10-4290(L)

10-4289(CON), 10-4647(XAP), 10-4668(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each corporate Appellee certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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Statement of the Case

This cross-appeal concerns the CIA's withholding under FOIA Exemptions 1 and 3 of records describing the CIA's use of waterboarding as well as "a one-page photo of Abu Zubaydah." The district court ordered the CIA to identify and process these records under FOIA after the CIA publicly revealed that it had destroyed videotapes depicting the use of "enhanced interrogation techniques" against certain prisoners held in CIA prisons overseas. Those tapes were responsive to Plaintiffs' FOIA request, and, as a partial remedy for their destruction, the district court ordered the CIA to identify all records describing their contents. The CIA identified numerous such records, but it withheld all of them. With one exception not relevant here, the district court upheld those withholdings.

The court held that information concerning "enhanced interrogation techniques," including waterboarding, could be withheld because the techniques are "intelligence methods" within the meaning of the CIA's withholding authorities under FOIA. The court also upheld the withholding of the photograph of Abu Zubaydah, notwithstanding the CIA's failure to present any justification for its withholding.

On appeal, Plaintiffs pursue only their challenges to the withholding of information relating to waterboarding and to the withholding of the photograph of

Abu Zubaydah. Information about waterboarding may not be suppressed by the CIA as an "intelligence method" because, as the President

torture, 18 U.S.C. § 2340A. JA 508–09. The ten techniques considered were: "(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard." *Id.*

The memorandum described "the waterboard" as follows:

> In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual's feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning. The individual does not breathe any water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated.

JA 510–11. Other memoranda and reports released in response to this litigation provide additional detail about the CIA's use of waterboarding. *See, e.g.*, JA 434–36, 462–66 (OLC memorandum, dated May 10, 2005); JA 482, 496, 498 & n.28 (OLC memorandum, dated May 30, 2005); JA 533–34, 541–42 (OLC memorandum, dated May 10, 2005); *see generally* JA 875–94 (CIA Inspector General's *Special Review*

B. The CIA's Destruction of the Videotapes and the Parties' Fifth Motions

of Abu Zubaydah, and other documents. JA 1371. Specifically, the records comprise:

- 53 cables between the CIA's headquarters and an interrogation facility, *Vaughn* Index Nos. 1–53;
- 3 emails postdating the tapes' destruction, *id.* Nos. 54–56;
- 2 lengthy logbooks detailing "observations of interrogation sessions," *id.* Nos. 57–58;
- 1 set of handwritten notes from a meeting between a CIA employee and a

from its director, Leon E. Panetta, JA 582–605; JA 1084–89; Classified Appendix 53–65, which argued that the "enhanced interrogation techniques" were "intelligence methods" within the meaning of the CIA's withholding authorities under FOIA, JA 582–605; JA 1084–89. Mr. Panetta's public declarations provided no explanation for the CIA's withholding of the photograph of Abu Zubaydah. *See generally id.* The index listing the photograph described it as "a one-page photo of Abu Zubaydah," but it, too, failed to explain the basis for the CIA's withholding. *Vaughn* Index No. 65.

In response, Plaintiffs argued, among other things, that the "enhanced interrogation techniques" were not "intelligence methods" within the meaning of the CIA's withholding authorities because they had been repudiated—and, in the case of waterboarding, declared to be unlawful—by the President. *See, e.g.*, President Barack Obama, Statement on Release of OLC Memos (Apr. 16, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/; President Barack Obama, News Conference by the President (Apr. 29, 2009), http://www.whitehouse.gov/the-press-office/news-conference-president-4292009 ("I believe that waterboarding was torture."; "What I've said—and I will repeat—is that waterboarding violates our ideals and our values. I do believe that it is torture. I don't think that's just my opinion; that's the opinion of many who've examined the topic. And that's why I

put an end to these practices."). Plaintiffs also argued that withholding of the photograph of Abu Zubaydah was improper because the CIA had failed to provide any rationale whatsoever for doing so under Exemptions 1 and 3.

C. The District Court's Rulings on the Fifth Motions for Partial Summary Judgment.

On September 30, 2009, the district court conducted an *in camera* and *ex parte* review of a portion of the sixty-five sample records, as well as a public hearing on the parties' motions. SPA 31–76, JA 1120–65; SPA 1–30, JA 1090–119.[4] With one exception not relevant here, the court deferred to the CIA's withholding decisions under FOIA Exemption 3. SPA 77–82, JA 1166–71; SPA 1–30, JA 1090–119. In a written order dated October 13, 2009 memorializing its tentative oral rulings, the court held that the lawfulness of an intelligence activity is not relevant to whether the activity may qualify as an "intelligence method" within the meaning of the CIA's withholding authorities. JA 1170–71.

