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-04-2699 DFL-DAD

DEFENDANT'S STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(s)**

FEDERAL STATUTES

REGULATIONS

PUBLIC LAWS

INTRODUCTION

Plaintiff Larry Berman brings this suit to challenge Defendant Central Intelligence Agency's ("CIA") denial of his request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for certain editions of the President's Daily Brief ("PDB"). Plaintiff, a history professor at the University of California at Davis, asserts that he seeks the documents – prepared by the CIA for former President Lyndon B. Johnson – for scholarly purposes. Defendant CIA objects on the grounds that (1) disclosing the editions of the PDB that Plaintiff seeks ("Requested PDBs") could reveal sensitive information about the nation's intelligence process as well as intelligence sources and methods at severe cost to U.S. intelligence-gathering and analytic capabilities and to the nation's security, and (2) each edition of the PDB is a presidential communication prepared for the President and his most senior advisors to be used in the conduct of his official duties and also constitutes a deliberative, pre-decisional document used to develop and conduct national security and foreign policy.

Prepared for the President and his closest advisors, the PDB reflects the nation's intelligence priorities at a given time, what the U.S. intelligence officials know and when they know it, as well as what the Intelligence Community does not know. Disclosure of a daily edition of the PDB would reveal parts of the "mosaic" of U.S. intelligence and its sources and methods, and reasonably could be expected to result in exceptionally grave damage to national security. Consequently, there have been only two instances in which the President authorized the Director of Central Intelligence to disclose specific editions of the PDB: the two PDBs preceding September 11, 2001, which the Director of Central Intelligence released in redacted form for inclusion in the Final Report of the National Commission on Terrorist Attacks on the United States ("9/11 Commission Report"), after determining pursuant to Section 3.1(b) of Executive Order 12,958, as amended, that the damage to national security that would result from disclosure was outweighed by the public interest in the PDBs' release. Were the CIA ordered to disclose other editions of the PDB, or even parts of other editions, there would be no principled point at which to prevent future compelled disclosures. The result would be the disclosure of a large mosaic of the most important intelligence available to the United States government that reasonably could be expected to reveal sensitive information about the intelligence process and about intelligence sources and methods, and therefore would cripple U.S.

intelligence-gathering and analytic capabilities. Compelled disclosure could also have a chilling effect on the quality of the PDB as a document used to advise the President and his most senior advisors on matters of national security and foreign policy, because it could lead those who produce the PDB to provide more qualified or less candid advice than if they were assured that their advice forever would be held in confidence.

The Requested PDBs are properly classified as Top Secret. The National Security Act of 1947 ("National Security Act"), section 103(c)(7), 50 U.S.C. § 403-3(c)(7), requires the CIA to withhold them from public disclosure, and they reflect critical communications and deliberations regarding national security and foreign policy at the top level of the Executive Branch. FOIA Exemptions 1, 3, and 5 – 5 U.S.C. § 552(b)(1), (b)(3), and (b)(5) – therefore exempt the PDBs from disclosure. The Court should enter summary judgment in the CIA's favor and dismiss the Complaint.

FREEDOM OF INFORMATION ACT

FOIA requires the disclosure of certain agency records. 5 U.S.C. § 552(a). "Congress recognized, however, that public disclosure is not always in the public interest." CIA v. Sims, 471 U.S. 159, 166-67, 105 S. Ct. 1881, 1886 (1985). Thus, FOIA sets forth nine exemptions to its general disclosure requirement. 5 U.S.C. § 552(b)(1)-(9). The Requested PDBs are exempt from disclosure pursuant to FOIA exemptions (b)(1), (b)(3), and (b)(5):

> (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order
>
> (b)(3) 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
>
> (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

5 U.S.C. § 552.

THE PRESIDENT'S DAILY BRIEF

The accompanying Declaration of Terry N. Buroker, the CIA's Information Review Officer for the Directorate of Intelligence, provides a detailed explanation of the history of the PDB, the purposes it serves, and why compelling its disclosure reasonably could be expected to damage national security. We provide a summary below.

The PDB is "a unique intelligence document prepared specifically for the President of the United States and his most senior advisors to provide them with the most important current intelligence about critical issues relating to national defense and foreign policy."[1] (Buroker Decl. ¶ 16.) The PDB presents intelligence on issues determined to be of most importance to the President and his most senior advisors on any given day. (Id. ¶ 22.) Because of its limited distribution and the nature of its readers, the PDB includes more sensitive and more immediate information than can be included in finished intelligence documents produced for a wider audience. (Id. ¶ 21.) The PDB thus reflects the nation's intelligence priorities, what the U.S. Intelligence Community is targeting and how, what the country's decision-makers know, when they know it, and also what they do not know. (Id. ¶ 23.) Moreover, because the PDB is "the most highly selective compendium of the most important intelligence available to the U.S. Intelligence Community" it is "uniquely sensitive in terms of risk of identification of intelligence sources and methods." (Id. ¶ 24.)

