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]

Pursuant to Executive Order 13,526, President Obama established a uniform policy of the Executive Branch concerning the protection of national security information.[3]

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* This section primarily includes case law, guidance, and statutes up until November 30, 2022. While some legal authorities after this date may be included, for a comprehensive accounting of all recent court decisions, please visit OIP's Court Decisions webpage (https://www.justice.gov/oip/court-decisions-overview). Please also note that this section generally only includes subsequent case history in the citations when it is relevant to the point for which the case is being cited.

[1] 5 U.S.C. § 552(b)(1) (2018); see also ACLU v. DOJ, 640 F. App'x 9, 10 (D.C. Cir. 2016) (acknowledging that Exemption 1 protects information properly classified under national security executive order); Larson v. Dep't of State, 565 F.3d 857, 861 (D.C. Cir. 2009) (same).

[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] Exec. Order No. 13,526, 3 C.F.R. 298 (2010) (Obama Administration) (retained by Trump and Biden Administrations). Previous versions of this executive order have been issued by prior Presidents, beginning with President Harry S. Truman in 1951. See, e.g., Exec. Order No. 10,290, 16 Fed. Reg. 9795 (Sept. 24, 1951) (Truman Administration); 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.

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.[4] The executive order sets forth the current standards governing national security classification and the mechanisms for declassification.[5] The executive order further provides the substantive and procedural legal framework for the classification decisions of the designated subject matter experts who have been granted classification authority by the President.[6] Exemption 1 protects from disclosure national security information that is properly classified in accordance with the substantive and procedural requirements of the appropriate executive order; the mere fact that information *could be* classified is not sufficient.[7]

The relevant provisions of this executive order are discussed below.

25197 (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).

[4] See Exec. Order No. 13,526, 3 C.F.R. 298 (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," while at the same time noting that throughout history "the national defense has required that certain information be maintained in confidence," and concluding that both "are equally important priorities").

[5] Id.; see also id. § 5.2, 3 C.F.R. 318 (establishing the Information Security Oversight Office (ISOO), which holds governmentwide oversight responsibility for classification matters under Executive Order 13,526).

[6] See id. 3 C.F.R. 298; see also NARA Classification Directive, 32 C.F.R. § 2001 (2010) (directive issued by NARA's Information Security Oversight Office (ISOO) describing procedures that agencies must follow to classify information pursuant to Executive Order 13,526).

[7] 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); Canning v. U.S. Dep't of State, 346 F. Supp. 3d 9, 16 (D.D.C. 2018) (observing that "FOIA Exemption 1 applies only to records that have been 'properly classified' pursuant to the governing Executive Order" and acknowledging that there are both "procedural and substantive requirements for classification of national security information" under Executive Order 13,526 (citing 5 U.S.C. § 552(b)(1)); 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); Assassination Archives & Rsch. 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) (explaining that defendant must demonstrate that it has followed classification procedures and that documents are actually properly classified).

Standards Governing National Security Classification

Section 1.1(a) of Executive Order 13,526 provides the following four standards, each of which must be satisfied in order for information to be originally classified:[8]

(1) "an original classification authority is classifying the information;"[9]

(2) "the information is owned by, produced by or for, or is under the control of the United States Government;"[10]

(3) "the information falls within one or more of the categories of information listed in section 1.4 of this order;[11] and"

(4) "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage."[12]

Consistent with the standards set forth in Sections 1.1(a)(4), 1.2, and 1.4, when courts assess harm in the Exemption 1 context, agencies are only required to show that

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[8] Exec. Order No. 13,526 § 1.1(a), 3 C.F.R. 298 (2010).

[9] Id. § 1.1(a)(1), 3 C.F.R. 298.

[10] Id. § 1.1(a)(2), 3 C.F.R. 298.

[11] Id. § 1.1(a)(3), 3 C.F.R. 298.

[12] Id. § 1.1(a)(4), 3 C.F.R. 298; see NARA Classification Directive, 32 C.F.R. § 2001.10 (2010) (emphasizing importance of agency classifier's ability to identify and describe damage to national security caused by unauthorized disclosure); see also, e.g., Rosenberg v. DOD, 342 F. Supp. 3d 62, 83-88 (D.D.C. 2018) (reviewing agency's assertions, for variety of records, that disclosure would pose harm to national security and finding that there would be harm for release of some records but not for others); Elec. Priv. Info. Ctr. v. DOJ, 296 F. Supp. 3d 109, 126 (D.D.C. 2017) (finding that "it is eminently logical that publicly disclosing the strengths, weaknesses, and/or changes in the [Foreign Intelligence Surveillance Court's] own processes . . . presents a risk that potential targets will alter their behavior to account for the disclosed practices and/or limitations"); Associated Press v. FBI, 265 F. Supp. 3d 82, 94 (D.D.C. 2017) (finding that release of information regarding phone hacking tool, specifically vendor identity and purchase price, could reasonably be expected to cause harm by limiting agency's ability to gain access to terrorists' phones in future).

disclosure *could* reasonably be expected to result in harm to national security.[13] Indeed, courts have consistently recognized that an agency's articulation of such harm must always be speculative to some extent, and to require a showing of actual harm would be judicial "overstepping."[14] At the same time, Section 1.4 provides that when an agency makes a classification harm determination, "[i]nformation shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to national security."[15] Finally, Section 1.1(d) establishes a presumption of harm to national security from the unauthorized disclosure of foreign government information.[16]

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[13] See, e.g., Knight First Amend. Inst. at Columbia Univ. v. CIA, 11 F.4th 810, 819 (D.C. Cir. 2021) (rejecting plaintiff's argument that, in Glomar context, agency be required to show that disclosure "would *necessarily* harm national security in every reasonably plausible circumstance"); cf. Wash. Post Co. v. Special Inspector Gen. for Afg. Reconstruction, No. 18-2622, 2021 WL 4502106, at *22 (D.D.C. Sept. 30, 2021) (holding that agency "submissions supporting the withholdings under Exemption 1 . . . satisfy the reasonable foreseeability of harm standard" because they identify "'particularized indicia of foreseeable harm'" to national security (quoting Reps. Comm. for Freedom of the Press v. FBI, 3 F.4th 350, 372 (D.C. Cir. 2021))); Exec. Order No. 13,526 §§ 1.1(a)(4), 1.2, & 1.4, 3 C.F.R. 298-300 (For further discussion of foreseeable harm requirements, see Litigation Considerations, Foreseeable Harm Showing).

[14] Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980); see also Wolf v. CIA, 473 F.3d 370, 375 (D.C. Cir. 2011) (same); Smith v. CIA, 393 F. Supp. 3d 72, 82 (D.D.C. 2019) (acknowledging that "agency statement of threatened harm to national security will always be speculative to some extent"); 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))); cf. Elec. Priv. Info. Ctr., 296 F. Supp. 3d at 129 (finding "that the government's explanation of the harm that might result from release of the Westlaw printouts, and how such a disclosure could reveal national security information that is not evident from looking at the documents in isolation, is reasonable and sufficient to support its invocation of Exemption 1"); N.Y. Times v. NSA, 205 F. Supp. 3d 374, 382 (S.D.N.Y. 2016) (finding that although specific program at issue is no longer operational, disclosure of records regarding program could still pose harm by revealing techniques that agency is still authorized to use and which may be used in other ongoing programs).

[15] Exec. Order No. 13,526 § 1.4, 3 C.F.R. 300.

[16] See id. § 1.1(d), 3 C.F.R. 298.

Section 1.4 of Executive Order 13,526 specifies the types of information that may be considered for classification.[17] The information must "pertain[] to"[18] at least one of the following categories:

(a) military plans, weapons systems, or operations;[19]

(b) foreign government information;[20]

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[17] See id. § 1.4(a)-(h), 3 C.F.R. 300.

[18] Id.; see also ACLU v. DOJ, 640 F. App'x 9, 11-12 (D.C. Cir. 2016) (noting that "'pertains is not a very demanding verb'" and rejecting plaintiff's argument that "pertains to" be read narrowly for consistency with the FOIA's purposes because the executive order "has relevance beyond FOIA, and [the court's] task is not to construe it in light of FOIA's purposes" (quoting Jud. Watch, Inc. v. DOD, 715 F.3d 937, 941 (D.C. Cir. 2013))).

[19] Exec. Order No. 13,526 § 1.4(a), 3 C.F.R. 300; 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 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); Rosenberg v. DOD, 342 F. Supp. 3d 62, 81-87 (D.D.C. 2008) (holding that detainees' individual reactions to news of being moved was not properly classified, but the government's withholding of information pertaining to detainee conduct, detainee health, detainee movements to third countries, an order affecting female guards, and court and commission proceedings was properly classified); 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).

[20] Exec. Order No. 13,526 § 1.4(b), 3 C.F.R. 300; see, e.g., Peltier v. FBI, 218 F. App'x 30, 32 (2d Cir. 2007) (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); Am. Ctr. for L. & Just. v. U.S. Dep't of State, 354 F. Supp. 3d 1, 10-11 (D.D.C. 2018) (finding agency assertions sufficient that information was provided by foreign government or international organization and that representative of the source confirmed that confidentiality was still expected); 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

(c) intelligence activities, intelligence sources, or methods,[21] or cryptology;[22]

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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 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).

[21] Exec. Order No. 13,526 § 1.4(c), 3 C.F.R. 300; 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); Elec. Frontier Found. v. DOJ, 376 F. Supp. 3d 1023, 1035 (N.D. Cal. 2019) (protecting opinions and orders of Foreign Intelligence Surveillance Court which would "reveal critical information about the intelligence community, including its targets, methods, limitations, resources, and sources"); N.Y. Times v. NSA, 205 F. Supp. 3d 374, 379 (S.D.N.Y. 2016) (protecting details regarding the NSA's collection of information and "technical means and analytic methods by which the NSA collected metadata" and other information); Elec. Frontier Found. v. DOJ, 892 F. Supp. 2d 95, 99 (D.D.C. 2012) (protecting "actual intelligence activities, sources or methods"); 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, 156-57 (D.D.C. 2008) (noting that foreign intelligence sources "can be expected to furnish information only when confident that they are protected from retribution by the absolute secrecy surrounding their relationship to 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); 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); Azmy, 562 F. Supp. 2d at 599 (finding that agency properly withheld "intelligence assessments and conclusions") (decided under Executive Order 12,958, as amended).

[22] Exec. Order No. 13,526 § 1.4(c), 3 C.F.R. 300; 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

(d) foreign relations or foreign activities of the United States, including confidential sources;[23]

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documents similarly encoded") (decided under Executive Order 12,356); Gilmore v. NSA, No. 92-3646, 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).

