UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RYAN GOODMAN, Plaintiff, v. UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	20 Civ. 8349 (LJL)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT THE UNITED STATES DEPARTMENT OF DEFENSE

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Defendant the United States Department of Defense ("DoD") respectfully submits this memorandum of law in support of its motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

PRELIMINARY STATEMENT

This Freedom of Information Act ("FOIA") lawsuit concerns two requests by Plaintiff Ryan Goodman seeking records "sufficient to show" various categories of information regarding the reporting of information about military troop levels for Operation Inherent Resolve ("OIR") in Iraq and Syria and Operation Freedom's Sentinel ("OFS") in Afghanistan since December 2017. Dr. Thomas M. Williams, performing the duties of Deputy Under Secretary of Defense for Policy, has provided a classified declaration, a redacted version of which has been filed on the public record, explaining DoD's reporting policy.[1] Dr. Williams explains that in 2017, then-Secretary of Defense James Mattis approved changes to the force management construct, that is, how DoD manages, accounts for, and reports troop levels, for OIR and OFS. Secretary Mattis made these changes to address national security concerns arising from the public disclosure of precise troop levels in those countries, and to promote greater transparency and consistency in DoD's reporting practices. Under the policy adopted by Secretary Mattis, DoD ceased publishing precise troop levels for Afghanistan, Iraq, and Syria. Instead, DoD publicly discloses approximate troop figures, which exclude certain military personnel who are not publicly acknowledged, while regularly providing Congress with precise figures. The publicly reported approximate figures account for previously undisclosed temporary duty personnel deployed in Afghanistan, Iraq, and Syria.

[1] The unredacted Williams Declaration has been lodged with a Classified Information Security Officer from the Department of Justice's Litigation Security Group, for secure storage and transmission to the Court.

Although Plaintiff's FOIA requests did not describe the records sought, DoD nonetheless conducted searches reasonably calculated to identify records "sufficient to show" the categories of information Plaintiff requested. Specifically, DoD produced unclassified portions of the action memoranda and implementation plans documenting Secretary Mattis' decision to change the force management construct for OIR and OFS, relevant sections of the Executive Orders for OIR and OFS issued by the Joint Staff to the U.S. Central Command implementing the change, DoD's quarterly reports to Congress between December 2017 and November 2020 containing both the publicly reported approximate troop levels and the precise figures reported to Congress, and correspondence with Congress explaining the change to DoD's reporting practices. DoD withheld classified information pursuant to Exemption 1 of FOIA, 5 U.S.C. § 552(b)(1), and the names and contact information of lower-level DoD employees under Exemption 6, *id.* § 552(b)(6).

The declarations provided by DoD establish that the agency's search was reasonable, particularly in light of the nature of Plaintiff's request, and that all of the withheld information is exempt from disclosure. Dr. Williams' declaration logically and plausibly explains that the information withheld under Exemption 1 is currently and properly classified. In the classified portions of the declaration, Dr. Williams provides detailed information about why disclosure of this classified information could reasonably be expected to impair DoD's ability to conduct military operations and to undermine the foreign relations and foreign activities of the United States. Under well-settled law, Dr. Williams' judgments as to the classified status of the information, including the national security harms that could flow from disclosure, are entitled to substantial weight. A separate declaration by DoD official Mark Herrington explains that disclosure of the withheld names and contact information would constitute a clearly unwanted

invasion of the personal privacy of the lower-level DoD employees. Accordingly, the Court should grant summary judgment to DoD.

BACKGROUND

I. DoD's Changes to the Force Management Construct for OIR and OFS

DoD has provided a declaration from a senior official in the Office of the Under Secretary of Defense for Policy, Dr. Thomas Williams, performing the duties of Deputy Under Secretary of Defense for Policy, to explain changes to the force management construct for OIR and OFS in 2017.[2] In June 2017, Secretary Mattis approved a proposal by the Joint Chiefs of Staff to make changes to DoD's force management construct, that is, how DoD manages, accounts for, and reports force levels, for OIR and OFS. *See* Williams Decl. ¶ 10. Secretary Mattis instructed the Under Secretary of Defense for Policy ("USD(P)") to develop plans to revise the force management construct for OIR and OFS from a Force Management Level ("FML") construct to a Baseline Forces and Temporary Enabling Forces ("TEF") construct. *Id.* As instructed, USD(P) developed "Force Management Implementation Plans" for OFS and OIR and prepared "Action Memos" that were submitted to Secretary Mattis. *Id.* ¶ 11. Those plans specified how troop deployments would be categorized; how DoD public affairs would report troop numbers to the press and the public; and how DoD would engage with congressional committees, other U.S. federal agencies, and foreign governments regarding troop numbers in the three countries. *Id.*

