UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADAM JOHNSON, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, Defendant.	Case No. 17 Civ. 1928 (CM)

(U) SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF THE CENTRAL INTELLIGENCE AGENCY'S MOTION FOR SUMMARY JUDGMENT

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(U) The CIA respectfully submits this supplemental memorandum of law in further support of its motion for summary judgment and in opposition to plaintiff Adam Johnson's ("Plaintiff") cross-motion for summary judgment in this Freedom of Information Act ("FOIA") lawsuit, pursuant to the Court's January 19, 2018, Memorandum Order (the "Order"), Docket No. 28. In the Order, the Court directed the CIA to provide further briefing addressing whether applicable FOIA exemptions had been waived by virtue of the CIA's limited disclosure of certain classified and statutorily protected information to three journalists in the five emails at issue. *See* Order at 9.

(U) The protections of FOIA's exemptions have not been waived. The Supreme Court has recognized that the National Security Act grants the CIA "broad discretion" and "sweeping power" to protect intelligence sources and methods, and the CIA's declarations demonstrate that the limited disclosures at issue were made for the purpose of protecting its sources and methods. Moreover, as the Court recognized in the Order, public release of the information withheld from the emails — which indisputably consists of properly classified and statutorily protected information concerning intelligence sources and methods — would present a "very real danger" to those sources and methods. Order at 9. The Court's supposition that a limited disclosure of information to three journalists necessarily equates to a disclosure to the public at large, Order at 9 & n.2, is legally and factually mistaken. The record demonstrates beyond dispute that the classified and statutorily protected information withheld from the emails has not entered the public domain. For these reasons, the limited disclosures here did not effect any waiver of FOIA's exemptions. Even if the Court were to find a waiver analysis appropriate in this context — which it should not — the Court should not order disclosure here.

(U) RELEVANT FACTUAL BACKGROUND

As explained in the Classified Shiner Declaration, the five emails at issue in this matter consist of communications in which the CIA provided certain classified and statutorily protected information to certain reporters [1]

With respect to four of the five emails,

[1] (U) The unredacted emails are attached to this brief at Tabs 1–5, corresponding to Exhibits C–G, respectively, of the Declaration of Anthony J. Sun dated August 25, 2017, Docket No. 17.

With respect to the fifth email,

(U) ARGUMENT

(U) There has been no waiver of the protections of FOIA exemptions by virtue of the CIA's limited disclosures to the three journalists in the emails at issue. Those disclosures were made, in the CIA's discretion, to protect intelligence sources and methods, and did not result in

the withheld information being introduced into the public domain. Even if the Court were to find a waiver analysis appropriate in this context — which it should not — the Court should not order disclosure of the withheld information.

I. (U) EXEMPTION 3 AND THE NATIONAL SECURITY ACT ARE NOT WAIVED BY LIMITED AGENCY DISCLOSURES TO PROTECT INTELLIGENCE SOURCES AND METHODS

(U) Although Exemptions 1 and 3 may not apply "when the information sought has previously been made public through official disclosures," *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421 (2d Cir. 1989), the Second Circuit has not specifically addressed how the disclosure of information affects the National Security Act's protection for intelligence sources and methods. Second Circuit precedent accordingly does not compel a broad application of "waiver" in this context.[2] In fact, the text of the National Security Act and the Supreme Court's decision in *CIA v. Sims* point in the opposite direction.

(U) Section 102A(i)(1) of the National Security Act, as amended, provides that "the

[2] (U) In the context of a prior disclosure of classified information, as the Court noted, Order at 5, the applicable "waiver" doctrine is the "strict" test for official disclosure set forth in *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (classified information "deemed to have been officially disclosed only if it (1) is as specific as the information previously released, (2) matches the information previously disclosed, and (3) was made public through an official and documented disclosure" (internal quotations and citations omitted)). *See also New York Times Co. v. U.S. DOJ*, 756 F.3d 100, 120 n.19 (2d Cir. 2014) (noting that "*Wilson* remains the law of this Circuit"). As discussed below, the classified and statutorily protected information withheld from the emails at issue in this case has not been made public, and thus the official disclosure test is not satisfied here.