[23] Exec. Order No. 13,526 § 1.4(d), 3 C.F.R. 300; see, e.g., Jud. 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'" (citing Exec. Order No. 13,526 § 1.4(d), 3 C.F.R. 300))); 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 v. CIA, 392 F.3d 244, 246 (7th Cir. 2004) (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); Am. Ctr. for L. & Just., 354 F. Supp. 3d at 11 (finding that disclosure could harm foreign relations by causing foreign officials to believe confidentiality might not be observed and risking inability to obtain information from foreign governments); Intell. Prop. Watch v. USTR, 205 F. Supp. 3d 334, 356 (S.D.N.Y. 2016) (protecting draft U.S. trade proposals because "disclosure of the U.S.'s evolving negotiating positions could damage other ongoing or future trade negotiations with other countries" but denying the protection of proposals made by the private sector); Muttitt v. Dep't of State, 926 F. Supp. 2d 284, 300 (D.D.C. 2013) (protecting information concerning "United States' role in formulating Iraq's proposed hydrocarbon laws and developing Iraq's oil and gas sector"); Schoenman, 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); 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

(e) scientific, technological, or economic matters relating to national security;[24]

(f) United States Government programs for safeguarding nuclear materials or facilities;[25]

(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to the national security;[26] and

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under Executive Order 12,958), aff'd in pertinent part & remanded on other grounds, 473 F.3d 370, 377-80 (D.C. Cir. 2007).

[24] Exec. Order No. 13,526 § 1.4(e), 3 C.F.R. 300; see, e.g., Am. Friends Serv. Comm. v. DOD, No. 83-4916, 1986 WL 10659, at *1, *5 (E.D. Pa. Sept. 25, 1986) (affirming withholding of "bi-weekly listing of military research and scientific and technical reports") (decided under Executive Order 12,356), vacated & remanded, 831 F.2d 441, 447 (3d Cir. 1987) (remanding to district court for agency to clarify inconsistencies in the record).

[25] Exec. Order No. 13,526 § 1.4(f), 3 C.F.R. 300; see, e.g., Weinberger v. Cath. 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).

[26] Exec. Order No. 13,526 § 1.4(g), 3 C.F.R. 300; see, e.g., Rosenberg v. DOD, 342 F. Supp. 3d 62, 89 (D.D.C. 2018) (affirming withholding of information about movement of detainees to other countries, possible mission changes, and threat assessments regarding movement of detainees because release could reveal vulnerabilities); Friedman v. U.S. Secret Serv., 923 F. Supp. 2d 262, 276 (D.D.C. 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); Jud. 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).

(h) development, production, or use of weapons of mass destruction.[27]

Additionally, courts have recognized that in certain circumstances legal analysis may be protected where its disclosure would reveal information protected under one of these eight classification categories.[28]

Executive Order 13,526 contains a number of distinct limitations on classification; specifically, Section 1.7(a) states that information may not be classified in order to:

(1) conceal violations of law, inefficiency, or administrative error;[29]

(2) prevent embarrassment to a person, organization, or agency;[30]

(3) restrain competition;[31] or

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[27] Exec. Order No. 13,526 § 1.4(h), 3 C.F.R. 300.

[28] See ACLU v. NSA, 925 F.3d 576, 601 (2d Cir. 2019) (affirming withholding of legal analysis in memoranda and reaffirming that "in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts"); ACLU v. DOD, 435 F. Supp. 3d 539, 564-65 (S.D.N.Y. 2020) (holding that where legal analysis and classified factual information are inextricably intertwined, withholding legal analysis is justified); ACLU v. CIA, 109 F. Supp. 3d 220, 236 (D.D.C. 2015) (finding that legal analysis may warrant protection even though it does not constitute intelligence activity, source, or method by itself, "so long as it *pertains* to an intelligence activity, source, or method").

[29] Exec. Order No. 13,526 § 1.7(a)(1), 3 C.F.R. 302; cf. 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).

[30] Exec. Order No. 13,526 § 1.7(a)(2), 3 C.F.R. 302; cf. Am. Ctr. for L. & Just. v. U.S. Dep't of State, 354 F. Supp. 3d 1, 13 (D.D.C. 2018) (holding that "[e]ven if certain portions could be considered embarrassing to State, 'it would nonetheless be covered by Exemption 1'" because "independent of any desire to avoid embarrassment, the information [was] properly classified" (quoting Wilson v. DOJ, No. 87-2415, 1991 WL 111457, at *2 (D.D.C. June 13, 1991))); 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, 1048 (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).

[31] Exec. Order No. 13,526 § 1.7(a)(3), 3 C.F.R. 302.

(4) prevent or delay the disclosure of information that does not require national security protection.[32]

Executive Order 13,526 also prohibits the classification of "[b]asic scientific research information not clearly related to national security."[33]

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.[34]

Compilation of Information

Executive Order 13,526 recognizes that compilations of information maintained by the government, 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."[35] This concept has been widely recognized by courts in Exemption 1 cases.[36]

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[32] Id. § 1.7(a)(4), 3 C.F.R. 302.

[33] Id. § 1.7(b), 3 C.F.R. 302.

[34] See id. § 1.1(b), 3 C.F.R. 298. 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).

[35] Exec. Order No. 13,526 § 1.7(e), 3 C.F.R. 302 (2010).

[36] See, e.g., 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 disclosed in context") (decided under Executive Order 12,356); Taylor v. Dep't of the Army, 684 F.2d 99, 104-05 (D.C. Cir. 1982) (upholding classification of compilation of information on Army combat units) (decided under Executive Order 12,065); Elec. Priv. Info. Ctr. v. ODNI, 281 F. Supp. 3d 203 (D.D.C. 2017) (holding that "unclassified and declassified information in the classified report may maintain a TOP SECRET classification" upon compilation); 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 have to be self-evident" to qualify for Exemption 1 protection) (decided under Executive Order 12,958).

Relatedly, courts have recognized protection for information using a "mosaic theory" approach[37] that considers the consequences of piecing together information maintained by the government with information in the public domain.[38] Particularly in national security contexts, courts have recognized that "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and

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[37] See Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980) (applying the Mosaic theory in the Exemption 1 context); see also CIA v. Sims, 471 U.S. 159, 178 (1985) (Exemption 3 Mosaic); Djenasevic v. EOUSA, 319 F. Supp. 3d 474, 490 (D.D.C. 2018) (Exemption 7(E) Mosaic); Shapiro v. DOJ, 239 F. Supp. 3d 100, 115-16 (D.D.C. 2017) (Exemption 7(E) Mosaic); Rosenberg v. ICE, 13 F. Supp. 3d 92, 107 (D.D.C. 2014) (applying Mosaic theory under Exemption 6 where "disclosure of pieces of information could potentially lead to the identification of third parties"); L.A. Times Commc'ns, LLC v. Dep't of the Army, 442 F. Supp. 2d 880, 898-900 (C.D. Cal. 2006) (Exemption 7(F) Mosaic).

[38] See, e.g., ACLU v. CIA, 24 F.4th 863, 868 (2d Cir. 2022) (acknowledging that "minor details of intelligence information may reveal more information than their apparent insignificance suggests, because, much like a piece in a jigsaw puzzle, each detail may aid in piecing together other bits of information"); 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); 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); Halperin, 629 F.2d at 150 (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" and that "[w]hen combined with other small leads, the [information] could well prove useful for identifying a covert transaction"); Brennan Ctr. for Just. v. Dep't of State, 296 F. Supp. 3d 73, 87-88 (D.D.C. 2017) (accepting State Department's Mosaic argument that "'someone knowledgeable of the complex web of U.S. diplomatic relations with other countries could look at a gap in the alphabetical list and predict with a high degree of certainty the country that would fill that gap'" and discussing Mosaic approach for other records at issue (quoting agency declaration)); ACLU v. ODNI, No. 10-4419, 2011 WL 5563520, at *10-11 (S.D.N.Y. Nov. 15, 2011) (explaining that releasing case numbers containing geographical prefix "could allow a hostile analyst to create a 'partial mosaic' of the specific intelligence activity, 'leading to the exposure of actual current activities or methods'" (quoting agency declaration)); Edmonds v. DOJ, 405 F. Supp. 2d 23, 33 (D.D.C. 2005) (upholding the agency's Mosaic argument and finding that "[w]hen combined with plaintiff counsel's notes, . . . the five government-withheld documents could prove useful for identifying information gathering methods and activities") (decided under Executive Order 12,958, as amended); ACLU v. DOJ, 321 F. Supp. 2d 24, 37 (D.D.C. 2004) (applying Mosaic approach and adopting FBI's explanation that disclosure of statistics, which on their face may appear innocuous, would be harmful to national security when coupled with "information that has already been placed in the public domain (through statutory disclosures, media accounts, etc.)").

may put the questioned item of information in its proper context."[39] Put another way, "'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.'"[40] As a result, the Court of Appeals for the District of Columbia Circuit has held that Exemption 1 "bars the court from prying loose from the government even the smallest bit of information that is properly classified."[41]

Reclassification of Information

Executive Order 13,526 provides that information "may not be reclassified after declassification and release to the public under proper authority" unless certain specified conditions are met.[42] To do so the agency must make a document-by-document determination that the reclassification is necessary to prevent "significant and demonstrable damage" to national security.[43] This determination must be "personally approved in writing by the agency head."[44] Further, the agency must determine that the information previously declassified and released "may be reasonably recovered without bringing undue attention to the information."[45] The "reclassification action" must be "reported promptly to the Assistant to the President for National Security Affairs

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[39] Sims, 471 U.S. at 178 (quoting Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978)); see also Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003) (quoting Sims, 471 U.S. at 178); Brennan Ctr. for Just., 296 F. Supp. 3d at 84 (same); ACLU v. DOD, 752 F. Supp. 2d 361, 371 n.4 (S.D.N.Y. 2010) (same).

[40] Sims, 471 U.S. at 178 (quoting Halperin, 629 F.2d at 150); see also Citizens United v. U.S. Dep't of State, 460 F. Supp. 3d 12, 18 (D.D.C. 2020) (quoting Sims, 471 U.S. at 178); Brennan Ctr. for Just., 296 F. Supp. 3d at 84 (same); ACLU v. ODNI, 2011 WL 5563520, at *11 (explaining that "[m]inor details of intelligence information may reveal more information than their apparent insignificance suggests"); ACLU v. DOD, 752 F. Supp. 2d at 371 n.4 (same).

[41] Pub. Citizen v. Dep't of State, 11 F.3d 198, 201 (D.C. Cir. 1993) (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)).

[42] See Exec Order No. 13,526 § 1.7(c), 3 C.F.R. 302 (2010); see also NARA Classification Directive, 32 C.F.R. § 2001.13(b) (2010) (directive issued by Information Security Oversight Office describing procedures for reclassifying information pursuant to Section 1.7(c) of Executive Order 13,526).

[43] Exec. Order No. 13,526 § 1.7(c)(1), 3 C.F.R. 302; see also NARA Classification Directive, § 2001.13(b).

[44] Exec. Order No. 13,526 § 1.7(c)(1), 3 C.F.R. 302; see also NARA Classification Directive, § 2001.13(b).

