



Exemption 1

Exemption 1 of the Freedom of Information Act protects from disclosure information that has been deemed classified "under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is "in fact properly classified pursuant to such Executive order."¹ The Supreme Court has recognized that the President bears immediate responsibility for protecting national security, which includes the development of policy that establishes what information must be classified to prevent harm to national security.² Exemption 1 is the provision of the FOIA which affords protection for such properly classified information.³

Each President, beginning with President Harry S. Truman in 1951,⁴ has issued a new or revised executive order establishing the uniform policy of the Executive Branch

¹ [5 U.S.C. § 552\(b\)\(1\) \(2006 & IV 2010\)](#); see also [Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government" and directing agencies to "adopt a presumption in favor of disclosure"); accord [Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act](#), 74 Fed. Reg. 51879 (Oct. 8, 2009); *FOIA Post*, "[OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a New Era of Open Government](#)" (posted 4/17/09).

² See, e.g., *Dep't of the Navy v. Egan*, 484 U.S. 518, 527-28 (1988) (discussing responsibility for protecting national security entrusted in the President as Commander in Chief of the military and as head of Executive Branch) (non-FOIA case).

³ See, e.g., *Larson v. Dep't of State*, 565 F.3d 857, 861 (D.C. Cir. 2009) (acknowledging that Exemption 1 protects information properly classified under national security executive order); *Morley v. CIA*, 508 F.3d 1108, 1123-24 (D.C. Cir. 2007) (same); *Wolf v. CIA*, 473 F.3d 370, 373 & n.3 (D.C. Cir. 2007) (same); *Campbell v. DOJ*, 164 F.3d 20, 29 (D.C. Cir. 1998) (same).

⁴ See Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 24, 1951). See generally Exec. Order No. 8381, 5 Fed. Reg. 1147 (Mar. 22, 1940) (establishing initial classification structure

concerning the protection of national security information.⁵ The executive order provides the procedural and substantive legal framework for the classification decisions of the designated subject matter experts who have been granted classification authority by the President.⁶ Exemption 1 does not protect information that is merely "classifiable" -- that is, meets the substantive requirements of the current executive order but has not been actually reviewed and classified under it.⁷ Exemption 1 protects from disclosure national security information that has been properly classified in accordance with the substantive and procedural requirements of the appropriate executive order.⁸

The current executive order in effect is Executive Order 13,526.⁹ The relevant provisions of this executive order are discussed below.

within military to protect information related to "vital military installations and equipment").

⁵ See, e.g., Exec. Order No. 10,501, 3 C.F.R. 398 (1949-1953 Comp.) (Eisenhower Administration); Exec. Order No. 10,985, 27 Fed. Reg. 439 (Jan. 2, 1962) (Kennedy Administration); Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975 Comp.) (Nixon Administration); Exec. Order 11,862, 40 Fed. Reg. 25,197 (June 11, 1975) (Ford Administration); Exec. Order No. 12,065, 3 C.F.R. 190 (1978) (Carter Administration); Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (Reagan Administration); Exec. Order No. 12,958, 3 C.F.R. 333 (1996) (Clinton Administration); Exec. Order No. 12,958, as amended, 3 C.F.R. 196 (2004) (George W. Bush Administration); [Exec. Order No. 13,526](#), 3 C.F.R. 298 (2010) (Obama Administration).

⁶ See [Exec. Order No. 13,526](#); see also NARA Classification Directive, 32 C.F.R. § 2001 (2012) (directives issued by NARA's Information Security Oversight Office describing procedures that agencies must follow to classify information pursuant to [Executive Order 13,526](#)).

⁷ See, e.g., [Schoenman v. FBI](#), 575 F. Supp. 2d 136, 151-52 (D.D.C. 2008) (explaining that agencies must follow procedural requirements of national security classification executive order to invoke Exemption 1); [Assassination Archives & Research Ctr. v. CIA](#), 177 F. Supp. 2d 1, 8-9 (D.D.C. 2001) (same), [aff'd](#), 334 F.2d 55 (D.C. Cir. 2003).

⁸ See [5 U.S.C. § 552\(b\)\(1\)](#); see also [Lesar v. DOJ](#), 636 F.2d 472, 481 (D.C. Cir. 1980) (explaining that agency bears the burden of "demonstrating proper classification under both the procedural and substantive criteria contained in the governing Executive Order") (decided under Executive Order 11,652); [Schoenman v. FBI](#), 841 F. Supp. 2d 69, 80 (D.D.C. 2012) (stating information must be "classified pursuant to the proper procedures and . . . substantively fall within the scope" of the executive order) (decided under [Executive Order 13,526](#)).

⁹ [Exec. Order No. 13,526](#).

Applicability of Successive Executive Orders

The issuance of each executive order concerning classification, or the amendment of an existing one, raises the question of the applicability of successive executive orders to records that were in various stages of an administrative proceeding or litigation as of the current executive order's effective date.¹⁰ The Court of Appeals for the District of Columbia Circuit has established a rule that the appropriate executive order to apply, with its particular procedural and substantive standards, is the order in effect when "the classifying official acted."¹¹ Only when "a reviewing court contemplates remanding the case to the agency to correct a deficiency in its classification determination is it necessary" to apply the standards of a superseding executive order.¹² It also is important to note that some courts have permitted agencies, as a matter of discretion, to reexamine their classification decisions under a newly issued or amended executive order in order to take into account "changed international and domestic circumstances."¹³

¹⁰ See FOIA Update, [Vol. XVI, No. 2](#), at 3, 12 ("OIP Guidance: The Timing of New E.O. Applicability").

¹¹ Lesar v. DOJ, 636 F.2d 472, 480 (D.C. Cir. 1980); accord ACLU v. DOJ, 681 F.3d 61, 70 n.5 (2d. Cir. 2012) (noting that "the propriety of a classification decision is considered under the criteria of the executive order that applied when the decision was made"); Halpern v. FBI, 181 F.3d 279, 289 (2d Cir. 1999) ("The governing rule is that an agency's decision to withhold information under FOIA is reviewed under the Executive Order upon which the classification determination was made."); Campbell v. DOJ, 164 F.3d 20, 29 (D.C. Cir. 1998) ("[A]bsent a request by the agency to reevaluate an exemption 1 determination based on a new executive order . . . the court must evaluate the agency's decision under the executive order in force at the time the classification was made."); King v. DOJ, 830 F.2d 210, 217 (D.C. Cir. 1987) (applying order in effect when "the agency's ultimate classification decision is actually made").

¹² King, 830 F.2d at 217; see also Campbell, 164 F.3d at 31 n.11 (recognizing that when court remands to agency for rereview of classification determination, such review is performed under superseding executive order); Greenberg v. U.S. Dep't of Treasury, 10 F. Supp. 2d 3, 12 (D.D.C. 1998) (applying Executive Order 12,356 to records at issue, but noting that Executive Order 12,958 would apply if court "[found] that the agencies improperly withheld information pursuant to Exemption 1").

¹³ Baez v. DOJ, 647 F.2d 1328, 1334 (D.C. Cir. 1980) (upholding agency's classification reevaluation under executive order issued during course of district court litigation); see, e.g., Miller v. U.S. Dep't of State, 779 F.2d 1378, 1388 (8th Cir. 1985) (agency chose to reevaluate under "new Executive Order which [became] effective during pendency of the lawsuit"); Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 7 (D.D.C. July 31, 2000) ("[E]ven though the existence of [subject] documents was originally classified under Executive Order 12,356, the fact that they were reevaluated under Executive Order 12,958 means that Executive Order 12,958 controls."); Keenan v. DOJ, No. 94-1909, slip op. at 7-8 (D.D.C. Mar. 24, 1997) (finding that although agency could "voluntarily reassess" its classification decision under executive order issued during pendency of lawsuit, agency not

Standard of Review

The role of the federal judiciary includes the de novo review of an agency's Exemption 1 claims in litigation, with appropriate deference given to the Executive Branch's special expertise in matters of national security.¹⁴ As the Supreme Court recognized decades ago, courts must afford deference to the agency's decision to protect national security information from disclosure,¹⁵ an accepted doctrine that continues to this day.¹⁶ The FOIA provides expressly for de novo review by the courts and for in camera review of documents,¹⁷ which can include in camera review of classified documents, where appropriate.¹⁸ In so doing, Congress sought to ensure that agencies

required to do so). But see Wiener v. FBI, No. 83-1720, slip op. at 3 (C.D. Cal. Aug. 25, 2005) (denying FBI's request to reevaluate classified information under amended executive order after court's earlier decision, and finding that FBI's decision not to conduct such review earlier suggests that such reconsideration "was not crucial to national security"), appeal dismissed per stipulation, No. 05-56652 (9th Cir. Jan. 3, 2007).

¹⁴ See, e.g., Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 926-27 (D.C. Cir. 2003) (discussing deference shown to Executive Branch in national security matters) (Exemption 7(A) case); Friedman v. U.S. Secret Serv., No. 06-2125, 2013 WL 588228, at *12 (D.D.C. Feb. 14, 2013) (acknowledging that courts "generally defer to agency expertise in national security matters"); Tarzia v. Clinton, No. 10-5654, 2012 WL 335668, at *12 (S.D.N.Y. Jan. 30, 2012) (restating court's responsibility to review agency determinations de novo while "accord[ing] substantial deference to agency affidavits that implicate national security" (citing Associated Press v. DOD, 498 F. Supp. 2d 707, 710 (S.D.N.Y. 2007))); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 773 (E.D. Pa. 2008) (noting that courts have "neither the expertise nor the qualifications to determine the impact upon national security" and that a "court must not substitute its judgment for the agency's regarding national defense or foreign policy implications" (citing Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980))).

¹⁵ See EPA v. Mink, 410 U.S. 73, 84, 94 (1973).

¹⁶ See, e.g., James Madison Project v. CIA, 605 F. Supp. 2d 99, 109 (D.D.C. 2009) (reiterating that court grants deference to agency national security decisions and noting balance required between openness and national security); Miller v. DOJ, 562 F. Supp. 2d 82, 101 (D.D.C. 2008) (noting that courts "generally defer to agency expertise in national security matters"); Makky v. Chertoff, 489 F. Supp. 2d 421, 441 n.23 (D.N.J. 2007) (finding that court is generally "not in a position to second-guess agency decisions relating to the segregability of non-exempt information when the information withheld implicates national security concerns"); Edmonds v. DOJ, 405 F. Supp. 2d 23, 32 (D.D.C. 2005) (explaining that "[t]his court must respect the expertise of the agency and stay within the proper limits of the judicial role in FOIA review").

¹⁷ See 5 U.S.C. § 552(a)(4)(B) (2006 & IV 2010).

¹⁸ See, e.g., CIA v. Sims, 471 U.S. 159, 189 n.5 (1985) (elaborating that "legislative history unequivocally establishes that in camera review [of classified material] would often be

properly classify national security records and that reviewing courts remain cognizant of their authority to verify the correctness of agency classification determinations.¹⁹

The Court of Appeals for the District of Columbia Circuit has refined the appropriate standard for judicial review of national security claims under Exemption 1, finding that summary judgment is proper if an agency's affidavits are reasonably specific and there is no evidence of bad faith.²⁰ This review standard has been adopted by other courts as well.²¹

necessary and appropriate"); ACLU v. DOJ, 681 F.3d 61, 75 (2nd Cir. 2012) (affirming withholding of classified material after in camera review).

¹⁹ See H.R. Rep. No. 93-876, at 7-8 (1974).

²⁰ See, e.g., Larson v. Dep't of State, 565 F.3d 857, 865 (D.C. Cir. 2009) (holding that if agency affidavit contains "reasonable specificity" and "information logically falls within claimed exemption," then "court should not conduct a more detailed inquiry to test the agency's judgment"); Pub. Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) (finding agency's affidavits sufficiently detailed to support Exemption 1 withholding and determining that subsequent release of some previously classified information was not evidence of bad faith); Halperin v. CIA, 629 F.2d 144, 147-48 (D.C. Cir. 1980) (finding that summary judgment was appropriate where agency affidavits are sufficient and there is no indication of bad faith); Summers v. DOJ, 517 F. Supp. 2d 231, 238 (D.D.C. 2007) (approving agency declaration containing "an extremely detailed description of each document, its classification level, the location on the document of each deletion made, and a description (to the extent possible) of the content of the deleted material").

