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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY BERMAN, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, Defendant.	No. S-04-2699 DFL-DAD **PLAINTIFF LARRY BERMAN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT CENTRAL INTELLIGENCE AGENCY'S MOTION FOR SUMMARY JUDGMENT** Date: June 1, 2005 Time: 10:00 a.m. Courtroom: 7 (14th Floor)

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I. INTRODUCTION AND SUMMARY OF LEGAL ARGUMENTS

Nearly four decades after the Central Intelligence Agency ("CIA") provided President Lyndon B. Johnson with two President's Daily Briefs ("PDBs") concerning events taking place in the world on August 6, 1965 and April 2, 1968, the CIA insists that University of California, Davis Professor Larry Berman, a scholar of the Vietnam War, and the public have no right of access to non-sensitive information found in these historic documents. *PDBs dated August 7, 1965 and April 1, 1968 already have been sanitized by the CIA and released to the public.* Indeed, more than 30 PDBs and its predecessor, the President's Daily Checklists ("PICLs"), have been publicly released by the CIA in sanitized form, without any damage. So have *several thousand* Central Intelligence Bulletins ("CIB"), which, like the PDBs, reflect top-level intelligence digests for the President and his senior staff and often contain the same verbatim reports as the PDBs. Indeed, both a Special Assistant to President Johnson, who regularly reviewed PDBs throughout his tenure with the President, and a former member of the CIA's own Historical Advisory Committee agree that historic PDBs such as those requested here can be released in sanitized form to the public without harm to present day national security concerns or to any deliberative interest. See Declarations of Bill Moyers and George Herring.

Against this evidence, the CIA has failed to satisfy both the factual and legal showing that it must to keep secret the requested PDBs. The CIA's sole declarant, a CIA information review officer with no unique insight into intelligence that the agency provided to President Johnson, merely recites the CIA's general concerns about releasing PDBs to the public. Yet, the CIA's general concerns about safeguarding of intelligence sources and methods, as well as its "mosaic" theory, simply cannot be squared with the indisputable fact that the agency previously reviewed, sanitized and released to the public, more than 30 *other* PDBs and PICLs. Indeed, no explanation is offered by the CIA as to how the content of two PDBs from the Johnson administration were cleared for release as recently as December 2004, as Plaintiff Larry Berman was preparing this case, when the PDBs came before the CIA's sole declarant in cable format rather than on PDB letterhead. Nor do the CIA's concerns make sense in light of the sheer volume of other far more detailed, CIA top-level intelligence information about the Vietnam War and other issues of the day

that is publicly available and that documents foreign-policymaking at the highest levels of government during this time – including tape recordings of President Johnson's foreign policy deliberations with his top aides. The CIA's declarant offers little analysis – and certainly with none of the required specificity – about the specific kinds of intelligence information or methods that will be uniquely compromised if the two PDBs requested are disclosed. Nor does he explain how 40-year old CIA intelligence in these particular PDBs remains sensitive and cannot be segregated.

Similarly, the CIA's assertion of the "deliberative process" privilege to prevent disclosure is dubious because the PDBs are neither intra-agency or interagency documents; rather, they are documents expressly prepared for the President, who is not an agency. The PDBs are not "draft" documents or in any way "predecisional," as the agency itself confirms that the PDBs reflect the final intelligence assessment of the CIA on the given day. Nor are PDBs "deliberative" documents, as they do not contain recommendations or advice, but instead report factual circumstances and developments. Finally, disclosure of the requested PDBs is not barred by the presidential communications privilege because that privilege is very narrow and there is absolutely no precedent that supports the CIA's standing to assert this privilege on behalf of the President. Because the CIA's evidence is patently insufficient and contradicted by the substantial evidence offered in opposition, summary judgment must be entered in favor of Plaintiff Larry Berman.

II. FACTUAL BACKGROUND

A. Plaintiff's FOIA Request

Plaintiff Larry Berman ("Berman") is a tenured Professor of Political Science at the University of California ("UC"), Davis, and a noted historian of the American presidency and the Vietnam war. See Declaration of Larry Berman ("Berman Decl."), ¶ 1. On March 2, 2004, in connection with an ongoing scholarly project, he made a Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, request to the Defendant CIA for four nearly 40-year-old PDBs prepared by the CIA during President Lyndon B. Johnson's Administration. See Exhibit ("Ex.") 2 to Berman Decl., ¶ 13. The CIA denied this request under FOIA exemptions (b)(1) (national security), (b)(3) (intelligence methods and sources) and (b)(5) (deliberative process), claiming the PDBs were

"inherently privileged, predecisional and deliberative material." See Ex. 4 to Berman Decl., ¶ 15. The CIA also refused to admit or deny the existence of the requested PDBs. Id. After exhausting his administrative appeals, Berman brought the instant action to obtain access to the PDBs dated August 6, 1965, March 31, 1968 and April 2, 1968.[1] The parties now present themselves on cross-motions for summary judgment.

B. Nature of The President's Daily Briefs

PDBs contain reporting on international developments assembled from various sources such as satellite photographs, signal intercepts, individual recruits, Department of State cables and open source intelligence, which includes published and transcribed news accounts of foreign events, public comments by foreign leaders and other dignitaries and other publicly available information. See Declaration of Bill Moyers, who served as Special Assistant to President Johnson ("Moyers Decl."), ¶ 4; see also Declaration of George Herring, who served on the CIA's Historical Advisory Committee ("Herring Decl."), ¶ 4. The PDBs created by the CIA during the Johnson Administration were not draft reports, nor did they contain policy recommendations; rather they reported facts designed as an intelligence aid to the President and other executive branch officials. Id.[2] The factual information contained in ten publicly available PDBs during the Johnson Administration and attached to Berman's Complaint are representative of the type of basic facts that President Johnson received in PDBs. See Moyers Decl., ¶ 7. Because a briefer from the CIA was not physically present when President Johnson read the PDBs, the CIA did not receive feedback from President Johnson through the use of the PDB in the manner generally described by the CIA's declarant. See Ex. 3 to Declaration of Thomas Blanton ("Blanton Decl."), ¶¶ 4, 6; see also Ex. 19 to Berman Decl., ¶ 41 (August 6, 1965 President's Daily Diary reflects no visits from CIA personnel or a CIA briefer).

Significantly, roughly 40 percent of the items covered in the PDBs are addressed in newspapers. See Ex. 3 to Blanton Decl., ¶ 5. Indeed, recently former President Bill Clinton was

[1] The CIA has stated that no PDB was produced for March 31, 1968. See Answer, n.1 at 2.

[2] Even today, the CIA admits that PDBs do not contain foreign policy recommendations, but instead are designed merely to report facts for the President's consideration. See Ex. 2 to Declaration of Thomas Blanton ("Blanton Decl."), ¶ 3.

reported by the *Washington Post* to have made a similar observation about information in the PDBs he reviewed. See Ex. 39 to Blanton Decl.,¶ 47.