[45] Exec. Order No. 13,526 § 1.7(c)(2), 3 C.F.R. 302; see also NARA Classification Directive, § 2001.13(b)(1).

(National Security Advisor) and the Director of the Information Security Oversight Office."[46] 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.[47]

Classifying Information After Receiving a FOIA Request

Executive Order 13,526 provides that "[i]nformation that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a [FOIA] request for it."[48] This provision applies whether the record was never classified or had been declassified pursuant to a specific date or event.[49] Further, an agency has no obligation to explain "the timing of the decision [to classify records post-request or] . . . 'what changed' to justify classification of previously unclassified documents."[50]

However, such post-request classification must (1) "meet the requirements of" Executive Order 13,526, (2) "be accomplished on a document-by-document basis," and (3) "be accomplished . . . with the personal participation or under the direction of" designated high level officials.[51] With regard to the third requirement, "[s]ub-delegation

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[46] Exec. Order No. 13,526 § 1.7(c)(3), 3 C.F.R. 302; see also NARA Classification Directive, § 2001.13(b)(5).

[47] See Exec. Order No. 13,526 § 1.7(c)(4), 3 C.F.R. 303; NARA Classification Directive, § 2001.13(b)(2).

[48] Exec. Order No. 13,526 § 1.7(d), 3 C.F.R. 303 (2010); see also 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).

[49] See Exec. Order No. 13,526 § 1.7(d), 3 C.F.R. 303; cf. Canning v. Dep't of State, 346 F. Supp. 3d 1, 19 (D.D.C. 2018) (holding that the existence of residual "UNCLASSIFIED" markings on a document that was previously unclassified does not negate its proper classification so long as an accompanying declaration or index confirms that all classification requirements were met and provides an explanation for the discrepancy).

[50] Canning, 346 F. Supp. 3d at 17-18 (quoting Canning v. Dep't of State, 134 F. Supp. 3d 490, 507 (D.D.C. 2015)).

[51] Exec. Order No. 13,526 § 1.7(d), 3 C.F.R. 303; see also Mobley v. CIA, 806 F.3d 568, 584-85 (D.C. Cir. 2015) (affirming post-request classification action of FBI conducted by delegated agency official on records that met requirement of Executive Order 13,526, after document-by-document review); Canning, 346 F. Supp. 3d at 16, 20 (describing process for classifying records after submission of relevant FOIA request and upholding validity of regulations that closely tracked language of Executive Order 13,526 § 1.7(d) or that stated

to a subordinate federal official is presumptively permissible, absent affirmative evidence in the original delegation of a contrary intent," so long as the agency can show that the subordinate official is acting under the direction of the designated high-level official.[52] "[T]his does not mean that [the designated high-level official] must review and approve each decision."[53] "Rather, one acts under the 'direction' of another if [they are] subject to that person's guidance, supervision, or management."[54]

Compliance With Proper Classification Procedures

Executive Order 13,526 requires that each classified document be marked with the appropriate classification level,[55] the identity of the original classification authority,[56] the identity of the agency and office classifying the document if not otherwise evident,[57] declassification instructions,[58] and "a concise reason for classification" that cites the

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that procedures must comply with that section); Muttitt v. Dep't of State, 926 F. Supp. 2d 284, 303 (D.D.C. 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)); Jud. 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 record under the direction of CIA Director).

[52] Mobley, 806 F.3d at 585 (holding that because the FBI's sub-delegation order contained an ongoing notification requirement by the sub-delegee to the high-level official, this sub-delegee's classification decisions qualify as being made "under the direction" of the high-level official).

[53] Canning, 346 F. Supp. 3d at 20-23 (internal citations and quotation marks omitted).

[54] Id. (holding that "'direction' requires *something* more than an unconstrained delegation" and finding requirements met for certain documents because Under Secretary "had the opportunity to disagree when he was 'apprised' of [] decisions" but not for others where declarant "merely asserts that he '*will* apprise the Under Secretary [in the future]'" and where there was "no evidence that he had an opportunity to express a contrary view" (quoting agency declaration)).

[55] See Exec. Order No. 13,526 § 1.6(a)(1), 3 C.F.R. 301 (2010); see also id. § 1.2, 3 C.F.R. 298-99 (authorizing classification at the following levels, and using these descriptive terms: (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").

[56] See id. § 1.6(a)(2), 3 C.F.R. 301.

[57] See id. § 1.6(a)(3), 3 C.F.R. 301.

[58] See id. § 1.6(a)(4), 3 C.F.R. 301.

applicable classification category or categories.[59] In addition, Executive Order 13,526 requires agencies to use portion markings to indicate levels of classification within documents,[60] and encourages the use of classified addenda in cases in which classified information comprises only "a small portion of an otherwise unclassified document."[61] The Information Security Oversight Office has issued governmentwide guidelines on all the marking requirements.[62] The Court of Appeals for the District of Columbia Circuit has held that markings that appear on a document that was properly classified pursuant to a previous, then-governing executive order, are valid if they satisfy that executive order's markings requirements.[63]

Multiple courts have held that in order to properly withhold information under Exemption 1, the government must show both that the withheld information substantively falls under the Executive Order and that the information was classified under the proper procedures.[64] To show that the proper procedures were followed,

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[59] Id. § 1.6(a)(5), 3 C.F.R. 301; see Am. Ctr. for L. & Just. v. Dep't of State, 354 F. Supp. 3d 1, 8, 13 (D.D.C. 2018) (finding "there are no magic words required to meet this standard" and simple reference to Section 1.4(d) as classification reason was sufficient, and holding further that "[t]he fact that the original [document] held one fewer classification rationale [§ 1.4(d) alone rather than both § 1.4(b) and § 1.4(d)] has no bearing on whether the information was properly classified originally" because agency established that document was properly classified under § 1.4(d)).

[60] See Exec. Order No. 13,526 § 1.6(c), 3 C.F.R. 301.

[61] Id. § 1.6(g), 3 C.F.R. 302.

[62] See NARA Classification Directive, 32 C.F.R. §§ 2001.20-.26 (2010) (providing detailed guidance on identification and marking requirements of Executive Order 13,526).

[63] See DiBacco v. U.S. Army, 795 F.3d 178, 196 (D.C. Cir. 2015) (holding that documents classified decades ago under "Clinton/Bush Order" were properly classified because they contained markings required by that order).

[64] See, e.g., Lesar v. DOJ, 636 F.2d 472, 483 (D.C. Cir. 1980) (holding that "[t]o be classified properly, a document must be classified in accordance with the procedural criteria of the governing Executive Order as well as its substantive terms"); McGehee v. DOJ, 362 F. Supp. 3d 14, 20 (D.D.C. 2019) (holding that FBI properly classified information pursuant to proper procedures and that withheld information substantively fell under Executive Order 13,526); Int'l Couns. Bureau v. DOD, 906 F. Supp. 2d 1, 4 (D.D.C. 2012) (finding that "to show that it has properly withheld information under Exemption 1, an agency must show both that the information was classified pursuant to the proper procedures, and that the withheld information meets the standard for classification"); Schoenman v. FBI, 575 F. Supp. 2d 136, 151-52 (D.D.C. 2008) (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").

"general statements of procedural compliance may suffice" absent a showing of bad faith.[65] Further, compliance with the proper procedures need not be established by the original classifier, but rather "the determining factor is whether a present-day original classification authority . . . is able to certify, based on [their] own independent review of the information, that it presently meets the standards for classification."[66]

In cases where procedural violations persist and have not been cured by subsequent classification authority, the D.C. Circuit has held that "actual procedural defects do not necessarily require the document to be disclosed."[67] The D.C. Circuit has explained that it "do[es] not mean to imply that only the substantive standards of the governing Executive Order must be followed" but rather recognizes that "the consequences of particular violations may vary."[68] The court went on to make clear that "some [violations] may be of such importance to reflect adversely on the agency's overall classification decision, requiring a remand to the district court for in camera inspection; while others may be insignificant, undermining not at all the agency's classification

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[65] Am. Ctr. for L. & Just. v. Dep't of State, 354 F. Supp. 3d 1, 8 (D.D.C. 2018); see also Jud. Watch, Inc. v. DOD, 857 F. Supp. 2d 44, 57 (D.D.C. 2012) (holding that "given the lack of evidence of bad faith, it is thus possible that . . . more general statements that all of EO 13526's procedural requirements were satisfied . . . are sufficient").

[66] Am. Ctr. for L. & Just., 354 F. Supp. 3d at 9; see also Jud. Watch, Inc. v. DOD, 715 F.3d 937, 944 (D.C. Cir. 2013) (affirming that any procedural defect in original classification was cured by subsequent classification reviews); Bigwood v. DOD, 132 F. Supp. 3d 124, 152 (D.D.C. 2015) (holding that "[b]ecause the government's declarations 'clearly indicate that the documents fit within the substantive standards of [the] Executive Order,' and remove 'any doubt that a person with original classification authority has approved the classification decision,' any procedural failure relating to an application of the Executive Order does 'not reflect adversely on the agency's classification decision'" (quoting Jud. Watch, Inc., 715 F.3d at 944)); Canning v. U.S. Dep't of State, 134 F. Supp. 3d 490, 508 (D.D.C. 2015) (holding that "[declarant's] confirmation that the documents were properly designated as classified in the first instance suffices to cure any procedural defects in their marking").

[67] Allen v. CIA, 636 F.2d 1287, 1292 n.27 (D.C. Cir. 1980) (citing Lesar, 636 F.2d at 478, 484), overruled on other grounds, Founding Church of Scientology v. Smith, 721 F.2d 828, 830 (D.C. Cir. 1983); see also Intel. Prop. Watch v. U.S. Trade Representative, 344 F. Supp. 3d 560, 573 n.4 (S.D.N.Y. 2018) (same); Jud. Watch, Inc., 857 F. Supp. 2d at 58 (same).

[68] Lesar, 636 F.2d at 485; see also DiBacco v. U.S. Dep't of the Army, 234 F. Supp. 3d 255, 275 (D.D.C. 2017) (disagreeing "that any procedural error nullifies the classification of information" because "[a]s the D.C. Circuit has recognized, 'the consequences of particular violations may vary'" (quoting Lesar, 636 F.2d at 485)); Canning, 134 F. Supp. 3d at 503 (holding that omission of unspecified markings from withheld documents did not affect application of Exemption 1 and recognizing that consequences of violations may vary).

decision."[69] (For a related discussion of markings in the Glomar context, see Exemption 1, Glomar Response, below.)

