



## 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."<sup>1</sup> The Supreme Court has recognized that Congress intended for the President to bear 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.<sup>2</sup> Exemption 1, in turn, is the provision of the FOIA which affords protection for such properly classified information.<sup>3</sup> 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.<sup>4</sup>

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<sup>1</sup> 5 U.S.C. § 552(b)(1) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; 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 (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>; *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).

<sup>2</sup> See, e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 527-30 (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).

<sup>3</sup> 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).

<sup>4</sup> 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)); Ray v. Turner, 587 F.2d 1187, 1190-95 (D.C. Cir. 1978) (discussing role of three branches of federal government in determining national security sensitivity); 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

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Each President, beginning with President Harry S. Truman in 1951,<sup>5</sup> has established the uniform policy of the Executive Branch concerning the protection of national security information with the issuance of a new or revised national security classification executive order.<sup>6</sup> This classification 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.<sup>7</sup> Exemption 1 provides for protection from disclosure for all national security information that has been properly classified in accordance with the substantive and procedural requirements of the current executive order.<sup>8</sup> As such, Exemption 1 does not protect information that is merely "classifiable" -- that is, meets the substantive requirements of the current such executive order but has not been actually reviewed and classified under it.<sup>9</sup> Accordingly, to qualify for Exemption 1 protection, the information must actually satisfy all of the requirements for classification under the executive order.<sup>10</sup>

The executive order in effect as of June 2009 is Executive Order 12,958, as amended, which is an amendment of an executive order first issued by President William J. Clinton in

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<sup>4</sup>(...continued)

policy implications" (citing Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980)).

<sup>5</sup> See Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 24, 1951). But see Exec. Order No. 8381, 5 Fed. Reg. 1147 (Mar. 22, 1940) (establishing initial classification structure within military to protect information related to "vital military installations and equipment").

<sup>6</sup> See, e.g., Exec. Order No. 10,501, 3 C.F.R. 398 (1949-1953) (Eisenhower Administration order); Exec. Order No. 10,985, 27 Fed. Reg. 439 (Jan. 2, 1962) (Kennedy Administration order); Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975) (Nixon Administration order); Exec. Order 11,862, 40 Fed. Reg. 25,197 (June 11, 1975) (Ford Administration amendment); Exec. Order No. 12,065, 3 C.F.R. 190 (1978) (Carter Administration order); Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (Reagan Administration order); Exec. Order No. 12,958, 3 C.F.R. 333 (1996) (Clinton Administration order).

<sup>7</sup> See Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 28, 2003) [hereinafter Exec. Order No. 12,958, as amended], reprinted in 50 U.S.C. § 435 note (2006) and summarized in FOIA Post (posted 4/11/03); see also NARA Classification Directive, 32 C.F.R. § 2001 (2008) (directives issued by NARA's Information Security Oversight Office describing procedures that agencies must follow to classify information pursuant to Executive Order 12,958, as amended).

<sup>8</sup> See 5 U.S.C. § 552(b)(1).

<sup>9</sup> 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).

<sup>10</sup> See Exec. Order No. 12,958, as amended, §§ 1.1-.4; see also NARA Classification Directive, 32 C.F.R. § 2001 (outlining procedural requirements for classification).

1995 and then revised by President George W. Bush on March 25, 2003.<sup>11</sup> The provisions of this executive order are discussed below. On May 27, 2009, President Barack Obama issued a memorandum directing the Assistant to the President for National Security Affairs to consult with the relevant Executive Branch departments and agencies and to submit to the President within ninety days recommendations and proposed revisions to Executive Order 12,958, as amended.<sup>12</sup>

The issuance of each classification executive order, or the amendment of an existing executive order, raises the question of the applicability of successive executive orders to records that were in various stages of administrative or litigative handling as of the current executive order's effective date.<sup>13</sup> The general rule is that the appropriate executive order to apply, with its particular procedural and substantive standards, depends upon when the responsible agency official takes the final classification action on the record in question.<sup>14</sup>