The PDB reflects an ongoing dialogue between the President, together with his most senior advisors, and the CIA. (Id. ¶ 19.) In response to the urgency of raw intelligence, current events, and the expressed foreign policy priorities of the President and his most senior advisors, senior CIA officials and analysts must determine what subjects merit inclusion in each day's PDB and must determine what information to provide out of the thousands of pieces of information on certain subjects. (Id. ¶ 73.) In response to information presented in the PDB, Presidents and their advisors commonly ask follow-up questions and suggest areas that the PDB should cover. (Id. ¶ 19.) "As such [the PDB] has served as a key element in Presidential deliberations on the making of U.S. national defense and foreign policy." (Id.) In turn, feedback from the President and his top advisors that is prompted by the PDB serves to direct the CIA's conduct of intelligence on a daily and a long-term basis, making the PDB itself an intelligence method. (Id. ¶¶ 35-37.)

[1] The PDB was originally called the President's Intelligence Checklist ("PICL"), which the CIA created during the Kennedy Administration for the purpose of providing the President with an intelligence document directed specifically to the most sensitive data and the CIA's best intelligence judgments about the matters in which the President and his most senior advisors were interested. (Buroker Decl. ¶ 18.) During the Johnson Administration, the PICL became the PDB, and the PDB since has been continually modified in format, content, and presentation in accordance with the needs of the sitting President and his top advisors. (Id.) The essential function of the PDB, however, has remained the same: to inform the President and his closest advisors of the current intelligence that is critical to U.S. national defense and foreign policy. (Id. ¶ 19.)

Because each edition of the PDB builds upon prior editions and at the same time lays groundwork for the content of subsequent editions, the CIA considers the PDB to be a "series." (Id. ¶ 25.) While a single PDB edition may appear harmless if disclosed, the information it conveys may be of great value to foreign governments, intelligence services, international terrorist organizations and other of the nation's enemies as "part of a 'mosaic'" that could "expose targeting strategies, gaps in intelligence capabilities, or more specifically reveal a source or an intelligence capability" with grave consequences for the nation's intelligence-gathering capabilities and its individual sources.[2] (Id. ¶ 26.) Indeed, because of the nature of the information included, the PDB "provides a bigger piece of any 'mosaic' that a hostile entity might assemble to use against the United States." (Id. ¶ 39.) The prospect of multiple PDBs being disclosed exacerbates the danger to U.S. intelligence and national security because such disclosures necessarily would expose multiple pieces of the "mosaic."[3] (Id. ¶¶ 28-30.) 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. ¶ 30.) "If significant numbers of individual editions of the PDB (no matter how old) were publicly disclosed, even after redaction of the obvious revelations of specific collection methods and sources, due to regular or even sporadic disclosure (by CIA policy or court order), patterns of application of intelligence methods including those by which the U.S. sets priorities, collects intelligence, and analyzes it would emerge." (Id. ¶ 38.)

[2] Mr. Buroker explains that the "mosaic theory" is a primary method of intelligence gathering employed by all intelligence services. (Buroker Decl. ¶ 27.) A theory in name only, it is the process of "collecting seemingly disparate pieces of information and assembling them into a coherent picture of foreign intelligence targets' activities and intentions." (Id.)

[3] Only very few PDBs have ever been released. The President authorized the Director of Central Intelligence to release of the two redacted PDBs in the 9/11 Commission Report pursuant to section 3.1(b) of Executive Order 12,958, as amended, based on his finding of exceptional circumstances attendant to the 9/11 Commission's special mission. (Buroker Decl. ¶ 30 n.4.) The other releases are attributable to error or the specific requirements of the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. 2107 note. (Id. ¶ 30 n.4.)

FACTUAL AND PROCEDURAL BACKGROUND

By letter dated March 3, 2004, Plaintiff requested that the CIA disclose to him pursuant to FOIA the PDBs of August, 6, 1965, August 8, 1965, March 31, 1968, and April 2, 1968.[4] (Id. ¶ 9.) By letter dated April 15, 2004, the CIA denied the request based on FOIA exemptions (b)(1), (b)(3), and (b)(5). (Id. ¶ 11.) By letter dated May 6, 2004, Plaintiff appealed the denial to the CIA's Agency Release Panel. (Id. ¶ 12.) By letter dated June 21, 2004, the Agency Release Panel upheld the withholding based on FOIA Exemptions 1, 3, and 5, and denied the appeal. (Id. ¶ 14.)

The Declaration of CIA Information Review Officer Buroker explains in detail the CIA's reasons for withholding the PDBs at issue in their entirety. Mr. Buroker explains that section 103(c)(7) of the National Security Act, 50 U.S.C. § 403-3(c)(7), as amended, obligates the Director of Central Intelligence to protect the PDBs from public disclosure because they constitute an intelligence method, as well as contain information concerning intelligence sources and methods. (Buroker Decl. ¶¶ 32-40.) He further explains that the PDBs are properly classified as Top Secret, (id. ¶¶ 41-65), and that their disclosure would reveal both presidential communications and the deliberative process concerning U.S. foreign policy decision-making and of providing intelligence to the President regarding foreign policy priorities, (id. ¶¶ 66-77). Mr. Buroker's declaration additionally sets forth the impossibility of segregating any non-exempt information in the Requested PDBs. (Id. ¶¶ 78-79.)