Duration of Classification and Declassification

Executive Order 13,526 establishes limitations on the length of time information may remain classified[70] and procedures for the declassification of older government information.[71]

At the time of original classification, Executive Order 13,526 requires agencies "to establish a specific date or event for declassification based upon the duration of the national security sensitivity."[72] The Executive Order provides that information is "automatically declassified" upon reaching that date or event.[73] Further, the Executive Order specifies that if the agency is unable to determine "an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original decision, unless the original classification authority otherwise determines that the sensitivity of the information requires that it be marked for declassification for up to 25 years from the date of the original decision."[74] Executive Order 13,526 provides that "[n]o information may remain classified indefinitely."[75]

Executive Order 13,526 contains procedures for declassification, including automatic declassification.[76] It also provides for a "mandatory declassification review" program.[77] The Court of Appeals for the Second Circuit has determined that it will

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[69] Lesar, 636 F.2d at 485; see also Jud. Watch, Inc., 857 F. Supp. 2d at 58-59 (holding that procedural errors did not warrant release and recognizing that "[s]o long as procedural violations do not undermine the agency's decision to classify – as when, for example, a procedural violation suggests that, contrary to the EO, classification was undertaken in order to conceal a violation of law – the Court will not order documents to be released on that ground").

[70] See Exec. Order No. 13,526 § 1.5, 3 C.F.R. 300-01 (2010).

[71] See id. §§ 3.3-3.5, 3 C.F.R. 307-12.

[72] Id. § 1.5(a), 3 C.F.R. 300; see also NARA Classification Directive, 32 C.F.R. § 2001.12(a)(1) (2010) (establishing guidelines for the duration of the classification).

[73] See Exec. Order No. 13,526 § 1.5(a), 3 C.F.R. 300.

[74] Id. § 1.5(b), 3 C.F.R. 300-01; see also NARA Classification Directive, § 2001.12(a)(1)(ii).

[75] Exec. Order No. 13,526 § 1.5(d), 3 C.F.R. 301.

[76] See id. §§ 3.1-3.4, 3 C.F.R. 305-311.

[77] Id. § 3.5, 3 C.F.R. 311-12.

generally not infer that statements by the President constitute a declassification determination unless the statements "are sufficiently specific" and "subsequently trigger[] actual declassification."[78] The Second Circuit is aware of "no authority [that] stands for the proposition that the President can inadvertently declassify information."[79] Further, the court held that a finding by the judiciary of inadvertent declassification would raise separation of powers concerns.[80] That said, in situations where a President's statements may suggest declassification, an agency defending Exemption 1 has the burden of dispelling any ambiguity to establish for the court that the information is, in fact, still classified.[81]

Finally, the Executive Order states that "[i]t is presumed that information that continues to meet the classification requirements under this order requires continued protection."[82] The Executive Order nonetheless 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."[83]

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.[84] The Court of Appeals for the District of

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[78] See N.Y. Times v. CIA, 965 F.3d 109, 122-23 (2d Cir. 2020) (declining to find President's statements constituted declassification action because they were "insufficiently specific to quell any 'lingering doubts' about what they reference," and CIA's affidavits "expressly stated that no declassification procedures had been followed with respect to any documents pertaining to the alleged covert program") (internal citation omitted).

[79] Id. at 123.

[80] Id. (noting that "such [judicial] determinations encroach upon the President's undisputedly broad authority in the realm of national security").

[81] See James Madison Project v. DOJ, No. 17-0597, 2019 WL 3430728, at *2 (D.D.C. July 30, 2019) (holding that agency "bears the burden to show that [documents are properly classified]" and that agency "cannot carry that burden by suggesting that a potential declassification order is ambiguous;" "[r]ather, the agency must dispel any ambiguity").

[82] Exec. Order No. 13,526 § 3.1(d), 3 C.F.R. 306.

[83] Id.

[84] See Lesar v. DOJ, 636 F.2d 472, 479 (D.C. Cir. 1980) (addressing "issue of which Executive Order should apply" when documents were classified under one Executive Order which "was supplanted by" a different Executive Order as the case proceeded in litigation);

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."[85] 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.[86] At the same time, the D.C. Circuit has permitted an agency, as a matter of discretion, to reexamine its classification decision under a newly issued or amended executive order to take into account "changed international and domestic circumstances."[87] The D.C. Circuit has held, though, that "absent a request by the agency to reevaluate an exemption 1 determination based on a new executive order, the district court may not require an agency to apply the new order" and must instead "evaluate the agency's decision under the executive order in force at the time the classification was made."[88]

Deference to Agency Judgment

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see also FOIA Update, Vol. XVI, No. 2 ("OIP Guidance: The Timing of New E.O. Applicability").

[85] Lesar, 636 F.2d at 480; 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"); 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.").

[86] King v. DOJ, 830 F.2d 210, 217 (D.C. Cir. 1987); 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").

[87] 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) (noting that agency chose to reevaluate under "new Executive Order which [became] effective during pendency of the lawsuit").

[88] Campbell, 164 F.3d at 29 (examining provisions of superseding order and finding that it "defines classified information to include information classified under prior orders" and "does not contain any provision that requires an agency to reconsider classification decisions in pending FOIA litigation"); see also DiBacco v. U.S. Army, 795 F.3d 178, 196 (D.C. Cir. 2015) (same).

Courts generally defer to agency expertise in national security cases.[89] Courts accord "*substantial weight* to an agency's affidavit concerning the details of the classified status" of records.[90] The standard of review that courts apply in cases involving classified information is a deferential "logical and plausible" standard.[91] The Court of Appeals for

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[89] See, e.g., ACLU v. NSA, 925 F.3d 576, 601 (2d Cir. 2019) (adopting a deferential posture and declining to "'second-guess the predictive judgments made by the government's intelligence agencies'" (citing Wilner v. NSA, 592 F.3d 60, 76 (2d Cir. 2009))); Leopold v. DOJ, 697 F. App'x 9, 9-10 (D.C. Cir. 2017) (stating that courts "have consistently granted substantial deference to the government's determination that information has important national security implications, and that the disclosure of such information would have harmful ramifications for national security"); 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"); Am. Ctr. for L. & Just. v. U.S. Dep't of State, 354 F. Supp. 3d 1, 12 (D.D.C. 2018) (rejecting plaintiff's suggestion that related or similar information on internet diminishes "long list of potential harms" described by agency, "tak[ing agency declarant]—not the Internet—at his word"); 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 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))).

[90] Knight First Amend. Inst. at Columbia Univ. v. CIA, 11 F.4th 810, 818 (D.C. Cir. 2021) (quoting Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007)); see also, e.g., ACLU v. CIA, 24 F.4th 863, 867 (2d Cir. 2022) (same); Broward Bulldog v. DOJ, 939 F.3d 1164, 1182-83 (11th Cir. 2019) (rejecting assertion that court should review agency's classification decisions de novo and finding district court properly accorded "substantial weight" to agency explanations because "Congress has approved of deference within the context of Exemption 1"); DiBacco v. U.S. Army, 795 F.3d 178, 195-96 (D.C. Cir. 2015) (noting that court "'must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record'" (quoting ACLU v. DOD, 628 F.3d 612, 619 (D.C. Cir. 2011))); Hamdan v. DOJ, 797 F.3d 759, 769 (9th Cir. 2015) ("Where the government invokes FOIA exemptions in cases involving national security issues, we are 'required to accord substantial weight to [the agency's] affidavits.'" (quoting Hunt v. CIA, 981 F.2d 1116, 1119 (9th Cir. 1992))); Houghton v. NSA, 378 F. App'x 235, 237 (3d Cir. 2010) (recognizing need to "afford substantial weight to an agency's affidavit concerning the details of the classified status"); Smith v. CIA, 393 F. Supp. 3d 72, 82 (D.D.C. 2019) (acknowledging that courts "approach affidavits with the awareness that the Executive Branch has a fuller knowledge of what information ought to be classified").

[91] See, e.g., ACLU v. CIA, 24 F.4th at 868 (applying logical and plausible standard to determine that agency properly withheld information related to specific intelligence activities); Knight First Amend. Inst. at Columbia Univ., 11 F.4th at 819 (noting that agency's "'justification for invoking a FOIA exemption is sufficient if it appears logical or plausible'" (quoting Wolf v. CIA, 473 F.3d 370, 374-75 (D.C. Cir. 2007))); ACLU v. DOJ, 640 F. App'x 9, 11 (D.C. Cir. 2016) (finding that "agency's explanations as to why the records are classified are both logical and plausible"); Ctr. for Const. Rts. v. CIA, 765 F.3d 161, 169 (2d Cir. 2014) (finding that release of images of Guantanamo Bay detainee could "logically and

the District of Columbia Circuit has noted that "little proof or explanation is required beyond a plausible assertion that information is properly classified."[92] Such deference is based upon the "magnitude of the national security interests and potential risks at stake,"[93] 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.[94] Indeed, courts ordinarily are very reluctant to substitute their judgment in place of the agency's "unique insights"[95] in the areas of national defense and foreign relations.[96] This is because courts have recognized that national security is a

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plausibly" damage national security because images could be used as propaganda by extremists); Elec. Frontier Found. v. DOJ, 376 F. Supp. 3d 1023, 1035 (N.D. Cal. 2019) (finding agency's declaration "provides sufficient detail . . . to make the Exemption 1 classification plausible"); Rosenberg v. DOD, 342 F. Supp. 3d 62, 84 (D.D.C. 2018) (holding that defendant's statements "readily satisfie[d] the standard for a plausible and logical explanation for classification"); N.Y. Times Co. v. NSA, 205 F. Supp. 3d 374, 381 (S.D.N.Y. 2016) (holding that agency's explanation was "detailed, logical, and plausible" and thus demonstrated that its withholdings fit within Exemption 1).

[92] Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007).

[93] Ctr. for Nat'l Sec. Stud. v. DOJ, 331 F.3d 918, 927 (D.C. Cir. 2003) (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).

[94] 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) (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. Stud., 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"); cf. 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").

[95] Larson v. Dep't of State, 565 F.3d 857, 864 (D.C. Cir. 2009) (recognizing that "Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of a particular classified record").

[96] See, e.g., Ctr. for Int'l Env't. L. v. U.S. Trade Representative, 718 F.3d 899, 903 (D.C. Cir. 2013) (rejecting district court's second guessing of agency's harm judgment and finding that harm to ability of United States to negotiate future trade agreements "is not for us to speculate"); Maynard v. CIA, 986 F.2d 547, 556 n.9 (1st Cir. 1993) (explaining court is "not

"uniquely executive purview"[97] and that "the judiciary is in an extremely poor position to second-guess the executive's judgment" on national security issues.[98] For the same reasons, Congressional requests for declassification do not undermine an agency's classification determinations.[99]

At the same time, it is the court's role to review an agency's classification decision and to determine whether the agency has met its burden.[100] The Court of Appeals for the

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in a position to 'second-guess'" agency's determination regarding need for continued classification of material (quoting Branch v. FBI, 700 F. Supp. 47, 48 (D.D.C. 1988))); Krikorian v. Dep't of State, 984 F.2d 461, 464 (D.C. Cir. 1993) (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) (acknowledging "court must not substitute its judgment for the agency's regarding national defense or foreign policy implications"); Summers v. DOJ, 517 F. Supp. 2d 231, 238 (D.D.C. 2007) (noting that assessing potential for harm to intelligence source from disclosure "is the duty of the agency, and not the court").

