McGREGOR W. SCOTT
United States Attorney
YOSHINORI H. T. HIMEL #66194
Assistant U. S. Attorney
501 I Street, Suite 10-100
Sacramento, California 95814
Telephone: (916) 554-2760
ELIZABETH J. SHAPIRO
Assistant Director
CAROLINE LEWIS WOLVERTON
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 514-3336
Facsimile: (202) 318-2672

Attorneys for Defendant,
CENTRAL INTELLIGENCE AGENCY

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

LARRY BERMAN,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant.

CIV. S-04cv2699 DFL-DAD

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Date: June 1, 2005
Time: 10:00 a.m.
Courtroom: 7 (14th floor, DFL)

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INTRODUCTION

Plaintiff opposes Defendant Central Intelligence Agency's ("CIA") withholding of two President's Daily Briefs ("Requested PDBs") under Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Exemptions 1 and 3 by arguing that (i) prior releases of PDBs and other intelligence information, and the age of the Requested PDBs, undercut the CIA's claim to those exemptions, and (ii) Information Review Officer for the Directorate of Intelligence Terry N. Buroker's Declaration is deficient because it lacks the requisite level of specificity. Contrary to those arguments, Mr. Buroker's Declaration is as specific and detailed as is required under FOIA caselaw and provides as much detail about classified information as possible in a public document, including in its accounting for prior disclosures of PDB editions and for the passage of time since the Requested PDBs were prepared. Moreover, it is well-established that the CIA's prior release of intelligence does not waive its ability to withhold similar intelligence. E.g., CIA v. Sims, 471 U.S. 159, 180, 105 S. Ct. 1881, 1893 (1985). It is likewise clear that the age of classified information does not itself undermine the need for it to remain classified. E.g., Fitzgibbon v. CIA, 911 F.2d 755, 763 (D.C. Cir. 1990). Plaintiff's arguments that Mr. Buroker's explanation of the CIA's withholding determination is not entitled to the great deference ordinarily afforded the CIA with respect to national-security information cannot be reconciled with the controlling Supreme Court precedent of Sims, and the controlling Ninth Circuit precedent of Minier v. CIA, 88 F.3d 796 (9th Cir. 1996), and Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992).

Regarding FOIA Exemption 5, Plaintiff is incorrect that the CIA may not rely on the presidential communications privilege in the absence of an invocation by the President and because of the age of the PDBs. A District Court for the District of Columbia recently rejected the same arguments in its comprehensive opinion in Lardner v. Dep't of Justice, No. 03-0180, 2005 WL 758267 (D.D.C. Mar. 31, 2005). Contrary to Plaintiff's arguments regarding the deliberative process privilege, the Supreme Court has recognized that documents, like the PDB, that an agency prepares for the President's use in Executive decisionmaking, are covered by that privilege. EPA v. Mink, 410 U.S. 73, 93 S. Ct. 827 (1973). Because the Requested PDBs are the sort of documents to which

the presidential communications and deliberative process privileges would ordinarily apply, Exemption 5 provides further justification for the CIA's decision to withhold them from disclosure.

The CIA has established the applicability of FOIA Exemptions 1, 3, and 5 to the Requested PDBs through the detailed, comprehensive Declaration of CIA Information Review Officer Buroker, filed with our opening Memorandum, and through Mr. Buroker's Supplemental Declaration, filed herewith. The Court therefore should grant the CIA's motion for summary judgment and deny Plaintiff's cross motion for summary judgment. The Court should additionally overrule Plaintiff's objections to Mr. Buroker's Declaration for the reasons set forth herein. See Section V, infra.

ARGUMENT

I. The CIA Has Demonstrated Entitlement to Exemption 3

A. The CIA's Declaration Is Sufficiently Specific and Detailed for the Court to Review the CIA's Withholding

Plaintiff argues that the Declaration of CIA Information Review Officer Terry N. Buroker "[f]ails to [d]emonstrate [h]ow [d]isclosure of the [t]wo PDBs [w]ill [r]eveal an [i]ntelligence [s]ource or [m]ethod." (Pl.'s Opp'n at 9.) The CIA is not required to demonstrate how disclosure would reveal intelligence sources and methods to establish entitlement to Exemption 3.[1] Minier, 88 F.3d at 801 (to meet its burden, CIA need only demonstrate that disclosure would "disclose 'sources and methods' of intelligence gathering") (citing Sims, 471 U.S. at 193, 105 S. Ct. at 1900 [Marshall, J., concurring], and Wiener, 943 F.2d at 983). Nevertheless, Mr. Buroker describes how such revelation would occur. He explains that the Requested PDBs "contain information that could, by

[1] As set forth in our opening Memorandum, FOIA Exemption 3 applies to records "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). The National Security Act of 1947, section 103(c)(7) requires the Director of Central Intelligence ("DCI") to "protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-3(c)(7). Plaintiff does not dispute that section 103(c)(7) meets Exemption 3's standard for a withholding statute. See Sims, 471 U.S. at 167-68, 105 S. Ct. at 1887 (previous codification of section, section 102(d)(3) of National Security Act, "qualifies as a withholding statute under Exemption 3"). Provisions of the Intelligence Reform and Terrorism Prevention Act of 2005 that vest authority to protect intelligence sources and methods with the Director of National Intelligence became effective on April 21, 2005. Because at the time the Requested PDBs were withheld the DCI was responsible for protecting intelligence sources and methods under the National Security Act, for the purposes of this case we refer to the DCI's authority with respect to protecting sources and methods.

itself or with other information, expose specific sources and methods including human sources, foreign liaison sources, and technical collection methods," and that each "contains information specifically stating sensitive sources or methods of collection" and "provides substantial information about its provenance [i.e., source] to an educated reader." (Buroker Decl. ¶ 34.) Specifically regarding intelligence sources, he explains that the Requested PDBs contain "explicit references to information provided by foreign officials as well as other information that may incorporate information from foreign liaison relationships," (id. ¶ 49), and "references to intelligence obtained from individual human sources and from confidential liaison relationships," (id. ¶ 54). Specifically regarding intelligence methods, Mr. Buroker explains that disclosure of the Requested PDBs would necessarily reveal the specific method of the PDB, (id. ¶¶ 35-37), that "[t]he release of the information in each of the Requested PDBs would disclose specific intelligence methods, including technical collection methods," (id. ¶ 59), and that "the Requested PDBs are part of a mosaic of PDBs that would reveal information about the application of intelligence methods even excluding any text that reveals specific methods used," (id. ¶ 62). While other PDBs and other intelligence documents have been disclosed previously, Mr. Buroker explains through his initial and Supplemental Declarations that compelled disclosure of the Requested PDBs under FOIA, and the precedent that would be set, could provide foreign governments and entities hostile to the United States with substantial pieces of "applicable mosaics." (Id. ¶¶ 29, 34-39; Supplemental Buroker Decl.)

This is as much specificity regarding sources and methods as is required. In addition, it is as much specificity as is possible on the public record. (See id. ¶ 5.) An agency that is concerned with national security, like the CIA, is necessarily constrained in what it may disclose publicly in responding to a FOIA request. While the CIA's declaration must be detailed to satisfy its burden under FOIA, e.g., Minier, 88 F.3d at 800, it "need not specify its objections [to disclosure] in such detail as to compromise the secrecy of the information," Lewis v. IRS, 823 F.2d 375, 378 (9th Cir. 1987) (quoting Church of Scientology v. Army, 611 F.2d 738, 742 [9th Cir. 1979]). Accord, e.g., Wiener, 943 F.2d 980 (Vaughn index must provide (to the extent permitted by national security needs) sufficient information to enable the requester to contest the withholding [decision]) (emphasis supplied).