Under the precedents established by the Court of Appeals for the District of Columbia Circuit, the accepted rule is that a reviewing court will assess the propriety of Exemption 1 withholdings under the executive order in effect when "the agency's ultimate classification decision is actually made."<sup>15</sup> 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.<sup>16</sup> It also is important to note that some courts

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<sup>11</sup> See Exec. Order No. 12,958, as amended; see also, e.g., Larson, 565 F.3d at 863 (applying Executive Order 12,958, as amended); ACLU v. FBI, 429 F. Supp. 2d 179, 188 (D.D.C. 2006) (same); Judicial Watch v. DOJ, 306 F. Supp. 2d 58, 64-65 (D.D.C. 2004) (same).

<sup>12</sup> Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Classified Information and Controlled Unclassified Information, 74 Fed. Reg. 26277 (May 27, 2009) (outlining six topics that shall be considered during revision process).

<sup>13</sup> See FOIA Update, Vol. XVI, No. 2, at 3, 12 ("OIP Guidance: The Timing of New E.O. Applicability").

<sup>14</sup> See Halpern v. FBI, 181 F.3d 279, 289-90 (2d Cir. 1999); Campbell, 164 F.3d at 29 ("[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."); cf. Summers v. DOJ, 140 F.3d 1077, 1082 (D.C. Cir. 1998) (remanding to district court because district court failed to articulate whether it was applying Executive Order 12,356 or Executive Order 12,958 to evaluate Exemption 1 withholdings), on remand, No. 87-3168, slip op. at 2 (D.D.C. Apr. 19, 2000) (applying Executive Order 12,958 to uphold Exemption 1 withholdings).

<sup>15</sup> King v. DOJ, 830 F.2d 210, 217 (D.C. Cir. 1987).

<sup>16</sup> Id.; see also Campbell, 164 F.3d at 31 n.11 (recognizing that when court remands to agency for rereview of classification, 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 (continued...)

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."<sup>17</sup>

### Standard of Review

In an early case that considered Executive Branch classification decisions made pursuant to a classification executive order, the Supreme Court held that records classified under proper procedures were exempt from disclosure per se, without the allowance for any further judicial review or in camera inspection.<sup>18</sup> The Supreme Court recognized that a great amount of deference should be accorded to the agency's decision to protect national security information from disclosure,<sup>19</sup> an accepted doctrine that continues to this day.<sup>20</sup> Thereafter, however, Congress amended the FOIA in 1974 to provide expressly for de novo review by the courts and for in camera review of documents, including classified documents, where

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<sup>16</sup>(...continued)  
Exemption 1").

<sup>17</sup> Baez v. DOJ, 647 F.2d 1328, 1233 (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 12,356); Military Audit Project v. Casey, 656 F.2d 724, 737 & n.41 (D.C. Cir. 1981) (agency chose to reevaluate under new Executive Order 12,065); 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 (D.D.C. Mar. 24, 1997) (finding that although agency could "voluntarily reassess" its classification decision under Executive Order 12,958, issued during pendency of lawsuit, agency not 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).

<sup>18</sup> See EPA v. Mink, 410 U.S. 73, 84 (1973).

<sup>19</sup> Id. at 84, 94.

<sup>20</sup> 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 related to the segregability of non-exempt information when the information withheld implicates national security concerns").

appropriate.<sup>21</sup> In so doing, Congress sought to ensure that agencies properly classify national security records and that reviewing courts remain cognizant of their authority to verify the correctness of agency classification determinations.<sup>22</sup>

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 entirely proper if an agency's affidavits are reasonably specific and there is no evidence of bad faith.<sup>23</sup> This review standard has been adopted by other circuit courts as well.<sup>24</sup>

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<sup>21</sup> See Pub. L. No. 93-502, 88 Stat. 1561 (1974).

<sup>22</sup> See H.R. Rep. No. 93-876, at 7-8 (1974).