Director of National Intelligence[3] shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). This language is broad and unqualified. It does not say that the Director shall protect only *confidential* intelligence sources and methods from unauthorized disclosure, or that the Director shall protect intelligence sources and methods from unauthorized disclosure *unless those sources and methods have previously been disclosed. Cf. CIA v. Sims*, 471 U.S. 159, 169 & n.13 (1985) (unlike FOIA Exemption 7(D) and the Privacy Act, the National Security Act does not "state that only confidential or nonpublic intelligence sources are protected"). Congress "simply and pointedly" protected *all* sources and methods that the Intelligence Community "needs to perform its statutory duties with respect to foreign intelligence." *Id.* at 169–70. As the Supreme Court recognized in *Sims*, "[t]he plain meaning of the statutory language, as well as the legislative history of the National Security Act . . . , indicates that Congress vested in the Director . . . very broad authority to protect all sources of intelligence information from disclosure." 471 U.S. at 168–69; *see also id.* at 169 ("Congress entrusted [the CIA] with sweeping power to protect its 'intelligence sources and methods.'"); *id.* at 174–75 ("Congress chose to vest the Director of Central Intelligence with broad discretion to safeguard the Agency's sources and methods of operation."). The CIA has "the authority to

[3] (U) The statute initially vested this authority in the CIA Director. National Security Act of 1947, § 102(d)(3), 61 Stat. 495, 498. It was amended in 2004 to make the Director of National Intelligence responsible for protection of intelligence sources and methods. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1011, 118 Stat. 3638, 3651 (2004). However, the CIA continues to be authorized to protect CIA sources and methods under the direction of the Director of National Intelligence. Declaration of Antoinette Shiner dated August 25, 2017 ("Shiner Declaration") ¶ 13, Docket No. 18; *see DeBacco v. U.S. Army*, 795 F.3d 178, 197–99 (D.C. Cir. 2015).

shield those Agency activities and sources from *any* disclosures that would unnecessarily compromise the Agency's efforts." *Id.* at 169 (emphasis added).

(U) Indeed, the *Sims* Court recognized that even affirmative disclosure of information by the CIA may be necessary, in the Agency's discretion upon consideration of all the circumstances, to protect sources and methods from greater harm and to fulfill the CIA's mission. *See Sims*, 471 U.S. at 180 ("[O]ur Government may choose to release information deliberately to 'send a message' to allies or adversaries. . . . The national interest sometimes makes it advisable, or even imperative, to disclose information that may lead to the identity of intelligence sources."); *accord Students Against Genocide v. Dep't of State*, 257 F.3d 828, 837 (D.C. Cir. 2001) (noting, in case in which satellite and aerial photographs were withheld under FOIA exemptions 1 and 3 and the National Security Act, that the United States government may disclose information to foreign governments who are "in a position to assist the United States in its efforts" while protecting the information from those who "may actively oppose those policy objectives"). "[I]t is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Sims*, 471 U.S. at 180; *see also id.* at 176 ("We seriously doubt whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case . . . ."). Moreover, one official's decision to disclose particular information in one context cannot "bind" the government to "make the same

determination, in a different context." *Id.* at 180–81. These principles should control here.

(U) This Court appears to have interpreted the National Security Act as prohibiting the limited disclosures that the CIA made in this case. *See* Order at 8 (suggesting that the CIA "had a statutory obligation *not* to disclose" the information withheld from the emails). That is not the case. "Congress did not mandate the withholding of information that may reveal the identity of an intelligence source [or method]; it made the Director of Central Intelligence responsible only for protecting against *unauthorized* disclosures." *Sims*, 471 U.S. at 181 (emphasis in original). And there is nothing in the National Security Act that forbids the CIA from making disclosures (or taking any other steps) to protect its intelligence sources and methods. To the contrary, the National Security Act grants the CIA broad authority and discretion to take steps — including by making limited disclosures — to protect intelligence sources and methods. *See* 50 U.S.C. § 3036(d)(3) (the Director of Central Intelligence must "ensure . . . that appropriate account is taken of the risks to the United States and those involved in . . . collection [of foreign intelligence]"); *Sims*, 471 U.S. at 180.

(U) It is also incorrect to suggest that "[t]here is absolutely no statutory provision that authorizes limited disclosure of otherwise classified information to anyone . . . for any purpose, including the protection of CIA sources and methods that might otherwise be outed." Order at 8. The National Security Act provides that very authority, as the *Sims* Court recognized.[4] For the

[4] (U) The Court stated that "senior CIA officials authorized the disclosure of classified information to reporters who were not cleared to receive it," Order at 3, but because the CIA authorized the disclosure under the National Security Act to protect intelligence sources and methods, the reporters were authorized to receive the information.

same reason, the "justification for why the CIA shared confidential information with [three reporters]" is not "irrelevant." Order at 4. The fact that the CIA was acting pursuant to its broad authority under the National Security Act to protect intelligence sources and methods is not only relevant but dispositive in this case.