The D.C. Circuit recently upheld the CIA's reliance on Exemption 3 to withhold a 1962 compendium of intelligence on Cuban individuals based on an agency declaration similar in level of detail to Mr. Buroker's Declaration. Assassination Archives and Research Ctr. v. CIA, 334 F.3d 55 (D.C. Cir. 2003). In Assassination Archives, the CIA Information Review Officer for the Directorate of Intelligence, the same position that Mr. Buroker now holds, explained in his declaration that

> the Compendium represents a "compilation of personality profiles of, or biographic data on, a number of Cuban individuals" that includes non-classified biographies, which are as a general rule based on "open source information," although profiles that are marked SECRET are so identified because they rely on "information collected clandestinely." Notwithstanding [the fact that] the nature of the sources from which the contents of the Compendium derives varies, the entire Compendium was classified [] because of the purpose behind the Compendium and the fact that disclosure of information might reveal intelligence methods and sources.

Id. at 56-57 (quoting CIA Information Review Officer's declaration). Based on that declaration the circuit concluded, "In view of the weight we give the Agency's judgment as to the effect of disclosure, we have no trouble concluding that the Agency may withhold the contents of the Compendium pursuant to Exemption 3 of FOIA." Id. at 58 (citing Sims, 471 U.S. at 174-75, 179, 105 S. Ct. at 1890-91, 1893, Ashfar v. Dep't of State, 702 F.2d 1125, 1133 [D.C. Cir. 1983], and Goldberg v. Dep't of State, 818 F.2d 71, 78 [D.C. Cir. 1987]).[2]

Plaintiff discounts Mr. Buroker's explanation of how foreign governments or entities hostile to the United States might be able to pair information in their possession with the specific information about sources and methods that is in the Requested PDBs so as to discover U.S. intelligence sources and/or methods, and suggests that the mosaic theory cannot support a claim to Exemption 3. (Pl.'s Opp'n at 11.) However, the Supreme Court in Sims, 471 U.S. at 178, 105 S. Ct. at 1892-93, explicitly endorsed the mosaic theory and its applicability to analysis of claims by the CIA to FOIA

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[2] Should the Court nevertheless find additional specificity necessary to determine the applicability of Exemption 3, the CIA is prepared to provide such specificity in an ex parte and in camera filing. See, e.g., Doyle v. FBI, 722 F.2d 554, 556-57 (9th Cir. 1983) ("Although we concede that only in the exceptional case would the district court be justified in relying solely on *in camera* affidavits, we are unwilling to hold as a matter of law that there are no situations in which affidavits alone are adequate. Review of the documents might not be necessary, for example, if the affidavits were specific, their contents were not contradicted elsewhere in the record, and there was no suggestion of bad faith either in that case or in other cases handled by that agency.").

Exemption 3.[3] Accord, e.g., Center for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 928 (D.C. Cir. 2003); Hunt, 981 F.2d at 1119. The high Court emphasized the great deference to which CIA judgments about the mosaic theory are entitled. Sims, 471 U.S. at 179, 105 S. Ct. at 1893 ("The decisions of the Director [of Central Intelligence], 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."). Plaintiff further criticizes Mr. Buroker's conclusion based on the mosaic theory that disclosure of the Requested PDBs might expose intelligence sources and methods as improperly speculative. (Pl.'s Opp'n at 10, 13; accord Pl.'s Objs. to Def.'s Evidence.) However, because the CIA cannot know the number and nature of pieces of applicable mosaics that foreign governments and hostile entities already have, application of the mosaic theory is necessarily speculative to a certain extent. See, e.g., Sims, 471 U.S. at 178, 105 S. Ct. at 1892 ("the very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data 'may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself'") (quoting Halperin v. CIA, 629 F.2d 144, 150 [D.C. Cir. 1980]) (emphasis supplied); Halperin, 629 F.2d at 149 ("when a hostile intelligence service is properly doing its job it can carry out various counter-intelligence operations against covert CIA operations, 'without drawing attention to itself, and we have no way of knowing'") (quoting CIA declaration).

Plaintiff also criticizes Mr. Buroker for not detailing the precise manner in which disclosure of the information in the Requested PDBs might expose sources and methods. (Pl.'s Opp'n at 10.) The Supreme Court recognized, however, that "[i]t is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency." Sims, 471 U.S. at 179, 105 S. Ct. at 1893. Again, Mr. Buroker has provided as much explanation of the bases on which the CIA withheld the Requested PDBs as necessary under applicable law and on the public record. (Buroker Decl. ¶ 5.)

[3] Thus, Plaintiff's reliance on Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (cited in Pl.'s Opp'n at 11), a deportation case involving First Amendment and personal liberty interests rather than FOIA, is misplaced.

B. Previous CIA Disclosures of the PDB and Other Intelligence Documents Do Not Require Court-Ordered Disclosure of the Requested PDBs

The Supreme Court in Sims specifically rejected the argument that previous disclosure of a particular type of intelligence information "somehow estop[s]" the CIA from withholding similar information from release under FOIA, the same argument Plaintiff advances in this case. Sims, 471 U.S. at 180, 105 S. Ct. at 1893. Only the Executive can determine when the interests furthered by disclosure of intelligence documents like individual PDBs outweigh the attendant risks because only the Executive has information about "the whole picture." Id. at 180, 105 S. Ct. at 1893-94; accord, e.g., accord, e.g., Center for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003); Gardels v. CIA, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982). The Supreme Court explained the rationale of this principle, with reference to the Director of Central Intelligence, in Sims:

> The national interest sometimes makes it advisable, or even imperative, to disclose information that may lead to the identity of intelligence sources. And it is the responsibility of the [DCI], 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, 105 S. Ct. at 1893-94.

Plaintiff's suggestion that the CIA must distinguish the type of information in the PDBs and other intelligence documents that have been released from the type of information in the Requested PDBs, (Pl.'s Opp'n at 12), is unwarranted. See Sims, 471 U.S. at 180, 105 S. Ct. at 1893-94, Aftergood v. CIA, 355 F. Supp.2d 557, 563-64 (D.D.C. 2005) (rejecting argument that CIA's release of its budget for 1963 waived its ability to withhold its budget for other years under Exemption 3). Indeed, Mr. Buroker's Supplemental Declaration explains that the Requested PDBs' contain different information from that in previously disclosed PDBs and Central Intelligence Bulletins ("CIB"). (Supplemental Buroker Decl. ¶¶ 3-4.)[4] Thus, disclosure of the Requested PDBs would result in the availability of more and different information than is available at present. That additional information could lead to exposure of U.S. intelligence sources and methods. (Buroker Decl. ¶ 62.)

[4] Plaintiff's assertion that releases of editions of the PDB and PICL have been "without any adverse consequences," (Pl.'s Opp'n at 12), is utterly lacking in foundation. Only current intelligence officials are in a position to draw conclusions about the consequences of release of intelligence information on intelligence-gathering capabilities and national security. See, e.g., 471 U.S. at 178, 105 S. Ct. at 1892-93.

The fact that information on the same subjects as that in the Requested PDBs might be available publicly in other forms, e.g., declassified intelligence documents, does not nullify the need to protect the fact that it appears in the PDB. As Mr. Buroker explains, the nature of the PDB highlights the information it contains as that which is most important to the nation's decisionmakers. (Id. ¶¶ 23-24, 29; Supplemental Buroker Decl. ¶ 4.) Thus, even if the actual information in the PDBs is disclosed elsewhere, disclosure of the Requested PDBs would give foreign intelligence services and other entities hostile to the United States "a unique glimpse as to what the Intelligence Community is targeting and what the [country's] decision-makers know (or do not know) and when they know it," as well as knowledge of "what topics are most important to have the attention of the President and his closest advisors on th[ose] day[s]." (Id. ¶¶ 23, 29; accord Supplemental Buroker Decl. ¶ 4.) Indeed, the D.C. Circuit "ha[s] unequivocally recognized that the 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." Fitzgibbon, 911 F.2d at 766 (citing cases). Additionally, Plaintiff's evidence that many CIBs have been released in redacted form demonstrates the CIA's willingness to release information that can be released without harm to national security. Such is not the case with the PDB which must remain specially protected for the reasons set forth in Mr. Buroker's Declaration. (Buroker Decl. ¶¶ 20-30.)