<sup>23</sup> 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 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); El Badrawi v. DHS, 583 F. Supp. 2d 285, 314 (D.Conn. 2008) (holding 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))); Schoenman v. FBI, 575 F. Supp. 2d 136, 153 (D.D.C. 2008) (suggesting that Court of Appeals for District of Columbia Circuit rule on reviewing propriety of agency's Exemption 1 assertion is "that little proof or explanation is required beyond a plausible assertion that information is properly classified"); 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"); 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"); Edmonds v. DOJ, 405 F. Supp. 2d 23, 33 (D.D.C. 2005) (explaining that "this court must respect the experience of the agency and stay within the proper limits of the judicial role in FOIA review").

<sup>24</sup> See, e.g., 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, 555-56 & 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  
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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.<sup>25</sup> In Exemption 1 cases, courts are likely to require that the affidavit be provided by an agency official with direct knowledge of the classification decision.<sup>26</sup> Where agency affidavits have been found to be insufficiently detailed, courts have withheld summary judgment in Exemption 1 cases.<sup>27</sup> When an affidavit contains sufficient explanation, however,

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<sup>24</sup>(...continued)

information logically falls into the exemption category cited and there exists no evidence of agency "bad faith"); Bowers, 930 F.2d at 357 (stating that "[w]hat fact or bit of information may compromise national security is best left to the intelligence experts").

<sup>25</sup> See El Badrawi, 583 F. Supp. 2d at 314 (noting that agency "must provide detailed and specific information" justifying classification decision); N.Y. Times Co., 499 F. Supp. 2d at 511 (concluding that multiple declarations provided by defendants together adequately describe records withheld and adequately demonstrate that it was properly classified); 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))).

<sup>26</sup> 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). But see also 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").

<sup>27</sup> 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, 1179-84 (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

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it is generally accepted that "the court will not conduct a detailed inquiry to decide whether it agrees with the agency's opinions."<sup>28</sup>

### Deference to Agency Expertise

As indicated above, courts generally have heavily deferred to agency expertise in national security cases.<sup>29</sup> The Court of Appeals for the District of Columbia 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

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<sup>27</sup>(...continued)

that they consist of "boilerplate" explanations not "tailored" to particular information being withheld pursuant to Exemption 1); Singh v. FBI, 574 F. Supp. 2d 32, 50 (D.D.C. 2008) (withholding summary judgment in part because defendants failed to justify all exemption claims); 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 v. DOJ, 310 F. Supp. 2d 44, 52 (D.D.C. 2004) (observing that courts do not expect "anything resembling poetry," but nonetheless expressing dissatisfaction with agency's "cut and paste" affidavits).

<sup>28</sup> Edmonds, 405 F. Supp. 2d at 33; see also Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at \*11 (D.D.C. Aug. 10, 2005) (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 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] affidavit both logically and plausibly suffices").

<sup>29</sup> 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, 148 (D.C. Cir. 1980))); Bowers v. DOJ, 930 F.2d 350, 357 (4th Cir. 1991) (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) (accorded "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"); 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).

classified.<sup>30</sup> Such deference is based upon the "magnitude of the national security interests and potential risks at stake,"<sup>31</sup> 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.<sup>32</sup> Indeed, courts ordinarily are very reluctant to substitute their judgment in place of the agency's "unique insights"<sup>33</sup> in the areas of national defense and foreign relations.<sup>34</sup> This is because courts have recognized that national security is a "uniquely

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<sup>30</sup> Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007); see Larson v. Dep't of State, 565 F.3d 857, 862 (D.C. Cir. 2009) (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))); James Madison Project v. CIA, 605 F. Supp. 2d 99, 109 (D.D.C. 2009) (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 v. DOJ, 517 F. Supp. 2d 231, 238 (D.D.C. 2007) (citing Wolf, 473 F.3d at 374-75, for proposition that court need only determine whether agency's classification decision is "'logical or plausible'").