The record before the Court establishes beyond dispute that the CIA made the limited disclosures at issue in order to protect intelligence sources and methods. The Classified Shiner Declaration demonstrates that the CIA made the limited disclosures in four of the emails in order to

Likewise, the Classified Shiner Declaration demonstrates that the information withheld from the fifth email

(U) Moreover, although Exemption 3 and the National Security Act do not require a showing of harm, *Larson v. Dep't of State*, 565 F.3d 857, 868 (D.C. Cir. 2009), there is no dispute that disclosure of the withheld portions of the emails would cause harm to intelligence

sources and methods. In fact, the Court appears to have accepted that disclosure would cause "a very real danger" to sources and methods. Order at 9. The record before the Court therefore establishes that the information withheld from the emails falls within the scope of the National Security Act. That should be the end of the Court's inquiry under Exemption 3 and the National Security Act. *See Sims*, 471 U.S. at 177; *Wilner v. NSA*, 592 F.3d 60, 72 (2d Cir. 2009) ("the sole issue for decision [under Exemption 3] is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage'" (quoting *Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987))).

II. (U) LIMITED DISCLOSURES THAT DO NOT ENTER THE PUBLIC DOMAIN DO NOT EFFECT A WAIVER OF FOIA EXEMPTIONS

(U) For a prior disclosure of classified information to be considered a waiver of FOIA's protections, the information must, among other things, have been "'made public.'" *Wilson*, 586 F.3d at 186 (quoting *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)); *see id.* at 188 ("The official disclosure doctrine applies only when classified information is 'made public.'" (again quoting *Wolf*); Order at 5 (noting that information must have been "disclosed to the public"). Contrary to the Court's supposition, Order at 9 n.2, a limited disclosure of information to three journalists does not constitute a disclosure to the public. Where, as here, the record shows that the classified and statutorily protected information at issue has not entered the public domain, there is no waiver of FOIA's exemptions.

(U) The premise behind the public domain doctrine is that "where information requested 'is truly public, then enforcement of an exemption cannot fulfill its purposes.'" *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (quoting *Niagara Mohawk Power Corp. v. U.S. Dep't of*

Energy, 169 F.3d 16, 19 (D.C. Cir. 1999)); *see also Prison Legal News v. Exec. Office for U.S. Attys.*, 628 F.3d 1243, 1253 (10th Cir. 2011) ("Given that the public domain doctrine appears nowhere in the statutory text of FOIA, only the failure of an express exemption to provide any protection of the interests involved could justify its application."); *Judicial Watch, Inc. v U.S. DOD*, 963 F. Supp. 2d 6, 12 (D.D.C. 2013) ("[T]he public domain doctrine is a doctrine of futility, triggered only when it would serve no purpose to enforce an exemption."). A plaintiff seeking release on a public domain theory therefore must show that the information they seek is "truly public and that the requester [will] receive no more than what is publicly available." *Cottone*, 193 F.3d at 555.[5]

(U) It follows from this premise that a limited disclosure of information that does not enter the public domain does not effect a waiver of FOIA's exemptions. To the contrary, courts have recognized that protected information — including classified information about intelligence sources and methods — can sometimes be disclosed in a limited fashion without waiving FOIA's exemptions from public disclosure.

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[5] (U) By contrast, the Supreme Court has held that information is "private" for FOIA purposes if it is "intended for or restricted to the use of a particular person or group or class of persons," and "not freely available to the public." *U.S. DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763–64 (1989) (citing dictionary definition of "private"); *cf. Wilson*, 586 F.3d at 188 (letter provided by CIA to former agent containing classified information not "made public" by CIA, nor was it a "disclosure" for purposes of official disclosure doctrine, as it did not "open [the information] up to general knowledge," citing dictionary definition of "disclose" (alteration omitted)). The Supreme Court observed in *Reporters Committee* that if the requested records "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to the information they contain." 489 U.S. at 764.

(U) For example, in *Students Against Genocide v. Department of State*, 257 F.3d 828 (D.C. Cir. 2001), the D.C. Circuit upheld the CIA's withholding pursuant to Exemptions 1 and 3 of satellite and aerial photographs of the Srebrenica area that then-U.N. Ambassador Albright had displayed to the U.N. Security Council. The plaintiffs argued that once the photographs were displayed to delegates of foreign governments, any legitimate national security interest in keeping them secret was lost, and the protections of Exemptions 1 and 3 were waived. *Id.* at 835–36. The D.C. Circuit declined to find a waiver, distinguishing between (a) the limited disclosure to selected foreign governments who "may be in a position to assist the United States," but not "other countries that may actively oppose" the Government's objective, and (b) a FOIA disclosure "to the world at large" that would "eventually make [its] way to foreign governments and others who may have interests that diverge from those of the United States." *Id.* at 836–37. The court also noted that the United States had taken steps to avoid further dissemination by displaying, but not distributing, the photographs in question. *Id.* at 837. The court concluded that the information sought was not "truly public," and therefore the Government had not waived its right to withhold them from release under FOIA. *Id.* at 836–37.