Plaintiff filed this lawsuit on December 23, 2004, to challenge the CIA's decision to withhold the PDBs at issue. The CIA filed its Answer on February 22, 2005, in which it disputes Plaintiff's claims.

ARGUMENT

I. Summary Judgment Is Appropriate for Resolution of Plaintiff's FOIA Claims

Courts typically resolve FOIA actions through summary judgment pursuant to rule 56 of the Federal Rules of Civil Procedure because they rarely involve disputed facts. See, e.g., Minier v. CIA, 88 F.3d 796, 800 (9th Cir. 1996). Where the government claims that one or more of the nine FOIA exemptions justifies nondisclosure of information, it bears the burden proving the applicability of the claimed exemption(s). E.g., id. The government "may meet its burden by submitting a detailed

[4] No PDB was produced on March 31, 1968, (Buroker Decl. ¶ 9 & n.3), and Plaintiff's Complaint does not request disclosure of a PDB from August 8, 1965, (Compl. ¶ 1). Thus, only two PDBs are at issue: the PDBs of August 6, 1965 and April 2, 1968.

affidavit showing that the information logically falls within the claimed exemptions." Id. (quoting Hunt v. CIA, 981 F.2d 1116, 1119 [9th Cir. 1992]). 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]). With regard to claims by the CIA to FOIA exemptions, the Ninth Circuit has specified that "a district court must accord 'substantial weight' to CIA affidavits, provided the justifications for nondisclosure 'are not controverted by contrary evidence in the record or by evidence of CIA bad faith.'" Minier, 88 F.3d at 800 (quoting Hunt, 981 F.2d at 1119).

In accordance with these standards, the CIA explains its bases for withholding the PDBs at issue pursuant to FOIA Exemptions 1, 3, and 5 through the attached Declaration of CIA Information Review Officer Buroker. Because Mr. Buroker's Declaration is reasonably detailed and is submitted in good faith, the CIA has satisfied its burden under FOIA and is entitled to summary judgment.

II. The CIA Properly Relied on Exemption 3

FOIA Exemption 3, 5 U.S.C. § 552(b)(3), applies to records "that are specifically exempted from disclosure by other federal statutes 'provided that such statute affords the agency no discretion on disclosure, establishes particular criteria for withholding the information, or refers to the particular types of material to be withheld.'" Minier, 88 F.3d at 800 (quoting Hunt, 981 F.2d at 1118). The only issues presented in an Exemption 3 claim are (1) "whether there is a statute within the scope of Exemption 3," and (2) "whether the requested information falls within the scope of the statute." Id. at 801 (citing CIA v. Sims, 471 U.S. at 167, 105 S. Ct. at 1886-87). Courts evaluating Exemption 3 claims must accord substantial weight to the CIA's judgment with respect to national security considerations at issue. See 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 interest and potential risks at stake."); see also Gardels v. CIA, 689 F.2d 1104-05 (D.C. Cir. 1982) ("The test is not whether the court personally agrees in full with the CIA's evaluation of the danger – rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in the field of foreign intelligence in which the CIA is expert and given by Congress a special role."); Phillippi v. CIA, 655 F.2d 1325, 1332 (D.C. Cir. 1981) (CIA affidavits on

Exemption 3 claims are to be accorded substantial weight); Halperin v. CIA, 629 F.2d 144, 147-48 (D.C. Cir. 1980).

The CIA invoked Exemption 3 in denying Plaintiff's FOIA request based on the National Security Act, section 103(c)(7), 50 U.S.C. § 403-3(c)(7), as amended.[5] (See Buroker Decl. ¶ 32.) Under section 103(c)(7), the Director of Central Intelligence, the head of the CIA, must "protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-3(c)(7). With that statutory mandate, "Congress intended to give the Director of Central Intelligence broad power to protect the secrecy and integrity of the intelligence process." Sims, 471 U.S. at 170, 105 S. Ct. at 1888;[6] accord, e.g., Hunt, 981 F.2d at 1120.

> Plainly the broad sweep of this statutory language comports with the nature of the Agency's unique responsibilities. To keep informed of other nations' activities bearing on our national security the Agency must rely on a host of sources. At the same time, the Director [of Central Intelligence] must have the authority to shield those Agency activities and sources from any disclosures that would unnecessarily compromise the Agency's efforts.

Sims, 471 U.S. at 169.