C. Historic PDBs Can Be Released Without Harm To Presidential Deliberations, National Security or Intelligence Sources or Methods

The Special Assistant to President Johnson, who regularly reviewed PDBs throughout his tenure with the President, and a former member of the CIA's own Historical Advisory Committee, agree that historic PDBs such as those requested here can be reviewed and sanitized for release to public without harm to present day national security concerns or to the presidential deliberative process. See Moyers Decl., ¶ 9; Herring Decl., ¶¶ 9-11. Additionally, both the CIA's Historical Advisory Committee and the U.S. State Department's Historical Advisory Committee on Diplomatic Documentation have recommended that historic PDBs, such as the two at issue here, and PICLs be reviewed for release to the public. See Herring Decl.,¶¶ 6,7, and Ex. 1 thereto; see also Exs. 27 and 28 to Blanton Decl.,¶¶ 33, 34.

Indeed, at least thirty-five sanitized PDBs and PICLs, or portions thereof, already have been released to the public in various forms. Specifically, fifteen Johnson-era PDBs have been released by the CIA in sanitized form and are publicly available through the President Lyndon B. Johnson Library in Austin, Texas. See Exs. 4-13; 15, 16, 18-20 to Blanton Decl. These include PDBs dated *a day after* (August 7, 1965) *and a day before* (April 1, 1968) the PDBs at issue in this lawsuit. See Exs. 5 and 4 to Blanton Decl.¶ 9. These also include two PDBs released by the CIA in sanitized form during the very month that Plaintiff Larry Berman brought the instant lawsuit and at a time when the CIA's sole declarant avers that he had the final say on such releases. See Exs. 15 and 16 to Blanton Decl.,¶¶ 15, 17; see also Declaration of Terry N. Buroker Directorate of Intelligence Information Review Officer Central Intelligence Agency ("Buroker Decl."), ¶ 2. The contents of portions of five of these fifteen PDBs have been published verbatim in government reports (The Report of the National Commission on Terrorist Attacks Upon the United States) or books authored by the former Director of Central Intelligence Robert M. Gates and journalist Bob Woodward. See Exs. 21-23 to Blanton Decl.¶¶ 27-29. Ten PICLs have been released pursuant to the President John F. Kennedy Assassination Records Review Collection Act

of 1992, 44 U.S.C. 2107. See Buroker Decl., n. 4 at 14. An additional five PICLs have been released by the CIA in sanitized form and are publicly available from the John F. Kennedy Presidential Library.[3] See Ex. 24 to Blanton Decl., ¶ 30.

In addition to the publicly available PDBs and PICLs, *several thousand* CIBs, which, like the PDBs, are top-level intelligence digests prepared by the CIA for the President and other senior executive branch officials, have been released by the CIA in sanitized form. See Berman Decl., ¶ 45; see also Blanton Decl., ¶ 36. Much of the same type of information contained in the PDBs during the Johnson administration was contained in the CIBs. See Moyer Decl., ¶ 8. Indeed, an analysis of just some of the publicly available CIBs around the time period of the PDBs at issue here, reveal that often times the CIBs contain verbatim or near verbatim information as contained in the PDBs, though the CIBs tend to be more detailed. For example, the May 16, 1967 PDB contains the following entry pertaining to Laos:

> Supplies brought to the North Vietnam-Laos border during late March and April are continuing to filter into Laos toward the Plaine des Jarres, **[Redacted]** inside Laos report that about 36 trucks a day – the highest rate in recent months – moved west along the route between 6 and 10 May. We still believe that this is a stockpiling operation in anticipation of the rainy season.

The corresponding declassified and publicly available CIB entry for Laos on that same day reads:

> Supplies brought to the North Vietnam-Laos border during late March and April are continuing to filter into Laos towards the Plaine des Jarres. **Trained observers** inside Laos report that about 36 trucks a day, the highest rate in recent months, moved west between 6 and 10 May. This activity along the principal route from North Vietnam still appears to be a stockpiling operation before the rainy season begins in northern Laos. [Redacted.] [Emphasis added.]

[3] Given the number of PDBs and PICLs that already are publicly available and even more detailed foreign intelligence information from this era, the CIA's effort to depict, ever so vaguely, generalized concerns that *might* or *could* arise from the release of PDBs *without* explaining how the release of sanitized versions of the two PDBs sought by Professor Berman pose any unique threat or concern demonstrates that the CIA's "evidence" is not credible. The Buroker Declaration does not point to any adverse consequences from the over thirty-five releases of PDBs and PICLs to date. Indeed, the CIA's careful choice of words – referring to previous PDB releases as "occasions" or "instances" rather than making clear the specific number of PDBs and PICLs that have previously been sanitized and released by the agency – suggests that the agency is not even certain how many PDBs, PDB excerpts or PICLs already have been released to the public. See Buroker Decl., n. 4 at 14.

Compare Ex. 11 at 1 to Ex. 29 at 7 to Blanton Decl.; see also additional examples; compare Ex. 4 at 4 to Ex. 30 at 10 to Blanton Decl.; Ex. 5 at 3 to Ex. 31 at 7 to Blanton Decl.; see also Plaintiff Larry Berman's Opposition to Defendant CIA's Statement of Undisputed Facts And Statement of Additional Facts, Nos. 58-63.

Moreover, vast amounts of information, including presidential deliberations and CIA created intelligence reports and analysis, from the Johnson Administration, and other presidential administrations, is already available to the public through presidential libraries, government collections and other libraries and centers. See Berman Decl., ¶¶ 38-52 and Exs. 17-26 thereto (describing extensive examples of intelligence and deliberative materials available through NARA, the Presidential libraries, and historical archives); see also Blanton Decl., ¶¶ 44, 45 (attaching documents describing Director of Central Intelligence Briefings with President George H.W. Bush and Secretary of State Briefings with President Nixon); Herring Decl., ¶ 10 ("[T]he claim that these documents cannot be released in redacted form without harm to national security or without somehow disclosing information that could lead to the disclosure of a source or method is belied by the enormous amount of historic top-level intelligence and executive branch information during this time that is already publicly available, some of which includes sources and methods from that point in history."); id., ¶¶ 12-14.

At the Johnson Library alone, there are publicly available National Security Files, which are the working files of President Johnson's Special Assistants for National Security Affairs, files reflecting Presidential deliberations during the Gulf of Tonkin attacks in 1964, and files of the deployment of combat forces to Vietnam. Also available are Presidential Staff Assistant and Deputy Press Secretary Tom Johnson's detailed notes and transcripts of 120 meetings President Johnson had with his senior civilian and military advisors during 1967-1968, including 45 Tuesday luncheons. The Library has a wealth of CIA intelligence reports and intelligence information cables and memoranda exchanged between the Director of Central Intelligence and President Johnson assessing issues in Vietnam. See Berman Decl., ¶¶ 38, 46, 47. Another valuable resource available to scholars at the Johnson Library is the President's Daily Diary, which serves as a guide to the President's daily visitors and contains valuable transcripts from the

office staff on telephone conversations and recordings, as well as presidential activities. Id. ¶ 41. Much of this information has been available for several years and has been the subject of scholarly discourse and publications, without evident harm to national security.