(U) Similarly, in *Judicial Watch, Inc. v. U.S. Department of Defense*, 963 F. Supp. 2d 6 (D.D.C. 2013), the district court upheld the Government's invocation of Exemption 3 despite a prior disclosure of statutorily protected information to the director and screenwriter of what ultimately became the feature film *Zero Dark Thirty*. At issue were the names and identities of CIA officers and a Navy SEAL (all protected from disclosure by statute) that were redacted from a transcript of the filmmakers' "background interview" of the then-Under Secretary of Defense

for Intelligence. *Id.* at 8–9. The plaintiffs argued that, because the Government had revealed the names to the filmmakers, they were in the public domain and must be disclosed to any FOIA requester. *Id.* at 12. In rejecting that argument, the court first noted that the fact that the information in question was not known to the requester — which "apparently ha[d] no way of learning" the information — was "strong evidence" that the information was "not in the public domain." *Id.* at 13. Furthermore, the court noted, the disclosure of the names was not made with "no strings attached"; rather, the Under Secretary specifically asked that the names not be publicly revealed, and the filmmakers complied. *Id.* at 15. Thus, the names were not "truly public" or "released to the general public." *Id.* The Court upheld the assertion of Exemption 3, noting that the "enforcement of an otherwise applicable exemption" was *not* "pointless" because it continued to fulfill its purposes. *Id.*

(U) Another district court recently observed that "[i]t defies commonsense to argue that any time a CIA official allegedly communicates with a third party, any such communication (if, in fact, one exists) has been 'made public' and is thus subject to FOIA disclosure." *Klayman v. CIA*, 170 F. Supp. 3d 114, 123 (D.D.C. 2016). The plaintiff in *Klayman* sought all communications between the CIA and a local prosecutor and judge in Douglas County, Colorado, concerning an alleged CIA agent named Raymond Allen Davis. *Id.* at 117 n.2. The CIA provided a *Glomar* response, invoking Exemptions 1 and 3, because whether or not there was a covert relationship between the CIA and Mr. Davis was both classified and protected from disclosure under the National Security Act and the CIA Act. *Id.* at 121–22. The plaintiff argued that a *Glomar* response was not appropriate because the information he sought had allegedly

been disclosed to third parties, and thus was officially acknowledged. The court rejected that argument, holding that even if the CIA had communicated with local officials as alleged, the official disclosure doctrine's "essential requirement" that the information "already have been *made public* through an official disclosure" was not met. *Id.* at 123 (emphasis in original) (internal quotation marks omitted). Relying on both *Students Against Genocide* and *Judicial Watch*, the court held that "the mere fact that Plaintiff seeks communications allegedly occurring between the CIA and third parties does not undermine the propriety of the CIA's *Glomar* response." *Id.* The "mere fact" that communications may have occurred between the CIA and third parties did not render the communications "public." *Id.*

(U) The D.C. Circuit's decision in *Phillippi v. CIA*, 655 F.2d 1325 (D.C. Cir. 1981), although an older case, Order at 6, is entirely consistent with these recent authorities. In *Phillippi*, as in *Students Against Genocide* and *Judicial Watch*, statutorily protected information was provided to persons without security clearances, namely, a group of reporters. The D.C. Circuit held the information, which was reflected in a transcript of discussions between the CIA Director and the reporters, nevertheless remained protected by Exemption 3 because "without the disclosure of the documents demanded [under FOIA], foreign analysts remain in the dark as to the provenience of the information appearing in published reports." 655 F.3d at 1332; *see id.* ("no one who was not privy to the CIA disclosures can know for sure which information came from CIA sources and which information originated elsewhere unless the appellant receives the documents she requests [under FOIA]").