[97] Ctr. for Nat'l Sec. Stud., 331 F.3d at 927-28; see also Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (recognizing that courts lack expertise in national security matters); L.A. Times Commc'ns, LLC, 442 F. Supp. 2d at 899 (echoing the belief that national security is "a uniquely executive purview" (citing Zadvydas, 533 U.S. at 696)).

[98] Ctr. for Nat'l Sec. Stud., 331 F.3d at 928; see also Ctr. for Int'l Env't. L., 718 F.3d at 904 (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, 1105 (D.C. Cir. 1982))); Mobley v. CIA, 924 F. Supp. 2d 24, 51 (D.D.C. 2013) ("To the extent that plaintiffs ask this Court to second-guess the CIA's statements . . . their request is inappropriate."), aff'd on other grounds, 806 F.3d 568 (D.C. Cir. 2015); 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").

[99] See Am. Ctr. for L. & Just. v. U.S. Dep't of State, 354 F. Supp. 3d 1,12 (D.D.C. 2018) ("It is the Executive, and not Congress and not the Court, who has the expertise to make such determinations.").

[100] 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); Fla. Immigr. Advoc. 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

Seventh Circuit has rejected the argument that judicial deference on national security issues "leads to the abdication of the role of the judiciary" and has observed that "courts are able to [properly] assess national-security withholdings" "[u]sing such sources as Vaughn indices, sworn affidavits, and in camera review."[101]

The D.C. Circuit has declared that "[w]hen an agency meets its burden through affidavits, in camera review is neither necessary nor appropriate, and in camera inspection is particularly a last resort in national security situations."[102] Further, courts have rejected the notion that additional judicial review should be triggered solely by a requester's unsupported allegations of wrongdoing against the government.[103]

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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 and that its "review is not 'vacuous'") (internal citation omitted); Laws. Comm. for Human Rts. 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. 87-1115, 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).

[101] Stevens v. U.S. Dep't of State, 20 F.4th 337, 344 (7th Cir. 2021).

[102] Mobley v. CIA, 806 F.3d 568, 588 (D.C. Cir. 2015); see, e.g., ACLU v. DOJ, 640 F. App'x 9, 12 (D.C. Cir. 2016) (holding that because plaintiff failed to point to any officially acknowledged, duplicate information, in camera review was unnecessary to determine whether the information was properly withheld); 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))).

[103] 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'") (internal citation omitted); Khatchadourian v. Def. Intel. Agency, 453 F. Supp. 3d 54, 77 (D.D.C. 2020) (finding that "internal [agency] communications which reveal[ed] that a FOIA analyst believed certain records were improperly withheld under Exemption 1 and 3" did not "evince bad faith and inconsistency warranting in camera review"); Competitive Enter. Inst. v. Dep't of Treasury, 319 F. Supp. 3d 410, 422 (D.D.C. 2018) (finding in camera inspection unnecessary without "tangible evidence of agency wrongdoing"); Mobley, 924 F. Supp. 2d at 63 (finding that inconsistency in defendant's declaration "is not evidence of bad faith, nor is it indicative of 'a general sloppiness in the declassification or review process'" (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1131 (D.C. Cir. 1983))); Peltier v. FBI, No. 03-905, 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 accorded little or no weight to opinions of persons other than the agency classification authority,[104] including persons who may have previously maintained some knowledge of the subject matter while employed within the Executive Branch.[105]

In Camera Submissions and Adequate Public Record

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.[106] In camera affidavits have also been employed when

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[104] 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, 924 F. Supp. 2d at 52 (noting that "unsworn opinions of non-governmental actors . . . carry little or no weight in that calculus"); Van Atta v. Def. Intel. 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. Laws. All. for Nuclear Arms Control v. DOE, No. 88-7635, 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).

[105] 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).

[106] See, e.g., Montgomery v. IRS, 40 F.4th 702, 714-15 (D.C. Cir. 2022) (holding that district court properly allowed in camera affidavits and "acted well within its discretion" in refusing to release affidavits); Maynard v. CIA, 986 F.2d 547, 562 (1st Cir. 1993) (affirming after review of public and in camera declarations regarding agency's search where some systems searched were classified); Patterson v. FBI, 893 F.2d 595, 598-99 (3d Cir. 1990) (allowing in camera affidavit 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); Stein v. DOJ, 662 F.2d 1245, 1255-56 (7th Cir. 1981) (same); Mobley v. CIA, 924 F. Supp. 2d 24, 64 (D.D.C. 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), aff'd on other grounds, 806 F.3d 568 (D.C. Cir. 2015); N.Y. Times v. DOJ, 915 F. Supp. 2d 508, 532 (S.D.N.Y. 2013) ("A district court may also conduct in camera review of classified affidavits when national security is at issue."), aff'd in pertinent part & remanded on other grounds, 752 F.3d 123, 144 (2d Cir.

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.[107] In camera affidavits have also been used when "the very association of the identities of the original classifying authorities . . . is itself a classified fact."[108] Courts have held that 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.[109] This public record is intended to provide both a meaningful and fair opportunity for a plaintiff to challenge an agency's actions and an adequate evidentiary basis for a court to rule on an agency's invocation of Exemption 1.[110]

2014); 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"); cf. Lahr v. NTSB, 569 F.3d 964, 986 (9th Cir. 2009) (affirming that agency's in camera affidavit ordered by the district court sufficiently described national security harm) (Exemption 3 case).

[107] See Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (addressing response to request for records regarding *Glomar Explorer* submarine-retrieval ship, with result that "neither confirm nor deny" response is now known as a "Glomar" response or as "Glomarization"); see also Ctr. for Human Rts. & Const. L. v. Nat'l Geospatial-Intel. 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) (internal citation omitted); Hunt v. CIA, 981 F.2d 1116, 1119-20 (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* responses").

[108] Mobley v. DOJ, 870 F. Supp. 2d 61, 69 (D.D.C. 2012) (acknowledging that even the "banal information," like date, author, and number of pages, is properly classified) (internal quotation marks omitted).

[109] Phillippi, 546 F.2d at 1013; see also Armstrong v. Exec. Off. 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"); 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").

[110] 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

Courts have found that counsel for plaintiffs are not entitled to participate in such in camera proceedings.[111] In other instances involving voluminous records, courts have on occasion, either by order[112] or agreement of the parties,[113] had agencies submit samples of the documents at issue for in camera review.

Glomar Response

Executive Order 13,526 provides that "[a]n 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."[114] Known as a Glomar response, this term comes from a series of requests made in 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

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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).

[111] See Salisbury v. United States, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982) (holding that "[i]n any FOIA case in which considerations of national security mandate in camera proceedings, the District Court may act to exclude outside counsel when necessary for secrecy or other reasons"); Hayden v. NSA, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979) (noting that "this court has accepted the idea of [i]n camera review of affidavits and documents without the presence of requester's counsel[] . . . when security is at stake"); 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" withheld information, and thus failed to satisfy second requirement for access to classified information); 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).

[112] See, e.g., Int'l Counsel Bureau v. DOD, 864 F. Supp. 2d 101, 107 (D.D.C. 2012) (ordering in camera review of sample of three videos from total of forty-five withheld under Exemption 1); 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 1,000 processed ones).

[113] 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").

[114] Exec. Order No. 13,526 § 3.6(a), 3 C.F.R. 312 (2010); see, e.g., Wilner v. NSA, 592 F.3d 60, 71 (2d Cir. 2009) (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); Lindsey v. FBI, 490 F. Supp. 3d 1, 11 (D.D.C. 2020) (same); ACLU v. DOJ, 808 F. Supp. 2d 280, 298 (D.D.C. 2011) (same), rev'd on other grounds sub nom., ACLU v. CIA, 710 F.3d 422 (D.C. Cir. 2013).

to recover a sunken Soviet submarine.[115] In that case, the agencies would neither confirm nor deny the existence of the requested records because "such an admission or denial could itself compromise national security."[116] Although there "had been a great deal of speculation in the press concerning the nature of the mission" of the *Glomar Explorer*, the agencies described to the court "why official confirmation of the involvement of the particular agencies in question was undesirable."[117] Since that time, when agencies neither confirm nor deny the existence of records, the response is referred to as a Glomar response, or Glomarization.

This response has been routinely upheld by the courts where it is logical and plausible that revealing the existence of records would harm national security.[118] At the same time, courts have held that if an "agency has already disclosed the fact of the existence (or nonexistence) of responsive records," a Glomar response is not

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[115] See Mil. Audit Project v. Casey, 656 F.2d 724, 728-31 (D.C. Cir. 1981) (providing background and history of request and subsequent litigation).

[116] Id. at 729-30.

[117] Id. at 732.

[118] See, e.g., Knight First Amend. Inst. at Columbia Univ. v. CIA, 11 F.4th 810, 819 (D.C. Cir. 2021) (holding Glomar response proper where "agencies ha[d] logically and plausibly explained why the existence or nonexistence of records is classified information"); Freedom Watch v. NSA, 783 F.3d 1340, 1345 (D.C. Cir. 2015) (holding that DOD properly issued Glomar response to requester seeking documents concerning leak of information about cyberattacks on Iran's nuclear facilities); James Madison Project v. DOJ, 302 F. Supp. 3d 12, 22, 31 (D.D.C. 2018) (holding that "the 'logical nor plausible' standard . . . is used to evaluate an agency's justification for invoking [FOIA Exemption 1] to . . . issue a *Glomar* response" and finding that "FBI properly issued a *Glomar* response" to plaintiff's request seeking copy of Synopsis that plaintiff alleged to exist of "Dossier" prepared by former British intelligence operative Christopher Steele) (internal citation omitted); Klayman v. CIA, 170 F. Supp. 3d 114, 121 (D.D.C. 2016) (finding that "the mere confirmation or denial of the existence of responsive records would reveal a classified fact—namely, whether [the] CIA has a covert relationship with [the subject]"); Moore v. FBI, 883 F. Supp. 2d 155, 164 (D.D.C. 2012) (concluding CIA properly invoked a 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'" (quoting agency declaration)); Cozen O'Connor v. U.S. Dep't of Treasury, 570 F. Supp. 2d 749, 788-89 (E.D. Pa. 2008) (affirming 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) (upholding 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).

appropriate.[119] (For further discussion, see Exemption 1, Waiver of Exemption 1 Protection, Waiver in the Glomar Context, below.) The Court of Appeals for the District of Columbia Circuit has held that when an agency issues a Glomar response, the agency is not required to conduct a search for responsive records or submit a Vaughn Index because a Glomar response "'narrows the FOIA issue to the existence of records vel non.'"[120]

In Glomar cases where plaintiffs have challenged agency compliance with the Executive Order's procedural requirements, courts have recognized that Glomar responses are unique in that they are "intangible forms of classified information" that "arise[] solely in the context of a response to a request for records."[121] Because an agency is not required to create or maintain a tangible record in response to a FOIA request, courts have held in Glomar cases that compliance with certain procedural requirements, "is not an absolute prerequisite to classifying information."[122] This includes the failure to

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[119] ACLU v. CIA, 710 F.3d 422, 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 implicitly acknowledged) (internal citation omitted); see, e.g., ACLU v. DOD, 322 F. Supp. 3d 464, 478 (S.D.N.Y. 2018) (rejecting use of Glomar – which sought to prevent revealing whether CIA had intelligence interest in matter or whether certain individuals had decision-making authority on matter – because White House press secretary made public statements that "clearly disclosed the CIA's intelligence interest in the matter, . . . explicitly acknowledged that the U.S. participated, . . . and that the Director of the [CIA] (explicitly referred to by his title) was in the room when the matter was decided"). But see Mobley v. CIA, 806 F.3d 568, 584 (D.C. Cir. 2015) (finding that acknowledgment by foreign government or due to "a simple clerical mistake in FOIA processing" cannot waive Glomar response).