<sup>31</sup> Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003) (quoting CIA v. Sims, 471 U.S. 159, 179 (1985)) (Exemption 7(A)); 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 (D.D.C. 2006) (acknowledging that "one may criticize the deference extended by the courts as excessive," but holding that such deference is the rule).

<sup>32</sup> Sims, 471 U.S. at 179-80; see also, e.g., Zadvvydas v. Davis, 533 U.S. 678, 696 (2001) (commenting that "terrorism or other special circumstances" may warrant "heightened deference") (non-FOIA case); Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) (explaining that "courts traditionally have been reluctant to intrude upon the authority of the executive in national security affairs") (non-FOIA case); Ctr. for Nat'l Sec. Studies, 331 F.3d at 918 (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").

<sup>33</sup> Larson, 565 F.3d at 864; see also Assassination Archives & Research Ctr. v. CIA, 334 F.3d 55, 58 (D.C. Cir. 2003).

<sup>34</sup> 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 v. Dep't of State, 984 F.2d 461, 464-65 (D.C. Cir. 1993) (acknowledging agency's "unique insights" in areas of national defense and foreign relation and further 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))); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 773 (E.D. Pa. 2008) (finding that courts have "neither the expertise nor the qualifications to determine the impact upon national security" and that "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

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executive purview"<sup>35</sup> and that "the judiciary is in an extremely poor position to second-guess the executive's judgment" on national security issues.<sup>36</sup>

Nevertheless, some FOIA plaintiffs have argued -- and in some cases courts have agreed -- that the nature of judicial review should involve questioning the underlying basis for the agency's classification decision.<sup>37</sup> 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.<sup>38</sup> Further, courts have overwhelmingly rejected the notion that additional judicial

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<sup>34</sup>(...continued)

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"). But see King, 830 F.2d at 226 (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); 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).

<sup>35</sup> Ctr. for Nat'l Sec. Studies, 331 F.3d at 927; 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)).

<sup>36</sup> Ctr. for Nat'l Sec. Studies, 331 F.3d at 928. But see 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").

<sup>37</sup> See ACLU, 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 Plaintiff's arguments"); Wiener v. FBI, No. 83-1720, slip op. at 3 (C.D. Cal. Sept. 27, 2004) (rejecting FBI's articulation of harm that would result from disclosure of classified information); ACLU v. DOD, 339 F. Supp. 2d 501, 504 (S.D.N.Y. 2004) (finding that "[m]erely raising national security concerns [cannot] justify unlimited delay," and considering "the public's right to receive information on government activity in a timely manner").

<sup>38</sup> 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 (continued...)

review should be triggered by a requester's unsupported allegations of wrongdoing against the government.<sup>39</sup>

When reviewing the propriety of agency classification determinations, courts have demonstrated deference to agency expertise by according little or no weight to opinions of persons other than the agency classification authority,<sup>40</sup> including persons who may have previously maintained some knowledge of the subject matter while employed within the Executive Branch.<sup>41</sup>

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<sup>38</sup>(...continued)

assurances, beyond a presumption of administrative good faith, to FOIA plaintiffs that the descriptions are accurate and as complete as possible"); 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"); Wiener, No. 83-1720, slip op. at 5 (C.D. Cal. Mar. 5, 2001) (rejecting plaintiff's request that court "independently verify" government's characterization of records).

<sup>39</sup> 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).

<sup>40</sup> 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); 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). But cf. Wash. Post v. DOD, 766 F. Supp. 1, 13-14 (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").

<sup>41</sup> 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); 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).

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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> This public record is intended to provide a meaningful and fair opportunity for a plaintiff

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<sup>42</sup> 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); 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); Elec. Frontier Found. v. DOJ, No. 07-00403, slip op. at 11 (D.D.C. Aug. 14, 2007) (noting that agency's filing of ex parte classified affidavit was appropriate, and would likely have been required by court had "agency not fortuitously proffered the classified declaration on its own"); Edmonds v. FBI, 272 F. Supp. 2d 35, 46 (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. Dept of State, 100 F. Supp. 2d 10, 27-28 (D.D.C. 2000) (ordering submission of an in camera affidavit because further description in a public affidavit "would reveal the [very] information the agency is trying to withhold"); Pub. Educ. Ctr., Inc. v. DOD, 905 F. Supp. 19, 22 (D.D.C. 1995) (ordering in camera affidavit because "extensive public justification would threaten to reveal the very information for which . . . [Exemption 1 was] claimed" (quoting Lykins, 725 F.2d at 1463)).