The declarations Plaintiff submits – his own and those of Bill Moyers, George Herring, and Thomas Blanton – do not undermine the credibility of Mr. Buroker's explanation of the CIA's reliance on Exemption 3 and do not lessen the degree of deference to which Mr. Buroker's Declaration is entitled under Sims. That Mr. Moyers previously served President Johnson's Special Assistant is inapposite. It is well-established that only current intelligence officials have access to the full scope of information necessary to assess the harm posed by disclosure. See Sims, 471 U.S. at 178, 105 S. Ct. at 1892-93. Congress recognized as much when it placed responsibility for protecting intelligence sources and methods from unauthorized disclosure in the office of the DCI.[5] See 50 U.S.C. § 403-3(c)(7). Mr. Moyers himself appears to recognize that only current CIA officials may

[5] See note 1, supra.

determine whether the PDBs may be released when he concludes that he "see[s] no reason why information that was sensitive at the time [of the Requested PDBs] should not [be] reviewed and considered for public release today." (Decl. of Bill Moyers ¶ 9 [emphasis supplied].)

The D.C. Circuit in Assassination Archives rejected an opinion similar to those of Plaintiff and Professor Herring,[6] both of whom are history professors, and Mr. Blanton, who is Director of the National Security Archive at George Washington University. In that case, the appellants relied on a University of Maryland associate professor's opinion that prior disclosures of information similar to the 1962 CIA compendium of intelligence at issue demonstrated that the national-security interest in withholding the compendium was "minimal."[7] Assassination Archives, 334 F.3d at 57. The CIA Information Review Officer explained in an affidavit that the CIA had never released any portion of the particular compendium at issue and that disclosing the document "'would be expected to reveal the identity of a confidential human source or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States.'" Id. at 59 (quoting CIA Information Review Officer's declaration). In light of the great deference to which the CIA's explanation is entitled under Sims, the circuit upheld the CIA's decision to withhold the document despite the prior disclosures of similar information. Id. (citing Gardels, 689 F.2d at 1103).

Unlike Plaintiff's declarants, all private citizens with no present official responsibilities with respect to classified information or knowledge of the effect of the release of classified information, Mr. Buroker is the current Information Review Officer of the Directorate of Intelligence of the CIA. (Buroker Decl. ¶ 1). His explanations are entitled to great deference, which Plaintiff's evidence is

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[6] Professor Herring is also Acting Director of the Patterson School of Diplomacy and served on the CIA's Historical Review Panel between 1990 and 1996. (Herring Decl. ¶¶ 1-2.)

[7] The prior disclosures at issue in that case had occurred under the JFK Assassination Records Collection Act, Assassination Archives, 334 F.3d at 56, the same act under which ten issues of the PICL were released, (Buroker Decl. at 14 n.4).

insufficient to overcome.[8] See Sims, 471 U.S. at 179, 105 S. Ct. at 1893; Assassination Archives, 334 F.3d at 59; Minier, 88 F.3d at 801; Hunt, 981 F.2d at 1120; Aftergood, 355 F. Supp.2d at 563.

C. The Age of the Requested PDBs Does Not Require Their Disclosure

Plaintiff's criticism of Mr. Buroker's Declaration as "offer[ing] no analysis of why Berman's request for two nearly 40-year-old PDBs is a 'tipping point' for the nation's security," (Pl.'s Opp'n at 12), is similarly unfounded. Mr. Buroker explains that, even at their age, the Requested PDBs contain specific sources and methods information. (Buroker Decl. ¶ 54.) Again, the National Security Act requires protection of intelligence sources and methods and does not place age limitations on its protection requirement.[9] 50 U.S.C. § 403-3(c)(7). Indeed, Sims involved information that was approximately thirty years. Sims, 471 U.S. at 161, 105 S. Ct. at 1884. The D.C. Circuit has explicitly rejected the argument that the passage of time bears on review of the CIA's entitlement to Exemption 3 based on the National Security Act. Fitzgibbon, 911 F.2d at 763 (explicitly rejecting historian's argument "that the District Court was under an obligation to consider the effect of the passage of time on the documents in question," which documents concerned an individual who disappeared in 1956). The First Circuit similarly refused to rely on the age of information requested under FOIA as determinative of whether the CIA could withhold it under Exemption 3. Maynard v. CIA, 986 F.2d 547, 555 n.6 (1st Cir. 1993). Recognizing that "[c]ourts have generally rejected the contention that the mere age of intelligence information rules out Exemption 3," the circuit explained,

> Reluctance stems from recognition that it is virtually impossible for an outsider to ascertain what effect the passage of time may or may not have had to mitigate the harm from disclosure of sources and methods. Such is true, certainly, as to events that have occurred well within the careers of living persons . . . The CIA, not the judiciary, is better able to weigh the risks that disclosure of such information may reveal intelligence sources and methods so as to endanger national security.

Id. (citing Sims, 471 U.S. at 180, 105 S. Ct. at 1893, and Fitzgibbon, 911 F.2d at 763-64).

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[8] Plaintiff's Statement of Additional Facts in Opposition therefore provides no basis for denial of Defendant's Motion for Summary Judgment.

[9] Information classified pursuant to Executive Order 12,958, as amended, and subject to FOIA Exemption 1 is subject to review for automatic declassification after it is more than 25 years old. See E.O. 13,292 § 3.3, 68 Fed. Reg. at 15320-21. No such age limitation applies to documents protected from disclosure under the sources and methods authority in the National Security Act.

In any event, Mr. Buroker explains why disclosure of the information despite its age could reveal sources and methods to the detriment of national security:

> Any disclosure by the CIA of information that could lead to the exposure of a past or current liaison relationship could cause serious damage to the CIA's ability to maintain current relationships, even with countries other than the source of the disclosed information, or to establish new ones.
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> . . .
>
> Intelligence information that may reveal an intelligence source does not automatically lose its need for protection after a period of even thirty or forty years. Individual people may have long lives and careers, and foreign governments and intelligence services may exist in perpetuity. Also, individuals may have colleagues, family members and friends who may suffer repercussions if the fact of an individual's cooperation with the CIA ever came to light.
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> In addition, the damage to national security caused by the exposure of a source's relationship with the CIA is not limited to the impact upon that source. Disclosure of information leading to the exposure of an intelligence source, no matter how inadvertent, could cripple the CIA's ability to recruit new individuals, establish new relationships, or even to maintain current relationships with intelligence sources . . .
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> . . .
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> Although the intelligence included in the Requested PDBs is over 30 years old, its disclosure would reveal to educated observers information about the application of intelligence methods in use at the time of the Requested PDBs and subsequently. The effective collection, analysis and exploitation of intelligence requires the CIA to prevent disclosure of such information to foreign governments, intelligence services or other entities hostile to the United States who could use it to undermine the current collection and analysis of foreign intelligence.

(Buroker Decl. ¶¶ 52, 55-56, 63.) The D.C. Circuit recognized the validity of this analysis in Fitzgibbon, "[M]aintaining the confidentiality of intelligence sources' identities has two purposes: protection of persons or entities that are or have been sources, and insurance (or inducement) both for current sources to remain so and future, potential sources to become sources." Fitzgibbon, 911 F.2d at 763. The circuit continued, "The appearance of confidentiality would hardly be enhanced if sources and future sources were to learn that their safety – and often their lives – were to depend on judicial oversight." Id. at 764.