Secretary Mattis approved the Action Memos in August and September 2017, respectively, and incorporated the plans into Executive Orders ("EXORDs") issued by the Joint

[2] DoD had previously identified the Under Secretary of Defense for Policy as the declarant. However, because the Under Secretary of Defense for Policy is traveling outside the United States, Dr. Williams has provided the declaration in his stead. Williams Decl. ¶ 1 fn.1.

Staff. *Id.* ¶ 12. In doing so, he changed the way DoD accounts for and reports troop levels in Afghanistan, Iraq, and Syria. Previously, the force management construct in place was the FML, which excluded certain personnel who were exempt from Boots-on-the-Ground ("BOG") business rules, such as specialized military forces focused on retrograde operations and personnel deployed by combat support agencies. *Id.* ¶ 13.

The change initiated by Secretary Mattis replaced the FML with a Baseline and Temporary Enabling Forces construct. *Id.* ¶ 14. Baseline forces are "conventional forces necessary to carry out the mission." *Id.* Temporary Enabling Forces are those "required for short-duration missions, to vary based on operational conditions," who "conduct relief-in-place/transfer of authority, temporary duty, and short-duration missions not routinely required to support the core mission." *Id.* Under the revised force management construct, BOG-exempt forces previously excluded from the FML are now accounted for. *Id.*

In approving the Baseline and TEF construct, Secretary Mattis sought to "increase operational flexibility to counter emergent threats and simplify and improve accounting rules." *Id.* ¶ 15. In his judgment, "the methodology for determining FML, which excluded BOG-exempt personnel, did not present a sufficiently accurate or complete picture of the level of troops in Iraq, Syria, or Afghanistan in reporting both to Congress and to the public." *Id.* Secretary Mattis "also had concerns that public reporting of precise troop figures advantaged the enemy by providing specific information about how many troops we were sending into specific theaters of operation." *Id.*

Under the changes approved by Secretary Mattis, DoD has altered its troop-count reporting practices, including in quarterly reports to Congress pursuant to Section 1267 of the National Defense Authorization Act for Fiscal Year 2018 ("Section 1267 Reports"). *Id.* ¶ 17. In

the unclassified Section 1267 Reports, DoD reports publicly disclosed approximate numbers of U.S. Armed Forces personnel deployed to Afghanistan, Iraq, and Syria. *Id.*; *see id.* Exh. A at 3, Exh. B at 3. Those figures exclude "military personnel whose deployment is not acknowledged publicly." *Id.* ¶ 17; *see id.*; Exh. A at 3, Exh. B at 3. In a classified annex to the Section 1267 Reports, DoD reports the total Baseline and Temporary Enabling Forces, as well as the presidentially authorized troop level. *Id.*

The new force management construct has important advantages over the previous construct. *Id.* ¶ 19. As Secretary Mattis explained in May 2018 correspondence to certain Members of Congress, the new construct "optimizes how DoD manages, accounts for, and accurately reports force levels consistent with operational security," and "increases the Department's transparency and consistency by publicly reporting certain previously undisclosed temporary duty personnel deployed in Afghanistan, Iraq, and Syria without inhibiting commanders' flexibility to adapt to battlefield conditions." *Id.*; *see* Declaration of Mark Herrington ("Herrington Decl.") Exh. C. Although DoD no longer publicly reports precise figures of deployed military personnel, in Secretary Mattis' judgment, the publicly disclosed approximate figures "appropriately balance the need for transparency with the need to protect sensitive information that could advantage the enemy and endanger our personnel." *Id.* And under the approach adopted by Secretary Mattis, "Congress is provided with a fully detailed accounting of the number of deployed military personnel in classified reporting that is kept current." *Id.*