<sup>43</sup> 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 Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992) (noting that court accepted in camera affidavits to explain basis for Glomar assertion); 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 response"); 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).

<sup>44</sup> 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; Simmons, 796 F.2d at 710; Elec. Frontier Found., No. 07-00403, slip op. at 12 (D.D.C. Aug. 14, 2007) (recognizing  
(continued...))

to challenge, and an adequate evidentiary basis for a court to rule on, an agency's invocation of Exemption 1.<sup>45</sup>

Courts have found that counsel for plaintiffs are not entitled to participate in such in camera proceedings.<sup>46</sup> This was the case even in one unusual situation where plaintiff's counsel had been issued a personnel security clearance for an unrelated purpose.<sup>47</sup> Many years ago, one court took the unprecedented step of appointing a special master to review and categorize a large volume of classified records.<sup>48</sup> In other instances involving voluminous records, courts have on occasion ordered agencies to submit samples of the documents at issue for in camera review.<sup>49</sup>

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<sup>44</sup>(...continued)

need for full public record to allow operation of adversarial process, but accepting necessity of district court's review of in camera affidavits to protect sensitive national security data); 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").

<sup>45</sup> 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 a 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); cf. Lion Raisins Inc. v. USDA, 354 F.3d 1072, 1083 (9th Cir. 2004) (approving the "use of in camera affidavits in order to supplement prior public affidavits that were too general," but rejecting the district court's use of in camera affidavits as "the sole factual basis for a district court's decision").

<sup>46</sup> See Salisbury, 690 F.2d at 973 n.3; Weberman v. NSA, 668 F.2d 676, 678 (2d Cir. 1982); Hayden, 608 F.2d at 1385-86; see also 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).

<sup>47</sup> 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 know" the withheld information, and thus failed to satisfy second requirement for access to classified information).

<sup>48</sup> 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).

<sup>49</sup> 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).



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, refusing to consider classified information to be in the public domain unless it has been officially disclosed.<sup>53</sup> 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.<sup>54</sup> Indeed, this approach comports

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<sup>53</sup> 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"); Hoch v. CIA, No. 88-5422, 1990 WL 102740, at \*1 (D.C. Cir. July 20, 1990) (concluding that without official confirmation, "clear precedent establishes that courts will not compel [an agency] to disclose information even though it has been the subject of media reports and speculation"); Abbotts v. NRC, 766 F.2d 604, 607-08 (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 ignore "[u]nofficial leaks and public surmise . . . but official acknowledgment may force a government to retaliate"); Gerstein v. CIA, No. 06-4643, 2008 WL 4415080, at \*6 (N.D. Cal. Sept. 26, 2008) (finding that agency is not required to confirm which particular reports of leaked information about satellite capabilities were accurate); 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, that agency's "Glomar" position was not defeated); Wash. Post Co. v. DOD, No. 84-3400, slip op. at 3 (D.D.C. Sept. 22, 1986) (refusing to find official disclosure through abandonment of documents in Iranian desert following tragic and aborted 1980 military mission to rescue American hostages or through government's introduction of them into evidence in espionage trial); 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").

<sup>54</sup> 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

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with the amended Executive Order 12,958, 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."<sup>55</sup> (For a discussion of the requirements for such belated classification, see Exemption 1, Executive Order 12,958, as Amended, below.)

Courts have rejected the 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.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup> Applying these criteria, the D.C. Circuit reversed the

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<sup>54</sup>(...continued)

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," and that "[d]isclosure by other agencies of CIA information does not preempt the CIA's ability to withhold that information").