D. The CIA's Inadequate Showing

The sole evidence offered by the CIA to support its contention that two, nearly 40-year-old PDBs created during the Johnson Administration cannot be disclosed is the declaration of a CIA information review officer, who has worked in this position for just over a year and whose base of personal knowledge before that time is anything but clear. See Buroker Decl., ¶ 1. The factual deficiencies of this declaration are set forth below and the legal objections to it are set forth in a separate Objections to Evidence, filed concurrently herewith. That this declaration never specifically addresses the two PDBs at issue, and instead addresses broadly the release of PDBs in general, is consistent with the CIA's blanket policy of non-disclosure of PDBs regardless of age and content, and its stated goal of "preserving the mystique" of the CIA in evaluating greater access policies. See Exs. 26 at 2 (December 20, 1991 report from the Task Force on Greater CIA Openness to the Director of Central Intelligence) and 27 at 3 to Blanton Decl., ¶¶ 32-35; see also Ex. 38 to Blanton Decl., ¶ 46 (internal CIA memo recommending in another matter nondisclosure of a 35-year-old PDB "in accordance with our current policy."). Because this policy cannot be countenanced with the law and because the CIA's declaration falls far short of that required to sustain its claimed exemptions, especially in light of the contradictory evidence offered in opposition, Berman requests that judgment be entered in his favor.

III. LEGAL ANALYSIS

A. The CIA's Declaration Is Wholly Inadequate To Support Any Of Its Claimed Exemptions

The CIA bears the burden of proof and must establish that the two withheld PDBs fall within one of FOIA's narrow exemptions. Maricopa Audubon Society v. Forest Service, 108 F.3d 1089, 1092 (9th Cir. 1983). "If the agency relies on affidavits, they must contain reasonably detailed descriptions of the documents and allege facts sufficient to establish an exemption." Id. at 1092. The Ninth Circuit has rejected as "clearly inadequate" the "categorical approach" indicating

the "anticipated consequences of disclosure" when a general type of information is disclosed. Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991) (citing King v. Department of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987)). "Effective advocacy is possible only if the requester knows the precise basis for nondisclosure. . .Unless the agency discloses 'as much information as possible without thwarting the exemptions' purpose,' the adversarial process is unnecessarily compromised." Weiner, 943 F.2d at 979 (citing King, 830 F.2d at 224)). See also Lion Raisins, Inc. v. Department of Agriculture, 354 F.3d 1072 (9th Cir. 2004) ("requiring as detailed public disclosure as possible of the government's reasons for withholding under a FOIA exemption is necessary" to give the party seeking the documents a "meaningful opportunity to oppose the government's claim of exemption"); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291 (N.D. Cal. 1992) ("Specificity is the defining requirement of the *Vaughn* index"); King, 830 F.2d at 223-24 ("A withholding agency must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information"); SafeCard Services v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (agency affidavits must be "relatively detailed and non-conclusory"); Mead Data Central v. Department of the Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977) ("when an agency seeks to withhold information, it must provide a relatively detailed justification, specifically identifying the reasons a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply").

Though the CIA's declaration is to be accorded substantial weight in the context of national security exemptions, "deference is not equivalent to acquiescence." Campbell v. Department of Justice, 164 F.3d 20, 30-31 (D.C. Cir. 1998). Rejecting the agency declarations because they failed to draw a connection between the decision to withhold and a national security justification for withholding, the court of appeals in Campbell explained that a declaration is insufficient for summary judgment for "lack of detail and specificity." Id. Agency declarations must provide factual descriptions of the withheld documents, detail how each asserted exemption applies to each document, and describe specific harms that will result from the disclosure of the

requested documents. Wiener, 943 F.2d at 980.[4] Because the CIA's declaration fails to provide any description whatsoever of the information found in the two PDBs and further fails to provide detailed justifications as to how each FOIA exemption applies to the August 6, 1965 and April 2, 1968 PDBs, this Court should deny the CIA's motion for summary judgment. See King v. Department of Justice, 830 F.2d 210, 219 (D.C. Cir. 1987) ("affidavits cannot support summary judgment if they are 'conclusory, merely reciting statutory standards, or if they are too vague and sweeping'") (citing Allen v. CIA, 636 F.2d 1287, 1291 (D.C. Cir. 1980)); Oglesby v. Dept. of the Army, 79 F.3d 1172, 1181, 1184 (D.C. Cir. 1996) (remanding CIA declaration for failure to provide detailed justification for exemptions 1 and 3 and rejecting Vaughn affidavits for being "sweeping and conclusory").

1. The CIA's Declaration Fails to Demonstrate How Disclosure Of The Two PDBs Will Reveal An Intelligence Source or Method (Exemption 3)

Under Exemption 3 to FOIA, the government may withhold documents if their withholding is authorized by another statute. 5 U.S.C. § 552(b)(3). Here, the CIA asserts that a statute intended to protect "intelligence sources and methods from unauthorized disclosure" justifies its withholding of the two PDBs. See 50 U.S.C. § 403(d)(3). Because the CIA's declaration fails to specifically articulate a source or a method that will be revealed by disclosure, its invocation of Exemption 3 fails.

The Ninth Circuit has rejected affidavits almost identical to the Buroker Declaration as insufficient to satisfy Exemption 3:

> The Dube affidavit is insufficient with respect to the document labeled CIA-2. The Dube affidavit justifies the deletions of three paragraphs from this document with the statement that "disclosure of [the withheld] portions reasonably could be expected to lead to identification of the source of information."

[4] In Wiener, the Ninth Circuit specifically considered and rejected a bad faith standard, that "absent a showing of bad faith, the CIA's determination that a document is withholdable under 50 U.S.C. § 403(d)(3) is unreviewable" because it found such a standard "inconsistent with the Supreme Court's decision in *Sims* in which the Court reviewed the CIA's withholdings under § 403(d)(3) for reasonableness." 943 F.2d at 983, n.19. Wiener, as the only case in which the Ninth Circuit articulated a standard, is controlling. The CIA's reliance upon Minier v. CIA, 88 Fed.3d 796 (1996) and Hunt (Motion at 6) in which the court only cites to the D.C. circuit cases but does not specifically address the applicable standard, cannot be relied upon on this point in light of the Wiener decision, explicitly rejecting bad faith as a Ninth Circuit standard.

Wiener, 943 F.2d at 983. The Court of Appeal explained that the government's affidavit did not justify withholding the requested document under Exemption 3 because it "fails to discuss the facts or reasoning upon which [the agent] based his conclusion" and thus afforded the plaintiff "no opportunity to contest that conclusion." Id. Like the declaration in Wiener, the Buroker Declaration contains only sweeping generalizations such as the claim that disclosure of the PDBs at issue here "would *tend to reveal* the identities of intelligence sources, both as a result of the disclosure of the specific document and as part of a mosaic of information s discussed above." See Buroker Decl., ¶ 53 (emphasis added).

The Ninth Circuit's holding in Wiener is consistent with its prior decisions requiring detailed justifications by agencies that invoke Exemption 3. For example, in National Commission on Law Enforcement and Social Justice v. CIA, 576 F.2d 1373 (9th Cir. 1978), a FOIA case that the agency did not brief in its summary judgment motion, the CIA provided affidavits that "contained detailed information," explaining that the requested document was "two pages with attachment," "contains the name of a CIA employee," had an attachment of the Foreign Intelligence Subcommittee's meeting minutes, devoted "seven of 13 paragraphs" to the deliberations described, and that the attachment "also contains the names of Agency employees." Id. at 1377 n.6. In contrast to the fact-heavy CIA affidavits discussing source identification in National Commission, the Buroker Declaration is glaringly insufficient. Indeed, the Buroker Declaration fails to explain, at all, how the disclosure of any portion of the requested PDBs will reveal the name of information sources, specific information methods or "liaison" relationships.