II. Plaintiff's FOIA Requests

Plaintiff submitted two FOIA requests, both dated April 22, 2020, to the Office of the Secretary of Defense and the Joint Staff. *See* ECF Nos. 1-2 ("First Request"), 1-3 ("Second

Request”). Each Request had multiple parts. The First Request sought: (1) “Records sufficient to show the number of military and DoD Appropriated Fund (APF) civilian personnel permanently assigned to . . . Afghanistan, . . . Iraq, . . . and Syria . . . for the period December 2017 to the most recent available quarter, disaggregated by country and broken down quarterly”; (2) “Records sufficient to show the number of U.S. Armed Forces personnel on temporary duty or deployed in support of contingency operations . . . in reported totals in [the same three countries over the same period]”; and (3) “Records sufficient to show the Force Management Level (FML) for [the same three countries over the same period].” ECF No. 1-2.

The Second Request sought: (1) “Records sufficient to show the criteria for counting or determining the number of military personnel by country reported in the DMDC [Defense Manpower Data Center] quarterly manpower report, ‘Number of Military and DoD Appropriated Fund (APF) Civilian Personnel Permanently Assigned By Duty Location and Service/Component’ . . . ”; (2) “Records sufficient to explain the decision to stop publishing the number of military personnel assigned to Afghanistan, Iraq, and Syria in DMDC quarterly reports . . . starting in late 2017”; (3) “Records sufficient to show the criteria for counting or determining the number of personnel under the Force Management Level (FML) for Afghanistan, Iraq, and Syria”; and (4) “Records sufficient to show whether FML continues to function as a troop cap in Afghanistan, Iraq, and Syria.” ECF No. 1-3.

III. DoD’s Responses to the Requests

On November 23, 2020, DoD provided Plaintiff with a response to the first item of his First Request—*i.e.*, records “sufficient to show the number of military and DoD Appropriated Fund (APF) civilian personnel permanently assigned to” Afghanistan, Iraq, and Syria from December 2017 to the most recent available quarter, *see* First Request. *See* Herrington Decl.

¶ 8. That response included production of a spreadsheet that contained the requested data. *Id.* ¶ 13.

On December 11, 2020, Defendant provided a response to the remaining items of Plaintiff's First Request. Defendant informed Plaintiff that, for the data requested in items 2 and 3 of Plaintiff's request, "Acting Secretary of Defense, Christopher C. Miller, who has original classification authority, has determined that such data is currently and properly classified under section 1.4(a) (military plans or operations) and 1.4(d) (foreign relations or foreign activities of the United States) of Executive Order ('EO') 13526 and thus exempt from release pursuant to Exemption 1 of the FOIA." *Id.* Ex. C. On January 6, 2021, DoD supplemented its December 11 production with the unclassified quarterly reports that DoD provided to Congress between December 2017 and November 2020. *Id.* ¶ 15. On January 11, 2021, DoD further supplemented its response by providing Plaintiff with redacted versions of the classified annexes to those quarterly reports. *Id.*

DoD provided a response to the Second Request on December 11, 2020. *See id.* Ex. C. DoD produced the May 2018 correspondence between then-Secretary Mattis and certain Members of Congress, as well as redacted versions of the Action Memos and Force Management Implementation Plans attached thereto. *Id.* ¶ 17. On January 11, 2021, DoD provided a supplemental response that released additional information from the Action Memos and Implementation Plans, and also produced redacted versions of the sections of the OIR and OFS EXORDs issued by the Joint Staff pertaining to force management methodology, accounting and reporting. *Id.* & Exh. E; Williams Decl. ¶ 20. The quarterly reports from December 2017 through November 2020, produced on January 6 and 11, 2021, also contain information responsive to the Second Request. Herrington Decl. ¶ 18.

DoD has withheld classified information from the Action Memos and Implementation Plans, the EXORD sections, and the classified annexes to the quarterly reports pursuant to Exemption 1. *Id*. Exh. C; Williams Decl. ¶¶ 20-21. DoD also withheld the names and contact information of low-level DoD employees pursuant to Exemption 6. Herrington Decl. ¶ 23.