<sup>55</sup> Exec. Order No. 12,958, as amended, § 1.7(d).

<sup>56</sup> 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); cf. Simmons v. DOJ, 796 F.2d 709, 712 (4th Cir. 1986) (ruling that there had been no "widespread dissemination" of information in question).

<sup>57</sup> 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").

<sup>58</sup> 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 and holding that in that case the

(continued...)



in the documents was sufficiently "different" so as to not "negate" their "confidentiality."<sup>63</sup> Before the D.C. Circuit, the requester contended first that the court's prior decisions concerned attempts by FOIA requesters to compel agencies to confirm or deny the truth of information that others had already publicly disclosed.<sup>64</sup> The plaintiff then argued that the Ambassador's public statements about her meeting with the Iraqi leader prior to the invasion of Kuwait were far more detailed than those that the D.C. Circuit had found did not constitute "waiver" in previous cases.<sup>65</sup> The D.C. Circuit repudiated both of the requester's points and, in affirming the district court's decision, grounded 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."<sup>66</sup> 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."<sup>67</sup>

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."<sup>68</sup> 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."<sup>69</sup>

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 earlier had rejected the plaintiff's waiver argument because the documents, while accessible, were not maintained

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<sup>63</sup> Pub. Citizen v. Dep't of State, 787 F. Supp. 12, 13, 15 (D.D.C. 1992).

<sup>64</sup> Pub. Citizen, 11 F.3d at 201-03.

<sup>65</sup> Id. at 203.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> 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 379-80 (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").

















requires that each classified document be marked with the appropriate classification level,<sup>116</sup> the identity of the original classification authority,<sup>117</sup> the identity of the agency and office classifying the document,<sup>118</sup> as well as with "a concise reason for classification" that cites the applicable classification category or categories.<sup>119</sup> It also requires that a date or event for declassification be specified on the document.<sup>120</sup> In addition, amended Executive Order 12,958 requires agencies to use portion markings to indicate levels of classification within documents,<sup>121</sup> and it advocates the use of classified addenda in cases in which classified information comprises only "a small portion of an otherwise unclassified document."<sup>122</sup> The Information Security Oversight Office (ISOO) has issued governmentwide guidelines on these marking requirements.<sup>123</sup>

Executive Order 12,958 also establishes a government entity to provide oversight of agencies' classification determinations and their implementation of the order. The Interagency Security Classification Appeals Panel consists of senior-level representatives of the Secretaries of State and Defense, the Attorney General, the Director of Central Intelligence, the Archivist of the United States, and the Assistant to the President for National Security Affairs.<sup>124</sup> Among other things, this body adjudicates classification challenges filed by agency employees and decides appeals from persons who have filed requests under the mandatory declassification review provisions of the order.<sup>125</sup>

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<sup>116</sup> 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 be expected to cause "exceptionally grave damage" to the national security; (2) "Secret" level, when disclosure could be expected to cause "serious damage" to the national security; and (3) "Confidential" level, when disclosure could be expected to cause "damage" to the national security).

<sup>117</sup> See id. § 1.6(a)(2).

<sup>118</sup> See id. § 1.6(a)(3).

<sup>119</sup> Id. § 1.6(a)(5).

<sup>120</sup> See id. § 1.6(a)(4).

<sup>121</sup> See id. § 1.6(c).

<sup>122</sup> Id. § 1.6(g).

<sup>123</sup> See NARA Classification Directive, 32 C.F.R. § 2001.20-.24 (providing detailed guidance on identification and marking requirements of amended Executive Order 12,958).

<sup>124</sup> See Exec. Order No. 12,958, as amended, § 5.3(a)(1); see also NARA Classification Directive, 32 C.F.R. pt. 2001 app. A (bylaws of Interagency Security Classification Appeals Panel).