[120] Wolf v. CIA, 473 F.3d 370, 374 n.4 (D.C. Cir. 2007); see also Carter v. NSA, No. 13-5322, 2014 WL 2178708, at *1 (D.C. Cir. Apr. 23, 2014) (holding "because [the agency] properly invoked a "Glomar" response, it was not required to submit a Vaughn index"); Elec. Priv. Info. Ctr. v. NSA, 678 F.3d 926, 934 (D.C. Cir. 2012) (holding "[b]ecause we find the [agency] declaration sufficient to support [the agency's] *Glomar* response, requiring [the agency] to conduct a search and segregability analysis would be a meaningless – not to mention costly – exercise"); Project for Priv. & Surveillance Accountability, Inc. v. DOJ, No. 20-3657, 2022 WL 4365745, at *6 (D.D.C. Sept. 19, 2022) ("The D.C. Circuit has repeatedly held . . . that when an agency issues a *Glomar* response, no search for responsive documents needs to be undertaken.").

[121] Mobley v. CIA, 924 F. Supp. 2d 24, 49 (D.D.C. 2013), aff'd on other grounds, 806 F.3d 568 (D.C. Cir. 2015); see also Project for Priv. & Surveillance Accountability, Inc., 2022 WL 4365745, at *7 (noting that both parties agreed that a Glomar response "is an intangible form[] of classified information"); cf. Nat'l Sec. Couns. v. CIA, No. 12-284, 2016 WL 6684182, at *19 (D.D.C. Nov. 14, 2016) (recognizing "the fundamental difference between a *Glomar* response and other classified information").

[122] Mobley, 924 F. Supp. 2d at 49.

provide necessary markings,[123] establish a declassification timeline,[124] or comply with special procedures for classifying information after receiving a FOIA request.[125]

Waiver of Exemption 1 Protection

An agency waives its ability to invoke Exemption 1 as to any information the agency has "officially acknowledged."[126] The Courts of Appeals for the District of Columbia Circuit has held that, in what is sometimes referred to as the Fitzgibbon test, a plaintiff must satisfy three elements to prove that information has been "officially acknowledged."[127] Under that test, information has been "officially acknowledged" if (1) "the information requested [is] as specific as the information previously released;" (2) "[the information requested] match[es] the information previously disclosed;" and (3) "[the information requested] already ha[s] been made public through an official and documented disclosure."[128] Further, the D.C. Circuit has elaborated that "[t]his test is

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[123] Project for Priv. & Surveillance Accountability, Inc., 2022 WL 4365745, at *8 (rejecting procedural attack on Glomar for failure to provide necessary markings and noting that marking "the original FOIA requests . . . and the agency's Glomar letter to the requester" "would not satisfy the procedural requirements of the Order; only marking the concededly intangible Glomar fact would do so – a metaphysical impossibility").

[124] See Mobley, 924 F. Supp. 2d at 49; Nat. Sec. Couns. v. CIA, 2016 WL 6684182, at 19 (holding agency "is not required to establish a declassification timeline in order to 'properly classif[y]' a *Glomar* fact under Executive Order 13526") (internal citation omitted).

[125] Project for Priv. & Surveillance Accountability, Inc., 2022 WL 4365745, at *7 (finding Glomar response proper despite agency's failure to show compliance with special procedures for classifying information after receiving a FOIA request).

[126] See Leopold v. CIA, 987 F.3d 163, 170 (D.C. Cir. 2021) (explaining that if "President Trump's tweet officially acknowledged the existence of [CIA] records . . .," then CIA's Glomar would have been waived); Mobley v. CIA, 806 F.3d 568, 583 (D.C. Cir. 2015) (reiterating that "when information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim" (citing Fitzgibbon v. CIA, 911 F.2d 755, 765-66 (D.C. Cir. 1990))); ACLU v. DOD, 628 F.3d 612, 620-21 (D.C. Cir. 2011) (same).

[127] Fitzgibbon v. CIA, 911 F.2d 755, 765-66 (D.C. Cir. 1990).

[128] Leopold, 987 F.3d at 170; see also, e.g., N.Y. Times v. CIA, 965 F.3d 109, 116 (2d Cir. 2020) (same); ACLU v. DOD, 628 F.3d at 620-21 (same); Wilson v. CIA, 586 F.3d 171, 186 (2d Cir. 2009) (same); Fitzgibbon, 911 F.2d at 765-66 (same); Rosenberg v. DOD, 342 F. Supp. 3d 62, 83-84 (D.D.C. 2018) (same). But see N.Y. Times v. DOJ, 756 F.3d 100, 120 (2d Cir. 2014) (applying only two parts of test and stating that "matching" aspect of the test does not require absolute identity because "such a requirement would make little sense" and "[a] FOIA requester would have little need for undisclosed information if it had to match precisely information previously disclosed").

quite strict" and "[p]rior disclosure of similar information does not suffice; instead, the *specific* information sought by the plaintiff must already be in the public domain by official disclosure."[129]

Courts have consistently held that the plaintiff in a FOIA case bears the burden of proving waiver.[130] (For further discussion, see Waiver and Discretionary Disclosure, Waiver.)

Matching and Specificity Prongs

The first two elements of the Fitzgibbon test require the requested information "match" and be "as specific as" the disclosed information.[131] The D.C. Circuit has held

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[129] ACLU v. DOJ, 640 F. App'x 9, 11 (D.C. Cir. 2016) (quoting Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007)) (internal quotation marks omitted); see also Students Against Genocide v. Dep't of State, 257 F.3d 828, 835 (D.C. Cir. 2001) (holding that prior release of photographs similar to those withheld did not waive Exemption 1 because 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)).

[130] See, e.g., Leopold, 987 F. 3d at 170 (holding that "[t]he initial burden rests with the requester, who must 'point[] to specific information in the public domain that appears to duplicate that being withheld'" (quoting ACLU v. CIA, 710 F.3d 422, 427 (D.C. Cir. 2013))); Pub. Citizen v. Dep't of State, 276 F.3d 634, 645 (D.C. Cir. 2002) (rejecting waiver claim based on speculation that records were potentially viewed by researchers and reaffirming that burden is on requester to establish that specific record in public domain duplicates that being withheld); see also Pub. Citizen v. Dep't of State, 782 F. Supp. 144, 145-46 (D.D.C. 1992) (noting that "plaintiff asserting a claim of prior disclosure bears the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld"), amended by 787 F. Supp. 14 (D.D.C. 1992) (granting agency's motion for reconsideration and amending order to hold that certain documents were properly withheld under Exemptions 1 and 5).

[131] Fitzgibbon, 911 F.2d at 765-66; see, e.g., Leopold, 987 F.3d at 170-71 (holding that President's tweet did not constitute an official acknowledgment because it "is subject to several plausible interpretations" and did not "point to specific information that matches the information sought – the existence of Agency records"); N.Y. Times v. CIA, 965 F.3d at 116 (holding that "a general acknowledgement of the existence of a program alone does not wholesale waive an agency's ability to assert *Glomar* where certain aspects of the program remain undisclosed," and finding no waiver where statements by President left "lingering doubts" about existence of records, and where court would be required to "draw inferences" to find official acknowledgment of existence of records); Open Soc'y Just. Initiative v. CIA, 505 F. Supp. 3d 234, 252 (S.D.N.Y. 2020) (holding that CIA Director's remarks in combination with President's statements are sufficiently specific and matching to "supply an official acknowledgement that the CIA created a written product analyzing Khashoggi's killing," thus waiving Glomar as to fact of report's existence; however, President's statements about report's conclusions were sufficiently ambiguous as to not waive

that these elements present a "high hurdle for a FOIA plaintiff to clear" because of the government's "vital interest in information relating to the national security and foreign affairs."[132]

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, gives the agency "a strong disincentive ever to provide its citizenry with briefings of any kind on sensitive topics."[133] Indeed, in an opinion following this D.C. Circuit decision, the Court of Appeals for the Seventh Circuit reasoned that the

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Exemption 1 as report's conclusions); Am. Ctr. for L. & Just. v. NSA, 474 F. Supp. 3d 109, 124-28 (D.D.C. 2020) (discussing implications of declassified memorandum on various parts of FOIA request and whether information in that memorandum specifically matched categories of information requested; noting that where waiver has occurred, scope of waiver is narrow to information that specifically matches what has previously been officially disclosed); ACLU v. DOD, 435 F. Supp. 3d 539, 561-67 (S.D.N.Y. 2020) (discussing various categories of records in turn and holding that Glomar proper where sworn affidavits explained that withheld information contained greater detail than general official disclosure), *preceded by* 322 F. Supp. 3d at 480-81 (2018) (holding that although CIA's broader Glomar was not justified as a result of official disclosure, court would give CIA opportunity to "assess whether a more targeted *Glomar* submission may viably be made" because several of ACLU's requests "seek much more specific (and comprehensive) data and records than [the broad information officially disclosed]"); Osen LLC v. U.S. Cent. Command, 375 F. Supp. 3d 409, 423 (S.D.N.Y. 2019) (finding requested information on Explosively Formed Penetrator (EFP) size was "'as specific'" as prior disclosures and had been officially acknowledged but prior disclosure of certain EFP strike photographs did not constitute waiver as to any and all EFP photographs) (internal citation omitted); Elec. Frontier Found. v. DOJ, 532 F. Supp. 2d 22, 24 (D.D.C. 2008) (ruling against waiver because information in public domain is not as specific as information requested); see also Elec. Priv. Info. Ctr. v. DOJ, 584 F. Supp. 2d 65, 71 (D.D.C. 2008) (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").

[132] Pub. Citizen v. Dep't of State, 11 F.3d 198, 203 (D.C. Cir. 1993); Am. Ctr. for L. & Just., 474 F. Supp. 3d at 123 ("This 'insistence on exactitude' honors 'the Government's vital interest in information relating to national security.'" (quoting Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007))).