ARGUMENT

I. Legal Standards for Summary Judgment in FOIA Actions

FOIA represents a balance struck by Congress "between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation and quotation marks omitted). Thus, while FOIA generally requires disclosure of agency records, the statute recognizes "that public disclosure is not always in the public interest," *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982); *accord ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012), and mandates that records need not be disclosed if "the documents fall within [the] enumerated exemptions," *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001). As the Supreme Court recently reaffirmed, "FOIA expressly recognizes that important interests are served by its exemptions, and those exemptions are as much a part of FOIA's purposes and policies as the statute's disclosure requirements." *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (citations, quotation marks and alterations omitted).

A motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 is the procedural vehicle by which FOIA cases are typically decided. *See, e.g.*, *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case,

"[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden" on summary judgment. *Carney*, 19 F.3d at 812 (footnote omitted).[3] The agency's declarations in support of its determinations are "accorded a presumption of good faith." *Id*. (citation and quotation marks omitted).

In the national security context, moreover, courts "must accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record." *Osen LLC v. U.S. Central Command*, 969 F.3d 102, 114 (2d Cir. 2020) (emphasis in original; internal quotation marks omitted); *accord N.Y. Times Co. v. DOJ*, 756 F.3d 100, 112 (2d Cir. 2014); *ACLU v. DOJ*, 681 F.3d at 71; *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009). Such deference is warranted because of "the uniquely executive purview of national security." *N.Y. Times Co. v. CIA*, 965 F.3d 109, 122 (2d Cir. 2020); *see also ACLU v. DOJ*, 681 F.3d at 70-71 ("'Recognizing the relative competencies of the executive and the judiciary, . . . it is bad law and bad policy to second-guess the predictive judgments of the government's intelligence agencies' regarding whether disclosure . . . would pose a threat to national security." (quoting *Wilner*, 592 F.3d at 76)). Indeed, the Second Circuit "has repeatedly found that it is appropriate to 'defer[] to executive [declarations] predicting harm to national security, and ha[s] found it unwise to undertake searching judicial review." *Osen LLC*, 969 F.3d at 115 (quoting *ACLU v. DOD*, 901 F.3d 125, 134 (2d Cir. 2018)); *see also Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("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

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[3] Because agency affidavits alone will support a grant of summary judgment in a FOIA case, Local Rule 56.1 statements are unnecessary. *See Ferguson v. FBI*, No. 89-5071, 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting "the general rule in this Circuit"), *aff'd*, 83 F.3d 41 (2d Cir. 1996); *see also, e.g.*, *N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012).

opinion of the agency"). Rather, "the agency's justification is sufficient if it appears logical and plausible." *ACLU v. DOD*, 901 F.3d at 133; *accord ACLU v. DOJ*, 681 F.3d at 71; *Wilner*, 592 F.3d at 73. The declarations submitted by DoD satisfy the agency's burden to show that the agency conducted a thorough search and that the withheld information falls within Exemptions 1 or 6, *Carney*, 19 F.3d at 812, particularly under the deferential standard of review applicable to national security matters. DoD is therefore entitled to summary judgment.

II. DoD's Search Was Reasonable and Adequate, Especially in Light of the Nature of Plaintiff's Requests

A FOIA request must "reasonably describe[] [the] records" sought. 5 U.S.C. § 552(a)(3). A request reasonably describes records only if "the agency is able to determine precisely what records are being requested." *Kowalczyk v. DOJ*, 73 F.3d 386, 388 (D.C. Cir. 1996) (citation omitted). The rationale for this rule is that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters." *Assassination Archives & Res. Ctr., Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989). A FOIA request cannot require the agency to do legal research or answer questions. *See Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985), *aff'd* 808 F.2d 137 (D.C. Cir. 1987); *see also, e.g.*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975) ("Nor is the agency required to identify, after the fact, those pre-existing documents which contain the 'circumstances of the case' to which the opinion may have referred, and which are not identified by the party seeking disclosure.").