Plaintiff's assertion that "[n]o case has applied the mosaic theory to withhold historic documents when no showing has been made that such documents implicate present day sources and methods," (Pl.'s Opp'n at 12 n.6), both misconstrues the legal standard for Exemption 3 where based on the National Security Act and is incorrect. The National Security Act's requirement that the DCI

"protect intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 403-3(c)(7), does not limit the required protection to "present day" sources and methods. In Maynard, the First Circuit upheld the CIA's withholding of an unredacted 1961 memorandum under Exemption 3 where "[i]n our opinion, it is at very least 'arguable' that the requested paragraph . . . could reveal intelligence methods." Maynard, 986 F.2d at 555 (citing Sims, 471 U.S. at 180-81, 105 S. Ct. at 1893-94; Aronson v. IRS, 973 F.2d 962, 965, 967 [1st Cir. 1992]); see also Fitzgibbon, 911 F.2d at 763 (explaining importance of protecting confidentiality of intelligence sources' identities to CIA's ability to retain current sources and recruit future sources). Similarly, Aftergood involved historical CIA budget information from 1947 through 1970.[10] Aftergood, 355 F. Supp.2d at 559. There, the D.C. District Court relied on Sims' description of the mosaic theory in concluding that disclosure of the historical budget information would compromise intelligence sources and methods in contravention of the National Security Act's requirement that the DCI protect such information. Id. at 563 (quoting Sims, 471 U.S. at 178, 105 S. Ct. at 1881). And in Assassination Archives and Research Ctr. v. CIA, 177 F. Supp.2d 1 (D.D.C. 2001), aff'd 334 F.3d 55 (D.C. Cir. 2003), the D.C. District Court found the CIA's affidavit sufficient where it stated that release of a 1962 compendium of intelligence would endanger current intelligence efforts. Id. at 7, aff'd 334 F.3d 55 (D.C. Cir. 2003). In any event, CIA Information Review Officer Buroker's Declaration explains that disclosure of the Requested PDBs could have detrimental consequences for the CIA's present and future intelligence-gathering abilities. (Buroker Decl. ¶¶ 52, 54-56, 63.)

In Aftergood, a D.C. District Court judge rejected an opinion similar to Mr. Blanton's that historical CIA information should be released. With regard to the opinion of a director at the Federation of American Scientists that release of historical CIA budget information would not harm intelligence sources, the court explained,

> Essentially, the plaintiff invites the court to conclude that the plaintiff is more knowledgeable than the [Acting Director of Central Intelligence] about what disclosure of information would harm intelligence sources and methods. The court

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[10] Contrary to Plaintiff's assertion, Aftergood recognized at least one occasion on which the CIA's historic budget information had been previously released. Aftergood, 355 F. Supp.2d at 563. Indeed, it was that particular budget information (from 1963) that the court ordered disclosed. Id. at 564. Plaintiff's description of the case's holding in his Opposition at 11 n.5 is therefore inaccurate.

> declines the plaintiff's invitation . . . The fact that the plaintiff subjectively believes that releasing the requested budget information would not compromise sources and methods of intelligence is of no moment. The DCI is statutorily entrusted with making that decision, not the plaintiff. 50 U.S.C. § 403-3(c)(7).

Aftergood, 355 F. Supp.2d at 563 (citing Sims, 471 U.S. at 178, 105 S. Ct. at 1881). That the CIA's Historical Review Panel recommended sometime between 1990 and 1996 that the CIA declassify records more than 35 years old and that the Department of State's Historical Advisory Committee on Diplomatic Documentation made similar recommendations, (see Decl. George Herring ¶¶ 2, 6-7), is of no consequence. The CIA did not adopt the recommendations. Rather, Executive Order ("E.O.") 12,958, as amended by E.O. 13,292, reflects the Executive Branch's policy determination regarding declassification of older classified documents. As noted in our opening memorandum, section 3.3 of the Executive Order provides for automatic declassification of classified documents that are 25 years old unless an agency head exempts them based on criteria set forth in the Executive Order. See E.O. 13,292 § 3.3(a)-(b), 68 Fed. Reg. 15315, 15320-21 (Mar. 28, 2003). Mr. Buroker explains that the Requested PDBs meet the criteria for exemption because their disclosure "could be expected to reveal the identity of a confidential human source, or a human intelligence source, or reveal information about the application of an intelligence source or method." (Buroker Decl. ¶¶ 58, 65 [applying exemption set forth at E.O. 13,292 § 3.3(b)(1)].)

D. Plaintiff's Arguments Fail in Light of the Great Deference to Which the CIA is Entitled for an Exemption 3 Withholding

The Supreme Court in Sims recognized that section 103(c)(7) of the National Security Act of 1947, 50 U.S.C. § 403-3(c)(7), gives the DCI "sweeping power" to protect intelligence sources and methods. Sims, 471 U.S. at 169-70, 105 S. Ct. at 1887. The Ninth Circuit recognized in both Minier and Hunt that when the CIA withholds records under FOIA Exemption 3 based on section 103(c)(7), Exemption 3 is in effect "a near-blanket FOIA exemption." Minier, 88 F.3d at 801; Hunt, 981 F.2d at 1120. Plaintiff suggests that Minier and Hunt, the most recent Ninth Circuit cases concerning the legal standard for Exemption 3 when based on the National Security Act, are not controlling precedent on the ground that they "only cite[] to D.C. circuit cases." (Pl.'s Opp'n at 9 n.4.) To the contrary, Hunt relies primarily on the Supreme Court's decision in Sims regarding the breadth of the exemption, see Hunt, 981 F.2d at 1118-20, and Minier follows Hunt, see Minier, 88

F.3d at 801. Hunt cites the D.C. Circuit cases of Miller v. Casey, 730 F.2d 773, 776 & 778 (D.C. Cir. 1984), and Gardels, 689 F.2d at 1105, for the proposition that CIA affidavits are entitled to "substantial weight," Hunt, 981 F.2d at 1119, but that is the same standard recognized in Wiener v. FBI, 943 F.2d 972, 980 (9th Cir. 1991), on which Plaintiff relies. And Minier again follows Hunt regarding the deference owed CIA affidavits. Minier, 88 F.3d at 800.[11] For the reasons set forth above, Plaintiff's suggestion that Mr. Buroker's explanation of the CIA's withholding decision is not credible is without merit.

As noted in our opening memorandum, because the CIA has established that it may rely on Exemption 3, determination of the applicability of Exemptions 1 and 5 is unnecessary. See Minier, 88 F.3d at 800 n.5; Hunt, 981 F.2d at 1118. But even if the Court were to reach those exemptions, the CIA has satisfied its burden of proving entitlement to those exemptions as well, as explained below and in our Opening Memorandum.

II. CIA Information Review Officer Buroker Explains in Sufficient Detail the Harm Posed by Release of the Requested PDBs and Establishes Entitlement to Exemption 1

Contrary to Plaintiff's charge that Mr. Buroker's Declaration is conclusory and lacking in specifics about the damage to national security that release of the Requested PDBs could cause, (Pl.'s Opp'n at 14-16), the Declaration describes that damage in detail. Mr. Buroker explains the specific harms to national security, how they would be caused, that information about specific sources is identified in the Requested PDBs, that release thereof could undermine current intelligence collection and analysis, that risk continues to exist despite the age of the documents, and that prior disclosures of intelligence heighten rather than lessen the CIA's need to withhold the Requested PDBs. (Buroker Decl. ¶¶ 30, 49-65.) For example, he explains:

> The Requested PDBs contain explicit references to information provided by foreign officials as well as other information that may incorporate information from foreign liaison relationships. Disclosure of any of this information could itself, or in conjunction with other information otherwise obtained by foreign intelligence services, betray particular intelligence sources and could be exploited by third-party governments to determine what countries' representatives were talking to the United States and when they were talking.