It is well-established that section 103(c)(7) of the National Security Act is within the scope of FOIA Exemption 3. See, e.g., id. at 167-68; Minier, 88 F.3d at 801; Krikorian v. Dep't of State, 984 F.2d 461, 465 (D.C. Cir. 1993) ("It is well settled that [section 103-3(c)(7)] falls within exemption 3."). In fact, the Ninth Circuit has recognized that "the 'sources and methods' statutory mandate [of the National Security Act] is a 'near-blanket FOIA exemption,' which is 'only a short step [from] exempting all CIA records from FOIA.'" Minier, 88 F.3d at 801 (quoting Hunt, 981 F.2d at 1120-21). Exemption 3 requires no demonstration that harm to national security would result from a disclosure, nor does Exemption 3 apply only to current sources and methods. Past sources and methods are equally protected under the National Security Act. Thus, to satisfy its burden with regard to Exemption 3, the CIA need only demonstrate that release of the information at issue would

---

[5] Once effective, section 102A(i)(1) of the Intelligence and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638, 3651, will amend the National Security Act to vest the responsibility to protect intelligence sources and methods with the Director of National Intelligence. See Pub. L. 108-458 § 1097, 118 Stat. at 3698-99 (specifying effective date as not later than six months after the date of the enactment of the Intelligence and Terrorism Prevention Act, which was December 17, 2004).

[6] The Supreme Court went on to explain, "The reasons are too obvious to call for enlarged discussion; without such protections the Agency would be virtually impotent." Sims, 471 U.S. at 170, 105 S. Ct. at 1888.

"disclose 'sources and methods' of intelligence gathering." Id. (citing Sims, 471 U.S. at 193, 105 S. Ct. at 1900 [Marshall, J. concurring], and Wiener v. FBI, 943 F.2d 972, 983 [9th Cir. 1991]). It may do so through a sufficiently detailed affidavit or declaration, which the Court should accord "substantial weight." See supra at 6.

The Declaration of CIA Information Review Officer Buroker sets forth a detailed explanation of how compelled disclosure of the Requested PDBs, and the precedent that would be set for future compelled disclosures of the PDB, would reveal important information about U.S. intelligence sources and methods in three ways. (Buroker Decl. ¶¶ 29, 34-39.) First, the Requested PDBs contain information that, by itself or in connection with other information, could expose the existence of sensitive sources and methods of intelligence collection, including human sources, foreign liaison sources, and technical collection methods. (Id. ¶ 34.) Although the Requested PDBs are over 30 years old, there is no time limit in Section 103(c)(7) of the National Security Act for the protection of sources and methods, and as Mr. Buroker observes, human sources can have long lives and careers, and foreign liaison services can exist in perpetuity. Moreover, family members and associates of human sources can be at risk long after the death of the individual human sources. (Id. ¶ 55.)

Second, the PDB is itself an intelligence method, and disclosure of the Requested PDBs, even if redactions of specific intelligence sources and methods are attempted, could reveal information about the intelligence method of the PDB process itself. (Id. ¶¶ 35-36.) The CIA's reliance on the PDB in focusing its resources and energy about both daily and long-term intelligence gathering makes the PDB no less an intelligence method than the CIA's historical intelligence budget information, which the U.S. District Court for the District of Columbia recently recognized as implicating intelligence methods in Aftergood v. CIA, 355 F. Supp.2d 557, 562 (D.D.C. 2005) (upholding agency's denial of FOIA request under Exemption 3).

Third, disclosure of the information in the Requested PDBs would itself, and in addition to any other PDB information released in the future, contribute to the mosaic of intelligence information available to entities hostile to the United States attempting to construct an accurate picture of U.S. intelligence sources, methods, targeting priorities and capabilities. (Id. ¶ 26.) In his Declaration, CIA Information Review Officer Terry N. Buroker observes that "[i]ntelligence services specialize in collecting information from many sources and drawing conclusions from all of the information

gathered." (Id.) The Declaration further explains that because of the nature of the information included in the PDB, its disclosure would provide larger pieces of a mosaic than other intelligence documents and that release of information in the PDB "presents an especially useful means for a foreign intelligence service, a sophisticated international terrorist organization, or other entity hostile to the United States, to dissect and analyze the information to identify specific intelligence sources and methods." (Id. ¶ 28.)

Although a specific showing of harm is not required to support a claim to Exemption 3, see 5 U.S.C. § 552(b)(3) and 50 U.S.C. § 403-3(c)(7), the magnitude of the harm posed by revelation of intelligence sources and methods through the PDB is substantial and worthy of emphasis. "Secret information-collection techniques, capabilities, or technological devices are valuable from an intelligence-gathering perspective only so long as they remain unknown." (Id. ¶ 60.) "Once the nature of an intelligence method or the fact of its use in a certain situation is discovered the method may become useless." (Id.) An additional and substantial risk posed by compelled disclosure of particular PDB editions is that pieces of information therein could fit into the intelligence "mosaic" prepared by foreign governments or the nation's enemies, helping them understand what kind of intelligence methods the United States has used over time. (Id. ¶ 62.)

The Supreme Court has recognized that the CIA's judgments regarding the mosaic theory are "worthy of great deference." Sims, 471 U.S. at 178-79 (explaining that "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" and "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context") (internal quotations omitted); accord, e.g., Center for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003). CIA Information Review Officer Buroker explains that "[t]he unique nature of the PDB makes disclosure of any of its contents particularly dangerous because . . . it is the only finished intelligence product that synthesizes all of the best available intelligence on topics that the U.S. government has determined to be the most important foreign policy issues facing the country at a given time." (Buroker Decl. ¶ 38.) Indeed, "[the PDB] provides a bigger piece of any 'mosaic' that a hostile entity might assemble to use against the United States and its sources than most other intelligence documents would provide." (Id. ¶ 39.)