²¹ See, e.g., ACLU v. DOJ, 681 F.3d at 70 (giving "substantial weight" to government declarations concerning classified records); Tavakoli-Nouri v. CIA, No. 00-3620, 2001 U.S. App. LEXIS 24676, at *9 (3d Cir. Oct. 18, 2001) (recognizing that courts give "substantial weight to agency's affidavit regarding details of classified status of a disputed document"); Maynard v. CIA, 986 F.2d 547, 555 n.7 (1st Cir. 1993) (recognizing that courts must accord "substantial deference" to agency withholding determinations and "uphold the agency's decision" so long as withheld information logically falls into the exemption category cited and there exists no evidence of agency "bad faith"); Bowers v. DOJ, 930 F.2d 350, 357 (4th Cir. 1991) (stating that "[w]hat fact or bit of information may compromise national security is best left to the intelligence experts"); El Badrawi v. DHS, 583 F. Supp. 2d 285, 314 (D. Conn. 2008) (reiterating that summary judgment is appropriate where agency has provided "detailed and specific information demonstrating both why the material has been kept secret and why such secrecy is allowed by the terms of an existing executive order" (citing N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 510 (S.D.N.Y. 2007))); N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 511 (S.D.N.Y. 2007) (concluding that multiple declarations provided by defendants together adequately support summary judgment by describing records withheld and demonstrating that records were properly classified); Makky, 489 F. Supp. 2d at 441 (approving agency declaration containing "specific categories of classified information that were redacted on each document" and demonstrating that disclosure could identify "specific type of intelligence activity directed at a specific target; targets of foreign counterintelligence investigation; and intelligence information about or from a foreign country").

Courts generally defer to agency expertise in national security cases.²² The D.C. Circuit has articulated an expansive standard of deference in national security cases, noting that "little proof or explanation is required beyond a plausible assertion that information is properly classified."²³ Such deference is based upon the "magnitude of the national security interests and potential risks at stake,"²⁴ and it is extended by courts because national security officials are uniquely positioned to view "the whole picture" and "weigh the variety of subtle and complex factors" in order to determine whether the disclosure of information would damage national security.²⁵ Indeed, courts ordinarily

²² See, e.g., Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (holding that because courts lack expertise in national security matters, they must give "substantial weight to agency statements" (quoting Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980))); Bowers, 930 F.2d at 357 (observing that "[w]hat fact . . . may compromise national security is best left to the intelligence experts"); Doherty v. DOJ, 775 F.2d 49, 52 (2d Cir. 1985) (accordig "substantial weight" to agency declaration); Taylor v. Dep't of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) (holding that classification affidavits are entitled to "the utmost deference"); Electronic Frontier Found. v. DOJ, 892 F. Supp. 2d 95, 100 (D.D.C. 2012) (recognizing "deferential posture to the executive in FOIA cases involving national security concerns"); ACLU v. DOJ, No. 09-0642, 2011 WL 887731, at *1 (W.D. Wa. March 10, 2011) (stating "[a]s a general rule, the courts are not well-suited to run executive branch functions, including law enforcement activities and terrorist watch list"), reconsideration granted in part, denied in part, 2011 WL 1900140 (W.D. Wa. May 19, 2011); Azmy v. DOD, 562 F. Supp. 2d 590, 597 (S.D.N.Y. 2008) (reiterating that agencies have "unique insights" in area of national security); ACLU v. DOJ, 429 F. Supp. 2d 179, 188 (D.D.C. 2006) (holding that court must recognize "unique insights and special expertise" of Executive Branch concerning the kind of disclosures that may be harmful).

²³ Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007); see e.g., Larson, 565 F.3d at 862 (noting that court need only examine whether agency's classification decision "appears 'logical' or 'plausible'" (citing Wolf v. CIA, 473 F.3d 370, 374-75 (D.C. Cir. 2007))); Schoenman v. FBI, 841 F. Supp. 2d 69, 82 (2012) (finding it "both plausible and logical" that disclosure could damage national security); James Madison Project, 605 F. Supp. 2d at 110 (commenting that D.C. Circuit rule is "that little proof or explanation is required beyond a plausible assertion that information is properly classified" (citing Morley, 508 F.3d at 1124)); Schoenman v. FBI, 575 F. Supp. 2d 136, 153 (D.D.C. 2008) (same); Summers, 517 F. Supp. 2d at 238 (same).

²⁴ Ctr. for Nat'l Sec. Studies, 331 F.3d at 927 (quoting CIA v. Sims, 471 U.S. 159, 179 (1985)) (Exemption 7(A) case); see also L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 899-900 (C.D. Cal. 2006) (deferring to judgment of senior Army officers regarding risks posed to soldiers and contractors by enemy forces in Iraq); ACLU v. DOD, 406 F. Supp. 2d 330, 333 (S.D.N.Y. 2005) (acknowledging that "one may criticize the deference extended by the courts as excessive," but holding that such deference is the rule).

²⁵ CIA v. Sims, 471 U.S. 159, 179-80 (1985); see e.g., Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (commenting that "terrorism or other special circumstances" may warrant "heightened deference to the judgments of the political branches with respect to matters of national security") (non-FOIA case); Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988)

are very reluctant to substitute their judgment in place of the agency's "unique insights"²⁶ in the areas of national defense and foreign relations.²⁷ This is because courts have recognized that national security is a "uniquely executive purview"²⁸ and that "the judiciary is in an extremely poor position to second-guess the executive's judgment" on national security issues.²⁹

(explaining that "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs") (non-FOIA case); Ctr. for Nat'l Sec. Studies, 331 F.3d at 928 (rejecting artificial limits on deference, and explaining that "deference depends on the substance of the danger posed by disclosure -- that is, harm to the national security -- not the FOIA exemption invoked").

²⁶ Larson, 565 F.3d at 864; see also, Ctr. for Int'l Envtl. Law v. U.S. Trade Representative, No. 12-5136, 2013 WL 2450527, at *4 (D.C. Cir. June 7, 2013) ("Whether—or to what extent—this reduced flexibility might affect the ability of the United States to negotiate future trade agreements is not for us to speculate."); Krikorian v. Dep't of State, 984 F.2d 461, 464 (D.C. Cir. 1993) (acknowledging agency's "unique insights" in areas of national defense and foreign relations).

²⁷ See, e.g., Maynard v. CIA, 986 F.2d 547, 556 n.9 (1st Cir. 1993) (stating that court "not in a position to 'second-guess' agency's determination regarding need for continued classification of material"); Krikorian, 984 F.2d at 464 (explaining that because judges "lack the expertise necessary to second-guess . . . agency opinions in the typical national security FOIA case," they must accord substantial deference to an agency's affidavit (quoting Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980))); Hall v. CIA, 881 F. Supp. 2d 38, 64 (D.D.C. 2012) (opining that "[t]here will always be a certain level of speculation when assessing the dangers of releasing [classified] information"); Cozen O'Connor, 570 F. Supp. 2d at 773 (acknowledging "court must not substitute its judgment for the agency's regarding national defense or foreign policy implications"); Summers, 517 F. Supp. 2d at 238 (noting that assessing potential for harm to intelligence source from disclosure "is the duty of the agency, and not the court"); ACLU v. FBI, 429 F. Supp. 2d 179, 188 (D.D.C. 2006) (reasoning that "while a court is ultimately to make its own decision, that decision must take seriously the government's predictions" of harm to national security); Aftergood v. CIA, No. 98-2107, 1999 U.S. Dist. LEXIS 18135, at *9-10 (D.D.C. Nov. 12, 1999) (declaring that courts must respect agency predictions concerning potential national security harm from disclosure, and recognizing that these predictions "must always be speculative to some extent").

²⁸ Ctr. for Nat'l Sec. Studies, 331 F.3d at 927-928; see also L.A. Times Commc'ns, 442 F. Supp. 2d at 899 (echoing the belief that national security is "a uniquely executive purview" (citing Zadvydas, 533 U.S. at 696)).

²⁹ Ctr. for Nat'l Sec. Studies, 331 F.3d at 928; see also Ctr. for Int'l Envtl. Law, 2013 WL 2450527, at *4 (reversing judgment of district court because "[t]he question is not whether the court agrees in full with the Trade Representative's evaluation of the expected harm to foreign relations" but "whether on the whole record the [a]gency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility") (quoting Gardels v. CIA, 689 F.2d 1100, 105 (D.C. Cir. 1982)); Mobley v. CIA, Nos. 11-2072, 11-2073, 2013 WL 452932, at *22 (D.D.C. Feb. 7, 2013) ("To the extent that plaintiffs ask this Court

Nevertheless, in some cases courts have questioned the underlying basis for the agency's classification decision.³⁰ However, the majority of courts have rejected the idea that judicial review is to serve as a quality-control measure to reassure a doubtful requester.³¹ Further, courts have overwhelmingly rejected the notion that additional judicial review should be triggered by a requester's unsupported allegations of wrongdoing against the government.³²

to second-guess the CIA's statements . . . their request is inappropriate"); [New York Times Co. v. DOJ, Nos. 11 Civ. 9336, 12 Civ. 794, 2013 WL 50209](#), at *19 (S.D.N.Y. Jan. 3, 2012) ("It lies beyond the power of this Court to declassify a document that has been classified in accordance with proper procedures on the ground that the court does not think the information contained therein ought to be kept secret"); [ACLU v. Dep't of State](#), 878 F. Supp. 2d 215, 222, (D.D.C. 2012) (recognizing "courts are generally ill-equipped to second-guess the Executive's opinion in the national security context").

³⁰ See [King v. DOJ](#), 830 F.2d 210, 226 (D.C. Cir. 1987) (holding that trial court erred in deferring to agency's judgment that information more than thirty-five years old remained classified when executive order presumed declassification of information over twenty years old and agency merely indicated procedural compliance with order); [ACLU v. FBI](#), 429 F. Supp. 2d at 186 (concluding that "the importance of the issues raised by this case" make in camera review necessary); [Fla. Immigrant Advocacy Ctr. v. NSA](#), 380 F. Supp. 2d 1332, 1338 (S.D. Fla. 2005) (granting in camera review "to satisfy an 'uneasiness' or 'doubt' that the exemption claim may be overbroad given the nature of the Plaintiff's arguments"); [Larson v. Dep't of State](#), No. 02-1937, 2005 WL 3276303, at *9 (D.D.C. Aug. 10, 2005) (observing that deference "does not mean acquiescence"); [Coldiron v. DOJ](#), 310 F. Supp. 2d 44, 53 (D.D.C. 2004) (cautioning that court's deference should not be used as "wet blanket" to avoid proper justification of exemptions); [Lawyers Comm. for Human Rights v. INS](#), 721 F. Supp. 552, 561 (S.D.N.Y. 1989) (reminding that such deference does not give agency "carte blanche" to withhold responsive documents without "valid and thorough affidavit"), [subsequent decision](#), No. 87-Civ-1115, slip op. at 1-2 (S.D.N.Y. June 7, 1990) (upholding Exemption 1 excisions after in camera review of certain documents and classified [Vaughn](#) affidavit).

³¹ See, e.g., [Nat'l Sec. Archive Fund, Inc. v. CIA](#), 402 F. Supp. 2d 211, 221 (D.D.C. 2005) (declining to conduct in camera review merely "to verify the agency's descriptions and provide assurances, beyond a presumption of administrative good faith, to FOIA plaintiffs that the descriptions are accurate and as complete as possible" (quoting [Mead Data Ctr., Inc. v. Dep't of Air Force](#), 566 F.2d 242, 262 n.59 (D.C. Cir. 1977))); [Haddam v. FBI](#), No. 01-434, slip op. at 21 (D.D.C. Sept. 8, 2004) (observing that "[w]hile Plaintiff understandably would like to review the FBI's decisions for classifying the material, nothing in FOIA entitles Plaintiff to do so").