A case that the CIA does cite in its summary judgment motion, Hunt v. CIA, 981 F.2d 1116 (9th Cir. 1992), further illustrates the deficiencies of the Buroker Declaration. In Hunt, the CIA asserted that both Exemptions 1 and 3 applied and provided affidavits that explained with "much particularity" why disclosure of the existence or non-existence of records pertaining to a certain individual would be "tantamount to a disclosure of whether or not he was a CIA source or intelligence target." 981 F.2d at 1119. Hunt and National Commission demonstrate that the CIA has not satisfied its burden in the instant case. See also Allen v. CIA, 636 F.2d 1287, 1291 (D.C. Cir. 1980) (CIA affidavits asserting that Exemptions 1 and 3 applied were not reasonably specific

"but rather were conclusory, merely reciting statutory standards" and trial court's grant of summary judgment was inappropriate); Oglesby, 79 F.3d at 1184 (agency affidavits that merely "averred that these five documents satisfied the requirements for exemption 3 as well, since they contained classified information concerning communications intelligence activities" were conclusory and insufficient).[5]

Lacking a factual basis for its invocation of Exemption 3, the CIA resorts to a theoretical assertion of harm. The agency asserts a blanket exemption for the two requested PDBs on the basis of the mosaic theory, that is, where "[b]its and pieces of information that may appear innocuous in isolation" but are used by terrorist groups to help form a "bigger picture" of the government's intelligence methods. Detroit Free Press v. Ashcroft, 303 F.3d 681, 706 (6th Cir. 2002) But while the risk of "mosaic intelligence," may exist, the Sixth Circuit has held that such speculation should not be a basis "for such a drastic restriction of the public's First Amendment rights." Id. at 709. In Detroit Free Press, the government sought to prohibit access to deportation proceedings and provided affidavits stating that opening such deportation hearings could result in disclosure of government intelligence via the mosaic theory. The Court of Appeal rejected the government's mosaic theory as a basis for a blanket exemption:

> [T]here seems to be no limit to the Government's argument. The Government could use its "mosaic intelligence" argument as a justification to close any public hearing completely. . .The Government could operate in virtual secrecy in all matters dealing, even remotely, with "national security,"
> . . . .
> This, we simply may not countenance. A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution.

Detroit Free Press, 303 F.3d at 709-710.

[5] Incorrectly, the CIA relies upon Aftergood v. CIA, 355 F. Supp. 2d 557, 562 (D.D.C. 2005), for support of its Exemption 3 claim. Aftergood, however, involved CIA budget information, which has never been made available to the public. In contrast, PDBs and PICLs have been made available to the public. See Blanton Decl.,¶¶ 7-30. Moreover, the Acting Director of CIA declared that aggregate intelligence budgets were not disclosed to protect "classified intelligence methods used to transfer funds to and between intelligence agencies." Aftergood, 355 F. Supp. at 562. There is no CIA testimony in the instant case that release of the two PDBs would disclose current and specific methods. A comparison of apples to oranges is no comparison at all. And, even in Aftergood, the district court issued an amended judgment on May 6, 2005 that ordered disclosure of the CIA's budget figure for 1963.

Even if the mosaic theory were applicable here, when the intelligence sources and methods are almost certainly stale, the CIA offers no analysis of why Berman's request for two nearly 40-year-old PDBs is a "tipping point" for the nation's security.[6] Instead, the Buroker Declaration generically asserts that if "significant numbers" of individual editions of the PDBs are publicly released, "patterns of application of intelligence methods would emerge." See Buroker Decl., ¶ 38. However, nothing in the Buroker Declaration in any way explains how any of the information contained in the two requested PDBs is any materially different from the PDBs and PICLs that were publicly released without any adverse consequences such that this Court must draw a line in the sand and prohibit their public disclosure.

Telling of the deficiencies of the Buroker Declaration is that two of the released PDBs were just declassified in December 2004, the same month that this lawsuit was filed. See Blanton Decl., ¶¶ 15, 17. These PDBs were in cable format, rather than being printed on the usual PDB letterhead, and appear to have been transmitted to President Johnson outside of Washington, D.C. Mr. Buroker avers that since April 5, 2004, he has been "responsible for the final review of documents containing information originated by components of the DI or that otherwise implicate DI interests" in response to FOIA requests. See Buroker Decl.,¶ 2. Accordingly, the implication must be drawn that Mr. Buroker had the "final review" of the two PDBs declassified in December 2004. Yet, his declaration fails to account for why an ordinary review of the content of the PDB – stripped of PDB letterhead – would result in the release of documents that the CIA now contends can never be disclosed without leading to the disclosure of methods or sources, harming national security or damaging any deliberative interest. Thus, the Buroker Declaration is not only insufficient it lacks credibility.

Therefore, just as the Court of Appeal in Detroit Free Press rejected the government's mosaic theory, so should this Court. The CIA had an opportunity – and the burden – to establish

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[6] Indeed, while the CIA relies upon the upholding of the mosaic theory in Center for National Security Studies v. Department of Justice, 331 F.3d 918 (D.C. Cir. 2003), the facts of that case easily distinguish it. There, the court's concern was the disclosure of current sources and methods implicating present day national security interests following the terrorist attacks on 9/11. Id. No case has applied the mosaic theory to withhold historic documents where no showing has been made that such documents implicate present day sources and methods.

that a specific source or method would be disclosed by the release of the two PDBs. It has missed its opportunity and failed to satisfy its burden. It cannot substitute a speculative "theory" for detailed, necessary facts.

2. The CIA's Declaration Fails to Demonstrate How Disclosure Of The Two PDBs Will Result In Harm To National Security (Exemption 1)

Exemption 1 to FOIA permits the government to withhold documents or portions or documents, the disclosure of which would be expected to cause damage to national security. 5 U.S.C. § 552(b)(1); see also Executive Order 12356.

To support an Exemption 1 claim, an agency affidavit must do the following:

> [F]or each redacted document or portion thereof, (1) identify the document, by type and location in the body of documents requested; (2) note that Exemption 1 is claimed; (3) describe the document withheld or any redacted portion thereof, disclosing as much information as possible without thwarting the exemption's purpose; (4) explain how this material falls within one or more of the categories of classified information authorized by the governing executive order; and (5) explain how disclosure of the material in question would cause the requisite degree of harm to the national security.

King v. Department of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987) (FBI affidavits asserting Exemption 1 applied deemed inadequate). The CIA's declaration does not support the withholding of the two PDBs on the basis of Exemption 1.

The Ninth Circuit's decision in Wiener, involving similar facts and an almost identical invocation of Exemption 1, is dispositive. In Weiner a professor sought disclosure of government dated records, specifically, FBI records from the 1960s and the 1970s regarding John Lennon, to investigate the use of agency power with regard to political dissent. The FBI stated in conclusory declarations that the release of the withheld documents would damage national security by leading to the disclosure of a confidential source. Wiener, 943 F.2d at 980. The Court of Appeal questioned the government's failure to allege specific harms to national security that would result from the disclosure of the requested documents:

> This explanation leaves unanswered the following relevant questions, among others. Is it realistic to expect disclosure of a twenty year old investigation to reveal the existence of a current

> intelligence investigation? If so, why? Why is it reasonable to expect that the disclosure of documents from the investigation of John Lennon would reveal the objectives or priorities of current intelligence operations? Are the intelligence methods used in the investigation of John Lennon still used today, justifying continued secrecy?