Contrary to Plaintiff's suggestion, that other PDBs have been released in the past does not bolster his claim that the PDBs at issue should be released. The Supreme Court rejected a similar argument in CIA v. Sims. The high Court explained that the suggestion that prior disclosure of information about intelligence sources "somehow estop[s]" the CIA from withholding information about other sources of the same category "overlooks the political realities of intelligence operations." Sims, 471 U.S. at 180, 105 S. Ct. at 1893; accord Center for Nat'l Sec. Studies, 331 F.3d at 930-31. The Court went on to observe,

> Congress did not mandate the withholding of information that may reveal the identity of an intelligence source; it made the Director of Central Intelligence responsible only for protecting against *unauthorized* disclosures. And it 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, 105 S. Ct. at 1893-94 (emphasis in original). As noted above, only a tiny fraction of all of the PDBs produced have been previously released. The President authorized the Director of Central Intelligence to disclose the two redacted PDBs in the 9/11 Commission Report pursuant to section 3(1)(b) of Executive Order 12,958, as amended, and the few additional PDBs that have been released were released in error or as required by the President John F. Kennedy Assassination Records Collection Act of 1992. (Buroker Decl. ¶ 30 n.4.) Moreover, that a few PDBs have already been released heightens the need to guard against further disclosures so as not to add to the mosaic of information available for exploitation by a hostile power. (See id. ¶ 30.) Whether certain information in the PDBs at issue is available publicly, as Plaintiff alleges, (Compl. ¶¶ 2-3), is immaterial. The fact of inclusion of information in the PDB officially acknowledges the information, a "critical difference" "in the arena of intelligence and foreign relations," Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990). It also reveals what the U.S. Intelligence Community was targeting at the time and shows when and from whom the United States obtained such information. (Buroker Decl. ¶ 28.)

> Nor does the age of the PDBs militate in Plaintiff's favor. As the D.C. Circuit has recognized: Given the Supreme Court's sweeping language in Sims and the fact that [provisions of the National Security Act] were congressionally designed to shield processes at the very core of the intelligence agencies – intelligence-collection and intelligence-source evaluation – we must conclude that the importation of standards [allowing disclosure of 'old' national security information] into the exemption 3 analysis from the exemption 1 analysis is improper, at least insofar as the latter analysis could be read to require the court to consider the effect of the passage of time on materials withheld under exemption 3.

Fitzgibbon, 911 F.2d at 764. Disclosure could betray U.S. intelligence sources' identities, violating the CIA's responsibility to hold their identities in secrecy for all time, as well as exposing them and (whether they are still living or not) their family and friends to possible embarrassment, retribution, torture, or death. (Id. ¶¶ 54-55.) Such a betrayal of intelligence sources could have severe repercussions on the nation's intelligence-gathering capabilities, including crippling the CIA's ability to recruit individuals as sources and to maintain relationships with its current sources. (Id. ¶ 56.) The Supreme Court very recently reiterated the critical importance of affording absolute protection to intelligence sources' identities in holding that courts may not entertain even a constitutional claim if doing so might reveal a source's identity: "'Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to close up like a clam.'" Tenet v. Doe, _ U.S. _, 125 S. Ct. 1230, 1237-38 (2005) (quoting Sims, 471 U.S. at 175, 105 S. Ct. at 1891). Further, as CIA Information Review Officer Buroker's Declaration explains, even though the intelligence in the PDBs is over 30 years old, its disclosure "would reveal to educated observers the application of intelligence methods in use at the time of the Requested PDBs and subsequently." (Id. ¶ 63.)

III. The CIA Properly Relied on Exemption 1[7]

FOIA Exemption 1 protects records that are: "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and (B) are in fact properly classified pursuant to Executive Order." 5 U.S.C. § 552 (b)(1); accord, e.g., Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 144, 102 S. Ct. 197, 202 (1981). In other words, under Exemption 1 material that has been properly classified is exempt from disclosure. Weinberger, 454 U.S. at 144-45, 102 S. Ct. at 202. "Congress has thus effected a balance between the needs of the public for access to documents prepared by a federal agency and the necessity of nondisclosure or secrecy." Id. at 145, 102 S. Ct. at 202.

[7] In both Miner and Hunt, the Ninth Circuit upheld the CIA's withholding of information concerning intelligence sources and methods based on [section 103(c)(7) of the National Security Act] and found it unnecessary to decide whether FOIA Exemption 1 was also applicable. Minier, 88 F.3d at 800 n.5; Hunt, 981 F.2d at 1118. Likewise here, Exemption 3 clearly encompasses the PDBs at issue, and there is no need to consider the applicability of additional exemptions. We nevertheless explain that Exemptions 1 and Exemption 5 cover the PDBs and supply additional grounds on which to grant summary judgment in the CIA's favor.