³² See [Bassiouni v. CIA](#), 392 F.3d 244, 247 (7th Cir. 2004) (commenting that "Exemption 1 would not mean much if all anyone had to do, to see the full list of the CIA's holdings, was allege that the agency had some documents showing how he 'exercises rights guaranteed by the First Amendment'"); [Peltier v. FBI](#), No. 03-CV-905, 2005 WL 735964, at *7 (W.D.N.Y. Mar. 31, 2005) (finding that plaintiff's bare claim that agency classified requested records solely in order to prevent embarrassment does not alone necessitate greater judicial scrutiny).

When reviewing the propriety of agency classification determinations, courts have generally demonstrated deference to agency expertise by according little or no weight to opinions of persons other than the agency classification authority,³³ including persons who may have previously maintained some knowledge of the subject matter while employed within the Executive Branch.³⁴

Despite the courts' general reluctance to "second-guess" agency decisions on national security matters, agencies still have the responsibility to justify classification decisions in supporting affidavits.³⁵ In Exemption 1 cases, courts are likely to require that the affidavit be provided by an agency official with direct knowledge of the

³³ See, e.g., Goldberg v. U.S. Dep't of State, 818 F.2d 71, 79-80 (D.C. Cir. 1987) (accepting classification officer's national security determination even though more than 100 ambassadors did not initially classify information); Mobley, 2013 WL 452932, at *2 (noting that "unsworn opinions of non-governmental actors . . . carry little or no weight in the calculus"); Van Atta v. Def. Intelligence Agency, No. 87-1508, 1988 WL 73856, at *1-2 (D.D.C. July 6, 1988) (rejecting opinion of requester about willingness of foreign diplomat to discuss issue); Wash. Post v. DOD, No. 84-2949, 1987 U.S. Dist. LEXIS 16108, at *19-20 (D.D.C. Feb. 25, 1987) (rejecting opinion of U.S. Senator who read document in official capacity as member of Committee on Foreign Relations); cf. Lawyers Alliance for Nuclear Arms Control v. DOE, No. 88-CV-7635, 1991 WL 274860, at *1-2 (E.D. Pa. Dec. 18, 1991) (rejecting requester's contention that officials of former Soviet Union consented to release of requested nuclear test results).

³⁴ See, e.g., Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989) (rejecting opinion of former admiral); Gardels v. CIA, 689 F.2d 1100, 1106 n.5 (D.C. Cir. 1982) (rejecting opinion of former CIA agent); Berman v. CIA, 378 F. Supp. 2d 1209, 1219 (E.D. Cal. 2005) (rejecting opinions of retired member of CIA's Historical Advisory Committee and former Special Assistant to the President of the United States) (Exemption 3 case); Rush v. Dep't of State, 748 F. Supp. 1548, 1554 (S.D. Fla. 1990) (rejecting opinion of former ambassador who had personally prepared some of records at issue); Pfeiffer v. CIA, 721 F. Supp. 337, 340-41 (D.D.C. 1989) (rejecting opinion of former CIA staff historian). But see Wash. Post v. DOD, 766 F. Supp. 1, 14 (D.D.C. 1991) (adjudging that "non-official releases" contained in books by participants involved in Iranian hostage rescue attempt -- including ground assault commander and former President Carter -- have "good deal of reliability" and require government to explain "how official disclosure" of code names "at this time would damage national security").

³⁵ See, e.g., El Badrawi, 583 F. Supp. 2d at 314 (noting that agency "must provide detailed and specific information" justifying classification decision (citing N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 510 (S.D.N.Y. 2007))); ACLU v. DOJ, 321 F. Supp. 2d 24, 35 (D.D.C. 2004) (declaring that "it is not a question of whether the Court agrees with the defendant's assessment of the danger, but rather, 'whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the [agency] is expert and given by Congress a special role'" (quoting Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982))).

classification decision.³⁶ Where agency affidavits have been found to be insufficiently detailed, courts have withheld summary judgment in Exemption 1 cases.³⁷ When an affidavit contains sufficient explanation, however, it is generally accepted that "the court will not conduct a detailed inquiry to decide whether it agrees with the agency's opinions."³⁸

³⁶ See Hudson v. DOJ, No. C 04-4079, 2005 WL 1656909, at *3 (N.D. Cal. July 11, 2005) (accepting that affiant had requisite knowledge of classification decision despite fact that she did not possess original classification authority); Judicial Watch, Inc. v. DOT, No. 02-566, 2005 WL 1606915, at *8 (D.D.C. July 7, 2005) (finding that affiant, while not original classification authority, had personal knowledge of matters set forth in his declaration); Wickwire Gavin, P.C. v. Def. Intelligence Agency, 330 F. Supp. 2d 592, 600 (E.D. Va. 2004) (holding that "in order to sustain a claim of FOIA Exemption One under Exec. Order 12,958, courts require an affidavit from an individual with classifying authority").

³⁷ See Halpern v. FBI, 181 F.3d 279, 293 (2d Cir. 1999) (declaring that agency's "explanations read more like a policy justification" for Executive Order 12,356, that the "affidavit gives no contextual description," and that it fails to "fulfill the functional purposes addressed in Vaughn"); Campbell v. DOJ, 164 F.3d 20, 31, 37 (D.C. Cir. 1998) (remanding to district court to allow the FBI to "further justify" its Exemption 1 claim because its declaration failed to "draw any connection between the documents at issue and the general standards that govern the national security exemption"), on remand, 193 F. Supp. 2d 29, 37 (D.D.C. 2001) (finding declaration insufficient where it merely concluded, without further elaboration, that "disclosure of [intelligence information] . . . could reasonably be expected to cause serious damage to the national security"); Oglesby v. U.S. Dep't of the Army, 79 F.3d 1172, 1180-1181 (D.C. Cir. 1996) (rejecting as insufficient certain Vaughn Indexes because agencies must itemize each document and adequately explain reasons for nondisclosure); Rosenfeld v. DOJ, 57 F.3d 803, 807 (9th Cir. 1995) (affirming district court disclosure order based upon finding that government failed to show with "any particularity" why classified portions of several documents should be withheld); Wiener v. FBI, 943 F.2d 972, 978-79 (9th Cir. 1991) (rejecting as inadequate agency justifications contained in coded Vaughn affidavits, based upon view that they consist of "boilerplate" explanations not "tailored" to particular information being withheld pursuant to Exemption 1); ACLU v. ODNI, No. 10-4419, 2011 WL 5563520, at *5 (S.D.N.Y. Nov. 15, 2011) (criticizing agency declaration that lacked contextual description of records and failed to identify the applicable provisions of executive order); ACLU v. DOJ, 2011 WL 887731, at *3 (rejecting agency affidavits where the agency "has, in effect, parroted the language of the Executive Order (in the disjunctive)"); Pipko v. CIA, 312 F. Supp. 2d 669, 674 (D.N.J. 2004) (commenting that agency affidavits must provide more than "merely glib assertions" to support summary judgment); Coldiron, 310 F. Supp. 2d at 52 (observing that courts do not expect "anything resembling poetry," but nonetheless expressing dissatisfaction with agency's "cut and paste" affidavits).

³⁸ Edmonds, 405 F. Supp. 2d at 33; see also Larson, 2005 WL 3276303, at *11 (explaining that "[g]iven the weight of authority counseling deference . . . in matters involving national security, this court must defer to the agency's judgment"); Fla. Immigrant Advocacy Ctr. v. NSA, 380 F. Supp. 2d 1332, 1334 (S.D. Fla. 2005) (declaring that Exemption 1, properly applied, serves as "absolute bar" to release of classified information); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 337 F. Supp. 2d 146, 162 (D.D.C. 2004) (ruling that "a reviewing

In Camera Submissions and Adequate Public Record

Agencies that classify national security information are sometimes unable to explain the basis for the classification decision on the public record without divulging the classified information itself. In these instances, courts have permitted or sometimes required agencies to submit explanatory in camera affidavits in order to protect the national security information that could not be discussed in a public affidavit.³⁹ In camera affidavits have also been employed when even acknowledging the existence of records at issue would pose a threat to national security and consequently the agency has used the "Glomar" response to neither confirm nor deny the existence of records.⁴⁰

court is prohibited from conducting a detailed analysis of the agency's invocation of Exemption 1" (citing Halperin, 629 F.2d at 148)); Wolf v. CIA, 357 F. Supp. 2d 112, 116 (D.D.C. 2004) (commenting that "this Circuit has required little more than a showing that the agency's rationale is logical"), aff'd in pertinent part & remanded, 473 F.3d 370, 376 (D.C. Cir. 2007) (concluding that "[i]n light of the substantial weight accorded agency assertions of potential harm made in order to invoke the protection of FOIA Exemption 1, the [agency a]ffidavit both logically and plausibly suffices").

³⁹ See, e.g., Patterson v. FBI, 893 F.2d 595, 598-99 (3d Cir. 1990) (allowing in camera affidavit in order to supplement public affidavit and describe national security harm); Simmons v. DOJ, 796 F.2d 709, 711 (4th Cir. 1986) (same); Ingle v. DOJ, 698 F.2d 259, 264 (6th Cir. 1983) (same); Salisbury v. United States, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982) (same); Stein v. DOJ, 662 F.2d 1245, 1255-56 (7th Cir. 1981) (same); Mobley v. CIA, Nos. 11-2072, 11-2073, 2013 WL 452932, at *34 (D.D.C. Feb. 7, 2013) (accepting in camera declaration when agency "cannot publicly describe these records or articulate the basis for their classification in greater detail" than provided in public declaration); New York Times Co. v. DOJ, Nos. 11 Civ 9336 (CM), 12 Civ 794 (CM), 2013 WL 50209, at *16 (S.D.N.Y. Jan 3, 2013) ("A district court may also conduct in camera review of classified affidavits when national security is at issue."); Eslaminia v. FBI, No. C 99-03249 MHP, 2011 WL 5118520, at *2 (N.D. Cal. Oct. 28, 2011) (affirming withholdings only after in camera declarations provided sufficient detail to justify use of Exemption 1); Robinson v. FBI, No. 06-3359, 2008 WL 2502134, at *2-3 (E.D. Pa. June 20, 2008) (commenting that FBI public affidavits may need to be supplemented with in camera affidavit to fully articulate withholdings for proper review by court); Edmonds v. FBI, 272 F. Supp. 2d 35, 46-47 (D.D.C. 2003) (approving the use of an in camera affidavit, noting that "extensive public justification would threaten to reveal the very information for which a FOIA exemption is claimed"); Pub. Citizen v. Dep't of State, 100 F. Supp. 2d 10, 28 (D.D.C. 2000) (ordering submission of an in camera affidavit because further description in a public affidavit "would reveal the [very] information that the agency is trying to withhold").

⁴⁰ See Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (dealing with request for records regarding Glomar Explorer submarine-retrieval ship, so "neither confirm nor deny" response is now known as a "Glomar" response or as "Glomarization"); see also Ctr. for Human Rights and Constitutional Law v. Nat'l Geospatial-Intelligence Agency, 506 F. App'x 547, 548 (9th Cir. 2013) (remanding case for filing of classified declaration when public declaration "failed to provide 'reasonably specific detail'" that demonstrates harm of acknowledging existence of records); Hunt v. CIA, 981 F.2d 1116, 1119-1120 (9th Cir. 1992) (noting that court accepted in camera affidavits to explain basis for Glomar assertion);

In camera affidavits have also been used when "the very association of the identities of the original classifying authorities . . . is itself a classified fact."⁴¹ If an agency submits an in camera affidavit, however, it is under a duty to "create as complete a public record as is possible" before doing so.⁴² This public record is intended to provide a meaningful and fair opportunity for a plaintiff to challenge, and an adequate evidentiary basis for a court to rule on, an agency's invocation of Exemption 1.⁴³

Courts have found that counsel for plaintiffs is not entitled to participate in such in camera proceedings.⁴⁴ This was the case even in one unusual situation where plaintiff's counsel had been issued a personnel security clearance for an unrelated purpose.⁴⁵ Similarly in another decision concerning this issue, a court specifically held

Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 786-87 (E.D. Pa. 2008) (explaining that "court may examine classified affidavits in camera if the public record is not sufficient to justify the Glomar responses"); cf. El Badrawi v. DHS, 583 F. Supp. 2d 285, 315 (D.Conn. 2008) (finding that FBI had not supported its "Glomar" response with regard to Exemptions 2 and 7(E), and directing it to submit in camera affidavit).