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[11] In any event, the Ninth Circuit is free to adopt precedents from other circuits that it finds persuasive, as Plaintiff recognizes in his own Memorandum. See, e.g., National Wildlife Fed'n v. Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988) (cited in Pl.'s Opp'n Mem. at 21).

> . . .
>
> The impact on the liaison relationship [of disclosure] would lead to a loss to the U.S. government of valuable foreign intelligence.

(Id. ¶¶ 49-51.)

> The Requested PDBs each contain references to intelligence obtained from individual human sources and from confidential liaison relationships. The exposure of a source's relationship with the CIA could lead to embarrassment, political ruin, retribution, and for individual human sources imprisonment, torture or even death of the source or the source's family and friends.
>
> . . .
>
> [T]he damage to national security caused by the exposure of a source's relationship with the CIA is not limited to the impact upon that source. Disclosure of information leading to the exposure of an intelligence source, no matter how inadvertent, could cripple the CIA's ability to recruit new individuals, establish new relationships, or even to maintain current relationships with intelligence sources. . . .

(Id. ¶¶ 54-56.)

> Once the nature of an intelligence method or the fact of its use in a certain situation is discovered, the method may become useless.
>
> . . .
>
> [T]he Requested PDBs are part of a mosaic of PDBs that would reveal information about the application of intelligence methods even excluding any text that reveals specific methods as such. To the extent that there may be remnants of information in either individuals PDB that would not be classified standing alone, when pieced together with other information available to a foreign intelligence service the remnants would reveal information about the application of intelligence methods employed by the CIA to obtain the intelligence reported . . .
>
> Although the intelligence included in the Requested PDBs is over 30 years old, its disclosure would reveal to educated observes information about the application of intelligence methods in use at the time of the Requested PDBs and subsequently. The effective collection, analysis and exploitation in intelligence requires the CIA to prevent disclosure of such information to foreign governments, intelligence services or other entities hostile to the United States who could use it to undermine the current collection and analysis of foreign intelligence.

(Id. ¶¶ 60-63.) That other PDBs, particularly two in close proximity in time to the Requested PDBs, as well as other intelligence documents have been disclosed heightens the risk that foreign governments and entities hostile to the United States would be able to use information in the Requested PDBs to complete a mosaic constructed from information that has previously been made public or otherwise in those entities' possession. (See id. ¶ 30.) And were the information in the

Requested PDBs to be "broken down and analyzed piecemeal in this case, "it does not appear that there will be a principled point at which to stop disclosure of information in additional PDBs in the future." (Id.) The Declaration itself elaborates additional details. (See id. ¶¶ 49-65.) Again, the Supreme Court has explicitly endorsed the mosaic theory and recognized the great deference to which the CIA is entitled regarding its application to particular intelligence information. Sims, 471 U.S. at 179, 105 S. Ct. at 1893.

The level of specificity Mr. Buroker provides meets the standard set in Wiener and reiterated in Rosenfeld v. DOJ, 57 F.3d 803, 807 (9th Cir. 1995). His Declaration ties the CIA's general concerns about disclosure of sources and methods to the specific PDBs at issue and, contrary to Plaintiff's assertion, is not mere boilerplate. Contrast Wiener, 943 F.2d at 981 (finding Vaughn index insufficient under Exemption 1 for "fail[ure] to tie the FBI's general concern about disclosure of confidential sources to the facts of this case"). And its accounting for the age of the PDBs and its explanation of why disclosure of the PDBs can reasonably be expected to undermine current intelligence collection and analysis answer the sort of questions the Wiener decision posed, as applied to this case. See id. at 981 n.15. The Declaration may not be criticized because it refers to possible harms that are reasonable to expect upon disclosure rather than harms that would occur with certainty. Executive Order 12,958, as amended, provides for Top Secret classification of information "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe." E.O. 13,292 § 1.2, 68 Fed. Reg. at 15315 (emphasis supplied). See also Gardels, 689 F.2d at 1106 (recognizing that there is "necessarily a region for forecasts in which informed judgment as to potential harm should be respected"); Halperin, 629 F.2d at 149 ("courts must take into account . . . that any affidavit of threatened harm to national security will always be speculative").

Plaintiff's opinion, and those of his declarants, that disclosure of the Requested PDBs would not harm the national security therefore are insufficient to controvert Mr. Buroker's justification for nondisclosure of the Requested PDBs, and do not lessen the great deference to which Mr. Buroker's Declaration is entitled. In Fitzgibbon v. U.S. Secret Service, 747 F. Supp. 51 (D.D.C. 1990), a D.C. District Court rejected a similar criticism of an agency affidavit's "wholly plausible assertion that

disclosure of the identity of the foreign government [] would effectively discourage other foreign governments from providing information to the United States." Id. at 55. The court described the criticism as "tantamount to a claim that, in order to pass muster, the affidavits must be so specific as to cause the very harm that the exemption was intended to avoid." Id. at 56. It further concluded, "That is obviously not appropriate. It is the nature of the FOIA's national security exemption that affidavits setting forth the reasons for claiming it are necessarily somewhat vaguer than those in support of claims for other exemptions." Id.; accord Assassination Archives, 334 F.3d at 59; Aftergood, 355 F. Supp.2d at 563.

We submit for the reasons set forth above and in our opening memorandum that Mr. Buroker's Declaration provides sufficient information to demonstrate that the CIA properly relied on Exemption 1. However, if the Court requires additional detail concerning the harm to national security posed by disclosure of the Requested PDBs, the CIA stands ready to provide such detail ex parte. See, e.g., Doyle, 722 F.2d at 556-57.

III. The Requested PDBs Are Covered By Exemption 5 Based on the Presidential Communications and Deliberative Process Privileges

Plaintiff's contention that the CIA may not rely on Exemption 5 because the Office of the President is not an agency under FOIA, (Pl.'s Opp'n at 16-17), should be given short shrift. As the Supreme Court has made clear, Exemption 5 covers documents "normally privileged in the civil discovery context." FTC v. Grolier, 462 U.S. 19, 26, 103 S. Ct. 2209, 2214 (1983) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148-49, 95 S. Ct. 1504, 1515 [1975]); accord, e.g., Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1088 (9th Cir. 2002). The presidential communications and deliberative process privileges are such "normal[] privilege[s]." E.g., United States v. Nixon, 418 U.S. 683, 708, 94 S. Ct. 3107-08 (1974) ("Nixon I") (presidential communications privilege); In re Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997) (quoting Nixon I) (presidential communications and deliberative process privileges); National Wildlife Fed'n, 861 F.2d at 1119 (deliberative process privilege). The D.C. Circuit recently recognized that Exemption 5 incorporates the presidential communications privilege. Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1113 (D.C. Cir. 2004) (citing Sears, Roebuck & Co., 421 U.S. at 149 n.16 & 150, 95 S. Ct. at 1515 n.16 & 1516). It is likewise

clear that the exemption encompasses the deliberative process privilege. E.g., National Wildlife Fed'n, 861 F.2d at 1117.

Congress did not intend the phrase "inter-agency or intra-agency" as used in FOIA to be "rigidly exclusive terms."[12] Ryan v. DOJ, 617 F.2d 781, 790 (D.C. Cir. 1980). FOIA expressly excluded the Office of the President from its definition of "agency" because of the constitutional problems that would arise with congressional regulation of its communications. See, e.g., Armstrong v. Executive Office of President, 1 F.3d 1274, 1292 (D.C. Cir. 1993). Accepting Plaintiff's contention that communications to the President and his most senior advisors for their use in crafting foreign policy are not covered by Exemption 5 because the President is not an "agency" would result in less protection to the Office of the President for the very reason that Congress determined to afford it greater protection. The Court should not adopt this inverted view of FOIA's statutory scheme.