[133] Pub. Citizen, 11 F.3d at 203.

public "is better off under a system that permits [the agency] to reveal some things without revealing everything."[134]

Official Disclosure Prong

The third element of the Fitzgibbon test requires that the requested information "already have been made public through an official and documented disclosure."[135] Courts have carefully distinguished between a bona fide declassification action or official release on the one hand and an unsubstantiated speculation lacking official confirmation on the other,[136] refusing to consider classified information to be in the public domain

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[134] Bassiouni v. CIA, 392 F.3d 244, 247 (7th Cir. 2004) (explaining that "if even a smidgen of disclosure required [the agency] to open its files, there would be no smidgens"); see also Fitzgibbon, 911 F.2d at 765-66 (holding that information published in congressional report did not constitute "official acknowledgment" of purported location of CIA station because information sought related to earlier time period than that discussed in report); Rosenberg v. DOD, 342 F. Supp. 62, 85 (D.D.C. 2018) (holding that similar statistics from previous time period – outside scope of request – are not a "match"); ACLU v. DOD, 584 F. Supp. 2d 19, 25-26 (D.D.C. 2009) (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 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).

[135] Fitzgibbon, 911 F.2d at 765-66.

[136] See Leopold, 987 F.3d at 170 (recounting that "official acknowledgement cannot be based on mere public speculation no matter how widespread" (quoting Wolf v. CIA, 473 F.3d 370, 378 (D.C. Cir. 2007))); N.Y. Times v. CIA, 965 F.3d at 122-23 (holding that [d]eclassification cannot occur unless designated officials follow specified procedures," and where "no declassification procedures had been followed with respect to any documents" no declassification had occurred "[b]ecause declassification, even by the President, must follow established procedures"); James Madison Project v. DOJ, No. 17-0597, 2019 WL 3430728, at *7 (D.D.C. July 30, 2019) (finding no clear intention to declassify where White House press release stated President directed DOJ to declassify documents but subsequent statements by President and DOJ made his intentions unclear, yet also reiterating agency's burden to establish proper classification, especially in light of ambiguity); 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); cf. ACLU v. DOD, 492 F. Supp. 3d 250, 265-66 (S.D.N.Y. 2020) (finding that ancillary disclosure in report by DOD spokesperson of update to procedures and criteria for identifying suspected terrorists to capture or kill abroad did not constitute official disclosure of underlying update to procedures because "mention of the update to the . . . Guidance was an 'oblique reference' limited to one paragraph in a voluminous report that extensively covered a different topic" (quoting agency declaration)).

unless it has been officially disclosed.[137] Courts have also rejected the view that the availability of information on the internet or widespread reports in the media about the general subject matter of the FOIA request are sufficient to overcome an agency's Exemption 1 claim for related records.[138]

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[137] See, e.g., Frugone v. CIA, 169 F.3d 772, 775 (D.C. Cir. 1999) (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, 11 F.3d at 201 (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. Nuclear Regul. Comm'n, 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 v. Dep't of State, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983) (observing that a foreign government can 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"), aff'd, 640 F. App'x 9 (D.C. Cir. 2016); 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. 01-2274, 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").

[138] See N.Y. Times v. CIA, 965 F.3d at 116 (cautioning that the courts will "'not infer official disclosure of information classified by the CIA from [] widespread public discussion of a classified matter'" (quoting Wilson v. CIA, 586 F.3d 171, 186-87 (2d Cir. 2009))); Am. Ctr. for L. & Just. v. NSA, 474 F. Supp. 3d 109, 122 (D.D.C. 2020) (reiterating and holding that press reports on subject cannot waive Glomar responses, nor can fact that information is purportedly "widely known" overcome Glomar response); Am. Ctr. for L. & Just. v. U.S. Dep't of State, 354 F. Supp. 3d 1, 12 (D.D.C. 2018) (holding that existence of related or similar information on internet does not constitute official acknowledgement, and warning that "[i]f Exemption 1 were considered waived every time a controversial issue was discussed on the Internet, then even the most sensitive information would be subject to disclosure"); 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 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).

The D.C. Circuit has "framed a general rule that disclosure by one federal agency does not waive another agency's right to assert [Exemption 1]" because such a disclosure does not constitute an official disclosure by the latter agency.[139] The Court has recognized "one limited exception to the general rule: if a public disclosure is 'made by an authorized representative of the agency's parent,' it is 'official' as to the subordinate agency."[140] This exception has been applied in two situations.[141] "First, a disclosure by one component of an executive department may bind 'another component *within*' the same department."[142] Second, an official acknowledgement made by the President (or by a subordinate acting at the direction of the President) would be attributable to Executive Branch agencies.[143] The D.C. Circuit has declined to apply this exception in a third situation where a plaintiff

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[139] Knight First Amend. Inst. at Columbia Univ. v. CIA, 11 F.4th 810, 816 (D.C. Cir. 2021) (internal quotation marks omitted) (quoting Mobley v. CIA, 806 F.3d 568, 583 (D.C. Cir. 2015) and citing Frugone, 169 F.3d at 774-75); see also N.Y. Times v. CIA, 965 F.3d at 121 (holding that "high-ranking officer in the Department of Defense[] was not authorized to speak for the CIA," and thus his statements did not constitute official disclosure by CIA).

[140] Knight First Amend. Inst. at Columbia Univ., 11 F.4th at 816.

[141] Id.

[142] Id. at 817 (quoting Marino v. CIA, 685 F.3d 1076, 1082 (D.C. Cir. 2012)); Marino, 685 F.3d at 1082 (finding that "a federal prosecutor's decision to release information at trial is enough to trigger the public domain exception where the FOIA request is directed to [a different] component within the Department of Justice"); Davis v. DOJ, 968 F.2d 1276, 1279-82 (D.C. Cir. 1992) (disallowing Glomar response by different DOJ component where U.S. Attorney's Office released documents regarding subject of request); Osen LLC v. U.S. Cent. Command, 375 F. Supp. 3d 409, 422-23 (S.D.N.Y. 2019) (holding that disclosure of information by a component within same Executive Branch agency constituted official acknowledgement on behalf of entire agency and waived CENTCOM's ability to withhold matching information).

[143] Knight First Amend. Inst. at Columbia Univ., 11 F.4th at 817 ("the President, as the 'head' of the entire Executive Branch, may make official acknowledgements binding on its agencies") (internal citations omitted); ACLU v. CIA, 710 F.3d 422, 429 n.7 (D.C. Cir. 2013) (holding that the President's counterterrorism advisor acting as "instructed" by the President did officially acknowledge information by disclosing such information, and that this was attributable to the CIA); Open Soc'y Just. Initiative v. CIA, 505 F. Supp. 3d 234, 249 (S.D.N.Y. 2020) (holding that "official statements by the top two officials in the Executive Branch [the President and Vice President] sufficiently acknowledge the tape to preclude the Government from claiming that its identification on a *Vaughn* index would reveal undisclosed classified information," and further, these statements, in combination with statements by the CIA, sufficiently connect the tape to the CIA); James Madison Project v. DOJ, 302 F. Supp. 3d 12, 24 (D.D.C. 2018) ("The D.C. Circuit has recognized that '[a] disclosure made by the President, or by [an] advisor acting as "instructed" by the president,' is attributable to executive branch agencies for purposes of the official acknowledgement doctrine." (citing ACLU v. CIA, 710 F.3d at 429 n.7)).

argued that an official disclosure on behalf of "the United States" by an executive branch agency with a component in the intelligence community should be binding on the entire intelligence community.[144]

Statements made by former officials after they have left service "do not constitute official statements and, therefore, cannot be treated as an official acknowledgement of the existence of a record."[145] Further, such statements will not be considered as "supplemental" evidence because "statements from a non-authoritative source cannot possibly bolster or undermine statements from an authoritative source."[146] In addition, one court held that documents disclosed to plaintiff's counsel under seal during a criminal trial "do[] not entitle the public to broad access to classified documents now."[147]

The D.C. Circuit has held that an accidental disclosure through "a simple clerical mistake" does not result in an "official and documented" disclosure.[148] Finally, the D.C. Circuit has also determined that congressional publications and disclosures by members of Congress do not constitute "official acknowledgment" for purposes of the FOIA.[149]

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[144] Knight First Amend. Inst. at Columbia Univ., 11 F.4th at 818 ("We see little basis for a rule permitting so many agencies to make official acknowledgements extending across large swaths of the entire Executive Branch[, and] . . . the rationale for not imputing statements by one agency to another applies with greater force, not lesser, in the intelligence context.").

[145] James Madison Project, 302 F. Supp. 3d at 27; see Am. Ctr. for L. & Just. v. NSA, 474 F. Supp. 3d 109, 121, 127 (D.D.C. 2020) (holding that statements by former official cannot constitute official disclosure by agency and cannot overcome agency's Glomar response); see also Afshar v. Dep't of State, 702 F.2d 1125, 1133-34 (D.C. Cir. 1983) (holding that disclosures in books authored by former CIA officials – screened and approved by the CIA – are not "tantamount to official executive acknowledgments"); Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989) (concluding that affidavit of retired naval officer "cannot effect an official disclosure of information" on behalf of the Navy).

[146] James Madison Project, 302 F. Supp. 3d at 28.

[147] Darui v. Dep't of State, 798 F. Supp. 2d 32, 42 (D.D.C. 2011).

[148] Mobley v. CIA, 806 F.3d 568, 584 (D.C. Cir. 2015).

[149] See Am. Ctr. for L. & Just. v. NSA, 474 F. Supp. 3d at 122 (holding that "members of Congress [cannot] waive *Glomar* responses" as they are not official agency disclosures); see also 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"); Mil. 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).

Waiver in the Glomar Context

The principles of waiver also apply in the Glomar context, where an agency can lose the ability to assert a Glomar because the "agency has already disclosed the fact of the existence (or nonexistence) of responsive records."[150] The District Court for the District of Columbia has explained how the three prongs of the Fitzgibbon test work in the Glomar context:

> The D.C. Circuit consistently has applied Fitzgibbon's three prongs to evaluate a claim of "official acknowledgment" in the *Glomar* context. That said, the three prongs of the Fitzgibbon test are not as differentiated in the *Glomar* context as they are with respect to a withheld document's contents. As the court explained in Wolf v. CIA: "In the *Glomar* context . . . if the prior disclosure establishes the *existence* (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue – the existence of records – and the specific request for that information." In other words, in the *Glomar* context, the first and second prongs of Fitzgibbon merge into one and the third prong continues to operate independently. Ultimately, then, to overcome an agency's *Glomar* response when relying on an official acknowledgement, "the requesting plaintiff must *pinpoint* an agency record that both matches the plaintiff's request and has been publicly and officially acknowledged by the agency."[151]

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[150] ACLU v. CIA, 710 F.3d 422, 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 implicitly acknowledged) (internal citation omitted); see, e.g., ACLU v. DOD, 322 F. Supp. 3d 464, 478 (S.D.N.Y. 2018) (rejecting use of Glomar – which sought to prevent revealing whether CIA had intelligence interest in matter or whether certain individuals had decision-making authority on matter – because White House press secretary made public statements that "clearly disclosed the CIA's intelligence interest in the matter, . . . explicitly acknowledged that the U.S. participated, . . . and that the Director of the [CIA] (explicitly referred to by his title) was in the room when the matter was decided"); Nat'l Sec. Archive v. CIA, 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"); cf. Mobley, 806 F.3d at 584 (finding that acknowledgment by foreign government or due to "a simple clerical mistake in FOIA processing" cannot waive Glomar response).