For information to be properly classified and on that basis properly withheld from disclosure pursuant to Exemption 1, the information must meet the requirements of Executive Order ("E.O.") 12,958, "Classified National Security Information," as amended by E.O. 13,292. 68 Fed. Reg. 15315 (Mar. 28, 2003):

> (1) an original classification authority is classifying the information;
>
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
>
> (3) the information falls within one or more of the categories of information in § 1.4 of E.O 12958, as amended; and
>
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damages.

Id. § 1.1, 68 Fed. Reg. at 15315. The Executive Order lists three classification levels for national security information:

> (1) "Top Secret" shall be applied to 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.
>
> (2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.
>
> (3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.

Id. § 1.2, 68 Fed. Reg. at 15315-16.

In reviewing classification determinations under Exemption 1, the courts have repeatedly stressed that, like the Exemption 3 analysis, "substantial weight" must be accorded agency affidavits concerning classified status of the records at issue, and that summary judgment is appropriate if the agency submits a detailed affidavit showing that the information logically falls within the exemption. See Minier, 88 F.3d at 800; see also Halperin, 629 F. 2d at 147-49 ("summary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of bad faith"). Moreover, if "the agency's statements meet this standard the

court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency." Halperin, 629 F.2d at 148; see also Frugone v. CIA, 169 F.3d 772, 775 (D.C. Cir. 1999) ("Mindful that courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns."); Salisbury v. United States, 690 F.2d 966, 970 (D.C. Cir. 1982) ("'The Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record.'") (quoting S. Rep. No. 1200, 93rd Cong., 2d Sess. 12 [1974]).

CIA Information Review Officer Buroker's Declaration fully supports application of Exemption 1 here as it describes "the justifications for nondisclosure with reasonably specific detail," and demonstrates "that the information withheld logically falls within the claimed exemption[]." Minier, 88 F.3d at 800 (citing Hunt, 981 F.2d at 119). The Declaration explains in detail why the CIA has properly classified the requested PDBs as "Top Secret," and explains the damage to national security that reasonably could be expected to result from disclosure of the PDBs.

The PDBs contain information foreign governments provided to the CIA pursuant to relationships that require absolute secrecy. (Buroker Decl. ¶¶ 49-52.) Disclosing that information could subject the foreign governments to internal and external political pressure, thereby placing in jeopardy the CIA's relationship with those and other governments. (Id. ¶ 51.) Information from foreign liaison sources is also referenced in the PDBs and, if disclosed, could betray the sources and be exploited by third-party governments with negative consequences for U.S. diplomacy and the ability of the U.S. intelligence community to maintain current intelligence relationships and to establish new relationships. (Id. ¶ 52.) The PDBs also contain information that, if disclosed, would reveal the identities of intelligence sources, including individual human sources and foreign government and intelligence service sources. (Id. ¶¶ 54, 56.) Such revelation would betray the CIA's promise to them of total secrecy with dire consequences, as described above. See supra at 11 (citing Buroker Decl. ¶¶ 54, 56). Additionally, because the Requested PDBs constitute an intelligence method themselves, their disclosure would necessarily reveal information about the application of an

intelligence method as well as reveal intelligence methods, both of which could "undermine the current collection and analysis of intelligence." [8] (Id. ¶ 63.)

Even if redaction of specific intelligence sources and methods were attempted, the PDBs would remain part of a mosaic that, if pieced together with information already available to foreign intelligence services, could give foreign governments an understanding, or enhance their understanding, of U.S. intelligence methods. (Id. ¶ 62.) The precedent that compelled disclosure of the PDBs in this case would set for future compelled disclosures would exacerbate the loss of protection of intelligence methods. "Should multiple PDBs become publicly available over time, the pattern of information then disclosed would provide foreign intelligence services an understanding of the various intelligence methods used by the United States to gather specific kinds of information from various locations around the world, as well as an understanding of gaps in our collection, of what the United States knew and didn't know, when, and the effectiveness of the methods we have used." (Id.)

Because the CIA has supplied a detailed explanation of why the PDBs are classified as Top Secret in order to prevent exceptionally grave damage to national security, the Court is obliged to accord the CIA's classification decision "substantial weight." See Minier, 88 F.3d at 800; Rosenfeld v. Dep't of Justice, 57 F.3d 803, 807-08 (9th Cir. 1996). For the reasons discussed in the preceding section, nothing in Plaintiff's Complaint calls into question the propriety of the CIA's classification decision with respect to the PDBs. See supra at 10-11. The CIA has sustained its burden of proving that the PDBs Plaintiff seeks are covered by FOIA Exemption 1. See, e.g., Weinberger, 454 U.S. at 144-45; Minier, 88 F.3d at 800.