Id. at 981 n.15. Criticizing the government affidavits for lacking allegations that the methods utilized during the John Lennon era were still used today, the Ninth Circuit rejected the agency's "generalized, theoretical discussion of the possible harms which can result from the release of this category of information." Wiener, 943 F.2d at 981. "No effort is made to tailor the explanation to the specific document withheld." Id. at 979-80. The Court found the agency's "boilerplate explanations" insufficient under FOIA because they provided plaintiff with "little or no opportunity to argue for release of particular documents" or failed to provide the court with "an opportunity to intelligently judge the contest." Id. at 979. Holding that the government's Vaughn index was inadequate, the Ninth Circuit ordered the government to revise its Vaughn index:

> The index fails to tie the FBI's general concern about disclosure of confidential sources to the facts of this case. The index does not describe any particular withheld document, identify the kind of information found in that document that would expose the confidential sources, or describe the injury to national security that would follow from the disclosure of the confidential source of the particular document.

Id. at 981.

Like the government affidavits in Wiener, replete with boilerplate language, the CIA's sole declaration in the instant case falls far short of providing the required descriptions of how the disclosure of the two PDBs would cause damage to national security and what damage would be caused. For example, the CIA fails to even inform Berman or this Court whether specific sources are identified in the PDBs let alone "whether the source [if there is one] is still useful as an informant, or even alive." Id. at 981 n.14.

Following Wiener, the Ninth Circuit had another opportunity to examine the contours of Exemption 1. Again, the court required detailed affidavits, and this time found that government's affidavits "showed with particularity how disclosure might reveal the identity of an intelligence source." Rosenfeld v. Department of Justice, 57 F.3d 803, 807 (9th Cir. 1995). Even after finding

that the government sustained its burden, however, the court found that the government could "delete information identifying the informant" and that partial disclosure of the document would be sufficient to accommodate the government's interest. Id. at 807-08. See also Assassination Archives and Research Center v. CIA, 177 F. Supp.2d 1, 7 (D.D.C. 2001) (accepting CIA affidavit asserting that Exemption 1 applied because it stated that the release of the requested information, compiled in 1962, "would endanger current intelligence efforts in Cuba").

Like the government affidavits in Wiener and in direct contrast with the affidavits in Rosenfeld and Assassination Archives, the CIA has not asserted facts sufficient to prove that the release of the two PDBs would endanger current intelligence efforts, anywhere in the world. Indeed, while the Buroker Declaration discusses the use of "undisseminated raw operational information," "covert" information and other forms of data in the PDBs generally, it suggests in only a conclusory statement that information from "individual human sources and liaison relationships" is implicated in the two PDBs at issue. See Buroker Decl., ¶ 54. The CIA makes no effort to explain the current sensitivity, if any, of these nearly four decade old sources, let alone whether these sources are alive or if the purported liaison relationships remain relevant.

Moreover, if the parade of horribles depicted in the Buroker Declaration is to believed, then the same threats to national security should have occurred when the more than 30 PDBs and PICLs currently in the public record were made publicly available. Critically, the Buroker Declaration fails to explain why the release of the two PDBs sought *in this case* will endanger national security, or why these dangers did not occur upon the release of the other previously disclosed PDBs and PICLs. It fundamentally fails to explain why this Court should concern itself with the precedent that will be set by releasing the two requested PDBs when such concerns were obviously not of concern to the CIA when literally dozens of PDBs were publicly released earlier.

Additionally, the Buroker Declaration lacks credibility because it fails to acknowledge any diminution over time in the sensitivity of the intelligence information reflected in the PDBs. While Buroker depicts the intelligence information appearing in the PDB as "immediate" [see Buroker Decl., ¶18], and as the information "deemed most important for the President and his most senior advisors to see that day" [id., ¶ 20], at the same time, the CIA provides no accounting

for when such time-sensitive intelligence becomes stale. No effort is made to explain that any of the information in the two requested PDBs is still relevant to any present military or intelligence activity or sensitive to any given country or adversary in 2005. Using the CIA's analysis, if PDBs had been used during President George Washington's administration, such PDBs would still reflect intelligence sources and methods and deliberations too sensitive to be disclosed to historians and the public. In short, the CIA's evidence falls far short of that required to invoke Exemption 1.

3. The Deliberative Process Privilege Does Not Apply To The PDBs (Exemption 5)

As a last ditch effort, the CIA asserts its withholding of the PDBs is justified by Exemption 5, which allows government agencies to shield "inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5). The type of privilege the CIA asserts here is the deliberative process privilege, which shelters "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carter v. Department of Commerce, 307 F.3d 1084, 1090-91 (9th Cir. 2002) (citing Department of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 12 (2001)). And, in a new twist, the CIA also asserts for the first time the presidential communications privilege.

In order to justify its continued withholding of the requested PDBs from disclosure under Exemption 5, the CIA must demonstrate that the documents are (1) inter-agency or intra-agency documents, (2) predecisional, and (3) part of the agency's deliberative or decision-making process. See 5 U.S.C. § 552(b)(5). See also Assembly of California v. Department of Justice, 968 F.2d 916, 920 (9th Cir. 1992); In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). The CIA does not and cannot satisfy any of these three prongs.

a. The PDBs Are Not Intra-Agency or Inter-Agency Documents

In its motion for summary judgment, the CIA's "argument skips a necessary step, for it ignores the first condition of Exemption 5" and treats the intra-agency or inter-agency requirement

as "a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential." Klamath, 532 U.S. at 12. In Klamath, a unanimous Supreme Court held that communications between the Department of Justice and the Klamath Tribe were neither intra-agency nor inter-agency memoranda and, as such, the documents could not be withheld under Exemption 5. Just as the Department of Justice failed to satisfy the first condition in Klamath, so too does the CIA.

An *intra*-agency memorandum is "a memorandum that is addressed both to and from employees of a single agency." See Klamath, 532 U.S. 1, 9 (2001) (citing Department of Justice v. Julian, 486 U.S. 1, 18 n.1 (1988) (dissenting opinion)). By its very title and admitted purpose, it is clear that the PDBs are provided to the President, do not remain within the CIA, and cannot be intra-agency documents.

Nor are the PDBs *inter*-agency documents. The President is not an agency. See Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980) (explaining that while the "Executive Office of the President" *is* an agency subject to FOIA, the Office of the President is not) ; Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (holding that the President's actions could not be reviewed under the Administrative Procedure Act because the President was not an agency under the Act); In re Lindsey, 148 F.3d 1100, 1110 (D.C. Cir. 1998) ("[t]he Office [of the President] is neither a 'department'. . .nor an 'agency'").[7] Communications from the CIA to the Presidency cannot be inter-agency memoranda.

Because the requested PDBs are neither intra-agency nor inter-agency memoranda, the CIA cannot invoke Exemption 5 to justify its prolonged nondisclosure.

b. The PDBs Are Not Predecisional

A separate and independent ground for rejecting the CIA's reliance on the "deliberative process" exemption is that the requested PDBs are not predecisional or "antecedent to the adoption of agency policy." National Wildlife Federation v. Forest Service, 861 F.2d 1114, 1117 (9th Cir. 1988).

[7] The Office of the President is a distinct and smaller unit comprised of immediate advisers such as the Chief of Staff and the White House Counsel. See Judicial Watch, Inc. v. Department of Justice, 365 F.3d 1108 (D.C. Cir. 2004).

