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11
12 **UNITED STATES DISTRICT COURT FOR THE**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

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16 MARGUERITE HIKEN and
THE MILITARY LAW TASK FORCE,

17 Plaintiffs,

18 v.
19

20 DEPARTMENT OF DEFENSE
21 and UNITED STATES
CENTRAL COMMAND,
22

23 Defendants.
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Case No. CV-06-2812 (MHP)

**PLAINTIFFS' REPLY IN SUPPORT
OF THEIR MOTION FOR SUMMARY
JUDGMENT AND OPPOSITION TO
DEFENDANTS' REPLY**

HEARING ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT
Date: February 26, 2007
Time: 2:00 p.m.

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INTRODUCTION

The war in Iraq has lost the support of the vast majority of the American people in part due to highly controversial actions such as those underlying Plaintiff’s FOIA request in this case. Both the siege on Fallujah and the attack on journalist Giuliana Sgrena have generated intense public

1 scrutiny, international controversy, and allegations of wrongdoing on the part of the U.S. military.
2 Release of the requested documents – most importantly the Rules of Engagement (“ROE”) for U.S.
3 soldiers in Iraq – will help the public decipher whether the military was following the law and
4 sound policy in its actions in Iraq.

5 Although defendants are engaged in orchestrating a war, that fact cannot immunize them
6 from their obligations under the law, including the Freedom of Information Act (“FOIA”). The
7 government’s refusal to disclose responsive information as well as its sloppy errors and multiple
8 acts of bad faith in this action make judicial intervention imperative, especially where, as here,
9 there is evidence that the government is withholding the documents to avoid embarrassment and
10 allegations of law-breaking by the military and other government officials. However, it is this very
11 practice of hiding documents to cover up potential governmental wrongdoing that the FOIA was
12 intended to prevent.¹ Accordingly, this court should order the release of all documents responsive
13 to plaintiffs’ request, or at minimum conduct *in camera* review to determine those that can be
14 segregated and released.

15 ARGUMENT

16 **I. SUMMARY JUDGMENT FOR DEFENDANTS IS INAPPROPRIATE BECAUSE** 17 **DEFENDANTS ACTED IN BAD FAITH, THEIR VAUGHN INDEX WAS** 18 **INADEQUATE, AND THEIR SEARCH WAS INCOMPLETE.**

19 To attain summary judgment, the government bears the burden of proving that all withheld
20 materials are exempt from FOIA’s disclosure requirements. 5 U.S.C. § 552(a)(4)(B); *Bay Area*
21 *Lawyers Alliance for Nuclear Arms Control v. Dep’t of State*, 818 F.Supp. 1291, 1295 (N.D. Cal.
22 1992). An agency may rely on affidavits to meet this burden, and a court is to accord those
23 affidavits substantial weight, “provided the justifications for nondisclosure are not controverted by
24 contrary evidence in the record or by evidence of [agency] bad faith.” *Minier v. CIA*, 88 F.3d 796,
25

26 ¹ “The basic purpose of the FOIA is ‘to ensure an informed citizenry, vital to the
27 functioning of a democratic society, needed to check against corruption and *to hold the governors*
28 *accountable to the governed.*” *Vigil v. Andrus*, 667 F.2d 931, 938 (10th Cir. 1982) (quoting *NLRB*
v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (emphasis added)).

1 800 (9th Cir. 1996) (internal quotation marks omitted); *see also Lahr v. Nat'l Transp. Safety Bd.*,
 2 453 F.Supp.2d 1153, 1169-70 (C.D. Cal. 2006).