Although the court's October 13, 2009 opinion did not mention the photograph of Abu Zubaydah, the district court upheld the CIA's withholding of the photograph during the proceedings on September 30. During the public session, it stated that "the image of a pe

[to the CIA's withholding] as well." SPA 26, JA 1115. During the *in camera* and *ex parte* session, the court appeared to rely on another rationale as well:

> THE COURT: So, on the theory that a person's picture gives out a lot more information, in addition to knowing the name, you want to keep [the photograph] secret.
>
> MR. LANE: Right. And because this is actually a CIA photo of a person in custody.
>
> THE COURT: I defer to that position.

SPA 75–76, JA 1164–65.

Plaintiffs moved for reconsideration of the district court's order allowing the CIA to withhold information relating to the "enhanced interrogation techniques." On July 15, 2010, the court denied that motion, affirming its earlier determination that the CIA's withholdings were justified under Exemption 3 and alternatively holding that withholding was proper

The district court's holding that waterboarding is an intelligence method is inconsistent with the language of the CIA's withholding statutes and with Congress's intent in enacting those statutes. Indeed, to accept the CIA's argument and the district court's holding would vest the CIA with virtually unreviewable authority to conceal evidence of illegal activity, no matter how clearly that activity contravenes the CIA's charter. It would, for example, allow the CIA to declare that outright murder in the course of an interrogation is an "intelligence method" and to forever conceal any such killings on that basis alone. This cannot be the law. This Court should reverse the judgment of the district court and remand for the district court to determine upon *in camera* review whether segregable portions of the records discussing waterboarding may be released.

The Court should also reverse the judgment of the district court upholding the CIA's withholding of the "one-page photo of Abu Zubaydah." Neither the CIA's declarations in support of its withholdings, nor the CIA's index describing the image and enumerating the exemptions relied upon to withhold it, provide any justification for the withholding of the photograph. In fact, the only justification ever offered by the government came from the government's counsel during an *in camera* and *ex parte* hearing with the district court. Even were an explanation from an agency's counsel an adequate substitute for the agency's own explanation of its withholding—which it is not—the justification offered, which was accepted

by the district court, is conclusory and inadequate. Disclosure of the photograph of Abu Zubaydah would not reveal any "intelligence sources or methods" not already revealed by the government's official acknowledgment of his identity.

Finally, the Court should affirm the district court's judgment ordering disclosure of a "source of authority" discussed in two OLC me

ARGUMENT

I. FOIA and the Standard of Review.

Congress enacted the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005) ("FOIA was enacted in order to 'promote honest and open government and to assure the existence of an informed citizenry . . . .'" (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999))).

Toward that end, FOIA requires federal agencies to disclose their records to the public when sought, 5 U.S.C. § 552(a)(3)(A), (a)(6), subject to nine enumerated exemptions, *id.* § 552(b). "In keeping with [FOIA's] policy of full disclosure, the exemptions are 'narrowly construed with doubts resolved in favor of disclosure.'" *Halpern v. Fed. Bureau of Investigation*, 181 F.3d 279, 287 (2d Cir. 1999) (quoting *Fed. Labor Relations Auth. v. Dep't of Veteran Affairs*, 958 F.2d 503, 508 (2d Cir. 1992)); *accord Nat'l Council of La Raza*, 411 F.3d at 355–56. For this reason, any reasonably segregable portion of a withheld record must be released. 5 U.S.C. § 552(b).

The government "bears the burden of demonstrating that any claimed exemption applies." *Nat'l Council of La Raza*, 411 F.3d at 356. Under FOIA, a court must undertake de novo review of an agency's decision to withhold documents, 5 U.S.C. § 552(a)(4)(B), and this Court reviews de novo a district court's grant of summary judgment, *Wood v. Fed. Bureau of Investigation*, 432 F.3d 78, 82 (2d Cir. 2005).