The Ninth Circuit considers a document pre-decisional if it was prepared "in order to assist an agency decision-maker in arriving at his decision." Assembly of California v. Department of Commerce, 968 F.2d 916, 921 (9th Cir. 1992) (en banc). Material loses its pre-decisional character if it is adopted, formally or informally, by the agency. Coastal States, 617 F.2d at 866. Final or formally adopted agency documents are referred to as post-decisional documents and "do not enjoy the protection of the deliberative process privilege." Assembly, 968 F.2d at 920. The reason is that the disclosure of post-decisional documents "does not impinge on the agency's deliberative process and thus does not affect the quality of agency decisions." Powell v. Department of Justice, 584 F. Supp. 1508, 1518 (N.D. Cal. 1984).

A PDB is a final document produced by the CIA and provided to the President. See Moyers Decl., ¶ 4. As such, it is not exempt from disclosure as pre-decisional material. A Ninth Circuit case, National Wildlife, is illustrative. National Wildlife Federation v. Forest Service, 861 F.2d 1114, 1117 (9th Cir. 1988). There, the United States Forest Service asserted that two of its draft forest plants and two draft Environmental Impact Statements were pre-decisional, and the court agreed: "These documents are merely working drafts subject to revision. Once they are in final form, the Forest Service will make them available to the public." National Wildlife, 861 F.2d at 1120. Those draft plans were also deliberative and included statements pertaining to which issues the Forest Service employees considered most urgent, what priority should be assigned to each issue, and included recommendations and opinions as to how various issues could be resolved. Id. at 1121.

Unlike the FOIA request in National Wildlife, there are no draft documents requested in the instant case. Nowhere in the Buroker Declaration does the CIA suggest or imply that the requested PDBs are draft documents that were circulated for brainstorming purposes, or depict the requested PDBs as "antecedent" drafts subject to later revisions. Even if the CIA's contention that the PDBs are a vehicle for an "ongoing dialogue" between the CIA and the President was true during the Johnson Administration – and this is not the case[8] -- there can be no question that each individual PDB is "final" for the day it is given to the President.

[8] See Ex. 3 to Blanton Decl., ¶ 4; see also Ex. 19 to Berman Decl.,¶ 41 (President Johnson's diary

Like the Department of Energy documents in Coastal States that the appeals court found were final because they were adopted by the agency rather than merely one individual in the agency, the PDBs are adopted by the agency and are post-decisional. In Coastal States, the D.C. Circuit explained that pre-decisional documents "are those which would inaccurately reflect or prematurely disclose the views of an agency, suggesting as agency position that which is yet only a personal decision." Coastal States, 617 F.2d.at 866. After examining documents that the Department of Energy claimed were protected by Exemption 5, the court concluded that the document were not "a draft of what will become a final document," id. at 867, but were final:

> The documents were not suggestions or recommendations as to what agency policy should be. Unlike the documents in EPA v. Mink and Murphy v. Dep't of the Army, the memoranda are not advice to a superior, nor are they suggested dispositions of a case, as in Grumman. They are not one step of an established adjudicatory process, which would result in a formal opinion, as were the documents held exempt in NLRB v. Sears. There is nothing subjective or personal about the memoranda. . .. Characterizing these documents as "predecisional" simply because they play into an ongoing audit process would be a serious warping of the meaning of the word."

Coastal States, 617 F.2d. at 868.[9]

The CIA asserts the same excuse for nondisclosure that was asserted by the Department of Energy and rejected by the Court of Appeal in Coastal States—that "the PDB, as a series, is an ongoing dialogue between the President and his most senior advisors and the CIA. As the basis for this dialogue and decision-making, each edition of the PDB is the quintessential pre-decisional, deliberative document." See Buroker Decl., ¶ 73. Such a pretext, if accepted, would allow all government agencies to evade disclosure under FOIA by forever claiming that the documents are part of an ongoing process. Further, the Buroker Declaration fails to establish that this "ongoing dialogue" was part of the process during the Johnson administration. To the contrary, President Johnson did not review the PDB in the company of a CIA briefer and, therefore, the CIA did not

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for August 6, 1965 reflects no meeting or appointments with CIA personnel).

[9] See also Grand Central Partnership v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999) (to determine if a document is deliberative, courts will examined whether the document "reflects the personal opinions of the writer rather than the policy of the agency" or "if released, would inaccurately reflect or prematurely disclose the views of the agency").

receive from Johnson the steady presidential feedback it received from his predecessor or more recent Presidents. See Ex. 3 to Blanton Decl., ¶ 4.

Moreover, the CIA's characterization of the term "predecisional" reflects a critical misunderstanding of the term. The CIA asserts that the PDBs are pre-decisional because they are provided to the President before *he* makes a foreign policy decision. See Buroker Decl., ¶¶ 72, 73 (describing the PDBs as "a catalyst for foreign policy discussion and decision-making"). That is not the standard. If it were, virtually every document created by every agency could be termed predecisional and would never be disclosed under FOIA.

Like the memos in Coastal States, the PDBs are not premature documents that would reflect an unadopted position of an individual within the CIA. There is nothing predecisional about them.

c. The PDBs Are Not Part of the CIA's Deliberative Process

The CIA also fails to establish the third prong of Exemption 5 because it has not and cannot establish that the PDBs are part of its deliberative or decision-making process. This prong focuses on information that the deliberative process privilege intended to protect, that is, "advisory opinions, recommendations and deliberations." Carter v. Department of Commerce, 307 F.3d 1084, 1090-91 (9th Cir. 2002) (holding that adjusted census data was not deliberative and would not reveal any protected decision-making process). The deliberative privilege allows agencies to "explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." Assembly of California v. Department of Commerce, 968 F.2d 916, 920 (9th Cir. 1992). The key inquiry is whether revealing the information requested exposes the deliberative process. Id. at 922.

In an attempt to fit the PDBs into this deliberative process prong, the Buroker Declaration states that, "[o]n occasion, information will also be provided in the PDB that responds directly to questions from the President or one of his advisors." See Buroker Decl., ¶ 72. This vague and generic allegation – made in a vacuum without reference any date, time, or subject matter, and certainly without reference to the requested PDBs for August 6, 1965 and April 2, 1968 – does not explain how the requested PDBs expose the *CIA's* deliberative process. Moreover, it is beyond

dispute that PDBs are not deliberative in that they contain only factual information, and not policy recommendations. See Moyers Decl., ¶ 5; Herring Decl.,¶ 5. In this regard, the Buroker Declaration contradicts the CIA's own description of its role vis-à-vis PDBs: "It is important to know that CIA's analysts only report information and DO NOT make policy recommendations – making policy is left to the executive branch of government, such as the State Department or the Defense Department. These policymakers use the information the CIA provides to help them make US policy toward other countries." See Ex. 2 to Blanton Decl.,¶ 3.

Failing to establish that the requested PDBs reflect the CIA's deliberative process, the CIA makes a last ditch effort to invoke Exemption 5 by asserting that disclosure of facts in the PDBs would reveal the CIA's deliberative process. See Buroker Decl. at ¶69 ("[d]etermining what information to include is the height of the deliberative process); id. at ¶70 ("the specified facts contained in the PDBS were selected and highlighted out of a wide body of other potentially relevant facts and background material"). Courts that have considered this very argument have rejected it. In a factually similar case, the Department of Justice made the same argument in its attempt to withhold a FBI report and the D.C. Circuit found this assertion unpersuasive:

> The Department, on the other hand, argues that the entire Rowe Report reflects the "choice, weighing and analysis of facts" by the task force, and is therefore protected as part of the deliberative process. According the Department 'it is the very narration of the facts that reflects the evidence selected and credited.'
>
> We are not persuaded by the Department's argument. Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were so, every factual report would be protected as a part of the deliberative process.