⁴¹ Mobley v. DOJ, 870 F. Supp. 2d 61, 67 (D.D.C. 2012) (acknowledging that even the "banal information," like date, author, and number of pages, is properly classified).

⁴² Phillippi, 546 F.2d at 1013; see also Armstrong v. Executive Office of the President, 97 F.3d 575, 580 (D.C. Cir. 1996) (holding that when district court uses an in camera affidavit, even in national security cases, "it must both make its reasons for doing so clear and make as much as possible of the in camera submission available to the opposing party" (citing Lykins v. DOJ, 725 F.2d 1455, 1465 (D.C. Cir. 1984))); Patterson, 893 F.2d at 600 (explaining that "public submissions represent a good faith effort by the [agency] to provide as much access to the information as possible"); Simmons, 796 F.2d at 710 (affirming that courts "should strive to develop as complete as possible a public record"); Scott v. CIA, 916 F. Supp. 42, 48-49 (D.D.C. 1996) (denying request for in camera review until agency "creates as full a public record as possible").

⁴³ See Campbell v. DOJ, 164 F.3d 20, 30 (D.C. Cir. 1999) (requiring defendant to provide plaintiff with "a meaningful opportunity to contest, and the district court [with] an adequate foundation to review, the soundness of the withholding" (quoting King v. DOJ, 830 F.2d 210, 218 (D.C. Cir. 1987))); Coldiron v. DOJ, 310 F. Supp. 2d 44, 49 (D.D.C. 2004) (finding that agency "must provide a basis for the FOIA requester to contest, and the court to decide, the validity of the withholding"); ACLU v. DOJ, 265 F. Supp. 2d 20, 27 (D.D.C. 2003) (acknowledging that agency affidavits "are entitled to substantial weight," but finding that they "must nevertheless afford the requester an ample opportunity to contest" them).

⁴⁴ See Salisbury, 690 F.2d at 973 n.3; Hayden v. NSA, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979); cf. Ellsberg v. Mitchell, 709 F.2d 51, 61 (D.C. Cir. 1983) (holding that plaintiff's counsel not permitted to participate in in camera review of documents arguably covered by state secrets privilege).

⁴⁵ See El Badrawi v. DHS, 596 F. Supp. 2d 389, 400 (D. Conn. 2009) (finding that although plaintiff's counsel maintained personnel security clearance, he did not have a "need to

that a government employee who requested information and who also held a current "Top Secret" security clearance was properly denied access to classified records concerning himself because Exemption 1 protects "information from disclosure based on the nature of the material, not on the nature of the individual requester."⁴⁶ One court took the unprecedented step of appointing a special master to review and categorize a large volume of classified records.⁴⁷ In other instances involving voluminous records, courts have on occasion, either by order⁴⁸ or agreement of the parties,⁴⁹ had agencies submit samples of the documents at issue for in camera review.

Waiver of Exemption Protection

Several courts have had occasion to consider whether agencies have a duty to disclose classified information that purportedly has found its way into the public domain.⁵⁰ This issue most commonly arises when a plaintiff argues that an agency has waived its ability to invoke Exemption 1 as a result of prior disclosure of similar or related information.⁵¹ In this regard, courts have held that, in making an argument of

know" withheld information, and thus failed to satisfy second requirement for access to classified information).

⁴⁶ Martens v. U.S. Dep't of Commerce, No. 88-3334, 1990 U.S. Dist. LEXIS 10351, at *10 (D.D.C. Aug. 6, 1990).

⁴⁷ See Wash. Post v. DOD, No. 84-3400, slip op. at 2 (D.D.C. Jan. 15, 1988), petition for mandamus denied sub nom.; In re DOD, 848 F.2d 232 (D.C. Cir. 1988); cf. Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep't of State, 818 F. Supp. 1291, 1301 (N.D. Cal. 1992) (holding that court "will not hesitate" to appoint special master to assist with in camera review of documents if agency fails to submit adequate Vaughn declaration).

⁴⁸ See, e.g., Wilson v. CIA, No. 89-3356, 1991 WL 226682, at *3 (D.D.C. Oct. 15, 1991) (ordering in camera submission of "sample" of fifty documents because it was "neither necessary nor practicable" for court to review all 1000 processed ones).

⁴⁹ Schoenman v. CIA, 604 F. Supp. 2d 174, 197 (D.D.C. 2009) (reviewing "a sample—selected by Plaintiff—of the documents withheld in full or in part").

⁵⁰ See, e.g., Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999) (finding that disclosure made by employee of agency other than agency from which information is sought is not official and thus does not constitute waiver); Azmy v. DOD, 562 F. Supp. 2d 590, 598-99 (S.D.N.Y. 2008) (finding that although much may now be known by the public about subject, there has been no indication that this specific information has been disclosed).

⁵¹ See, e.g., Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 60 (D.C. Cir. 2003) (holding that FOIA plaintiff must show that previous disclosure duplicates specificity of withheld material to establish waiver of exemptions, and determining that CIA's prior disclosure of some intelligence methods employed in Cuba does not waive use of exemptions for all such methods); Elec. Privacy Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 71 (D.D.C. 2008) (ruling against waiver and rejecting contention that public availability of

waiver through some prior public disclosure, a FOIA plaintiff bears "the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld."⁵²

Courts have carefully distinguished between a bona fide declassification action or official release on the one hand and unsubstantiated speculation lacking official confirmation on the other,⁵³ refusing to consider classified information to be in the public domain unless it has been officially disclosed.⁵⁴ Courts have also rejected the

some information about Terrorist Surveillance Program diminishes government's argument for classification of remaining information); Wheeler v. CIA, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (rejecting plaintiff's contention that foreign nation's knowledge of past U.S. intelligence activities creates general waiver of all intelligence activities related to that nation).

⁵² Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983); see also Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007) (ruling against waiver because plaintiff can not "point to specific information that was previously released and is now withheld"); James Madison Project v. NARA, No. 02-5089, 2002 WL 31296220, at *1 (D.C. Cir. Oct. 11, 2002) (affirming that the "party claiming that public disclosure prevents withholding the same information bears the burden of showing that the specific information at issue has been officially disclosed"); Pub. Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) (reaffirming that burden is on requester and rejecting plaintiff's waiver claim as "speculation" where plaintiff failed to demonstrate that specific information had been released into public domain, even though records were publicly accessible in NARA reading room upon request); Nat'l Sec. Archive Fund, Inc. v. CIA, 402 F. Supp. 2d 211, 222 (D.D.C. 2005) (ruling that plaintiff's "bald assertion" of public disclosure do not satisfy waiver standard); Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative, 237 F. Supp. 2d 17, 20 (D.D.C. 2002) (holding that plaintiff failed to show that information was in public domain when it merely pointed to other publicly available documents dealing with same general subject matter). But see Wash. Post v. DOD, 766 F. Supp. 1, 12-13 (D.D.C. 1991) (suggesting that agency has ultimate burden of proof when comparing publicly disclosed information with information being withheld, determining whether information is identical and, if not, determining whether release of slightly different information would harm national security).

⁵³ See ACLU v. Dep't of State, 878 F. Supp. 2d 215, 224 (D.D.C. 2012) (refusing to categorize "generalized and sweeping comments" made by an Executive official as official acknowledgment of authenticity of WikiLeaks disclosures).

⁵⁴ See, e.g., Frugone, 169 F.3d at 775 (holding that letter from OPM advising plaintiff that his employment records were in CIA custody is not "tantamount to an official statement of the CIA"); Pub. Citizen v. Dep't of State, 11 F.3d 198, 201 (D.C. Cir. 1993) (holding that "an agency official does not waive FOIA exemption 1 by publicly discussing the general subject matter of documents which are otherwise properly exempt from disclosure under that exemption"); Abbotts v. NRC, 766 F.2d 604, 607 (D.C. Cir. 1985) (reasoning that even if the withheld data were the same as an estimate in the public domain, that is not the same as knowing the NRC's official policy as to the "proper level of threat a nuclear facility should guard against"); Afshar, 702 F.2d at 1130-31 (observing that a foreign government can

view that widespread reports in the media about the general subject matter involved are sufficient to overcome an agency's Exemption 1 claim for related records.⁵⁵ The District Court for the Southern District of New York has ruled that even general comments from an Executive Branch official do not meet the exacting standard required to find waiver in matters involving national security.⁵⁶ While this yields an especially narrow concept of "waiver" in the national security context, courts have recognized the importance of protecting sensitive national security information through such an approach.⁵⁷ Indeed,

ignore "[u]nofficial leaks and public surmise . . . but official acknowledgment may force a government to retaliate"); ACLU v. DOJ, 808 F. Supp. 2d 280, 300 n.6 (D.D.C. 2011) (declaring that "unauthorized disclosure of classified facts does not officially disclose those facts"); Hiken v. DOD, 521 F. Supp. 2d 1047, 1059 (N.D. Cal. 2007) (ruling that agency not required to give "official confirmation" that information in public domain is classified); Edmonds v. FBI, 272 F. Supp. 2d 35, 49 (D.D.C. 2003) (holding that anonymous leak of information concerning FBI counterterrorism activities did not prevent agency from invoking exemption, because disclosures in tandem would amount to official confirmation of authenticity); Rubin v. CIA, No. 01 CIV 2274, 2001 WL 1537706, at *5 (S.D.N.Y. Dec. 3, 2001) (finding that plaintiff's mere showing that some private publication alleged that CIA maintained files on subject was not evidence of official disclosure and, therefore, agency's "Glomar" position was not defeated); Schlesinger v. CIA, 591 F. Supp. 60, 66 (D.D.C. 1984) (rejecting contention that CIA prepublication review of former employees' books and articles serves as an official disclosure); cf. Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 422 (2d Cir. 1989) (commenting that retired senior naval officer who was "no longer serving with an executive branch department cannot continue to disclose official agency policy" and "cannot establish what is agency policy"). But see Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (ruling that Exemption 1 protection is not available when same documents were disclosed by foreign government or when same information was disclosed to media in "off-the-record exchanges").

⁵⁵ See Azmy, 562 F. Supp. 2d at 598-99 (finding that although much may now be known by the public about former detainee, there has been no indication that this specific information has been officially disclosed); Elec. Frontier Found. v. DOJ, 532 F. Supp. 2d 22, 24 (D.D.C. 2008) (holding that newspaper article generally referring to existence of records on subject is not specific enough to waive exemptions).

⁵⁶ New York Times Co. v. DOJ, Nos. 11 Civ. 9335, 12 Civ. 794, 2013 WL 50209, at *21 (S.D.N.Y. Jan. 3, 2012) (concluding that for certain records "there has been no official disclosure of sufficient exactitude to waive the Government's right" to withhold records).

⁵⁷ See Frugone, 169 F.3d at 774 (ruling that disclosure made by employee from agency other than one from which information was sought is not official and thus does not constitute waiver); Edmonds v. DOJ, 405 F. Supp. 2d 23, 29 (D.D.C. 2005) (finding that even agency's disclosure to plaintiff's counsel during meeting does not constitute declassification action that waives Exemption 1); Nat'l Sec. Archive v. CIA, No. 99-1160, slip op. at 12-13 (D.D.C. July 31, 2000) (ruling that Exemption 1 can be waived only through "the stamp of truth that accompanies official disclosure," even where requested information is otherwise "common knowledge in the public domain").

this approach comports with Executive Order 13,526, which allows agencies to classify or reclassify information following an access request if it "has not previously been disclosed to the public under proper authority."⁵⁸ (For a discussion of the requirements for such classification, see Exemption 1, Executive Order 13,526, below.)