The Requests at issue here did not inform the agency "precisely what records were being requested." *Kowalczyk*, 73 F.3d at 388. Instead, they sought records "sufficient to show" various categories of information. *See* ECF Nos. 1-2, 1-3. For example, the Second Request sought "records sufficient" to "show the criteria for counting or determining the number of military personnel by country reported in the DMDC quarterly manpower report," "to explain the

decision to stop publishing the number of military personnel assigned to Afghanistan, Iraq, and Syria in DMDC quarterly reports," "to show the criteria for counting or determining the number of personnel under the Force Management Level (FML)," and "to show whether FML continues to function as a troop cap in Afghanistan, Iraq, and Syria." ECF No. 1-3. These are the sorts of "questions disguised as a FOIA request" that courts have concluded fail to comply with FOIA's requirements. *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 64 (D.D.C. 2003).

Despite Plaintiff's failure to describe the specific records sought, DoD undertook a search for records responsive to Plaintiff's queries. DoD's search for responsive records was reasonable, especially given the nature of Plaintiff's Requests.

An agency does not bear a heavy burden in defending the searches it performed in response to a FOIA request; it need only show "that its search was adequate." *Long v. Office of Personnel Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012) (citation omitted). "Adequacy" requires the agency to demonstrate that its search be "reasonably calculated to discover the requested documents," not that the search "actually uncovered every document extant"; the search "need not be perfect, but rather need only be reasonable." *Grand Cent. P'ship*, 166 F.3d at 489 (internal quotation marks omitted). Where the agency's declarations demonstrate that it has conducted a reasonable search, "the FOIA requester can rebut the agency's affidavit only by showing that the agency's search was not made in good faith." *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993); *see also Carney*, 19 F.3d at 812. "[P]urely speculative claims about the existence and discoverability of other documents" are insufficient to impugn the good-faith presumption accorded to an agency declaration. *Carney*, 19 F.3d at 813 (internal quotation marks omitted).

Applying these standards, and particularly in light of the nature of Plaintiff's requests, DoD's searches for records responsive to Plaintiff's Requests were entirely reasonable. The declaration of Mark Herrington establishes that the agency made reasonable efforts to identify documents "sufficient to" respond to the categories of information sought by Plaintiff. Herrington explains that, because the Requests did not describe specific documents or groups of records but instead sought unspecified records "sufficient to show" certain information, he "contacted relevant offices, including DMDC, the Joint Staff, . . . [USD(P)], and the Office of the Under Secretary of Defense for Intelligence . . . and other attorneys within OGC, to understand the history of the changes in the reporting of troop numbers and to determine what records or groups of records were likely to contain the information sought." Herrington Decl. ¶ 11. Through these consultations, Mr. Herrington "determined that the information sought by Plaintiff was likely to be contained in" five sets of documents: (1) "the Action Memo for the Revised OFS Force Management Construct signed by Secretary Mattis on August 29, 2017, and the attached OFS Force Management Implementation Plan signed by Secretary Mattis on August 30, 2017"; (2) "the Action Memo for the Revised OIR Force Management Construct signed by Secretary Mattis on September 28, 2017, and the attached OIR Force Management Implementation Plan signed by Secretary Mattis on October 7, 2017"; (3) relevant sections of the Executive Orders ('EXORDs') for OIR and OFS issued by . . . the Joint Staff to implement the new force management construct; (4) "DoD's report[s] to Congress in December 2017 pursuant to the War Powers Resolution, Pub. L. No. 93-148 . . . and from March 2018[4] through November 2020, pursuant to Section 1267 of the National Defense Authorization Act for Fiscal Year 2018"; and (5) "certain data contained in a DMDC database." *Id.* ¶ 12.

[4] The first quarterly report for 2018, although dated June 2018 on the cover page, reports data as of March 1, 2018.

In response to the First Request, DoD provided a spreadsheet with data that DMDC retrieved from its unclassified database, as well as quarterly reports provided to Congress and redacted versions of the classified annexes. Herrington Decl. ¶¶ 13-15. The spreadsheet provided to Plaintiff is sufficient to respond to item one of the First Request—*i.e.*, records sufficient to show "the number of military and DoD Appropriate Fund ('APF') civilian personnel permanently assigned to Afghanistan, Iraq, and Syria for the period December 2017 to the most recent available quarter." *Id.* ¶ 13. The quarterly reports are sufficient to respond to the remaining items in the First Request—*i.e.*, "the number of U.S. Armed Forces personnel on temporary duty or deployed in support of contingent operations" and "the Force Management Level" for the three countries over the same period. *Id.* ¶ 14. "Unclassified sections of those reports contain publicly reported approximate troop counts, which exclude military personnel whose deployment is not acknowledged publicly." *Id.* The exact figures "are contained in classified annexes to the [r]eports," and include, *inter alia*, "the total number of deployed personnel in Afghanistan, Iraq, and Syria; limitations on the number of personnel in those countries; the number of DoD military personnel that are not subject to such limitations; and a description of military functions not subject to these limitations." *Id.* The Acting Secretary of Defense "determined that the figures contained in the classified annexes . . . remain currently and properly classified"; DoD therefore withheld the classified information from disclosure. *Id.* ¶ 15.