A. Presidential Communications Privilege

1. Presidential Invocation Is Not a Prerequisite to Exemption 5 Based on the Privilege

Plaintiff's argument that the CIA "lacks standing" to rely on the presidential communications privilege because the privilege is applicable only when formally invoked by the President, (Pl.'s Opp'n at 22-25), is at odds with the fundamental FOIA principle that an applicable privilege need not be formally invoked and that the inquiry is whether the document is of the type that would be "normally privileged in the civil discovery context." See Sears, Robuck & Co., 421 U.S. at 148-49,

[12] Plaintiff's reliance on Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 121 S. Ct. 1060 (2001), is misplaced, as its holding that Exemption 5 was inapplicable to settlement negotiations between the government and the Klamath tribe rests on the tribe's status as a non-government entity which was "representing an interest of its own" in the negotiations. See Klamath, 532 U.S. at 10-12, 121 S. Ct. at 1066-68. Plaintiff does not dispute that the Requested PDBs are intra-government communications. Moreover, Klamath recognizes the functional approach courts should take in interpreting Exemption 5. Klamath, 532 U.S. at 9-10, 121 S. Ct. at 1066 (noting that courts construing Exemption 5 have found that it is broad enough to encompass documents prepared by "a person acting in a governmentally conferred capacity other than on behalf of another agency – e.g., in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency") (citing with approval Justice Scalia's dissenting opinion in DOJ v. Julian, 486 U.S. 1, 18 n.1, 108 S. Ct. 1606, 1616 n.1 [1988]).

95 S. Ct. at 1515-16; accord, e.g., Carter, 307 F.3d at 1088.[13] The rationale underlying the principle is persuasive, as the D.C. District Court set forth in detail in the recent decision Lardner, 2005 WL 758267, at *6-8 (copy of slip opinion attached to Def.'s Opening Mem.).[14] FOIA's exemptions are statutory, meaning that agency records are not subject to disclosure so long as they "fall within [any of nine] enumerated exemptions." Klamath, 532 U.S. at 7, 121 S. Ct. at 1065 (quoted in Lardner, 2005 WL 758267 at *6.). Exemption 5, then, covers documents that "fall within the ambit of a privilege." Id. at 7-8; accord Lardner, 2005 WL 758267 at *6. While outside of FOIA the head of an agency might be required to invoke common law privileges in response to civil discovery requests, Congress could not have intended that cabinet officers – much less the President – be required to invoke privilege in order for Exemption 5 to apply.[15] Again, the "test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." Grolier Inc., 462 U.S. at 26, 103 S. Ct. at 2214; accord Lardner, 2005 WL 758267 at *6. The Supreme Court in its recent decision in Cheney v. United States District Court for the District of Columbia, 124 S. Ct. 2576 (2004), emphasized the extraordinary nature of the President's assertion of executive

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[13] The cases on which Plaintiff relies in arguing the contrary are inapposite as they do not involve FOIA. See United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090 (1974) ("Nixon I"); Nixon v. Administrator of General Servs., 433 U.S. 425, 97 S. Ct. 2793 (1977) ("Nixon II"); In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997). The D.C. Circuit in Judicial Watch, Inc., 365 F.3d at 1114, which is a FOIA case, expressly declined to reach the question of whether presidential invocation is necessary because the appellant had waived the argument.

[14] Plaintiff argues that Lardner is entitled to little weight because it is unpublished. (Pl.'s Opp'n at 24 n.12.) However, it was only decided March 31, 2005, and is expected to be published.

[15] Plaintiff's suggestions to the contrary ignore critical differences between FOIA and civil discovery. In civil litigation, a party with standing can seek discovery relevant to any claim that withstands dispositive threshold motions. The formal requirements for assertion of various privileges developed in the litigation context reflect the circumscribed scope of appropriate discovery and the extent to which that discovery may be necessary to the consideration of a civil claim. In contrast, virtually anyone can request almost anything under FOIA. Any requester can, for example, ask for materials reflecting the inner deliberations of any agency or every agency on any and all matters. The courts have never suggested that the applicability of an executive privilege under FOIA Exemption 5 depends on the invocation of privilege by an agency head or other high-ranking official, as can be required in civil litigation. And there is no reason to believe that Congress intended to establish a regime that would potentially convert high-ranking officials, much less the President of the United States, into full-time document reviewers. See Lardner, 2005 WL 758267 at *9 (recognizing that "requiring the President of the United States to personally examine the documents at issue and then invoke the presidential communications privilege every time a citizen seeks presidential records through FOIA would expose the President to a considerable burden").

privilege, explaining that, "[o]nce executive privilege is invoked, coequal branches of the Government are set on a collision course," forcing the Judiciary "into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives." Id. at 2592; see also In re Cheney, No. 02-5354, slip op. at 7 (D.C. Cir. May 10, 2005) (en banc) (separation of powers requires strict construction of statutes that intrude on presidential decisionmaking) (copy attached). It was plainly not Congress' intent under FOIA to set coequal branches of the government on a collision course by requiring the President to invoke privilege under Exemption 5. See Lardner, 2005 WL 758267 at *8 (citing Cheney). The Court should conclude, as did the court in Lardner, that reliance on the presidential communications privilege under Exemption 5 is not dependent on invocation by the President.

2. The Age of the Requested PDBs Does Not Preclude Application of the Privilege Under FOIA Exemption 5

As Plaintiff observes, executive privileges are subject to erosion over time. However, there is no fixed time limit on the duration of the presidential communications privilege. Nixon II, 433 U.S. at 448-49, 97 S. Ct. at 2793 ("[T]he confidentiality necessary to [a president's] exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic"); Lardner, 2005 WL 758267 at *12 (quoting this passage of Nixon II and Nixon v. Freeman, 670 F.2d 346, 356 [D.C. Cir. 1982] ["there is no fixed number of years that can measure the duration of the privilege"].) Again, it is important to recognize that the inquiry under FOIA is whether the document at issue is of the type that would be "normally privileged in the civil discovery context." See Sears, Robuck & Co., 421 U.S. at 149, 95 S. Ct. at 1515-16; accord, e.g., Carter, 307 F.3d at 1088.

The recent decision in Lardner is instructive here as well. See Lardner, 2005 WL 758267 at *10-13. The plaintiff in that case contested the presidential communications privilege's applicability to over 20 year-old documents.[16] See id. at *11. The court examined caselaw concerning the effect

[16] Lardner involved presidential pardon documents from Reagan Administration, which began in 1980. The decision's references to 15 years reflect the plaintiff's effort to tie the age of the presidential communications privilege to the 15-year time frame set forth in the Presidential Records

of passage of time on the availability of the privilege and concluded, "this Court can find no basis in existing precedent for the notion that the presidential communications or deliberative process privileges are not routinely available in civil discovery for documents more than 15 years old." Id. (discussing Nixon II, 433 U.S. at 451, 97 S. Ct. at 2794 [1977], Judicial Watch, 365 F.3d at 1124, Nixon v. Freeman, 670 F.2d 346, and citing other cases). To be sure, the Requested PDBs are older than the documents at issue in Lardner, 37 years (PDB of April 2, 1968) and 39 years (PDB of August 6, 1965). Nevertheless, we have found no caselaw, and Plaintiff has identified none, which indicates that documents containing the sort of intelligence in the Requested PDBs loses its otherwise normally privileged status when it is the age of the Requested PDBs.

Lardner further recognizes that the presidential communications privilege is a qualified privilege in the civil discovery context and that the age of the document is only one of the factors that courts consider in deciding a request for disclosure. Id. at *13.

> Therefore, even if there were support for the argument that the executive privilege for a document significantly erodes after 15 years . . . Plaintiff would still need to demonstrate that the privilege erodes to such a degree that – even after one sets the age of the document alongside all of the other factors that bear on the assessment of the privilege – the documents still would "normally" or "routinely" be disclosed.