Another issue that has arisen in this regard has been the possible argument for waiver created when a government agency releases limited information on a subject while retaining additional information on the same subject as classified.⁵⁹ The Court of Appeals for the District of Columbia Circuit has held that for information to be "officially acknowledged" in the context of Exemption 1, it must: (1) be as "specific" as the information previously released; (2) "match" the information previously disclosed; and (3) have been made public through an "official and documented" disclosure.⁶⁰ Applying these criteria, the D.C. Circuit reversed the lower court's disclosure order and

⁵⁸ [Exec. Order No. 13,526](#), § 1.7(d), 3 C.F.R. 298 (2010); see [Darui v. Dep't of State](#), 798 F. Supp. 2d 32, 42 (D.D.C. 2011) (clarifying that documents disclosed to plaintiff during his trial were not disclosed to the public and therefore could be classified after they had been requested under the FOIA).

⁵⁹ See, e.g., [Elec. Privacy Info. Ctr.](#), 584 F. Supp. 2d at 71 (rejecting contention that public availability of some information about classified Terrorist Surveillance Program diminishes government's argument for classifying remaining information); [Whalen v. U.S. Marine Corps](#), 407 F. Supp. 2d 54, 57 (D.D.C. 2005) (holding that the defendant agency's prior disclosures on a subject did not constitute a waiver of all information on that subject, and noting that "it seems equally as likely that the government's prior voluminous disclosures indicate diligent respect by the coordinate agencies to Executive Order 12,958 and bolster the defendant's position that it has withheld only that information which it must under the applicable exemptions").

⁶⁰ [Fitzgibbon v. CIA](#), 911 F.2d 755, 765 (D.C. Cir. 1990); see also [Morley](#), 508 F.3d at 1124 (ruling against waiver because plaintiff did not "point to specific information that was previously released and is now withheld"); [Wolf v. CIA](#), 473 F.3d 370, 378 (D.C. Cir. 2007) (reaffirming the rule in [Fitzgibbon](#) and the necessity of an "insistence on exactitude" when considering potential waiver of national security information); [Students Against Genocide v. Dep't of State](#), 257 F.3d 828, 835 (D.C. Cir. 2001) (holding that a prior release of photographs similar to those withheld did not waive Exemption 1, because the fact that "some 'information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to [national security]'" (quoting [Fitzgibbon](#), 911 F.2d at 766)); [Darui](#), 798 F. Supp. 2d at 42 (concluding that documents disclosed to plaintiff's counsel under seal during his criminal trial "does not entitle the public to broad access to classified documents now"); [Elec. Frontier Found.](#), 532 F. Supp. 2d at 24 (ruling against waiver because information in public domain is not as specific as information requested). But see [Nat'l Sec. Archive](#), No. 99-1160, slip op. at 15-16 (D.D.C. July 31, 2000) (ordering CIA to disclose fact that it kept biographies on seven former East European heads of state because "Glomar" response was waived by CIA's 1994 admission that it kept biographies on all "heads of state" -- a "clear and narrowly defined term that is not subject to multiple interpretations").

held that information published in a congressional report did not constitute "official acknowledgment" of the purported location of a CIA station, because the information sought related to an earlier time period than that discussed in the report.⁶¹

In so ruling, the D.C. Circuit did not address the question of whether congressional release of the identical information relating to intelligence sources and methods could ever constitute "official acknowledgment," thus requiring disclosure under the FOIA.⁶² However, the D.C. Circuit had previously considered this question and had concluded that congressional publications do not constitute "official acknowledgment" for purposes of the FOIA.⁶³

In a later decision, the D.C. Circuit had another opportunity to consider the issue of whether an agency had "waived" its ability to properly withhold records pursuant to Exemption 1. The case involved the question of whether the public congressional testimony of the U.S. Ambassador to Iraq constituted such a "waiver" so as to prevent the agency from invoking the FOIA's national security exemption to withhold related records.⁶⁴ The district court had held—after reviewing the seven documents at issue in camera—that the public testimony had not "waived" Exemption 1 protection because the "context" of the information in the documents was sufficiently "different" so as to not "negate" their "confidentiality."⁶⁵ The D. C. Circuit affirmed the district court's decision, grounding its own decision in the fact that the requester "conceded" it could not "meet [the] requirement that it show that [the Ambassador's] testimony was 'as specific as' the documents it [sought] in this case, or that her testimony 'matche[d]' the information contained in the documents."⁶⁶ Acknowledging that such a stringent standard is a "high hurdle for a FOIA plaintiff to clear," the D.C. Circuit concluded that the government's "vital interest in information relating to the national security and foreign affairs dictates that it must be."⁶⁷

⁶¹ Fitzgibbon, 911 F.2d at 765-66.

⁶² Id.

⁶³ See, e.g., Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (holding that inclusion of information in Senate report "cannot be equated with disclosure by the agency itself"); Military Audit Project v. Casey, 656 F.2d 724, 744 (D.C. Cir. 1981) (finding that publication of Senate report does not constitute official release of agency information); Earth Pledge Found. v. CIA, 988 F. Supp. 623, 628 (S.D.N.Y. 1996) (same), aff'd per curiam, 128 F.3d 788 (2d Cir. 1997).

⁶⁴ Pub. Citizen v. Dep't of State, 11 F.3d 198, 199 (D.C. Cir. 1993).

⁶⁵ Pub. Citizen v. Dep't of State, 787 F. Supp. 12, 13, 15 (D.D.C. 1992).

⁶⁶ Pub. Citizen, 11 F.3d at 201-03.

⁶⁷ Id.

The D.C. Circuit reasoned that to hold otherwise in a situation where the government had affirmatively disclosed some information about a classified matter would, in the court's view, give the agency "a strong disincentive ever to provide the citizenry with briefings of any kind on sensitive topics."⁶⁸ Indeed, in an opinion following this D.C. Circuit decision, the Court of Appeals for the Seventh Circuit reasoned that the public "is better off under a system that permits [the agency] to reveal some things without revealing everything; if even a smidgen of disclosure required [the agency] to open its files, there would be no smidgens."⁶⁹

In a case decided nearly a decade later, the D.C. Circuit once again visited the issue of claimed public disclosure of classified information. The district court had rejected the plaintiff's waiver argument because the documents, while accessible, were not maintained in a public access area and were not likely to have been accessed by a researcher.⁷⁰ The district court had explained that such a "remote possibility of very limited disclosure" was not the type of "widespread" official dissemination capable of defeating an Exemption 1 claim.⁷¹ Agreeing with this, the D.C. Circuit ruled that the party claiming prior disclosure must point to "specific information in the public domain that appears to duplicate that being withheld,"⁷² to prevent the defendant agency from unrealistically having to bear "the task of proving the negative."⁷³ The D.C. Circuit concluded that the plaintiff had failed to meet this burden, and it dismissed plaintiff's argument that public disclosure occurred because of potential viewing of records by researchers as nothing more than "speculation."⁷⁴ (For a further discussion of this issue, see Discretionary Disclosure, below.)

⁶⁸ Id.

⁶⁹ Bassiouni v. CIA, 392 F.3d 244, 247 (7th Cir. 2004); see also ACLU v. DOD, 584 F. Supp. 2d 19, 25-26 (D.D.C. 2008) (holding that general public comment by agency officials on same topic did not waive Exemption 1 protection for more specific information on this topic); N.Y. Times Co. v. DOD, 499 F. Supp. 2d 501, 512-14 (S.D.N.Y. 2007) (affirming agency classification of Terrorist Surveillance Program information despite official acknowledgment that program exists). But see Wolf, 473 F.3d at 379 (remanding for determination of whether CIA Director's 1948 testimony before Congress, which was found to constitute "official acknowledgment" of "existence" of requested records, had also waived exemption protection for their "contents").

⁷⁰ Pub. Citizen v. Dep't of State, 100 F. Supp. 2d 10, 29 (D.D.C. 2000).

⁷¹ Id. at 28-29.

⁷² Pub. Citizen, 276 F.3d 634, 645 (D.C. Cir. 2002) (quoting Afshar, 702 F.2d at 1129).

⁷³ Id. (quoting Davis v. DOJ, 968 F.2d 1276, 1279 (D.C. Cir. 1992)).

⁷⁴ Id. at 645.

Executive Order 13,526

Executive Order 13,526 sets forth the current standards governing national security classification and the mechanisms for declassification.⁷⁵ As with prior executive orders, Executive Order 13,526 recognizes both the right of the public to be informed about activities of its government and the need to protect national security information from unauthorized or untimely disclosure.⁷⁶ Accordingly, under Executive Order 13,526, information may not be classified unless "the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism."⁷⁷ Courts have consistently recognized that an agency's articulation of the threatened harm to national security must always be speculative to some extent and that to require a showing of actual harm would be judicial "overstepping."⁷⁸

Section 1.4 of Executive Order 13,526 specifies the types of information that may be considered for classification.⁷⁹ No other types of information may be classified pursuant to the Executive Order.⁸⁰ The information categories identified as proper basis for classification in Executive Order 13,526 consist of:

- (1) military plans, weapons systems, or operations;⁸¹

⁷⁵ See [Exec. Order No. 13,526](#), 3 C.F.R. 298 (2010).

⁷⁶ See [Exec. Order No. 13,526](#) (commenting in introductory statement that "our Nation's progress depends on the free flow of information both within the Government and to the American people," and "the national defense has required that certain information be maintained in confidence").

⁷⁷ *Id.* § 1.1(a)(4); see also NARA Classification Directive, 32 C.F.R. § 2001.10 (2012) (emphasizing importance of agency classifier's ability to identify and describe damage to national security caused by unauthorized disclosure).

⁷⁸ [Halperin v. CIA](#), 629 F.2d 144, 149 (D.C. Cir. 1980); see [Aftergood v. CIA](#), No. 98-2107, 1999 U.S. Dist. LEXIS 18135, at *9 (D.D.C. Nov. 12, 1999) (declaring that "the law does not require certainty or a showing of harm" that has already occurred); cf. [ACLU v. DOJ](#), 265 F. Supp. 2d 20, 30 (D.D.C. 2003) (reiterating that "[t]he test is not whether the court personally agrees in full with the [agency's] evaluation of the danger -- rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the [agency] is expert" (quoting [Gardels v. CIA](#), 689 F.2d 1100, 1105 (D.C. Cir. 1982))).

⁷⁹ See [Exec. Order No. 13,526](#), § 1.4(a)-(g).

⁸⁰ See *id.*

⁸¹ [Exec. Order No. 13,526](#), § 1.4(a); see, e.g., [Taylor v. Dep't of the Army](#), 684 F.2d 99, 109 (D.C. Cir. 1982) (protecting combat-ready troop assessments) (decided under Executive

- (2) foreign government information;⁸²
- (3) intelligence activities, intelligence sources, or methods,⁸³ or cryptology;⁸⁴

Order 12,065); ACLU v. Dep't of State, 878 F. Supp. 2d 215, 222 (D.D.C. 2012) (protecting details of military flight operations and procedures for obtaining allied cooperation in performance of military flight operations) (decided under [Executive Order 13,526](#)); Miller v. DOJ, 562 F. Supp. 2d 82, 101 (D.D.C. 2008) (holding that disclosure of records concerning "noncombatant evacuation operation" of American citizens from foreign nation could harm future attempts to evacuate or protect citizens abroad) (decided under Executive Order 12,958, as amended); Tawalbeh v. U.S. Dep't of the Air Force, No. 96-6241, slip op. at 10-11 (C.D. Cal. Sept. 4, 1997) (protecting information about military readiness and operational security related to operations Desert Shield and Desert Storm) (decided under Executive Order 12,958); Pub. Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 21 (D.D.C. 1995) (protecting videotapes made during U.S. military action in Somalia) (decided under Executive Order 12,356).

⁸² [Exec. Order No. 13,526](#), § 1.4(b); see, e.g., Peltier v. FBI, 218 F. App'x 30, 32 (2d Cir. 2007) (finding that disclosure would "reveal an intelligence relationship and could threaten the flow of information" between governments); (decided under Executive Order 12,958); Miller 562 F. Supp. 2d at 102 (finding that disclosure of foreign government information would show that government's cooperation, capabilities and vulnerabilities, and would lead to negative diplomatic consequences and diminished intelligence capabilities) (decided under Executive Order 12,958, as amended); Azmy v. DOD, 562 F. Supp. 2d 590, 600 (S.D.N.Y. 2008) (holding that agency properly classified foreign government information and that disclosure could be expected to "impair DOD's ability to obtain information from foreign governments in the future, who will be less likely to cooperate with the United States if they cannot be confident that the information they provide will remain confidential") (decided under Executive Order 12,958, as amended); Wash. Post Co. v. DOD, No. 84-2403, slip op. at 3 (D.D.C. Apr. 15, 1988) (protecting foreign military information) (decided under Executive Order 12,356).