In order to satisfy its burden of demonstrating that an exemption to disclosure applies, the government must submit what are now referred to as a *Vaughn* declaration and *Vaughn* index setting forth the bases for its claimed exemptions under FOIA. *See Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C. Cir. 1973); *Halpern*, 181 F.3d at 290–93. In light of the tendency of federal agencies to "claim the broadest possible grounds for exemption for the greatest amount of information," agencies are required to produce "a relatively detailed analysis" of the withheld material "in manageable segments" without resort to "conclusory and generalized allegations of exemptions." *Vaughn*, 484 F.2d at 826–27; *see Halpern*, 181 F.3d at 290–93. The *Vaughn* declaration must describe with "reasonable specificity" the nature of the documents and the justification for non-disclosure. *See Halpern*, 181 F.3d at 293–94; *Lesar v. Dep't of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980); *Lykins v. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984)

(requiring “that as much information as possible be made public” in *Vaughn*

government from classifying information "in order to . . . conceal violations of the law." *Id.* § 1.7(a)(1).

Exemption 3 allows the withholding of information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). In *Central Intelligence Agency v. Sims*, the Supreme Court established that the consideration of withholdings under Exemption 3 is a two-step process.

II. The District Court Erred in Allowing the Withholding of Information Relating to Waterboarding.

The heart of this dispute is the CIA's withholding under Exemptions 1 and 3 of information—captured in cables, emails, memoranda, logbooks, and notes—relating to its use of waterboarding, an interrogation technique that the United States has previously prosecuted as a war crime and that the President has declared to be unlawful. The district court held that, under both exemptions, waterboarding is a protectable "intelligence method." This was error. The term "intelligence

A. The CIA may only withhold "intelligence methods" within its

definition that goes beyond the requirement that the information *fall within the Agency's mandate* to conduct foreign intelligence." *Id.* (emphasis added).

In other words, the Supreme Court held that the CIA's authority is broad but not unlimited. If the intelligence activity at issue is "within the Agency's mandate," it is an "intelligence source or method" within the meaning of the CIA's charter and may be withheld. Conversely, intelligence activities outside the CIA's charter are not "intelligence sources or methods" within the meaning of the withholding statutes, and they may not be withheld as such.

Although the Supreme Court has yet to hear a case in which the CIA sought to withhold information outside its charter, at least two lower courts have. Both rejected the CIA's claim of exemption upon determining that the conduct at issue fell outside the CIA's charter.

In *Weissman*, the D.C. Circuit considered Gary Weissman's FOIA request to the CIA for files about himself. 565 F.2d at 693. The CIA initially disclosed documents to Weissman revealing that he had been under periodic investigation by the CIA for approximately five years, but it withheld approximately fifty documents under Exemptions 1, 3, and 7, claiming, in part, that the National Security Act's protection of "intelligence sources and methods" extended to the CIA's *domestic* investigation of Weissman. *Id.* at 695–96. The D.C. Circuit rejected this reliance on the "intelligence sources and methods" provision because

the CIA's charter prohibited the CIA from engaging in domestic law-enforcement functions. *Id.* The court held, in essence, that the protection of "intelligence sources and methods" did not "grant [the CIA] power to conduct security investigations of unwitting American citizens," *id.* at 696, and that the withheld documents could not, therefore, be withheld as "intelligence sources and methods."

The D.C. Circuit based this interpretation of "intelligence sources and methods" on the text of the National Security Act. *See, e.g.*, *id.* at 695 ("The National Security Act of 1947, which created the CIA and empowered it to correlate and evaluate intelligence relating to the national security, specifically provided that the 'Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions.' 50 U.S.C. § 403(d)(3). This directive was intended, at the very least, to prohibit the CIA from conducting secret investigations of United States citizens, in this country, who have no connection with the Agency."). The court also cited the Act's legislative history, *see, e.g.*, *id.* ("Congress was well aware such activities create a potential for abuse, and chose to limit the Agency's activities to intelligence gathering abroad. It was unwilling to make it a policeman at home, or to create a conflict between the CIA and the FBI."), and the findings of the Church Committee Report, *see, e.g.*, *id.* at 696 ("'Given the prohibition against internal security functions, it is unlikely that the ['intelligence sources and methods'] provision was meant to include investigations

of private American nationals who had no contact with the CIA, on the grounds that eventually their activities might threaten the Agency.'" (quoting S. Rep. No. 94-755, Book I, at 139 (1976))).