Id. Given the "demanding burden" to overcome the presidential communications privilege, the court was "unconvinced that the showing [that presidential communications must be disclosed when they are more than 15 years old] would be so routine that a blanket 15-year statute of limitations on the presidential communications and deliberative process privileges should be recognized under Exemption 5." Id. (citing Cheney, 124 S. Ct. at 2589; Grolier, 462 U.S. at 28, 103 S. Ct. at 2214-15; In re Sealed Case, 121 F.3d at 744-75). Likewise here, there is no basis for a conclusion that litigants would be able to show "routinely" that presidential communications concerning intelligence must be disclosed when they are 39 or 37 years old. To the contrary, courts have recognized that CIA intelligence information does not necessarily lose its sensitivity – certainly a critical factor in any balancing analysis – when it is 39 years old, Assassination Archives, 334 F.3d at 61 (1962

Act. That the Department of Justice stated in that case that it would not assert privilege for pardon documents more than 30 years old or from the Ford and Carter Administrations, Larnder, 2005 WL 758267 at *2, is inapposite with respect to the CIA's decision to withhold the sensitive intelligence information in Requested PDBs, an entirely different type of information.

intelligence compendium), or 32 years old, Maynard, 986 F.2d at 555-56 (unredacted 1961 memorandum).

Thus, there is no basis for a conclusion that the passage of 39 or 36 years routinely erodes the national security reasons to protect presidential communications regarding intelligence to such a degree that the presidential communications privilege ordinarily would be unavailable. The court should conclude that the presidential communications privilege operates under FOIA Exemption 5 to justify the CIA's withholding of the Requested PDBs.

B. Deliberative Process Privilege

Because the Requested PDBs are covered by the presidential communications privilege, the Court need not consider the deliberative process privilege as a basis for application of Exemption 5. See In re Sealed Case, 121 F.3d at 746 (recognizing that presidential communications privilege affords greater protection than deliberative process privilege and that "we would need to address application of the deliberative process privilege as to any document only if we determine that the withheld document is not subject to the presidential privilege"). But even if the Court were to reach the issue, it should readily conclude that the deliberative process privilege covers the Requested PDBs.

In addition to the argument that the Requested PDBs are not "inter-agency or intra-agency" documents because the CIA prepared them for the President, Plaintiff challenges the CIA's reliance on the privilege on the grounds that (i) the CIA prepared the PDBs for the President's use in foreign policy decisionmaking rather than for the CIA's own use and the PDBs are not predecisional to any CIA decision, and (ii) the PDBs contain intelligence that is factual in nature. (Pl.'s Opp'n at 16-22.) Plaintiff's first argument fails because the Supreme Court has recognized that documents prepared for the President's decisionmaking fall within Exemption 5. In EPA v. Mink, the Supreme Court found it "beyond question" that documents prepared for the President by a committee within the National Security Council could be covered by Exemption 5. Mink, 410 U.S. at 85, 93 S. Ct. at 835[17]; see also

[17] Following Mink, Congress amended FOIA's Exemption 1 to its current form so as to broaden the scope of courts' inquiry under that exemption beyond the scope described in Mink. See Ray v. Turner, 587 F.2d 1187, 1190 (D.C. Cir. 1978). The amendment does not bear on Mink's holding regarding Exemption 5.

In re Sealed Case, 121 F.3d at 746 (treating White House documents as protectable under deliberative process and presidential communications privilege). Additionally, the feedback from the President and his most senior advisors concerning information in the PDB informs the CIA's decisions about where to focus its intelligence-gathering activities and analyses. (Buroker Decl. ¶¶ 19, 35-36.)

Plaintiff's second argument is without merit because its emphasis on the factual nature of the information in the Requested PDBs reflects an overly rigid interpretation of the privilege's scope, an interpretation that the Ninth Circuit rejected in favor of a functional approach in National Wildlife Fed'n, 861 F.2d at 1119; accord, e.g., Mink, 410 U.S. at 91, 93 S. Ct. at 838. To be sure, National Wildlife Federation recognized that "'a report does not become part of the deliberative process simply because it contains only those facts which the person making the report thinks material.'" Id. (quoting Playboy Enter., Inc .v. DOJ, 677 F.2d 931, 935 [D.C. Cir. 1982]) (cited in Pl.'s Opp'n at 21). However, the circuit went on to explain that the deliberative-process analysis should be "process-oriented," or "functional," and should not depend on whether the information at issue may be labeled "factual" or "deliberative." Id. (citing Montrose Chem Corp. of Cal. v. Train, 491 F.2d 63, 71 [D.C. Cir. 1974]). Under that test, factual materials are exempt "to the extent they reveal the mental processes of decisionmakers." Id. (citing Dudman Comm. Corp. v. Dep't of the Air Force, 815 F.2d 1265, 1568 [9th Cir. 1987], Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83 [2d Cir. 1979], Montrose Chem, 491 F.2d at 67-68.)

Plaintiff does not dispute that the Requested PDBs reflect and give insight into the President's foreign policy decisionmaking process.[18] Indeed, his own Declaration explains that a reason he seeks the Requested PDBs is that "[u]nderstanding what the president knew and when is key to understanding how and why foreign policy decisions were made during relevant times in our history."[19] (Decl. of Pl. Larry Berman ¶ 10.) Plaintiff's reliance on Coastal States Gas Corp. v. Dep't

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[18] Mr. Buroker's Declaration explains how disclosure of the Requested PDBs would expose both the deliberative process of U.S. national security and foreign policy decisionmaking and the deliberative process of providing intelligence to the President regarding foreign policy priorities. (Buroker Decl. ¶ 69.)

[19] Plaintiff's reasons for seeking the Requested PDBs have no bearing on the FOIA analysis. See, e.g., Sears, Roebuck & Co., 421 U.S. at 143 n.10, 95 S. Ct. at 1513 n.10 ("Sears' rights under [FOIA] are neither increased nor decreased by reason of the fact that it claims an interest in the

of Energy, 617 F.2d 854 (D.C. Cir. 1980), is misplaced. The documents at issue in that case – "memoranda from regional counsel to auditors working in DOE's field offices," id. at 858 – were "simply straightforward explanations of agency regulations in specific factual situations" and were not part of any process in which "'decision[s]' [were] being made or 'policy' being considered." Id. at 868. Unlike the "ongoing audit process" of which the memoranda in Coastal States were a part, the Requested PDBs are "one part of the established [presidential foreign-policy decisionmaking] process," id., and reflect the particular information out of the universe of available information which the President considers during that part of the decisionmaking process.[20] (See Buroker Decl. ¶ 62.) Likewise, Playboy Enterprises, 677 F.2d 931 (quoted in Pl.'s Opp'n at 21), lends Plaintiff no support given that it involved an investigative report concerning crimes allegedly committed by an FBI informant at the time he was acting as an FBI informant, id. at 933, hardly analogous to the intelligence communications to the President that are at issue here.

Finally, that the Requested PDBs are not draft versions of a subsequently finalized CIA document, as Plaintiff states, (Pl.'s Opp'n at 18-19), does not alter their status as documents prepared to assist the President in his foreign policy decisionmaking. Because disclosure of the Requested PDBs would expose aspects of that process, the deliberative process privilege operates through FOIA Exemption 5 to protect them from disclosure. See Mink, 410 U.S. at 85, 93 S. Ct. at 835; National Wildlife Fed'n, 861 F.2d at 1119.