⁸³ [Exec. Order No. 13,526](#), § 1.4(c); see, e.g., Schrecker v. DOJ, 254 F.3d 162, 166 (D.C. Cir. 2001) (protecting intelligence sources because release would harm national security by "dissuading current and future sources from cooperating") (decided under Executive Order 12,958); Jones v. FBI, 41 F.3d 238, 244 (6th Cir. 1994) (protecting "numerical designators" assigned to national security sources) (decided under Executive Order 12,356); Patterson v. FBI, 893 F.2d 595, 597, 601 (3d Cir. 1990) (protecting information concerning intelligence sources and methods FBI used in investigation of student who corresponded with 169 foreign nations) (decided under Executive Order 12,356); Electronic Frontier Found. v. DOJ, 892 F. Supp. 2d 95, 99 (D.D.C. 2012) (protecting "actual intelligence activities, sources or methods") (decided under [Executive Order 13,526](#)); Singh v. FBI, 574 F. Supp. 2d 32, 42 (D.D.C. 2008) (holding that FBI properly classified "'numerical designator, which serves as a singular identifier for an intelligence source utilized to provide information on a specific individual or organization determined to be of national security interest") (decided under Executive Order 12,958, as amended); Schoenman v. FBI, 575 F. Supp. 2d 136, 153, 156 (D.D.C. 2008) [hereinafter Schoenman I] (noting that foreign intelligence sources "can be expected to furnish information only when confident that they are protected from

- (4) foreign relations or foreign activities of the United States, including confidential sources;⁸⁵

retribution by the absolute secrecy surrounding their relationship with the U.S. government" and finding that disclosure of source information "regardless of whether they are active or inactive, alive or deceased, can reasonably be expected to jeopardize the safety of the source or his or her family") (decided under Executive Order 12,958 as amended); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 774 (E.D. Pa. 2008) (agreeing that agency had properly classified information received through confidential sources) (decided under Executive Order 12,958, as amended); Azmy, 562 F. Supp. 2d at 599 (finding that agency properly withheld "intelligence assessments and conclusions") (decided under Executive Order 12,958, as amended); Miller, 562 F. Supp. 2d at 105 (finding that FBI properly classified detailed information provided by human intelligence source, and noting that "[i]n certain parts of the world, the consequences of public disclosure to an individual that has served as a U.S. source are often swift and far reaching, from economic reprisals to possible harassment, imprisonment, or even death") (decided under Executive Order 12,958, as amended); cf. Schrecker v. DOJ, 14 F. Supp. 2d 111, 117-18 (D.D.C. 1998) (observing that identities of intelligence sources are protectable pursuant to Exemption 1 regardless of whether individuals are alive or deceased), summary judgment granted, 74 F. Supp. 2d 26 (D.D.C. 1999), aff'd, 254 F.3d 162 (D.C. Cir. 2001).

⁸⁴ Exec. Order No. 13,526, § 1.4(c); see, e.g., McDonnell v. United States, 4 F.3d 1227, 1244 (3d Cir. 1993) (upholding classification of cryptographic information dating back to 1934 when release "could enable hostile entities to interpret other, more sensitive documents similarly encoded") (decided under Executive Order 12,356); Gilmore v. NSA, No. C92-3646, 1993 U.S. Dist. LEXIS 7694, at *18-19, (N.D. Cal. May 3, 1993) (finding mathematical principles and techniques in agency treatise protectable under this executive order category) (decided under Executive Order 12,356).

⁸⁵ Exec. Order No. 13,526, § 1.4(d); see, e.g., Judicial Watch, Inc. v. DOD, 715 F.3d 937, 941 (D.C. Cir. 2013) (withholding photographs from military operation in Pakistan resulting in death of Osama Bin Laden because "all 52 images plainly 'pertain[] . . . to foreign activities of the United States'") (decided under Executive Order 13,526); Peltier, 218 F. App'x at 32 (holding that disclosure of foreign government information "would breach express promises of confidentiality made to a foreign government, on which the provision of the information was expressly contingent") (decided under Executive Order 12,958); Bassiouni, 392 F.3d at 246 (observing that "[e]ven allies could be unpleasantly surprised" by disclosure of CIA espionage information involving one of its citizens) (decided under Executive Order 12,958); Muttitt v. Dep't of State, No. 10-202, 2013 WL 781709, at *12 (D.D.C. Mar. 4, 2013) (protecting information concerning "United States' role in formulating Iraq's proposed hydrocarbon laws and developing Iraq's oil and gas sector") (decided under Executive Order 13,526); Tarzia v. Clinton, No. 10 Civ 5654(FM), 2012 WL 335668 at *13 (S.D.N.Y. Jan. 30, 2012) (affirming withholding when release of information would jeopardize valuable confidential source in foreign government) (decided under Executive Order 13,526); Schoenman I, 575 F. Supp. 2d at 153 (holding that intelligence agency properly classified "deliberative descriptions, commentary, and analysis on [foreign] government and defense establishment" because disclosure would damage "working relationship" and lead to less effective foreign intelligence collection) (decided under Executive Order 12,958);

- (5) scientific, technological, or economic matters relating to national security;⁸⁶
- (6) United States Government programs for safeguarding nuclear materials or facilities;⁸⁷
- (7) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to the national security;⁸⁸ and

Miller, 562 F. Supp. 2d at 102-04, 107 (finding that declarants had properly demonstrated potential for harm to foreign relations in disclosing information concerning foreign cooperation in plans to evacuate American citizens and an assessment of that foreign government's military and police capabilities) (decided under Executive Order 12,958, as amended); Wheeler v. DOJ, 403 F. Supp. 2d 1, 12 (D.D.C. 2005) (noting that "foreign relations between Cuba and the United States remain tenuous at best," and that it would follow that information about persons in Cuba who provided information to the United States could still be very dangerous and, if disclosed, result in "embarrassment or imprisonment, if not death") (decided under Executive Order 12,958); ACLU v. DOD, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) (reasoning that "even if the only question was whether to recognize officially that which was informally or unofficially believed to exist, the niceties of international diplomacy sometimes make it important not to embarrass a foreign country or its leaders, and exemptions from FOIA protect that concern as well") (decided under Executive Order 12,958, as amended); Wolf v. CIA, 357 F. Supp. 2d 112, 116 (D.D.C. 2004) (reasoning that the fact of the CIA's covert interest in a foreign citizen "could adversely affect relations with a foreign government because that government might believe that the CIA has collected intelligence information on or recruited one of its citizens or resident aliens") (decided under Executive Order 12,958), aff'd in pertinent part & remanded on other grounds, 473 F.3d 370, 377-80 (D.C. Cir. 2007). But see Keenan v. DOJ, No. 94-1909, slip op. at 8-9 (D.D.C. Dec. 16, 1997) (ordering release of document segments withheld by the agency pursuant to Exemption 1, because the agency failed to show that the foreign governments named in documents more than thirty years old "still wish to maintain the secrecy of their cooperative efforts with" U.S.).

⁸⁶ [Exec. Order No. 13,526](#), § 1.4(e); see, e.g., Am. Friends Serv. Comm. v. DOD, No. 83-4916, 1986 WL 10659 (E.D. Pa. Sept. 25, 2012) (affirming withholding of "bi-weekly listing of military research and scientific and technical reports") (decided under Executive Order 12,356), vacated on other grounds, 831 F.2d 441, 447 (3rd Cir. 1987).

⁸⁷ [Exec. Order No. 13,526](#), § 1.4(f); see, e.g., Weinberger v. Catholic Action of Haw., 454 U.S. 139, 144-45 (1981) (protecting "information relating to the storage of nuclear weapons") (decided under Executive Order 12,065); Abbots v. NRC, 766 F.2d 604, 607 (D.C. Cir. 1985) (protecting "the NRC's determination as to the number of attackers a nuclear facility should be able to defend against successfully," because release of this information would allow potential attackers to "compute the size of the assault force needed for optimum results") (decided under Executive Order 12,356); Loomis v. DOE, No. 96-149, 1999 WL 33541935, at *6 (N.D.N.Y. Mar. 9, 1999) (protecting nuclear containment layout plan and referenced document on propagation of radiological requirements and procedures) (decided under Executive Order 12,958), summary affirmance granted, 21 F. App'x 80 (2d Cir. 2001).

(8) development, production, or use of weapons of mass destruction.⁸⁹

Executive Order 13,526 incorporated the classification category added by the previous Executive Order,⁹⁰ protecting information concerning "weapons of mass destruction."⁹¹ However, Executive Order 13,526 limits this classification category by specifying that the information must pertain to the "development, production, or use of weapons of mass destruction."⁹² Section 1.4 also added additional emphasis on the requirement that unauthorized disclosure of the information could cause damage to national security.⁹³

Executive Order 13,526 also establishes a presumption of harm to national security from the unauthorized disclosure of foreign government information.⁹⁴

⁸⁸ [Exec. Order No. 13,526](#), § 1.4(g); see, e.g., [Friedman v. U.S. Secret Serv., No. 06-2125, 2013 WL 588228](#), at *13-14 (D.D.C. Feb. 14, 2013) (affirming withholding of report "outlin[ing] security measures in place at the White House to thwart aerial attacks") (decided under Executive Order 12,958, as amended); [Judicial Watch, Inc. v. DOT](#), No. 02-566, 2005 WL 1606915, at *8 (D.D.C. July 7, 2005) (holding that disclosure of testing data, minimum detection rates, and false alarm rates for explosive-detection systems would harm national security by exposing vulnerabilities in airport security) (decided under Executive Order 12,958); [Pub. Educ. Ctr., Inc. v. DOD](#), 905 F. Supp. 19, 21-22 (D.D.C. 1995) (identifying videotapes made during raid by U.S. forces in Somalia as relating to vulnerabilities or capabilities of projects concerning national security) (decided under Executive Order 12,356); cf. [U.S. News & World Report v. Dep't of the Treasury](#), No. 84-2303, 1986 U.S. Dist. LEXIS 27634, at *12 (D.D.C. Mar. 26, 1986) (providing protection for information regarding armored limousines for the President) (Exemptions 1 and 7(E)) (decided under [Executive Order 12,356](#)).

⁸⁹ [Exec. Order No. 13,526](#), § 1.4(h).

⁹⁰ Exec. Order No. 12,958, as amended, § 1.4(h), 3 C.F.R 196 (2004).

⁹¹ See [Exec. Order No. 13,526](#), § 1.4(h).

⁹² [Id.](#)

⁹³ [Id.](#) § 1.4 (stating "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order").

⁹⁴ See [id.](#) § 1.1(d).

As with prior orders, Executive Order 13,526 contains a number of distinct limitations on classification.⁹⁵ Specifically, information may not be classified in order to:

- (1) conceal violations of law, inefficiency, or administrative error;⁹⁶
- (2) prevent embarrassment to a person, organization, or agency;⁹⁷
- (3) restrain competition;⁹⁸ or
- (4) prevent or delay the disclosure of information that does not require national security protection.⁹⁹

Executive Order 13,526 also prohibits the classification of "[b]asic scientific research information not clearly related to national security."¹⁰⁰

Additionally, Executive Order 13,526 reintroduced the requirement that agency classification authorities not classify information if there is "significant doubt" about the need to classify it.¹⁰¹

Under Executive Order 13,526, and subject to strict conditions, agencies may reclassify information after it has been declassified and released to the public.¹⁰² The

⁹⁵ See [id.](#) § 1.7.