A district court within the Southern District of New York engaged in a similar analysis in *Navasky*, 499 F. Supp. at 274–75. Victor Navasky, a journalist, had sought documents relating to the CIA's "clandestine book publishing activities" as described in the Church Committee Report. *Id.* at 271. The CIA claimed that documents responsive to the request were exempt from disclosure as "intelligence sources and methods." *Id.* at 274. The court rejected that position, holding that neither the text nor the legislative history of the National Security Act "indicates that covert propaganda activities of the kind involved here were contemplated by Congress." *Id.* Secret "book publishing activities," in other words, fell outside of the CIA's charter and, thus, could not be withheld as "intelligence sources and methods." *Id.* at 275 ("The 'intelligence sources and methods' language of section 403(d)(3), therefore, cannot be applied to protect authors, publishers and books involved in clandestine propaganda activities from disclosure.").

The lessons of *Sims*, *Weissman*, and *Navasky* are twofold. First, courts and not the CIA determine the statutory meaning of the phrase "intelligence sources

and methods." And second, while that phrase is broad in meaning, it does not encompass activities that fall outside the CIA's charter.

B. Waterboarding is not an "intelligence method" because, as the President has confirmed, it violates the CIA's charter.

Waterboarding is not an "intelligence

methods." The provision in *Weissman* prohibited the CIA from engaging in domestic law-enforcement functions, 565 F.2d at 695–96; the more recently enacted provision prohibits the CIA from violating the law. Because both types of conduct fall outside of the CIA's charter, neither may qualify as an "intelligence method."

Application of this principle to this litigation is straightforward. On April 29, 2009, the President of the United States unequivocally recognized, in a declaration binding on the CIA, that waterboarding is torture and therefore illegal.

the meaning of the CIA's withholding statutes. For this reason, the district court erred in affirming the CIA's withholding of information about waterboarding as an "intelligence method."[9]

It is important to emphasize the narrowness of this argument. Plaintiffs do not contend that the illegality of governmental conduct is a free-standing trump card to an otherwise valid withholding of information under FOIA. In some circumstances, information relating to illegal activities may be withholdable on other grounds. For example, the questions asked and the responses given during the CIA's waterboarding need not be disclosed because the CIA may have an independent and legitimate interest in protecting them under Exemptions 1 and 3. Nor must interrogation techniques within the CIA's charter be disclosed simply

because they are discussed in the same records discussing waterboarding. Indeed, even a discussion of waterboarding may be withheld if it is otherwise properly withholdable. What the government may *not* do, however, is withhold information about waterboarding, an illegal interrogation technique, on the basis that the illegal conduct is *itself* an "intelligence method."

The district court reached its conclusion to the contrary by making two errors. First, the court insisted that Plaintiffs "seek to insert 'limiting language' into Exemption 3." JA 1379. That is incorrect. Plaintiffs rely, as the court did in *Weissman*, on limiting language *already*

its “primary functions.”

(D.C. Cir. 1979) ("Although NSA would have no protectable interest in suppressing information simply because its release might uncloak an illegal operation, it may properly withhold records gathered illegally if divulgence would reveal *currently viable* information channels, albeit ones that were abused in the past." (emphasis added)).

Another case that considered a similar request for information about the TSP confirms this understanding of *Wilner*. In *People for the American Way Foundation v. National Security Agency*, 462 F. Supp. 2d 21 (D.D.C. 2006), the plaintiffs sought documents related to the TSP and claimed that the documents could not be withheld under FOIA because the TSP was illegal. *Id.* at 30. The court concluded, however, that it "need not grapple with" the alleged illegality of the TSP because the actual activities that the agency sought to suppress—information related to its "signals intelligence"—were in fact legitimate methods that the agency had an interest in protecting. *Id.* at 31; *see id.* (noting that the TSP was only "one of the NSA's *many* SIGINT programs involving the collection of electronic communications" (emphasis added)).

The distinction drawn by *People for the American Way* bears emphasis. When the underlying intelligence method is legitimate, the mere fact that it has been used in an unlawful manner does not necessitate disclosure. But the CIA may

not withhold evidence of illegal conduct by claiming that the illegal conduct *itself* is the "intelligence source or method" deserving of protection.