Playboy Enterprises, Inc. v. Department of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982) (internal citations omitted) (emphasis added). The Ninth Circuit has adopted the view of the D.C. Circuit on this point. See National Wildlife, 861 F.2d at 1119 (citing Playboy Enterprises, Inc. v. Department of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982)). See also EPA v. Mink, 410 U.S. 73, 92 (1973) (Exemption 5 contemplates a "flexible, common-sense approach" and extends to "factual material appearing in those documents in a form that is severable without compromising

the private remainder of the documents"); Powell v. United States Department of Justice, 584 F. Supp. 1508, 1519 (N.D. Cal. 1984) ("consistent with the Congressional intent that Exemption 5 be construed as narrowly as possible, factual material contained in deliberative memoranda cannot be considered to be intertwined with legal or policy matters solely on the broad theory that the very choice of which facts to present necessarily reveals the writer's viewpoint").

The CIA, like the FBI in Playboy Enterprises, cannot circumvent FOIA by asserting that the facts in the PDBs reveal its decision-making process. Excluding or including facts in the PDBs does not make them deliberative.[10]

4. The CIA Lacks Standing to Assert the Presidential Communications Privilege and the Passage of Time Has Abrogated Any Justification for Doing So

Unable to establish that the deliberative process privilege applies, the CIA asserts the presidential communications privilege as a catchall for its continued withholding of the PDBs.

There is no authority for the CIA's assertion that it has standing to assert the presidential communications privilege. In United States v. Nixon ("Nixon I"), then President Nixon asserted the claim of absolute executive privilege and unsuccessfully attempted to quash a subpoena. See 418 U.S. 683, 710 (1974). Three years later, in Nixon v. Administrator of General Services ("Nixon II"), no longer the incumbent, former President Nixon invoked the presidential privilege to contest the constitutionality of the Presidential Recording and Materials Preservation Act. See 433 U.S. 425, 446-449 (1977). The Supreme Court held that former President Nixon could assert the privilege with regard "to communications 'in performance of (a President's) responsibilities,'" but cautioned that the privilege was accorded less weight when invoked by a former president than when invoked by an incumbent. Id. The Court also cautioned that the "expectation of the

[10]The PDBs attached as Exhibits 4-13, 15,16,18-20 to the Blanton Declaration plainly contradict the Buroker Declaration that "many of the facts contained in the PDBs are also intertwined with CIA analysis, making it impossible to segregate specific hard facts from the analytical content of the PDBs." See Buroker Decl., ¶ 70. For example, the PDB from April 1, 1968 has been "sanitized" and demonstrates that sensitive information (there, it appears to be the identity of sources and names) can easily be redacted and is segregable from the disclosable facts. See Ex. 4 to Blanton Decl. The same is true for the PDBs from August 7, 1965, June 5-9, 1967, and May 27, 1967. See Exs. 5-13 to Blanton Decl. A review of the released PDBs reveals that the amount of information disclosed was far greater than the amount of information redacted, demonstrating that the hard facts in PDBs are easily segregated from any sensitive intelligence "analysis."

confidentiality of executive communications [] *has always been limited and subject to erosion over time after an administration leaves office*." Id. at 451 (emphasis added). There is no Supreme Court precedent, nor any other binding precedent, that provides the CIA with standing to assert the presidential communications privilege.

In a more recent case before the D.C. Circuit, the President was also the party invoking the privilege. In re Sealed Case, 121 F.3d 729, 744 (D.C. Cir. 1997). As the Court of Appeals noted, "in his affidavit former White House Counsel. . stated. . .President [Clinton] has specifically directed me to invoke formally the applicable privileges over those documents." Id. at 745 n.16. Upon review of the withheld documents, the appeals court found that the documents were properly subject to the presidential communications privilege because of the type of and the content of the documents:

> The withheld documents consist primarily of outlines of issues and questions that needed to be investigated and drafts of the White House Counsel's report on the Espy investigation. There are also notes of meetings and phone conversations, lists of information on Espy, and press briefings on Espy. Most of the documents were authored by two associate White House Counsel, a few were authored by top presidential advisers, specifically the White House Counsel, Deputy White House Counsel, Chief of Staff and Press Secretary. . . All of the documents related to the investigation of Espy that the President asked the White House Counsel to undertake.

121 F.3d at 757 (emphasis added). The documents in In re Sealed Case – containing draft outlines of issues and questions – provide a stark contrast to the final PDBs, devoid of questions and brainstorming.

In 2004, the D.C. Circuit had another opportunity to examine the presidential communications privilege and affirmed its limited nature:

> [T]he [*In re Sealed Case*] emphasized the limited nature of its holding, cautioning against the dangers of "expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President." The court instructed that "[n]ot every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies.

Judicial Watch, 365 F.3d at 1116. There, the court of appeal rejected the Department of Justice's argument that the presidential communications privilege should extend to officials in the Justice Department who the Department asserted were there solely to advise and assist the President: "We decline to sanction such an extension of the presidential communications privilege to all agency documents prepared in the course of developing the Deputy Attorney General's pardon recommendations for the President." Id. at 1114.[11]

In fact, recent Presidents who have considered the issue have agreed that the presidential communications privilege must be invoked by the President. See Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1085, 1094, 1102, 1117 (1999) (citing executive orders and memoranda from Presidents Carter, Reagan, George H. W. Bush, and Clinton that state that the President must invoke or authorize invocation of the privilege).

In contrast to Nixon I, Nixon II, and In re Sealed Case, neither the incumbent nor any former President is invoking the privilege in the instant case. Nor does the Buroker Declaration indicate, as the affidavit in In re Sealed Case did, that President Bush has specifically directed the CIA to invoke the privilege.[12] There is no precedent supporting the CIA's position that it has standing to assert the presidential communications privilege. Exemption 5 is not automatically

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[11] In Judicial Watch, the court did not reach the issue of whether a party other than the President could assert the presidential communications privilege. The court observed that White House Counsel's declaration did not invoke the presidential communications privilege, but that Judicial Watch did not raise the issue, so "the issue of whether a President must personally invoke the privilege remains an open question." Id. at 1114. This, however, does not support the notion that the CIA has standing to assert the privilege. To the contrary, the court explained that there is "a built-in presidential communications privilege for records in the possession of, or created by, immediate White House advisers, who are not considered an agency for the purposes of FOIA." 365 F.2d at 1112. This statement supports the notion that the privilege is reserved for those who "are not considered an agency," such as White House Counsel or the Chief of Staff. Id. at 1115. Because the CIA is an agency, it does not have standing to assert the privilege, and can only assert the deliberative process privilege, which it cannot establish.