[151] James Madison Project, 302 F. Supp. 3d at 21 (internal citations omitted); see also Leopold v. CIA, 987 F.3d 163, 171 (D.C. Cir. 2021) (quoting Wolf and finding that "[t]o establish official acknowledgment our precedents require certainty, not assumptions of this sort"); Smith v. CIA, 393 F. Supp. 3d 72, 79 (D.D.C. 2019) (acknowledging that "[a]n official acknowledgement inquiry in the *Glomar* context is not identical to a situation where an agency *does* acknowledge the existence of a record and invokes a FOIA exemption" and

The D.C. Circuit has held that "[o]fficial acknowledgment ends all doubt[,]"[152] meaning that any such disclosure in this context "must leave no doubt that the agency possesses the requested records."[153] The court further opined that "[t]he official acknowledgement standard is not [a] 'surely the agency must have it' standard."[154]

In certain instances, where the "totality of collective acknowledgments . . . 'are tantamount to an acknowledgment that the [Agency] has documents on the subject [of a FOIA request],'" it may be "'neither logical nor plausible' for the Agency to deny an interest in [the subject]."[155] Under these circumstances, the requirement remains that the collective acknowledgements, taken together, "remove *all* doubt as to their meaning."[156] For example, in ACLU v. CIA,[157] based on a series of public statements made by the President, his counterterrorism advisor, and the then-Director of the CIA, the D.C.

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describing this distinction); James Madison Project, 302 F. Supp. 3d at 20 (stating that plaintiff "bears burden of pointing to specific public statements that officially acknowledge records subject to a *Glomar* response"); see, e.g., N.Y. Times v. CIA, 314 F. Supp. 3d 519, 529-30 (S.D.N.Y. 2018) (holding that (1) President's "tweet does not confirm the existence of records being requested let alone the program"; (2) President's "statements [to a media outlet] are similarly ambiguous and lack the requisite specificity to be considered an official acknowledgment"; and (3) even if President's "statements officially acknowledge the existence of a covert program to arm and train Syrian rebels, . . . a general acknowledgment of the existence of a program alone does not wholesale waive an agency's ability to invoke Glomar where certain aspects of the program remain undisclosed").

[152] Leopold, 987 F.3d at 170 (quoting Gardels v. CIA, 689 F.2d 1100, 1105 (D.C. Cir. 1982)).

[153] James Madison Project, 302 F. Supp. 3d at 22, 29-30 (internal quotation marks omitted) (further noting that the D.C. Circuit "has provided guidance on this issue in two types of cases: (1) where the existence of responsive records is plain on the face of the official statement, . . . and (2) where the substance of an official statement and the context in which it is made permits the inescapable inference that the requested records in fact exist . . . .").

[154] Id. at 29, 35 (holding that "none of [the President's] statements or tweets acknowledge the existence of the Synopsis, let alone that he received a copy of it from the FBI" and that "it does not follow that just because a tweet is an 'official' statement of the President that its substance is necessarily grounded in information contained in government records") (internal citation omitted).

[155] Leopold, 987 F.3d at 171 (quoting ACLU v. CIA, 710 F.3d at 431).

[156] N.Y. Times v. CIA, 965 F.3d 109, 112 (2d Cir. 2020); see also Leopold, 987 F.3d at 170 ("'Official acknowledgement ends all doubt . . . '"; and, where it is both plausible that tweet reveals program and that it does not, "therein lies a problem" for plaintiff (quoting Gardels, 689 F.2d at 1105)).

[157] 710 F.3d 422, 432 (D.C. Cir. 2013).

Circuit rejected a Glomar intended to shield whether the CIA had an intelligence interest in drone strikes.[158] The government had not explicitly confirmed the CIA's intelligence interest in drone strikes in any of these public statements, but taken together, the court found that as a result of these statements it was no longer logical or plausible for the CIA to deny such an interest in drone strikes.[159]

By comparison, in two appellate decisions regarding a tweet by the President and other public statements concerning alleged payments to Syrian rebels, the D.C. Circuit and the Court of Appeals for the Second Circuit each found that doubts regarding the existence of responsive records meant that the agency's Exemption 1 Glomar responses were not waived.[160] In Leopold v. CIA,[161] the D.C. Circuit determined that a tweet "subject to several plausible interpretations" created doubt about the tweet's meaning and, therefore, did not officially acknowledge the existence of a program to fund Syrian rebels.[162] The court further determined that "[e]ven if the [] tweet revealed *some* program, it did not reveal the existence of Agency records about that alleged program."[163] The court distinguished this tweet from the circumstances in ACLU v. CIA and found that "[w]hereas [the court in] ACLU relied on specific statements revealing the Agency's interest," the district court in Leopold simply assumed that "'it seems wildly unlikely'" that responsive records did not exist.[164] The court explained that "[t]o establish official acknowledgment our precedents require certainty, not assumptions of this sort."[165] In

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[158] Id. at 430-32.

[159] Id. (noting that the President, his counterterrorism advisor, and the then-Director of the CIA "publicly acknowledged that the United States uses drone strikes against al Qaeda" and further noting additional statements made by the then-CIA Director regarding his knowledge of drone strikes and their precision, which the Court said "could [not] have made [the CIA's] knowledge of – and therefore 'interest' in – drone strikes any clearer") (internal citation omitted).

[160] See Leopold, 987 F.3d at 170-71; N.Y. Times v. CIA, 965 F.3d at 112.

[161] 987 F.3d 163, 170 (D.C. Cir. 2021).

[162] Id. at 170-71.

[163] Id. (analyzing President's tweet regarding news story about President ending program, where it was not clear whether President's statement affirmatively confirmed that he ended program or whether it merely provided "editorial interpretations" regarding news story's assertion and, in any event, President's tweet made no connection between agency and program).

[164] Id. at 171 (quoting Leopold v. CIA, 419 F. Supp. 3d 56, 67 (D.D.C. 2019).

[165] Id.

New York Times v. CIA,[166] the Second Circuit determined that the same tweet by the President and another statement made by the President in a news article concerning alleged payments to Syrian rebels did not "remove *all* doubt as to their meaning," and thus did not allow the Court to find an inescapable inference that records existed.[167] As in Leopold, the court distinguished these statements from those in ACLU v. CIA, which "were far more precise, thorough, and numerous" and which "were detailed enough to 'leave no doubt that some U.S. agency' operates drones."[168] The court rejected plaintiff's assertion that the President's statements "would be revealing nothing more than" the CIA's interest in the subject matter of the request; rather, the CIA articulated much more specific harms that would be caused by the disclosure of the existence of records.[169]

Consistent with these principles, where an agency has already officially disclosed information that would sufficiently undermine the agency's basis for asserting that acknowledging the existence or non-existence of responsive records would harm national security, a Glomar response would not be appropriate.[170]

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[166] 965 F.3d 109, 112 (2d Cir. 2020).

[167] Id. (analyzing President's tweet and his statement that matter "was 'not something that [he] was involved in' and that the decision was 'made by people, not me,'" and holding that no waiver occurred where statements made by President left "lingering doubts" about existence of records and where court would be required to "draw inferences" to find official acknowledgment of existence of records (quoting presidential interview)).

[168] Id. at 120; see also Leopold, 987 F.3d at 171 (quoting portions of N.Y. Times v. CIA, 965 F.3d at 120).

[169] N.Y. Times v. CIA, 965 F.3d at 112 (noting that the CIA's affiant attested that "acknowledging the existence of responsive documents would: (1) 'confirm the existence and the focus of a sensitive Agency activity that is by definition kept hidden to protect U.S. Government foreign policy objectives'; (2) 'reveal whether or not the United States Government exercised extraordinary legal authorities to covertly influence the political, economic, and/or military conditions in Syria,' which could, 'in turn, either compromise a specific foreign policy goal . . . or serve as confirmation for U.S. adversaries that there was no such objective'; and 'require the disclosure of an intelligence source or method'" (quoting agency declaration)).

[170] N.Y. Times v. DOJ, 756 F.3d 100, 122 (2d Cir. 2014) (holding that CIA's argument for use of Glomar "evaporates," once CIA was identified by former CIA Director as having "had an operational role in targeted drone killings"); ACLU v. DOD, 322 F. Supp. 3d 464, 479 (S.D.N.Y. 2018) (holding that "where an agency's official acknowledgements make untenable the basis of its *Glomar* response – *i.e.*, where agency statements have exposed as fallacious the basis for claiming that revealing the existence of records would cause the harm underlying a FOIA exemption – the agency's *Glomar* response may be rejected in toto"); see also ACLU v. DOD, 492 F. Supp. 3d 250, 268 (S.D.N.Y. 2020) (finding no reasonable expectation that damage to national security would result from disclosing fact of updated guidance in investigation report because "[n]othing in the record suggests that such an extensive military investigation, authored and approved by such high-level military

Separately, the Second Circuit has found that although a sister agency's disclosure does not constitute an official acknowledgment by the non-disclosing agency, the sister agency's disclosures could "bear on the [non-disclosing agency's] position that the mere acknowledgment that it does or does not have possession of documents . . . would harm the national security."[171]

Exclusion Considerations

Finally, the FOIA statute excludes from the requirements of the FOIA those records maintained by the FBI which concern "foreign intelligence or counterintelligence, or international terrorism," where the existence of such records is classified for "as long as the existence of the records remains classified information."[172] (For a further discussion of this provision, see Exclusions.)

officials, concerning the rules for high-stake military operations, could leave any doubt in the mind of any reasonable observer regarding the existence of updated guidance confirmed there-in").

[171] Florez v. CIA, 829 F.3d 178, 186 (2d Cir. 2016) (remanding to district court where case subsequently settled); see also N.Y. Times v. CIA, 965 F.3d at 121-22 (holding that "there are times when other agency disclosures can be 'relevant evidence' regarding the 'sufficiency of the justifications set forth by the [agency] in support of its *Glomar* response,'" but declining to find that certain ambiguous statements by officials at another agency were sufficient in that case to constitute official acknowledgement (quoting Florez, 829 F.3d at 184, 187)).

[172] 5 U.S.C. § 552(c)(3) (2018); see also OIP Guidance: Implementing FOIA's Statutory Exclusion Provisions (advising agencies that "given the unusual nature of the exclusion provisions, the limited circumstances in which they apply, and the relative infrequency with which they are employed, any agency considering whether to invoke an exclusion should consult first with the Office of Information Policy" to "help ensure that all aspects of the request and possible excludable records are reviewed and analyzed before determining whether use of an exclusion is warranted") (posted 9/14/2012).