In response to the Second Request, DoD processed and produced redacted versions of the Action Memos and attached Force Management Implementation Plans that provided details regarding the changes to the force management construct that DoD adopted in 2017, and the relevant sections of the EXORDs implementing those changes. *Id.* ¶ 16. The Action Memos and Implementation Plans "constitute the final decisions, signed by the head of the agency, regarding

changes to DoD's force management." *Id.* "The EXORD sections produced by DoD in redacted form reflect the incorporation of the changes into the Executive Orders to USCENTCOM for OIR and OFS." *Id.* "No other documents would provide more detailed, responsive information regarding the reasons for the changes to the force management construct that are the subject of Plaintiff's Second FOIA Request." *Id.* In addition, the quarterly reports also contain information responsive to Plaintiff's Second Request. *Id.* ¶ 18. They "provide information about how and why certain information is unclassified while other information is classified." *Id.* Finally, DoD produced "copies of correspondence between Secretary Mattis and Members of Congress regarding DoD's change in public reporting of troop counts by DMDC." *Id.* ¶ 19. These documents "were deemed sufficient to respond in full to Plaintiff's Second FOIA Request, as they are 'sufficient to show' the information sought by Plaintiff." *Id.* ¶ 20.

DoD's search was reasonable, particularly in light of Plaintiff's requests for records "sufficient to show" various categories of information. DoD did not conduct a search for all records relating to the requested categories because that is not what Plaintiff requested. Rather, Plaintiff requested records "sufficient to show" certain information, and Mr. Herrington consulted with multiple components within DoD to ascertain which documents would be sufficient to show the information Plaintiff requested. That method was reasonably calculated to uncover records "sufficient to show" the information sought by Plaintiff. *Grand Cent. P'ship*, 166 F.3d at 489. DoD is therefore entitled to summary judgment with regard to the adequacy of its search.

III. DoD Properly Withheld Classified Information Pursuant to Exemption 1

Exemption 1 protects from public disclosure matters 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 such Executive order." 5 U.S.C. § 552(b)(1). The current standard for classification is set forth in Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) ("E.O. 13,526"). Section 1.1 of the Executive Order lists four requirements for the classification of national security information: (1) an "original classification authority" must classify the information; (2) the information must be "owned by, produced by or for, or . . . under the control of the United States Government;" (3) the information must pertain to one or more of eight protected categories of information listed in section 1.4 of the Executive Order; and (4) an original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and be "able to identify or describe the damage." E.O. 13,526 § 1.1(a)(1)-(4).

The declaration submitted by Dr. Williams—who is exercising the duties of the Deputy Under Secretary of Defense for Policy and has been delegated original classification authority—logically and plausibly demonstrates that all of these requirements have been met with regard to the classified information withheld under Exemption 1. Williams Decl. ¶¶ 3, 20-42. All of that information was classified by an original classification authority; is owned by, produced by or for, or under the control of the U.S. Government; and pertains to military plans or operations and/or or foreign relations or foreign activities of the United States, within the meaning of sections 1.4(a) and (d) of the Executive Order. *See id.* ¶ 24. Specifically, the information withheld from the quarterly reports under Exemption 1 "pertains to military plans and operations and reveals details about our strategy in Iraq, Afghanistan, and Syria." *Id.* ¶ 25. It also "pertains to U.S. military actions abroad and the United States' relations with the governments of Afghanistan, Iraq, and Syria, as well as our allies that have partnered with us in relation to those

countries, including member nations of the North Atlantic Treaty Organization (NATO)." *Id.* The information withheld from the Action Memos, Implementation Plans, and EXORD sections under Exemption 1 "pertains to ongoing military plans and operations in Iraq, Syria, and Afghanistan, including specific details and analysis of how troop numbers will be accounted for and reported, as well as locations of special missions forces." *Id.* ¶ 26. It also pertains to foreign relations and activities of the United States, including information about "foreign relations considerations" and "engagement plans with the governments of Afghanistan, Iraq, and Syria, as well as allied partners." *Id.*