[12] The CIA's reliance on an unpublished, non-binding district court decision is insufficient to support the proposition that the CIA has standing to assert the presidential privilege. See CIA's Motion for Summary Judgment at 15 (citing Lardner v. Department of Justice, No. 03-0180, slip op. at 14 (March 31, 2005) (2005 WL 758267)). Even in Lardner, the Department of Justice acknowledged that the privilege dissipated over time, "announced that it would no longer assert Exemption 5 privileges for documents that were more than thirty years old" and "notified plaintiff that it would no longer assert Exemption 5 for any Ford and Carter administration pardon records." 2005 WL 758267 (D.D.C. Mar. 31, 2005).

applicable for "documents that physically enter the Oval Office." Judicial Watch v. Department of Justice, 365 F.3d 1108, 1122 (D.C. Cir. 2004). Moreover, the documents sought are well over thirty years old, and assuming arguendo that the CIA had standing to assert the presidential communications privilege, such a privilege would be "subject to erosion over time." Nixon II, 433 U.S. at 451.

In summary, Exemption 5 simply does not apply, and extension of the privilege would be at odds with the purpose and policy of FOIA. "We reemphasize the narrow scope of Exemption 5 and the strong policy of the FOIA that the public is entitled to know that its government is doing and why." Coastal States, 617 F.2d at 868. Accordingly, the Court should deny the CIA's motion for summary judgment and enter judgment in favor of Berman.

B. The CIA's Declaration Fails To Justify Why Information In The Two PDBs is Not Reasonably Segregable

In addition to its factual deficiencies, described above, the CIA's declaration fails to satisfy the FOIA requirement that it sufficiently explain if any information is segregable, and if not, why not. FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided. . .after deletion of the portions which are exempt." 5 U.S.C. § 552(b).

Thus, an agency must perform a "segregability analysis" that distinguishes exempt from non-exempt material within each document. Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973) ("An entire document is not exempt merely because an isolated portion need not be disclosed. Thus the agency may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information.") If an agency can show that certain material in a document is exempt but cannot be reasonably segregated from non-exempt information, that agency must also "describe what proportion of the information is non-exempt and how that material is dispersed throughout the document" such that "both litigants and judges will be better positioned to test the validity of the agency's claim that the non-exempt material is not segregable." Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977).

In direct contravention of this requirement, there is virtually no discussion of segregation of disclosable materials in the government's affidavits. The CIA asserts that the information in the PDBs is not segregable and that Plaintiff should simply trust them. But the Ninth Circuit has rejected this "categorical" approach listing in "general terms" the types of harms that result when a type of information is disclosed. Wiener, 943 F.2d at 978-79 (government affidavits insufficient to sustain Exemptions 1 and 3).

Even in a case where the CIA's affidavit contained far more factual detail than the Buroker Declaration for its assertion that Exemption 3 applied, specifying that the release of a particular document would disclose the identity of a "sensitive intelligence source," the D.C. Court of Appeal nonetheless found the affidavit defective for its "failure to address specifically whether the disclosure of substantive information may be possible without the disclosure of the source, and if not why not." Ray v. Turner, 587 F.2d 1187, 1196 (D.C. Cir. 1978). The fact that the documents concern alleged matters of national security does not insulate the CIA from FOIA's segregability requirement or permit it to withhold documents in their entirety on the basis of vague and generic declarations about non-segregability.

District courts considering FOIA cases must "make specific factual findings on the issue of segregability" to establish that the required *de novo* review of the agency's withholding decision has in fact taken place. Wiener, 943 F.2d at 988. "[A]gencies are required to provide the Court with facts which will enable it to make that determination." Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1300 (N.D. Cal.1992).

Because the only information before this Court is Mr. Buroker's sweeping declaration that there are no segregable portions, the Court cannot make the necessary finding. To do so based upon such conclusory allegations would "constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review." Allen v. CIA, 636 F.2d 1287, 1293 (D.C. Cir. 1980).

C. The Court Should Deny The CIA's Motion For Summary Judgment And Grant Plaintiff's Motion For Summary Judgment, Or, Alternatively, Conduct An *In Camera* Review Of The Limited Documents at Issue

The Ninth Circuit has held that *in camera* review is appropriate if "the preferred alternative to *in camera* review – government testimony and detailed affidavits – has first failed to provide a sufficient basis for a decision." Maricopa Audubon Society, 108 F.3d at 1093 n.2. Generally, a court conducts *in camera* review after the agency has submitted "as detailed public affidavits and testimony as possible." Wiener, 943 F.2d at 979. See also Mead Data Central, 566 F.2d at 262 n.59 (*in camera* review conducted "to verify the agency's descriptions and provide assurances, beyond a presumption of administrative good faith, to FOIA plaintiffs that the descriptions are accurate and complete as possible"); King, 830 F.2d at 225 (*in camera* review permits a "first-hand inspection" for the court to determine "whether the weakness of the affidavits is a result of poor draftsmanship or a flimsy exemption claim").

Here, where the CIA's sole declaration lacks any detail regarding the specific PDBs being withheld, there can be no doubt that the CIA has not met its burden. Berman urges this Court to deny the CIA's motion for summary judgment for its failure to meet its burden, and to grant his motion for summary judgment because the requested PDBs are not subject to any of the alleged exemptions.

In the alternative, Berman urges this Court to deny the CIA's motion for summary judgment and conduct an *in camera* review of the two PDBs. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) ("*in camera* review. . .is designed to be invoked when the issue before the District Court could not be otherwise resolved"); Quinton v. FBI, 86 F.3d 1222, 1228 (D.C. Cir. 1996) ("we have repeatedly noted that *in camera* review may be particularly appropriate when. . .the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims"); Trulock v. Department of Justice, 257 F. Supp. 2d 48, 51 (D.D.C. 2003) (denying government's motion for summary judgment and directing government to submit documents for *in camera* review because "the CIA has not provided sufficient information through affidavits and descriptions of the documents fully and partially withheld to permit the Court to rule on the CIA's claims of statutory exemptions").

The limited nature of the instant FOIA request for two PDBs further supports an *in camera* review. In Allen v. CIA, the Court of Appeal emphasized that the document at issue in that case was only 15 pages and "[i]f ever there were a case in which *in camera* inspection offered the most efficient technique for conducting de novo review, this is it." Id. at 1299 (reversing district court's summary judgment for the CIA and remanding for an *in camera* review). The CIA has wholly failed to meets its burden of providing sufficiently detailed information to permit this Court to assess the claim or for Berman to effectively challenge it. There are only two documents at issue in this case, and the dispute centers wholly on the contents of these documents. On the sparse record before this Court, the CIA's motion for summary judgment must be denied. While Berman believes his motion for summary judgment should be granted, he also acknowledges that this is an appropriate case for the Court to exercise its discretion to conduct as *in camera* review of the two PDBs, for which the CIA has failed to provide any sufficient justification for withholding.

IV. CONCLUSION

Nearly four decades have passed since President Lyndon Johnson received the two foreign intelligence briefings that are at issue in this case. Since then, the Cold War has ended, entire governments have fallen and many wars have been fought. Historians like Professor Berman and the public are entitled to see the history that is reflected in these documents. Because the CIA's sole declaration utterly fails to satisfy the standards necessary to invoke any of its claimed exemptions and because the evidence in opposition overwhelmingly contradicts the notion that disclosure of the two, nearly 40-year-old PDBs will harm any national security or deliberative interest, this Court should deny the CIA's motion for summary judgment and enter judgment in favor of Plaintiff Larry Berman.

DATED this 2nd day of May, 2005. DAVIS WRIGHT TREMAINE LLP

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