The CIA has argued that, despite the plain language in its withholding statutes excluding unlawful activity, it alone decides whether an intelligence activity falls within its charter and is therefore withholdable. But this interpretation would vest unreviewable authority within the CIA to conceal evidence of its own misconduct, no matter how egregious. *See generally Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 905 (N.D. Ill. 2006) (expressing concern that the NSA's interpretation of its withholding statute, "if . . . taken to its logical conclusion, . . . would allow the federal government to conceal information regarding blatantly illegal or unconstitutional activities simply by assigning these activities to the NSA or claiming they implicated information about the NSA's functions"); *People for the Am. Way Found.*, 462 F. Supp. 2d at 31 (agreeing with the court in *Terkel* that the NSA's withholding authority is "not without limits").[10]

arguments here. Although the court upheld the CIA's withholding of information relating to the CIA's use of "enhanced interrogation techniques," the court's legal reasoning (in the four sentences it devotes to the issue) is consistent with Plaintiffs' position. The court stated that "there is no legal support for the conclusion that illegal activities cannot produce classified documents." *Id.* Plaintiffs agree. For example, the alleged illegality of the TSP was properly determined to be no barrier to the withholding of the NSA's "signals intelligence" functions, which remained properly classified. In any event, the D.C. Circuit did not address its prior decision in *Weissman* or the crux of Plaintiffs' claim here: that the meaning of "intelligence method" within the CIA's charter is broad but limited by Congress's requirement that the CIA comply with the law. Although illegal activity may be withholdable on other grounds, the illegal activity itself cannot be an "intelligence method."[11]

For these reasons, the Court should reverse the judgment of the district court and remand with instructions for the district court to determine whether information relating to waterboarding may be segregated from properly classified information. If it can, it must be disclosed.

[11] In an unpublished decision, a district court for the District of Columbia recently followed the D.C. Circuit's decision in affirming the withholding of information relating to "enhanced interrogation techniques." *Am. Civil Liberties Union v. Dep't of Justice*, No. 1:10-cv-123 (D.D.C. Feb. 14, 2011).

III. The District Court Erred in Allowing the Withholding of a One-Page Photograph of Abu Zubaydah.

The district court also erred in affirming the CIA's withholding of a "one-page photo of Abu Zubaydah." That photograph was processed by the CIA in response to the district court's order of April 20, 2009, JA 1371, and withheld under Exemptions 1 and 3. The district court upheld that withholding even though the CIA itself offered no explanation for its withholding; even though the only explanation ever offered for its withholding came from the government's counsel, not the CIA, during an *in camera* and *ex parte* hearing; and even though that explanation was deficient. The Court should therefore reverse the district court's judgment and remand for the district court to order the CIA to disclose the photograph.

The CIA filed three public documents in support of its withholding of the photograph at issue here, none of which even described the photograph.

and it includes two boilerplate descriptions of Exemptions 1 and 3, but it does not explain the photograph's withholding under either exemption. *Id.* The third document is the CIA's supplemental declaration of September 21, 2009. JA 1084–89. It does not mention the photograph. *Id.*

The CIA's failure to provide any justification for its withholding of the photograph is dispositive. Agencies must defend their withholdings and may not rely on post-hoc rationalizations offered by counsel. *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1119–20 (D.C. Cir. 2007) (a government counsel's "*post hoc* explanation cannot make up for [the agency's] silence" (citing *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983))); *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50 ("The short—and sufficient—answer to petitioners' submission is that the courts may not accept appellate counsel's post hoc rationalizations for agency action. . . . It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

Even were post-hoc explanations offered by counsel acceptable, the explanations offered in this case would not suffice to justify the CIA's withholding of the photograph. The government's first explanation of its withholding of the photograph came during the *in camera* and *ex parte* session held on September 30, 2009. This is the entire exchange with the district court:

> THE COURT: 65 is a photograph.
>
> MR. LANE: Correct. That was the next one I wanted to bring to the Court's attention. As the Court is aware, for photographs from the Department of Defense that the Court has considered, those photographs were not photographs taken by the Department of Defense, but rather by third-party individuals—
>
> THE COURT: Let me cut this short. You've given out various names, but as I recall, nobody's picture has been given out.
>
> MR. LANE: Not by the U.S. government, no, that's correct, your Honor.
>
> THE COURT: So, on the theory that a person's picture gives out a lot more information, in addition to knowing the name, you want to keep that secret.
>
> MR. LANE: Right. And because this is actually a CIA photo of a person in custody.
>
> THE COURT: I defer to that position. Have we done everything?

SPA 75–76, JA 1164–65. During the subsequent public hearing, the district court explained its decision as follows: "I think that the image of a person in a

that the photograph of Abu Zubaydah "is actually a CIA photo of a person in custody."

