D.C. Cir. 1995); *SafeCard Services*, 926 F.2d at 1206.

Likewise, the names of law enforcement officers who work on criminal investigations have traditionally been protected against release by Exemption 7(C). *Davis*, 968 F.2d at 1281; *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 487-88 (D.C. Cir. 1980). Similarly, individuals

who provide information to law enforcement authorities, like the law enforcement personnel themselves, have protectable privacy interests in their anonymity. *Computer Prof. for Social Responsibility*, 72 F.3d at 904; *Farese v. U.S. Department of Justice*, 683 F. Supp. 273, 275 (D.D.C. 1987). The *Vaughn* index provided reflects clearly that the Secret Service applied Exemption 7(C) appropriately in this case to protect names and individual's personal information. Ulmer Decl. ¶¶ 42-43.

The Secret Service invoked Exemption 6 in conjunction with Exemption 7(C), which is addressed below, to protect names and other identifying information of persons employed by entities outside of the Secret Service who provide security advice and information on potential security threats and security equipment to the Secret Service to perform its statutory duties. Ulmer Decl. ¶48. In arriving at the decision to withhold, the Secret Service weighed the interest of the general public to know against the privacy rights of third parties and the latter carried the day. *Id.* at ¶49. If disclosed, this information could put these individuals at personal risk or peril due to their connection with the Secret Service and other government entities. *Id.* at ¶¶49-50. Those who are seeking to harm a Secret Service protectee like the President or Vice-President could use the disclosure of this information to achieve that objective. *Id.*

#### Exemption (b)(7)(F)

In conjunction with its treatment of the responsive documents under Exemption 7(C), the Secret Service also applied Exemption 7(F). Ulmer Decl. ¶¶ 51-52. Exemption 7(F) allows agencies to withhold individuals' identifying information when disclosure "could reasonably be expected to endanger the life or physical safety of any individual. 5 U.S.C. § 552(b)(7)(F). This exemption does not require a balancing test. *Id.* at ¶52. This is an exemption that the Secret

Service will naturally claim as its purpose is to protect the “life and physical safety” of the President and Vice President. Clearly, amongst many others, the Secret Service claims this withholding to enable and enhance their ability to carry out its statutory obligation to protect certain individuals. *Id.*

#### **E. Segregability**

In this Circuit, a District Court considering a FOIA action has “an affirmative duty to consider the segregability issue *sua sponte.*” *Trans-Pacific Policing Agreement v. United States Customs Service*, 177 F.3d 1022, 1028 (D.C. Cir. 1999). The FOIA requires that, if a record contains information that is exempt from disclosure, any “reasonably segregable” information must be disclosed after deletion of the exempt information unless the non-exempt portions are “inextricably intertwined with exempt portions.” 5 U.S.C. § 552(b); *Mead Data Cent., Inc. v. United States Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

In order to demonstrate that all reasonably segregable material has been released, the agency must provide a “detailed justification” rather than “conclusory statements.” *Mead Data*, 566 F.2d at 261. The agency is not, however, required “to provide such a detailed justification” that the exempt material would effectively be disclosed. *Id.* All that is required is that the government show “with ‘reasonable specificity’” why a document cannot be further segregated. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996). Moreover, the agency is not required to “commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content.” *Mead Data*, 566 F.2d at 261, n.55., 479 F.2d 183, 186 (D.C. Cir. 1973).

The only records withheld by the Secret Service are exempt. In other words, no information can be segregated from the documents withheld. Ulmer Decl. ¶53. Some of the records were determined to be beyond the scope of Plaintiff's request and therefore only a smaller amount of information was released.

**F. Plaintiff's Motion to Compel Should be Denied as Moot**

On July 23, 2007, the Secret Service provided copies of records responsive to Plaintiff's request. *Id.* at ¶19. Subsequently, on August 27, 2007, Plaintiff filed a Motion to Compel production of the records he seeks. *Docket Entry 27*. Since then, the Secret Service produced additional documents on October 11, 2007 and October 24, 2007. The Secret Service contends that it has provided Plaintiff with all non-exempt documents responsive to his request and that summary judgment is appropriate. In light of its recent production, the Secret Service respectfully requests that Plaintiff's motion be denied as moot.

**CONCLUSION**

Since the Secret Service has conducted a proper search and turned over all non-exempt documents to Plaintiff, there are no genuine issue as to any material fact and the Secret Service is entitled to judgment as a matter of law. The Secret Service respectfully request that the Court grant summary judgment in its favor.

December 4, 2007

Respectfully submitted,

/s/  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that service of Defendant's Motion for Summary Judgment and Opposition to Motion to Compel and supporting documents were made by first class, postage prepaid mail this 4th day of December, 2007 to:

Donald Friedman  
1301 4<sup>th</sup> Street  
Napa, CA 94559-3015

\_\_\_\_\_/s/\_\_\_\_\_  
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