Dr. Williams also explains in some detail how disclosure of the classified information withheld pursuant to Exemption 1 "would result in specific and identifiable harms to DoD's ability to conduct military operations in Iraq, Syria, and Afghanistan and to the foreign relations and foreign activities of the United States." *Id.* ¶ 28. Much of Dr. Williams' explanation of the harms likely to flow from disclosure is itself classified. In such circumstances, it is well settled that the government can explain the bases for its withholdings in a classified declaration submitted for the Court's *ex parte* and *in camera* review. *See, e.g.*, *ACLU v. DOJ*, 681 F.3d at 70; *N.Y. Times Co. v. DOJ*, 756 F.3d at 117; *Ctr. for Const. Rights v. CIA*, 765 F.3d 161, 169 n.16 (2d Cir. 2014); *ACLU v. Office of the Dir. of Nat'l Intelligence*, No. 10 Civ. 4419 (RJS), 2011 WL 5563520, at *12 (S.D.N.Y. Nov. 15, 2011); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 507–08 (S.D.N.Y. 2010).

Although the principal discussion of the harms to national security is classified, Dr. Williams is able to provide some explanation in unclassified terms. With respect to the presidentially authorized force level, for example, Dr. Williams explains that disclosure "could reasonably be expected to harm national security by revealing to adversaries whether and how

many additional troops may be available to commanders on the ground, and whether there is flexibility to increase troop levels or barriers to doing so in a particular theater of operations." Williams Decl. ¶ 36. "It would advantage the enemy to know that the level of U.S. forces currently in a particular theater is or is not close to the presidentially authorized force level, such that there may be impediments to increasing the force level, at least in the near term." *Id.*; *see id.* ("It could also be strategically advantageous to U.S. forces if the enemy were to believe that U.S. forces may be at or near the cap, if in fact there is flexibility to add additional forces."). In addition, disclosure of data relating to projected personnel totals "provides insight into specific future military plans and operations" and "could be used by the enemy to ascertain U.S. military strategy and analyze whether certain events impacted that strategy." *Id.* ¶ 37. As noted, the classified portions of Dr. Williams' declaration provide substantial additional information about the harms to national security that could reasonably be expected to result from disclosure of the classified information withheld pursuant to Exemption 1.

Dr. Williams' detailed declaration logically and plausibly explains that the information withheld under Exemption 1 is currently and properly classified. His determinations as to the classified status of the withheld information, and the harms that could reasonably be expected to flow from disclosure, are entitled to substantial deference. *See Osen LLC*, 969 F.3d at 114; *N.Y. Times Co. v. CIA*, 965 F.3d at 114; *ACLU v. DOJ*, 681 F.3d at 70-71; *Halperin v. CIA*, 629 F.2d at 148. At bottom, the determinations made by then-Secretary Mattis, confirmed by Acting Secretary Miller, and explained by Deputy Under Secretary of Defense for Policy Williams are policy judgments—made at the highest level of the Department of Defense—about the appropriate balance between transparency, on the one hand, and protection of national security, on the other. Williams Decl. ¶¶ 19, 42; Herrington Decl. Exh. C at 5-6. So long as the agency

has logically and plausibly explained those judgments, as DoD has done here, they should be upheld. *See ACLU v. DOJ*, 681 F.3d at 70-71; *ACLU v. DOD*, 901 F.3d at 134.

IV. DoD Properly Withheld the Names and Phone Numbers of Lower-Level DoD Employees Under Exemption 6

Exemption 6 protects from disclosure information from "personnel or medical files or similar files" when disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 599 (1982). The statutory language concerning files "similar" to personnel or medical files has been read broadly by the Supreme Court to encompass any "information which applies to a particular individual . . . sought from Government records." *Id.* at 602; *see also Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 175 (2d Cir. 2014).