<sup>125</sup> See Exec. Order No. 12,958, as amended, § 5.3(b); see also id. § 3.5 (establishing mandatory declassification review program as non-FOIA mechanism for persons to seek access to classified information generated or maintained by agencies, including papers  
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executive order<sup>134</sup> and is intended to ultimately lead to the creation of a governmentwide declassification database within NARA.<sup>135</sup> For records that fall within any exception to amended Executive Order 12,958's automatic declassification mechanism, agencies are required to establish "a program for systematic declassification review" that focuses on any need for continued classification of such records.<sup>136</sup>

As did prior executive orders, amended Executive Order 12,958 provides for a "mandatory declassification review" program.<sup>137</sup> This mechanism allows any person -- entirely apart from the FOIA context -- to request that an agency review its national security records for declassification.<sup>138</sup> Unlike under the FOIA, though, such requesters do not have the right to judicial review of the agency's action.<sup>139</sup> Instead, amended Executive Order 12,958 authorizes persons to appeal an agency's final decision under this program to the Interagency Security Classification Appeals Panel.<sup>140</sup> To alleviate some of the burden of this program, Executive Order 12,958 contains a provision that allows an agency to deny a mandatory review request if it has already reviewed the information for declassification within the past two years.<sup>141</sup>

For declassification decisions, amended Executive Order 12,958 authorizes agencies to apply a balancing test -- i.e., to determine "whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure."<sup>142</sup> Though Executive Order 12,958, as amended, specifies that this provision is implemented solely as a matter of administrative discretion and creates no new right of

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<sup>134</sup> See Exec. Order No. 12,958, as amended, § 3.3(a).

<sup>135</sup> See id. § 3.7 (directing Archivist to establish database of information that has been declassified by agencies, and instructing agency heads to cooperate in this governmentwide effort); see also Presidential Memorandum for Heads of Executive Departments and Agencies Concerning Classified Information and Controlled Unclassified Information, 74 Fed. Reg. 26277 (May 27, 2009) (directing Assistant to the President for National Security Affairs to address, in revisions to Executive Order 12,958, as amended, the creation of a National Declassification Center within NARA).

<sup>136</sup> See Exec. Order No. 12,958, as amended, § 3.4(a).

<sup>137</sup> Id. § 3.5.

<sup>138</sup> See id.

<sup>139</sup> See id.; cf. Miller v. Casey, 730 F.2d 773, 778 (D.C. Cir. 1984) (refusing to review CIA decision to deny access to records under agency's discretionary "historical research program").

<sup>140</sup> See Exec. Order No. 12,958, as amended, § 3.5(b)(4), (d).

<sup>141</sup> See id. § 3.5(a)(3).

<sup>142</sup> Id. § 3.1(b).

judicial review, it is significant that no such provision existed under prior orders.<sup>143</sup> Although a few courts have attempted to apply the balancing test to the review of classification decisions in litigation,<sup>144</sup> most have held that national security officials are responsible for applying this balancing test at the time of the original classification decision, and that these officials are in the best position to weigh the public interest in disclosure against the threat to national security.<sup>145</sup>

### Glomar Response and Mosaic Approach

Two additional considerations addressed initially by the original version of Executive Order 12,958, and then continued in the amended version, have already been recognized by the courts. First, the "Glomar" response is explicitly incorporated into the order: "An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the very fact of their existence or nonexistence is itself classified under this order."<sup>146</sup> The use of this response has been routinely upheld by the courts.<sup>147</sup>

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<sup>143</sup> See FOIA Update, Vol. XVI, No. 2, at 11 ("Executive Order Comparison Chart") (providing chart comparing provisions of original version of Executive Order 12,958 with those of predecessor Executive Order 12,356).

<sup>144</sup> See, e.g., L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 902 (C.D. Cal. 2006) (explaining that the court was attempting to achieve the "balance Congress sought to preserve between the public's right to know and the government's legitimate interest in keeping certain information confidential").