IV. The CIA Properly Relied on Exemption 5

FOIA Exemption 5 allows an agency to withhold from the public "inter-agency or intra-agency memorandums or letters which would not be available to a party by law other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption cover documents "normally

---

[8] The contents of the PDBs at issue thus meet the criteria for exemption from the automatic declassification that Executive Order 13,292 § 3.3 provides will occur on December 31, 2006. See E.O. 13,292 § 3.3(b)(1) (providing exemption from automatic declassification for information which 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.)

privileged in the civil discovery context." National Labor Relations Bd. v. Sears, Robuck & Co., 421 U.S. 132, 149, 95 S. Ct. 1504, 1516 (1975); accord, e.g., Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1088 (9th Cir. 2002). Formal invocation of a privilege is not required; rather, the inquiry is whether the document in question is of the type normally covered. See id.; see also, e.g., Lardner v. Dep't of Justice, No. 03-0180, slip op. at 14 (D.D.C. Mar. 31, 2005). In this case, the presidential communications privilege and the deliberative process privilege would normally apply to the Requested PDBs and therefore support the CIA's reliance on Exemption 5 in denying Plaintiff's request for the PDBs at issue.

A. Presidential Communications Privilege

There exists a "a presumptive privilege for Presidential communications" that is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 708, 94 S. Ct. 3107-08 (1974) ("Nixon I"); accord, e.g., In re Sealed Case, 121 F.3d 729, 743 (D.C. Cir. 1997) (quoting Nixon I); see also Kelly v. City of San Jose, 114 F.R.D. 653, 658 (N.D. Cal. 1987) (recognizing constitutional underpinnings of executive privileges). "[T]he privilege is limited to communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions.'" Nixon v. Administrator of General Services, 433 U.S. 425, 449, 97 S. Ct. 2793 (1977) ("Nixon II") (quoting Nixon I). The privilege reflects "a President's generalized interest in confidentiality," Nixon I, 418 U.S. at 711, 94 S. Ct. at 3109, and also "flow[s] from the nature of enumerated powers" of the Presidency, id. at 705 & n.16, 94 S. Ct. at 3106.

The presidential communications privilege covers communications "solicited and received" by the President, as well as by those of the President's immediate advisers and staff with "broad and significant responsibility for investigating and formulating the advice to be given to the President." In re Sealed Case, 121 F.3d at 752; accord Judicial Watch, Inc. v. Dep't of Justice, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (analyzing presidential communications privilege in context of Exemption 5). Unlike the deliberative process privilege, which applies to decision making of executive officials generally, the presidential communications privilege applies specifically to decision-making of the President. In re Sealed Case, 121 F.3d at 745; see also Nixon II, 433 U.S. at 449, 97 S. Ct. at 2793 (privilege is "limited to communications 'in performance of [a President's] responsibilities,' . . . and

made 'in the process of shaping policies and making decisions'") (citation omitted). At the same time, the presidential communications privilege is broader than the deliberative process privilege and covers documents and materials in their entirety. See In re Sealed Case, 121 F.3d at 745 ("Even though the presidential privilege is based on the need to preserve the President's access to candid advice, none of the cases suggest that it encompasses only the deliberative or advice portions of documents.") The privilege furthermore "covers final and post-decisional materials as well as pre-deliberative ones." Id.

CIA Information Review Officer Buroker explains that the CIA prepared the Requested PDBs for the President to use in his capacity as President in making decisions about the course of U.S. national security and foreign policy. (Buroker Decl. ¶ 18.) Because the PDBs are direct communications between the CIA and the President for use in the conduct of his official duties, they are covered by the presidential communications privilege.

Ultimately, the question about application of the presidential communications privilege is whether their public revelation will "'impede the President's ability to perform his constitutional duty.'" In re Sealed Case, 121 F.3d at 751 (quoting Morrison v. Olson, 487 U.S. 654, 691, 108 S. Ct. 2619 [1988]). "If it does, the constitutional separation of powers will be violated." Id. As part of an ongoing dialogue between the President and his top advisors and the CIA, the PDB has served as a key element in Presidential decision-making in matters of national security and foreign policy. (Buroker Decl. ¶ 19.) CIA Information Review Officer Buroker's Declaration describes the detrimental effects that after-the-fact public scrutiny could have on the quality of the PDB as an intelligence reporting document. (Id. ¶¶ 74-75.) Such detrimental effects on the quality of the PDB could seriously undermine the President's ability to conduct effective national security and foreign policy. Because the PDB fits squarely within the ambit of the presidential communications privilege, see Department of Interior v. Klamath 532 U.S. 1, 8, 121 S. Ct. 1065 (2001), it is exempt from disclosure under 5 U.S.C. § (b)(5).

B. Deliberative Process Privilege

The deliberative process privilege "covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" Carter, 307 F.3d at 1089 (quoting Dep't of Interior v. Klamath, 532

U.S. at 8, 121 S. Ct. at 1065); accord, e.g., National Wildlife Fed'n v. Forest Serv., 861 F.2d 1114, 1117 (9th Cir. 1988). A document falls within the deliberative process privilege when it is both "predecisional" and "deliberative":

> A predecisional document is one prepared in order to assist an agency decisionmaker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. A predecisional document is a part of the deliberative process, if the disclosure of the materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.