3 **A. Defendants Acted in Bad Faith Both in the Present FOIA Action and in the**
 4 **Underlying Activities That Generated the Documents at Issue, Precluding a**
 5 **Grant of Summary Judgment.**

6 **1. Defendants Have Demonstrated Bad Faith in the Present Action.**

7 The presumption that an agency takes actions and submits affidavits in good faith “may be
 8 overcome where there is evidence of bad faith in the agency’s handling of the FOIA request.”
 9 *Jones v. F.B.I.*, 41 F.3d 238, 242 (6th Cir. 1994); *accord, Defenders of Wildlife v. U.S. Dep’t of*
 10 *Interior*, 314 F.Supp.2d 1, 8 (D.D.C. 2004). Defendants and their counsel have engaged in bad faith
 11 in the course of the present litigation. For example, defendants and their counsel have:

- 12 • Redacted more and different information from *every page* of the AR 15-6 Report they
 13 produced to plaintiffs than the version of the same report that they made public on the
 14 Internet. AR 15-6 Report, redacted version produced to plaintiffs by defendants, Exhibit G
 15 to Plaintiffs’ Motion for Summary Judgment (“AR 15-6 Report, redacted”); AR 15-6
 16 Report, unofficial redacted version obtained from the Internet, Exhibit A attached hereto;
- 17 • Asserted in their Reply that the AR 15-6 report was “leaked,” even though the client
 18 affidavit makes no such assertion. Defendants’ Reply in Support of Their Motion for
 19 Summary Judgment and Opposition to Plaintiffs’ Cross-Motion for Summary Judgment
 20 “Ds’ Reply,” 3-4; Ghormley Supp. Decl., paras. 3-5;
- 21 • Tried to justify withholding the AR 15-6 Report and its appendices by misleadingly
 22 including in their affidavits *descriptions* of key strategic military information that is not
 23 likely responsive. *See* Plaintiffs’ Motion for Summary Judgment (“Ps’ MSJ”), at 8;
- 24 • Claimed that the release of the AR 15-6 Report would “pose grave risk to US forces,”
 25 Ghormley Decl., para. 11 – yet made a less-than-serious effort to protect its confidentiality
 26 by releasing the report in such a way as to be easily unredacted;²
- 27 • Claimed that the names the military has given to routes as well as military units and

27 ² David Willey, *Italy Media Reveals Iraq Details*, BBC News, May 1, 2005,
 28 <http://news.bbc.co.uk/2/hi/europe/4504589.stm>.

1 divisions are secret and their disclosure would endanger U.S. troops, when they use such
2 terms on their own websites. *See infra*, part IV.A;

- 3 • Failed to disclose ROE cards, a “summary or extract of mission-specific ROE” given to all
4 soldiers, even though all ROE cards are unclassified and clearly responsive to plaintiffs’
5 request. International and Operational Law Department, the Judge Advocate General’s
6 Legal Center and School, *Operational Law Handbook 96* (2006)³ (“OLH”);
- 7 • Admitted to overclassifying documents. Ghormley Decl., para. 6 (two of the responsive
8 ROE documents “contain both classified and unclassified information, but they are
9 classified as a whole as SECRET”). Indeed, it is their “standard policy” to overclassify. Ds’
10 Reply, at 9 n.6;
- 11 • Claimed, disingenuously, that the ROE in place in Iraq “are not necessarily case specific
12 and do not always change with time,” when in fact “ROE . . . must be dynamic and
13 changing as the mission evolves.” Ds’ *Vaughn* Index; Judge Advocate General’s School,
14 *The Military Commander and the Law* 624 (2006),⁴ and
- 15 • Failed to list in their *Vaughn* Index responsive documents containing diplomatic
16 correspondence that General Ghormley discussed in his declaration. Ghormley Supp. Decl.,
17 para 9.

18 These actions show that defendants’ bad faith in their willingness to misstate facts,
19 overclassify information and hide documents that may embarrass the executive branch and the
20 military.

21 **2. Defendants Acted in Bad Faith in the Underlying Activities That** 22 **Generated the Documents at Issue.**

The U.S. Court of Appeals for the Sixth Circuit has found:

23 Even where there is no evidence that the agency acted in bad faith with regard to the
24 FOIA action itself there may be *evidence of bad faith or illegality with regard to the*
25 *underlying activities which generated the documents at issue.* Where such evidence
26 is strong, it would be an abdication of the court’s responsibility to treat the case in
the standard way and grant summary judgment on the basis of *Vaughn* affidavits

27 ³ http://www.au.af.mil/au/awc/awcgate/law/oplaw_hdbk.pdf.