<sup>145</sup> See, e.g., ACLU v. DOJ, 265 F. Supp. 2d 20, 32 (D.D.C. 2003) (holding that even a "significant and entirely legitimate" public desire to view classified information "simply does not, in an Exemption 1 case, alter the analysis"); Kelly v. CIA, No. 00-2498, slip op. at 15 (D.D.C. Aug. 8, 2002) (observing that agency should factor in public interest at time that classification decision is made, and further noting that requester's asserted public interest in disclosure of requested information will not undermine proper classification because it certainly is in public interest to withhold information that would damage national security), modified in other respects, No. 00-2498, slip op. at 1 (D.D.C. Sept. 25, 2002), appeal on adequacy of search dismissed on procedural grounds, No. 02-5384, 2003 WL 21804101 (D.C. Cir. July 31, 2003).

<sup>146</sup> Exec. Order No. 12,958, as amended, § 3.6(a), 68 Fed. Reg. 15,315 (Mar. 28, 2003), reprinted in 50 U.S.C. § 435 note (2006); see also Hogan v. Huff, No. 00-6753, 2002 WL 1359722, at \*7 (S.D.N.Y. June, 21, 2002) (ruling that the executive order "authorizes agencies to refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence is itself classified") (decided under original version of Executive Order 12,958).

<sup>147</sup> See 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); 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); ACLU v. DOD, 406 F. Supp. 2d 330, 333 (D.D.C. 2006) (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  
(continued...)



consistently endorsed by the courts.<sup>151</sup> The 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."<sup>152</sup>

In another decision, the United States District Court for the District of Columbia commented that while the mosaic argument may be seen to "cast too wide a net," it is today accepted that "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene."<sup>153</sup> The court held that 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."<sup>154</sup> As with other agency decisions regarding harm to national security, it is also reasonable for courts to grant an agency the appropriate degree of deference with regard to the practical applicability of their mosaic analysis.<sup>155</sup>

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<sup>150</sup>(...continued)

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).

<sup>151</sup> See, e.g., 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 disclosed in context"); Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (explicitly acknowledging "mosaic-like nature of intelligence gathering"); Taylor v. Dep't of the Army, 684 F.2d 99, 105 (D.C. Cir. 1982) (upholding classification of compilation of information on army combat units); 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"); 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"), summary affirmance granted, 21 F. App'x 80 (2d Cir. 2001); Nat'l Sec. Archive v. FBI, 759 F. Supp. 872, 877 (D.D.C. 1991) (adjudging that disclosure of code names and designator phrases could provide hostile intelligence analyst with "common denominator" permitting analyst to piece together seemingly unrelated data into snapshot of specific FBI counterintelligence activity).

<sup>152</sup> Abbotts v. NRC, 766 F.2d 604, 608 (D.C. Cir. 1985) (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)).

<sup>153</sup> ACLU, 321 F. Supp. 2d at 37 (quoting Sims, 471 U.S. at 178).

<sup>154</sup> Id. (quoting Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003)).

<sup>155</sup> See Berman, 378 F. Supp. 2d at 1217 (holding, in context of Exemption 3, that agency's decision to employ a mosaic analysis is entitled to deference); see also Larson v. Dep't of State, No. 02-1937, 2005 WL 3276303, at \*12 (D.D.C. Aug. 10, 2005) (allowing that "the CIA has the right to assume that foreign intelligence agencies are zealous ferrets" (citing Gardels v. CIA, 689 F.2d 1100, 1106 (D.C. Cir. 1982))).

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Exclusion Considerations

Additionally, agencies should also be aware of the FOIA's "(c)(3) exclusion."<sup>156</sup> This special records exclusion applies to certain especially sensitive records maintained by the Federal Bureau of Investigation, which concern foreign intelligence, counterintelligence or international terrorism matters: Where the existence of such records is itself a classified fact, 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.<sup>157</sup> (See the discussion of this provision under Exclusions, below.)

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<sup>156</sup> 5 U.S.C. § 552(c)(3).

<sup>157</sup> Id.; see also Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 24-25 (Dec. 1987).