⁹⁶ [Id.](#) § 1.7(a)(1); see also [Billington v. DOJ](#), 11 F. Supp. 2d 45, 59 (D.D.C. 1998) (dismissing plaintiff's "unsubstantiated accusations" that information should be disclosed because FBI engaged in illegal "dirty tricks" campaign) (decided under Executive Order 12,958), [rev'd in part on other grounds](#), 233 F. 3d 81 (D.C. Cir. 2000).

⁹⁷ [Exec. Order No. 13,526](#), § 1.7(a)(2); see, e.g., [Billington](#), 11 F. Supp. 2d at 58 (rejecting plaintiff's argument that information was classified by FBI to shield agency and foreign government from embarrassment); [Canning v. DOJ](#), 848 F. Supp. 1037, 1047-48 (D.D.C. 1994) (finding no credible evidence that the FBI improperly withheld information to conceal the existence of "potentially inappropriate investigation" of a French citizen, and noting that "if anything, the agency released sufficient information to facilitate such speculation") (decided under [Executive Order 12,356](#)).

⁹⁸ [Exec. Order No. 13,526](#), § 1.7(a)(3).

⁹⁹ [Id.](#) § 1.7(a)(4).

¹⁰⁰ [Id.](#) § 1.7(b).

¹⁰¹ See [id.](#) § 1.1(b). Compare [Exec. Order No. 12,958](#), §1.2(b) (including the language: "If there is significant doubt about the need to classify information, it shall not be classified."), with [Exec. Order No. 12,958](#), as amended (omitting same language).

agency must make a document-by-document determination that the reclassification is necessary to prevent "significant and demonstrable damage" to national security.¹⁰³ This determination must be "personally approved in writing by the agency head".¹⁰⁴ Further, the information previously declassified and released must be "reasonably recovered without bringing undue attention to the information."¹⁰⁵ The "reclassification action" must be "reported promptly to the Assistant to the President of National Security Affairs (National Security Advisor) and the Director of the Office Information Security Oversight Office."¹⁰⁶ Finally, if the document is in the physical and legal custody of NARA and has been available for public use, the Executive Order sets out procedures for suspending public access to the document pending approval of the reclassification action by the Director of the Information Security Oversight Office (ISOO).¹⁰⁷

Similarly, Executive Order 13,526 also authorizes the classification of a record that has not been previously disclosed to the public after an agency has received a FOIA request for it.¹⁰⁸ This applies whether the record was never classified or had been declassified pursuant to a specific date or event.¹⁰⁹ Such post-request classification is permitted only through the "personal participation or under the direction" of designated high-level officials, if the record meets the requirements of the Executive Order, and only on a "document-by-document basis."¹¹⁰

¹⁰² See [Exec Order No. 13526](#), § 1.7(c); see also NARA Classification Directive, 32 C.F.R. § 2001.13(b) (2012) (directive issued by Information Security Oversight Office describing procedures for reclassifying information pursuant to section 1.7(c) of [Executive Order 13.526](#)).

¹⁰³ [Exec. Order No. 13.526](#), § 1.7(c)(1); see also NARA Classification Directive, 32 C.F.R. § 2001.13(b).

¹⁰⁴ [Exec. Order No. 13.526](#), §1.7(c)(1); NARA Classification Directive, 32 C.F.R. § 2001.13(b).

¹⁰⁵ [Exec. Order No. 13.526](#), § 1.7(c)(2); see also NARA Classification Directive, 32 C.F.R. § 2001.13(b)(1).

¹⁰⁶ [Exec. Order No. 13.526](#), § 1.7(c)(3).

¹⁰⁷ See [Exec. Order No. 13.526](#), § 1.7(c)(4); see also NARA Classification Directive, 32 C.F.R. § 2001.13(b)(2).

¹⁰⁸ See [Exec. Order No. 13.526](#), § 1.7(d).

¹⁰⁹ [Id.](#)

¹¹⁰ [Id.](#); see also, [Muttitt v. Dep't of State, No. 10-202, 2013 WL 781709](#), at *15 (D.D.C. Mar. 4, 2013) (affirming validity of regulation designating specific official "to be the official to classify information on document-by-document basis consistent with" [Executive Order 13.526](#) § 1.7(d)); [Judicial Watch, Inc. v. DOD](#), 857 F. Supp. 2d 44, 58 (D.D.C. 2012) (noting that any classification after receipt of FOIA request was accomplished by review of each

In addition to satisfying the substantive criteria outlined in the applicable executive order, information also must adhere to the order's procedural requirements to qualify for Exemption 1 protection.¹¹¹ This requirement recognizes that proper classification is actually a review process to identify potential harm to national security.¹¹² Executive Order 13,526 prescribes the current procedural requirements that agencies must employ.¹¹³ These requirements include such matters as the proper markings to be applied to classified documents,¹¹⁴ as well as the manner in which agencies designate officials to classify information in the first instance.¹¹⁵

Regarding proper national security markings, Executive Order 13,526, requires that each classified document be marked with the appropriate classification level,¹¹⁶ the

record under the direction of CIA Director) (decided under [Executive Order 13,526](#)); [Pub. Citizen, Inc. v. Dep't of State](#), 100 F. Supp. 2d 10, 26 (D.D.C. 2000) (finding that agency official had "power to classify documents" following receipt of FOIA request) (decided under Executive Order 12,958), [rev'd in part on other grounds](#), 276 F.3d 674 (D.C. Cir. 2002).

¹¹¹ See, [Exec. Order No. 13,526](#), §§ 1.1-4, 1.6; see also NARA Classification Directive, 32 C.F.R. § 2001.10-11, .20-.24; [Schoenman I](#), 575 F. Supp. 2d at 151-52 (holding that agencies asserting Exemption 1 are required to "show both that the information was classified pursuant to the proper procedures, and that the withheld information substantively falls within the scope of [the applicable] Executive Order") (decided under Executive Order 12,958).

¹¹² See [Judicial Watch, Inc. v. DOD](#), 715 F.3d 937, 944 (D.C. Cir. 2013) (rejecting plaintiff's argument that agency failed to follow proper procedures for classification when agency presented a declaration from an original classification authority "averring that he reviewed the [records] and determined they were correctly classified Top Secret").

¹¹³ See, e.g., [Exec. Order No. 13,526](#), §§ 1.5, 1.6, 2.1; see also NARA Classification Directive, 32 C.F.R. § 2001.20-.26.

¹¹⁴ See [Exec. Order No. 13,526](#), § 1.6; see also [Cohen v. FBI](#), No. 93-1701, at 5-6 (D.D.C. Oct. 11, 1994) (rejecting plaintiff's argument that subsequent marking of two documents during agency's second classification review rendered FBI's classification action improper; to require agencies "to perform every classification review perfectly on the first attempt" would be "a very strict and unforgiving standard") (decided under Executive Order 12,356).

¹¹⁵ See [Exec. Order No. 13,526](#), § 1.3.

¹¹⁶ See [id.](#) § 1.6(a)(1); see also [id.](#) § 1.2 (authorizing classification at the following levels, and using these descriptive terms only: (1) "Top Secret" level, when disclosure could reasonably be expected to cause "exceptionally grave damage" to the national security; (2) "Secret" level, when disclosure could reasonably be expected to cause "serious damage" to the national security; and (3) "Confidential" level, when disclosure could reasonably be expected to cause "damage" to the national security).

identity of the original classification authority,¹¹⁷ the identity of the agency and office classifying the document, if not otherwise evident,¹¹⁸ declassification instructions,¹¹⁹ and "a concise reason for classification" that cites the applicable classification category or categories.¹²⁰ In addition, Executive Order 13,526 requires agencies to use portion markings to indicate levels of classification within documents,¹²¹ and it encourages the use of classified addenda in cases in which classified information comprises only "a small portion of an otherwise unclassified document."¹²² ISOO has issued governmentwide guidelines on these marking requirements.¹²³

Agencies with questions about the proper implementation of the substantive or procedural requirements of Executive Order 13,526, may consult with ISOO which holds governmentwide oversight responsibility for classification matters under Executive Order 13,526, by telephone at (202) 357-5250.¹²⁴

Duration of Classification and Declassification

The Court of Appeals for the District of Columbia Circuit has held that information may be protected from disclosure under Exemption 1 only when it is currently and properly classified.¹²⁵ Therefore, additional important provisions of Executive Order 13,526 are those that establish (1) limitations on the length of time

¹¹⁷ See [id.](#) § 1.6(a)(2).

¹¹⁸ See [id.](#) § 1.6(a)(3).

¹¹⁹ See [id.](#) § 1.6(a)(4).

¹²⁰ [Id.](#) § 1.6(a)(5).

¹²¹ See [id.](#) § 1.6(c).

¹²² [Id.](#) § 1.6(g).

¹²³ See NARA Classification Directive, 32 C.F.R. § 2001.20-.26 (providing detailed guidance on identification and marking requirements of [Executive Order 13,526](#)).

¹²⁴ See [Exec. Order No. 13,526](#), § 5.2.

¹²⁵ See, e.g., [ACLU v. DOD](#), 628 F.3d 612, 626 (D.C. Cir. 2011) (affirming invocation of Exemption 1 when agency affidavits affirm that information is "currently and properly classified"); [Larson v. Dep't of State](#), 565 F.3d 857, 863 (D.C. Cir. 2009) (same); [accord Knight v. CIA](#), 872 F.2d 660, 664 (5th Cir. 1989) (determining that information is "currently and properly classified" and exempt for disclosure).

information may remain classified,¹²⁶ and (2) procedures for the declassification of older government information.¹²⁷

First, Executive Order 13,526 read in conjunction with NARA Classification Directive provide the guidelines for determining the appropriate length of time information may remain classified. The Executive Order limits the duration of classification to no longer than is necessary in order to protect national security by requiring agencies "to establish a specific date or event for declassification based upon the duration of the national security sensitivity."¹²⁸ Information is automatically declassified upon reaching that date or event.¹²⁹ If the agency is unable to determine a date or event that is less than 10 years, the original classification authority "shall ordinarily assign a declassification date that is 10 years from the date of the original classification decision."¹³⁰ If a date or event of 10 years cannot be identified, the classification authority may determine that the sensitivity of the information justifies classification for a period of twenty-five years.¹³¹ Information that "clearly and demonstrably could be expected to reveal" the identity of a confidential human source, human intelligence source, or key design concepts of weapons of mass destruction, may be classified for up to 75 years.¹³²

Executive Order 13,562 states: "No information may remain classified indefinitely."¹³³ "Information marked for an indefinite duration of classification under predecessor orders" or information "that contains incomplete declassification instructions or lacks declassification instructions shall be declassified [according to] this

¹²⁶ See [Exec. Order No. 13,526](#), §1.5, 3 C.F.R. 298 (2010).

¹²⁷ [Id.](#) § 3.3- 3.5.

¹²⁸ [Id.](#) § 1.5(a); see also NARA Classification Directive, 32 C.F.R. § 2001.12(a)(1) (2012) (establishing guidelines for the duration of the classification).

¹²⁹ See [Exec. Order No. 13,526](#), § 1.5(a).

¹³⁰ NARA Classification Directive, 32 C.F.R. § 2001.12(a)(1)(ii); see also [Exec. Order No. 13,526](#), § 1.5(b).

¹³¹ See [Exec. Order No. 13,526](#), § 1.5(b); see also NARA Classification Directive, 32 C.F.R. § 2001.12(a)(1)(iii).

¹³² NARA Classification Directive, 32 C.F.R. § 2001.12(a)(2)(i)-(ii). cf. [Exec. Order No. 13,526](#) §1.5(a) ("Except for information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, the date or event shall not exceed the time frame established in paragraph (b) of this section.").