The first observation is undoubtedly true—an image does contain more, or at least different, information than a person's name—but neither the district court nor the government explained how that additional information qualifies as an "intelligence source or method" (or some other classifiable fact) under Exemptions 1 and 3. Indeed, neither explained, even in broad or vague terms, what that information might be. This is precisely the sort of conclusory explanation of a withholding that this Court has rejected under FOIA. *See, e.g.*, *Halpern*

recognized earlier in the same closed hearing, it is generally the content of a record that determines whether the government may withhold it, not its form. SPA 65, JA 1154 ("The fact it is a cable or even a contemporaneous cable in my mind is neutral. The content[] is what I'm looking at . . . ."); *see also Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) ("T wi4s6 e f3CInc.1 Tf1temp

district court held) or as an “intelligence method” under Exemptions 1 and 3 (as

specific extra-textual limitation imposed by the lower courts on the definition of "intelligence sources and methods." 471 U.S. at 168–70. Nowhere did the Court suggest, however, that the phrase therefore encompasses anything and everything the CIA chooses to include within it. Rather, the Court emphasized the plain statutory meaning of the phrase, which the Court—not the CIA—interpreted as protecting "all sources [and methods] of intelligence information . . . within the Agency's mandate." *Id.* at 169. *Weissman* and *Navasky* were based on the same understanding. Each interpreted the phrase "intelligence sources and methods" as excluding certain conduct: *Weissman* concluded that domestic law-enforcement functions were not "intelligence sources and methods," 565 F.2d at 695–96, and *Navasky* concluded that clandestine book-publishing was not an "intelligence method" and that the authors and publishers of those books were not "intelligence sources," 499 F. Supp. at 274–75.

Plainly, sources of authority are not "intelligence methods." A method is "[a]n orderly procedure or process." Webster's New International Dictionary 1548 (2d ed. 1944).[13] As the district court noted, the redacted information is "less a matter of methodology and more an aspect of authorization." SPA 86, JA 1175. The CIA claims that the Court nonetheless owes it deference in its withholding

[13] *See also* Merriam-Webster (2011) ("method": "a procedure or process for attaining an object"); Black's Law Dictionary (9th ed. 2009) ("method": "A mode of organizing, operating, or performing something, esp. to achieve a goal").

decision. CIA Br. 36. Though true as a general matter, that deference is to the CIA's determinations of *harm* under Exemption 1,

Although the government primarily attempts to withhold the "source of authority" as an "intelligence method," at times throughout its brief it refers to the "source of authority" as a withholdable "function," CIA Br. 29, or "intelligence activity," CIA Br. 40. Those terms do in fact appear in the CIA's withholding authorities, 50 U.S.C. § 403g; Exec. Order No. 12,958, § 1.4(c). But courts have rejected expansive constructions of such terms lest they effectively exempt the CIA altogether from FOIA. In *Phillippi v. Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976), for example, the court confronted the argument that "[section] 403g's reference to withholding information about 'functions . . . of personnel employed by the Agency' . . . allows the agency to refuse to provide any information at all about anything it does." *Id.* at 1015 n.14. Recognizing that "[t]his argument . . . would accord the Agency a complete exemption from the FOIA," *id.*, the court rejected it. *See id.* ("We do not think that [section] 403g is so broad."). The court held that the term "functions" protects only "intelligence sources and methods" and "information about [the CIA's] internal structure." *Id.*; *see also Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981) (same). In any event, a "source of authority" is neither a "function" nor an "intelligence activity." To be sure, intelligence sources, methods, and activities might flow from a source of authority; but withholding of the source of authority itself is only proper if disclosing it would reveal those intelligence sources,

methods, or activities. The CIA does not appear to have argued, either before the district court or here, that disclosing the "source of authority" would somehow reveal other potentially withholdable information.

For these reasons, the Court should affirm the district court's judgment ordering disclosure of the CIA's "source of authority." Plaintiffs agree with the government that the district court erred in attempting to craft a "compromise" to full disclosure. Though laudable, that effort is not authorized by FOIA. Therefore, if affirmed, the district court's holding that the CIA's "source of authority" is not withholdable as an "intelligence method" compels disclosure.

CONCLUSION

For the foregoing reasons, the Court should (1) reverse the judgment of the district court and hold that waterboarding is not an "intelligence method" within the meaning of the CIA's withholding authorities, (2) reverse the judgment of the district court and hold that the CIA has not justified the withholding of the "one-page photo of Abu Zubaydah," and (3) affirm the judgment of the district court and hold that the CIA's "source of authority" is not an "intelligence method." The Court should thus remand to the district court for that court to order disclosure of information relating to waterboarding that is segregable from properly classified information, to order disclosure of the photograph of Abu Zubaydah, and to order disclosure of the "source of authority."

June 3, 2011

Respectfully submitted,

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