(U) While this Court disagreed with the analysis in *Phillippi*, Order at 6–9, it appears to have misunderstood the D.C. Circuit's rationale. The relevant question under what the Court termed the "second *Phillippi* justification" is not whether the CIA was the source of the information withheld from the emails in this case, as the Court appears to have believed. *See* Order at 8 (stating that "the second *Phillippi* justification depends for its force on there being some possibility that CIA is only one of several sources for the information sought by the FOIA request," and observing that only CIA could have been the source of the information in the emails). The information withheld from the emails is analogous to the information contained in the transcript in *Phillippi*, of which the CIA was also the undisputed source. Rather, the relevant inquiry under *Phillippi* is whether the CIA was the definitive source of the information subsequently published by the journalists. *See* 655 F.3d at 1332 (noting the questionable "provenience of the information appearing *in published reports*" (emphasis added)). Here, as in *Phillippi*, it remains unknown whether the CIA was the source of the reports subsequently published by the journalists who received the emails, and in fact the record before the Court demonstrates that the emails would reveal classified and statutorily protected information that has *not* been published. *See generally Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (recognizing the Government's compelling interest in protecting the appearance of confidentiality so essential to the effective operation of our foreign intelligence service); *Wilson*, 586 F.3d at 195 (recognizing the Government's interest in "preserving the options of deniability and professed ignorance that remain important niceties of international relations," or "some increment of doubt regarding the reliability of publicly available information").

The D.C. Circuit's decisions in *Phillippi* and *Students Against Genocide*, and the recent district court decisions in *Judicial Watch* and *Klayman*, make clear that "the fact that the journalists might not have published everything they were told," Order at 8, is therefore crucial to any waiver inquiry.[6] That is particularly true where, as here, the limited disclosures to journalists were made to protect intelligence sources and methods. The disclosures in four of the emails were specifically intended to

[7]

To the contrary, *Sims* holds that there are "dangerous consequences of [a] narrowing of the statute [the National Security Act]" that would limit the "broad discretion to safeguard the Agency's sources and methods." 471 U.S. at 174–75. Here, the CIA properly exercised its broad discretion

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[6] (U) The Court viewed this as the *Phillippi* court's first of two separate justifications, but the two are intertwined.

[7] (U) For that reason, Plaintiff's argument that the permitting withholding here would "allow[] the government to hypocritically release sensitive national security information when its suits its public relations interests without fear of being held to its own standard later," Pl. Br., Docket No. 22, at 4, is inapposite. The limited disclosure here was not to further "public relations interests" but to fulfill the CIA's obligations under the National Security Act to protect intelligence sources and methods. The CIA's "attempt[] to influence reporting," *id.* at 6, was in service of protecting intelligence sources and methods.

to provide certain limited information to the three reporters

(U) Indeed, the argument for protection is even stronger here than in *Phillippi* and *Judicial Watch*, which also involved limited disclosures to members of the media memorialized in an agency record (here an email, and in *Phillippi* and *Judicial Watch*, a transcript). Unlike in *Phillippi*, where it was uncertain whether the information provided by the CIA to journalists was later reported, the record shows that public disclosure of the information withheld from the emails would reveal specific classified and statutorily protected information[8] that is not in the public domain. *See* Order at 9 (recognizing the "very real danger" to intelligence sources and methods); *see also Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) ("[T]he fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods and operations."). And unlike in *Judicial Watch*, where the purpose of disclosure was to assist filmmakers, the undisputed purpose of the limited disclosure was to protect intelligence sources and methods[9] in accordance with the National Security Act. Order at 8 (not questioning that CIA's purpose in making the limited disclosures was "the protection of CIA sources and methods"). The CIA is entitled to the broadest possible deference when it comes to the protection of its sources and methods. *Wolf*,

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473 F.3d at 377–78; *see also Sims*, 471 U.S. at 179 ("The decisions of the Director [of the CIA], who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.") .

III. (U) EVEN IF THE COURT FINDS THAT WAIVER ANALYSIS IS OTHERWISE APPROPRIATE, THE COURT SHOULD NOT ORDER DISCLOSURE IN THIS CASE

(U) Even if the Court concludes that, despite the broad discretion and sweeping power that Congress granted to the CIA to protect intelligence sources and methods, the information at issue has been officially disclosed into the public domain, the Court should not order disclosure of the information withheld from the emails.

First, as discussed in the Classified Shiner Declaration,

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Even if the Court would otherwise consider applying waiver principles in this context, the Court should not expand the public domain doctrine to encompass a limited disclosure made

Out of the 349 responsive documents produced to Plaintiff in response to his FOIA request, only five contain partial redactions pursuant to FOIA's exemptions, and the CIA has persuasively articulated a "very real danger"

See Students Against Genocide, 257 F.3d at 835 ("[P]articularly because the government did release numerous photographs, we see no reason to question its good faith in withholding the remaining photographs on national security grounds.").

(U) CONCLUSION

(U) For the foregoing reasons, and the reasons stated in the CIA's prior submissions, the Court should grant summary judgment in favor of the CIA.

Dated: New York, New York
February 14, 2018

Respectfully submitted,

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