¹³³ [Exec. Order No. 13,526](#), § 1.5(d).

order."¹³⁴ Executive Order 13,526 continues the automatic declassification mechanism that was originally established by Executive Order 12,958 and continued in Executive Order 12,958, as amended.¹³⁵ If the records are exempt from Executive Order 13,526's automatic declassification provisions, agencies are required to establish "a program for systematic declassification review" that focuses on any need for continued classification of such records.¹³⁶ Executive Order 13,526 provides for a "mandatory declassification review" program.¹³⁷ This mechanism allows any person—entirely apart from the FOIA context—to request that an agency review its national security records for declassification.¹³⁸ Finally, Executive Order 13,526 also establishes the National Declassification Center within the National Archives and Records Administration to "streamline declassification processes."¹³⁹

For declassification decisions, Executive Order 13,526 recognizes that "[i]n some exceptional cases, . . . the need to protect . . . information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified."¹⁴⁰

Glomar Response

The Executive Order explicitly provides that agencies may issue what is referred to as a "Glomar" response, i.e., a response where the agency neither confirms nor denies the existence of records. Specifically, Executive Order 13,526 provides: "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."¹⁴¹ The term "Glomar" response comes from a series of requests made in

¹³⁴ [Id.](#)

¹³⁵ Compare [Exec. Order No. 13,526](#), § 3.3, with Exec. Order No. 12,958, 3 C.F.R. 333, § 3.4 (1996) and [Exec. Order No. 12,958](#), as amended, 3 C.F.R. 196, § 3.3 (2004).

¹³⁶ See [Exec. Order No. 13,526](#), § 3.4(a) .

¹³⁷ See [Id.](#), § 3.5.

¹³⁸ See [id.](#)

¹³⁹ [Id.](#), § 3.7(a).

¹⁴⁰ [Id.](#) § 3.1(d).

¹⁴¹ [Exec. Order No. 13,526](#), § 3.6(a), 3 C.F.R. 298 (2010); see, e.g. [ACLU v. DOJ](#), 808 F. Supp. 2d 280, 298 (D.D.C. 2011) (acknowledging that executive order authorizes agencies to refuse to confirm or deny existence or non-existence of requested information whenever fact of its existence is classified) [rev'd on other grounds sub. nom ACLU v. CIA, 710 F.3d 422](#) (D.C. Cir. 2013); [ACLU v. DOD](#), No. 09 Civ. 8071, 2010 WL 4449375, at *3 (S.D.N.Y. Oct. 25, 2010) (same).

the 1970s to the CIA and the Department of Defense seeking access to records showing a connection between the agencies and a ship named the "Glomar Explorer," which purportedly was being used to recover a sunken Soviet submarine.¹⁴² The agencies would neither confirm nor deny the existence of the requested records because "such an admission or denial could itself compromise national security."¹⁴³ Although there "had been a great deal of speculation in the press concerning the nature of the mission the Glomar Explorer was to carry out," the agencies described to the court "why official confirmation of the involvement of the particular agencies in question was undesirable."¹⁴⁴ Since that time, when agencies neither confirm nor deny the existence of records, the response is known as a "Glomar" response.

The use of the "Glomar" response has been routinely upheld by the courts.¹⁴⁵ At the same time the Court of Appeals for the District of Columbia Circuit has held that if

¹⁴² Military Audit Project v. Casey, 656 F.2d 724, 728-731 (D.C. Cir. 1981) (providing background and history of request and subsequent litigation).

¹⁴³ Id. at 729-730.

¹⁴⁴ Id. at 732 (finding, after defendants later acknowledged existence of records, that those records were properly protected from disclosure by Exemption 1).

¹⁴⁵ See, e.g., Moore v. FBI, 883 F. Supp. 2d 155, 164 (D.D.C. 2012) (concluding CIA properly invoked "Glomar" response for a first party request because "[i]f a *Glomar* response is provided only when classified records are found, the response would in fact be useless because it 'would unsurprisingly be interpreted as an admission that classified response records exist'") (decided under Executive Order 13,526); Amnesty Int'l USA v. CIA 728 F. Supp. 2d 479, 514 (S.D.N.Y. 2010) (affirming "Glomar" response when limited public disclosures regarding the detention and treatment of detainees do not diminish harm to national security from release of information to public) (decided under Executive Order 12,958); Moore v. Bush, 601 F. Supp. 2d 6, 14-15 (D.D.C. 2009) (affirming use of "Glomar" response by National Security Agency to first-party request for surveillance records) (decided under Executive Order 12,958, as amended); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 788-89 (E.D. Pa. 2008) (allowing use of "Glomar" response in national security context by law enforcement component of Department of Treasury) (decided under Executive Order 12,958, as amended); ACLU v. DOD, 406 F. Supp. 2d 330, 333 (S.D.N.Y. 2005) (allowing agency to assert "Glomar" response despite limited disclosure in news reports); Wheeler v. CIA, 271 F. Supp. 2d 132, 140 (D.D.C. 2003) (allowing agency to give "Glomar" response to request for records concerning plaintiff's activities as journalist in Cuba during 1960s) (decided under Executive Order 12,958, as amended); Marrera v. DOJ, 622 F. Supp. 51, 53-54 (D.D.C. 1985) (applying "Glomar" response to request for any record which would reveal whether requester was target of surveillance pursuant to Foreign Intelligence Surveillance Act) (decided under Executive Order 12,356); cf. Bassiouni v. CIA, No. 02-C-4049, 2004 WL 1125919, at *6-7 (N.D. Ill. Mar. 31, 2004) (explaining that "no number, no list" response—i.e., admission that records existed, coupled with refusal to further describe them—is appropriate to protect classified national security information even though agency previously acknowledged existence of records) (decided under Executive Order 12,958), aff'd, 392 F.3d 244 (7th Cir. 2004). But see ACLU v. DOD, 389 F. Supp. 2d 547, 561 (S.D.N.Y. 2005) (commenting that the "danger

an "agency has already disclosed the fact of the existence (or nonexistence) of responsive records" a "Glomar" response is not appropriate.¹⁴⁶

In a recent decision by the District Court for the District of Columbia addressing a challenge to compliance with the Executive Order's procedural requirements, the court found that "Glomar" responses are "intangible forms of classified information that only arise "in the context of a response to a request for records."¹⁴⁷ Because an agency is not required to create or maintain a tangible record in response to a FOIA request, the court held that an agency "is not required to establish a declassification timeline in order to 'properly classif[y]' a 'Glomar' fact."¹⁴⁸ For this particular situation, the court "that the requirement . . . to establish a declassification timeline is not an absolute prerequisite to classifying information."¹⁴⁹ (For declassification requirements see Duration of Classification and Declassification above).

Compilation Approach

Executive Order 13,526 recognizes that compilations of information that are themselves unclassified may be classified "if the compiled information reveals an additional association or relationship that meets the standards for classification under this order [and] is not otherwise revealed in the individual items of information."¹⁵⁰ This concept that has been widely recognized by courts in Exemption 1 cases.¹⁵¹ The

of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods") (decided under Executive Order 12,958, as amended).

¹⁴⁶ [ACLU v. CIA, 710 F.3d 422, 427, 432](#) (D.C. Cir. 2013) (finding that "it strains credulity to suggest that an agency charged with gathering intelligence affecting the national security does not have an 'intelligence interest' in drone strikes, even if that agency does not operate the drones itself" and concluding that such a program had been publicly acknowledged).

¹⁴⁷ [Mobley v. CIA, Nos. 11-2072, 11-2073, 2013 WL 452932](#), at *19 (D.D.C. Feb. 7, 2013).

¹⁴⁸ [Id.](#) at *20.

¹⁴⁹ [Id.](#)

¹⁵⁰ [Exec. Order No. 13,526](#), § 1.7(e).

¹⁵¹ See, e.g., [ACLU v. DOJ](#), 681 F.3d 61, 71 (2d. Cir. 2012) (finding that information that "seems innocuous in the context of what is already known by the public . . . may reveal more information than their apparent insignificance suggests") (decided under Executive Order 12,958); [Bassiouni v. CIA](#), 392 F.3d 244, 246 (7th Cir. 2004) (recognizing that "[w]hen a pattern of responses itself reveals classified information, the only way to keep secrets is to maintain silence uniformly") (decided under Executive Order 12,958); [Am. Friends Serv. Comm. v. DOD](#), 831 F.2d 441, 444-45 (3d Cir. 1987) (recognizing validity of "compilation" theory, and ruling that certain "information harmless in itself might be harmful when

Court of Appeals for the District of Columbia Circuit has also reaffirmed that even if there is other information that if released "would pose a greater threat to the national security," Exemption 1 "bars the court from prying loose from the government even the smallest bit of information that is properly classified."¹⁵² Situations may exist, in the national security context particularly, where even "'bits and pieces' of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance itself.'"¹⁵³

disclosed in context") (decided under Executive Order 12,356); Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (acknowledging "mosaic-like nature of intelligence gathering") (decided under Executive Order 12,065); Taylor v. Dep't of the Army, 684 F.2d 99, 104-105 (D.C. Cir. 1982) (upholding classification of compilation of information on army combat units) (decided under Executive Order 12,065); Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) (observing that "[e]ach individual piece of intelligence information, much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself"); ACLU v. ODNI, No. 10-4419, 2011 WL 5563520, at *11 (S.D.N.Y. Nov. 15, 2011) (explaining that "[m]inor details of intelligence information may reveal more information than their apparent insignificance suggests") (decided under [Executive Order 13,526](#)); Edmonds v. DOJ, 405 F. Supp. 2d 23, 33 (D.D.C. 2005) (upholding the agency's mosaic argument, and finding that it "comports with the legal framework") (decided under Executive Order 12,968, as amended); ACLU v. DOJ, 321 F. Supp. 2d 24, 37 (D.D.C. 2004) (acknowledging that "this Circuit has embraced the government's 'mosaic' argument in the context of FOIA requests that implicate national security concerns") (decided under Executive Order 12,958); Edmonds v. FBI, 272 F. Supp. 2d 35, 47-48 (D.D.C. 2003) (accepting that "some information required classification because it was intertwined with the sensitive matters at the heart of the case" and "would tend to reveal matters of national security even though the sensitivity of the information may not be readily apparent in isolation") (decided under Executive Order 12,958); ACLU v. DOJ, 265 F. Supp. 2d 20, 29 (D.D.C. 2003) (allowing the agency to withhold statistical intelligence-collection data, commenting that "even aggregate data is revealing," and concluding that disclosure "could permit hostile governments to accurately evaluate the FBI's counterintelligence capabilities") (decided under Executive Order 12,958). Loomis v. DOE, No. 96-149, 1999 WL 33541935, at *7 (N.D.N.Y. Mar. 9, 1999) (finding that safety measures regarding nuclear facilities set forth in manuals and lay-out plans contain highly technical information and that "such information in the aggregate could reveal sensitive aspects of operations") (decided under Executive Order 12,958), summary affirmance granted, 21 F. App'x 80 (2d Cir. 2001); Billington v. DOJ, 11 F. Supp. 2d 45, 55 (D.D.C. 1998) (stating that "aggregate result" does not need to be "self-evident" to qualify for Exemption 1 protection) (decided under Executive Order 12,958), summary judgment granted in pertinent part, 69 F. Supp. 2d 128 (D.D.C. 1999), aff'd in part, vacated in part & remanded all on other grounds, 233 F.3d 581 (D.C. Cir. 2000).

¹⁵² Abbotts v. NRC, 766 F.2d 604, 608 (D.C. Cir. 1985) (decided under Executive Order 12,356) (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)).

¹⁵³ ACLU v. DOJ, 321 F. Supp. 2d at 37 (quoting Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003)) (internal quotation marks omitted).

Exclusion Considerations

Additionally, agencies should also be aware of the FOIA's "(c)(3) exclusion."¹⁵⁴ This special records exclusion applies to certain especially sensitive records maintained by the FBI, which concern foreign intelligence or counterintelligence, or international terrorism matters, where the existence of such records is itself a classified fact.¹⁵⁵ The FBI may, so long as the existence of the records remains classified, treat the records as not subject to the requirements of the FOIA.¹⁵⁶ (See the discussion of this provision under Exclusions, below.)

¹⁵⁴ [5 U.S.C. § 552\(c\)\(3\) \(2006 & Supp. IV 2010\)](#).

¹⁵⁵ Id.

¹⁵⁶ Id.; see also DOJ, OIP Guidance: [Implementing FOIA's Statutory Exclusion Provisions \(2012\)](#) (setting out a multi-tiered approach for agencies to follow in bringing greater awareness to and understanding of FOIA's statutory exclusions).