IV. The CIA's Declaration Explains in Sufficient Detail Why the Requested PDBs Cannot Be Redacted

Plaintiff's charge that CIA Information Review Officer Buroker's Declaration is conclusory and lacking in specifics regarding the non-segregability of the Requested PDBs is also without basis. Mr. Buroker describes why redaction of the Requested PDBs is not possible. He explains, "Since the

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[information at issue] greater than that shared by the average member of the public.") (citing cases); North v. Walsh, 881 F.2d 1088, 1096 (D.C. Cir. 1989) ("In sum, [a FOIA requester's] need or intended use for the documents is irrelevant.")

[20] That President Johnson's diary reflects no meetings or appointments between the President and CIA personnel on the dates of the Requested PDBs, (Pl.'s Opp'n at 18-19 n.8 [citing Pl.'s Exs 3 & 19]), hardly undercuts CIA Information Review Officer Buroker's statement that the PDB reflects "an ongoing dialogue between the President and his most senior advisors and the CIA," (Buroker Decl. ¶ 73).

PDB itself is an intelligence method, it follows that any PDB information, including both the obviously classified revelations of sensitive methods and the information remaining after such specific revelations are removed, constitutes information about the application of an intelligence method." (Buroker Decl. ¶ 37.) He further explains,

> [W]hile the CIA recognizes that in some circumstances there may be information provided by human sources or foreign liaison services that can be declassified, declassification decisions must be made with awareness that any information released can be analyzed in light of other information (i.e., other pieces of a "mosaic") that might lead to the exposure of an intelligence source. As I have explained, the PDB would be an especially large piece of any mosaic of intelligence information; this is the case even after the identifiable pieces of specifically source-revealing information are redacted out of a PDB. The remnants of a series of PDBs would tend to reveal source information to the educated reader that would not be apparent from a single, specific document.

(Id. ¶ 57.) Thus, there is ample support in Mr. Buroker's Declaration for his conclusions that: (i) "All of the information in the Requested PDBs is related to intelligence activities, sources and methods, foreign government information, foreign relations, and activities and/or the deliberative process," (ii) "Any [non-exempt] information is so inextricably intertwined with the exempt information that release of the non-exempt information would produce little, if anything, more than fragmented, unintelligible sentences composed of isolated, meaningless words," and (iii) "Any intelligible information that is not properly classified as a specific item is nevertheless a part of a mosaic of PDB information such that a compilation of PDBs would tend to reveal gravely damaging insight into how the CIA conducts its intelligence business." (Id. ¶ 78.) Contrast, e.g., Ray v. Turner, 587 F.2d 1187, 1196 (D.C. Cir. 1978) (affidavit failed to establish non-segregability due to "failure to address specifically whether the disclosure of substantive information may be possible without the disclosure of source, and if not why not") (cited in Pl.'s Opp'n at 26). The opinions of Plaintiff's declarants to the contrary provide no basis on which to second-guess Mr. Buroker's explanation. See, e.g., Sims, 471 U.S. at 179, 105 S. Ct. at 1893; Assassination Archives, 334 F.3d at 59.

Again, Mr. Buroker's Declaration provides all the information necessary to establish that no reasonably segregable portions of the documents exist. (See Buroker Decl. ¶ 5.) Should the Court require additional information regarding non-segregability, the CIA is prepared to provide the information to the Court ex parte. See, e.g., Doyle, 722 F.2d at 556-57.

V. Plaintiff's Objections to CIA Information Review Officer Buroker's Declaration Should Be Overruled

Plaintiff has objected to Mr. Buroker's Declaration by filing a lengthy pleading entitled "Plaintiff Larry Berman's Objections to Defendant Central Intelligence Agency's Evidence in Support of Defendant's Motion for Summary Judgment." None of Plaintiff's objections has merit.

The majority of Plaintiff's objections argue that Mr. Buroker lacks personal knowledge to discuss certain matters or that his statements are not factual statements supported by personal knowledge. This argument is in conflict with well-established precedent on this point and with clearly stated information in the Declaration establishing Mr. Buroker's ability and authority to provide facts on each of the matters addressed. The courts have long recognized that an agency defending a FOIA case may submit a declaration by an agency official with responsibility for coordinating the agency's decision on FOIA requests so long as the official has personal knowledge of the procedures used in handling the FOIA request at issue and is familiar with the documents in question.[21] E.g., Spannaus v. DOJ, 813 F.2d 1285, 1289 (4th Cir. 1987) (rejecting as "entirely without merit" plaintiff's argument that government declarant was not speaking from personal knowledge given that declarant was familiar with procedures used in processing plaintiff's FOIA request, although he did not have personal knowledge of underlying investigation with respect to which plaintiff had requested documents); Schrecker v. DOJ, 217 F. Supp.2d 29, 35 (D.D.C. 2002) (finding unit chief appropriate official to relay information regarding activities of agency with respect to FOIA request); see also Safecard Serv., Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (finding person in charge of the agency's search for documents to be the most appropriate person to provide an affidavit even if she did not have personal knowledge of all the minutiae of a large investigation). Indeed, an agency necessarily must testify through a person and that person necessarily must testify to what other agency officials told him and about the documents he/she reviewed.

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[21] Plaintiff's suggestion that a single CIA declaration is insufficient to establish entitlement to its claimed exemptions is at odds with the vast majority of FOIA cases involving the CIA as well as other agencies. See, e.g., Assassination Archives and Research Ctr. v. CIA, 334 F.3d 55 (D.C. Cir. 2003) (relying on single declaration submitted by CIA Information Review Officer for Directorate of Intelligence); see also Minier, 88 F.3d at 800 ("The agency may meet its burden [under FOIA] by submitting a detailed affidavit . . .") (emphasis supplied).

As the Information Review Officer for the Directorate of Intelligence, Mr. Buroker is responsible for the final review of all documents containing information originating in components of the Directorate of Intelligence ("DI") or that otherwise implicate DI interests when they are subject to requests for disclosure such as under FOIA. (Buroker Decl. ¶ 2). Also as part of his official duties, Mr. Buroker ensures that determinations as to the release or withholding of CIA information are proper and do not jeopardize CIA interests, intelligence activities, personnel, facilities, sources or methods. (Id. ¶ 3.) Finally, Mr. Buroker states that in the course of his official duties he has become familiar with Plaintiff's FOIA claim and that he makes all statements in the Declaration based upon his personal knowledge and upon information made available to him in his official capacity. (Id. ¶ 4.) It therefore is clear that Mr. Buroker has established foundation for his testimony. See, e.g., Spannaus, 813 F.2d at 1289; Schrecker, 217 F. Supp.2d at 35.

Contrary to Plaintiff's contention, Mr. Buroker's references to legal standards are not legal conclusions. Rather, they are part of Mr. Buroker's explanation of why the CIA concluded that FOIA Exemptions 1, 3, and 5 cover the Requested PDBs. (See generally Buroker Decl.) The CIA necessarily had to make reference to the legal standards governing FOIA and its exemptions in order to analyze Plaintiff's FOIA request and reach its decision thereon.

We have explained above why Plaintiff's objections to Mr. Buroker's Declaration as conclusory, speculative, vague, and ambiguous are without merit and contrary to the governing standards for FOIA declarations addressing intelligence such as contained in the Requested PDBs. See Sections I-II, supra.

CONCLUSION

For the foregoing reasons and those set forth in our opening memorandum, the Court should grant Defendant CIA's motion for summary judgment, deny Plaintiff's cross-motion for summary judgment, overrule Plaintiff's Objections to CIA Information Review Officer Buroker's Declaration, and dismiss the Complaint with prejudice.

Dated: May 11, 2005

Respectfully submitted,

McGREGOR W. SCOTT
United States Attorney
YOSHINORI H. T. HIMEL #66194
Assistant U. S. Attorney

ELIZABETH J. SHAPIRO
Assistant Director
CAROLINE LEWIS WOLVERTON
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch

Of Counsel:

JONATHAN FERRY
Assistant General Counsel
Litigation Division
Central Intelligence Agency

By: /s/ Caroline Lewis Wolverton