Carter, 307 F.3d at 1089 (internal quotations omitted). These two requirements reflect the underlying purpose of the privilege: "to 'protect[] the consultative functions of government . . .'" National Wildlife Fed'n, 861 F.2d at 1117 (quoting Jordan v. Dep't of Justice, 591 F.2d 753, 774 [D.C. Cir. 1978]).

In considering whether material is protected, the Court should focus on whether the material reflects any part of the deliberative process. Id. at 1118. "[E]ven if the content of a document is factual, if disclosure of the document would expose 'the decision-making process itself' to public scrutiny by revealing the agency's 'evaluation and analysis of the multitudinous facts,' the document would nonetheless be exempt from disclosure." Id. (quoting Montrose Chem. Corp. of Cal. v. Train, 491 F.2d 63, 71 [D.C. Cir. 1974]); accord Carter, 307 F.3d at 1089. If disclosure of requested documents would reveal the deliberative process, then the documents are covered by the privilege. Id. at 119 (citing Ryan v. Dep't of Justice, 617 F.2d 781, 790 [D.C. Cir. 1980]; Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 83 [2d Cir. 1979]; Soucie v. David, 448 F.2d 1067, 1078 [D.C. Cir. 1971]).

CIA Information Review Officer Buroker's Declaration explains in detail that the PDB is the "quintessential predecisional, deliberative document." (Buroker Decl. ¶ 73.) The PDB provides the President and his most senior advisors intelligence information used in the development and implementation of national security and foreign policy. Decisions on these subjects are made continuously throughout a President's term, so information in the PDB will necessarily be predecisional in nature. (Id. ¶ 71.) Also, disclosure of the Requested PDBs, which include analysis of political, economic, military, and social conditions in multiple foreign countries, (id.), would expose both the deliberative process of U.S. national security and foreign policy decision-making and the deliberative process of providing intelligence to the President regarding foreign policy priorities:

> [T]he contents of the PDB reflect the foreign policy priorities of the U.S. government by showing what subjects are of interest to the President and when. The Requested PDBs also expose the deliberative process of providing intelligence to the President with regard to those foreign policy priorities. Producing the PDB requires the PDB analysts and writers to comb through thousands of pieces of information in determining what must be briefed to the President . . . the height of the deliberative process.

(Id. ¶ 69.) Compelled disclosure would "effectively stifle and 'chill' the presentation of timely intelligence collection and analysis" by causing analysts and others contributing to the PDB process to hesitate to report information and offer opinions for fear that they would be misinterpreted or taken out of context. (Id. ¶ 74.)

> If those contributing to and producing the PDB believe that their work will be critiqued years later by those with the benefit of twenty-twenty hindsight and their own agenda to pursue, there is a risk that they will be less willing to offer speculative analysis that might later be mischaracterized or proved wrong, with the eventual result that the PDB will be of less use to the policymakers' deliberative process.

(Id. ¶ 75.) The deliberative process privilege accordingly is an additional basis for application of FOIA Exemption 5.[9]

V. CIA Properly Determined that No Segragable Non-Exempted Portions of the PDBs Could be Disclosed

Finally, as demonstrated in the Declaration of CIA Information Review Officer Buroker, no reasonably segragable, non-exempt portion of the Requested PDBs exists. (Buroker Decl. ¶ 78.) In addition to the danger that specific text in the Requested PDBs will reveal specific intelligence sources and methods, the disclosure of the Requested PDBs (and possibly other PDBs in the future) will provide valuable information as to the PDB as an analytic intelligence method. Moreover, certain specific pieces of information that appear innocuous in the context of a single PDB could help to complete a mosaic of information that compromises the intelligence process or reveals an intelligence source or method.

Additionally, because the PDB combines all source intelligence reporting with analytic judgments of raw intelligence the deliberative aspects of the PDB are inextricably intertwined with

---

[9] Although the deliberative process privilege is a qualified privilege and, when asserted in civil litigation, can be overcome in certain circumstances, such a balancing does not occur under FOIA. Rather, the statutory test is whether the document would ordinarily be privileged in the context of civil litigation, i.e., National Labor Relations Bd., 421 U.S. at 149, 95 S. Ct. at 1516, "fall within the ambit" of the relevant privilege, Klamath, 532 U.S. at 7-8, 121 S. Ct. at 1065 Accord Lardner, No. 03-0180 slip op. at 10 (copy attached).

any purely factual matters that would not be subject to the deliberative process privilege. For all of the above reasons, if the Requested PDBs were redacted to exclude protected information, the resulting non-exempt information, if any, would be effectively meaningless, if not unintelligible and would have no informational value.

CONCLUSION

For the foregoing reasons, the Court should grant Defendant CIA's motion for summary judgment and dismiss the Complaint with prejudice.

Dated: April 4, 2005

Respectfully submitted,

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

Of Counsel:

JONATHAN FERRY
Assistant General Counsel
Litigation Division
Central Intelligence Agency

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

By: /s/ Caroline Lewis Wolverton