In determining whether personal information is exempt from disclosure, courts must balance the public's need for this information against the individual's privacy interest. *See Long*, 692 F.3d at 190. "The privacy interests protected by the exemptions to FOIA are broadly construed." *Associated Press v. DOJ*, 549 F.3d 62, 65 (2d Cir. 2008) (per curiam). They "embody the right of individuals 'to determine for themselves when, how, and to what extent information about them is communicated to others.'" *Id.* (quoting *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 763 (1989)). On the other side of the balance, the "only relevant 'public interest in disclosure' to be weighed . . . is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is contribut[ing] significantly to public understanding *of the operations or activities of the government*.'" *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (quoting *Reporters Comm. for Freedom of the*

Press, 489 U.S. at 775) (emphasis in original); *see also Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991). This purpose is not furthered by disclosure of information that "reveals little or nothing about an agency's own conduct." *Reporters Comm.*, 489 U.S. at 773. "The requesting party bears the burden of establishing that disclosure of personal information would serve a public interest cognizable under FOIA." *Associated Press*, 549 F.3d at 66.

In his declaration, Mark Herrington explains that "DoD's general practice is to withhold under Exemption 6 personally identifying information of those members of DoD who are at the military rank of Colonel (06) or below and the rank of GS-15 or below." Herrington Decl. ¶ 22. DoD employs this practice because "disclosing the names and other identifying information [of the individuals involved] could subject [them] to annoyance or harassment in their private lives," and "release of these low-level individuals' names and other identifying information would not serve the core purpose of the FOIA." *Id.* Here, consistent with its general practice, DoD applied Exemption 6 narrowly to withhold "low-level employees' names and phone numbers." *Id.* ¶ 23.

The Exemption 6 balancing test tilts heavily towards protecting this information from disclosure. The DoD employees have a significant privacy interest in avoiding disclosure of their names and phone numbers. Herrington Decl. ¶ 22; *see, e.g.*, *Judicial Watch v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006) (Exemption 6 applies to "bits of personal information, such as names and addresses"); *Conti v. U.S. Dep't of Homeland Sec.*, No. 12 Civ. 5827 (AT), 2014 WL 1274517, at *18 (S.D.N.Y. Mar. 24, 2014) (names and phone numbers of third parties properly withheld under Exemption 6). Meanwhile, disclosure of lower-level DoD employees' names and phone numbers would shed no light on DoD's operations or activities—the only legally cognizable public interest in disclosure. Herrington Decl. ¶ 22; *see Reporters Comm.*, 489 U.S.

at 773; *Fed. Labor Relations Auth.*, 510 U.S. at 495-96. Accordingly, DoD properly withheld this personal information pursuant to Exemption 6.

V. DoD Produced All Reasonably Segregable, Non-Exempt Information in the Responsive Records

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). This provision does not require disclosure of records in which the non-exempt information that remains would be meaningless or without value. *See Cook*, 758 F.3d at 178-79; *Elec. Privacy Info. Ctr. v. ODNI*, 982 F. Supp. 2d 21, 31-32 (D.D.C. 2013); *Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 221-22 (D.D.C. 2005); *accord Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 88 (2d Cir. 1979) (Friendly, J.) (disclosure not required where all that remains is "a few nuggets of non-intertwined, 'reasonably segregable'" information). Courts "may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated." *Juarez v. DOJ*, 518 F.3d 54, 61 (D.C. Cir. 2008).

Here, DoD released the unclassified portions of the Action Memos and attached Implementation Plans, the relevant EXORD sections, and the quarterly reports to Congress. Herrington Decl. ¶¶ 15-18. Dr. Williams avers that he has reviewed the withheld classified information and determined that "there is no reasonably segregable, non-exempt information among the information withheld by DoD pursuant to Exemption 1." Williams Decl. ¶ 41. And DoD's Exemption 6 withholdings were limited to "low-level employees' names and phone numbers." Herrington Decl. ¶ 23. DoD has therefore met its segregability obligations under FOIA.

CONCLUSION

For these reasons, and the reasons set forth in DoD's declarations, DoD's motion for summary judgment should be granted.

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Respectfully submitted,

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