28 ⁴ <http://milcom.jag.af.mil/milcom2006-complete.pdf>.

1 alone. It would risk straining the public's ability to believe – not to mention the
 2 plaintiff's – that the courts are neutral arbiters of disputes whose procedures are
 designed to produce justice out of the clash of adversarial arguments.

3 *Jones v. F.B.I.*, 41 F.3d at 242-43 (emphasis added).

4 Defendants acted in bad faith, for example, with regard to the underlying activities which
 5 generated the records requested by plaintiffs in relation to the incident in which U.S. soldiers shot
 6 at the car carrying Giuliana Sgrena. *Jones*, 41 F.3d at 242-43. Immediately after the shooting, the
 7 U.S. removed the vehicles involved and destroyed the U.S. soldiers' duty logs, making objective
 8 conclusions impossible.⁵

9 Because U.S. soldiers cleared the road so quickly, "it was impossible for forensic experts to
 10 establish the speed of the car, how quickly it stopped, or the trajectory of the bullets," facts that
 11 would bear on culpability in the shooting.⁶ Accounts of the incident given by U.S. soldiers were
 12 described in an Italian government report as "contradictory, and in some cases totally unreliable."⁷

13 That the U.S. military foiled forensic investigation of the crash and destroyed written
 14 records of the incident leads to the conclusion that it was trying to hide the embarrassing truth that
 15 U.S. soldiers had opened fire on and killed Italian Nicola Calipari – an intelligence agent from an
 16 allied nation.⁸ This demonstrates defendants' bad faith in "the underlying activities which
 17 generated the documents at issue." *Jones*, 41 F.3d at 242.

18 **B. Defendants' *Vaughn* Index Pertaining to the ROE Is Inadequate Because It**
 19 **Lacks Specificity and Relies on Boilerplate Explanations.**

20 The objective of the *Vaughn* requirement is to permit the requesting party to present its case
 21 effectively. *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir.
 22 1977). "Because the court and the plaintiff do not have the opportunity to view the [requested]

23 _____
 24 ⁵ AR 15-6 Report, redacted, at BS 42; *Iraq Shooting; Differing Accounts*, BBC News, May
 3, 2005, <http://news.bbc.co.uk/2/hi/europe/4325253.stm>.

25 ⁶ *Dueling views of the Sgrena shooting*, Christian Science Monitor, May 25, 2005,
<http://www.csmonitor.com/2005/0505/p07s01-woiq.htm>.

26 ⁷ Irene Peroni, *Italy keen to search for own truth*, BBC News, May 1, 2005,
<http://news.bbc.co.uk/2/hi/europe/4503003.stm> (internal quotation marks omitted).

27 ⁸ *Iraq Shooting; Differing Accounts*, BBC News, May 3, 2005,
 28 <http://news.bbc.co.uk/2/hi/europe/4325253.stm>.

1 documents themselves, the [*Vaughn* Index] must be detailed enough for the district court to make a
2 *de novo* assessment of the government’s claim of exemption.” *Lion Raisins v. U.S. Dep’t of Agric.*,
3 354 F.3d 1072, 1082 (9th Cir. 2004) (internal quotation marks omitted). Thus, a court can only
4 grant summary judgment where an agency’s *Vaughn* Index (1) “describe[s] *each* withheld
5 document or portion thereof,” (2) discuss[es] the consequences of disclosing the requested
6 information, and (3) explain[s] why an exemption is relevant and correlate such a claim with the
7 portion of the withheld document to which it applies. *King v. U.S. Dep’t of Justice*, 830 F.2d 210,
8 223-224 (D.C. Cir. 1987).

9 Further, “boilerplate explanations,” with no attempt made to tailor the explanation to the
10 specific document withheld, are “properly rejected . . . as clearly inadequate.” *Weiner v. F.B.I.*, 943
11 F.2d 972, 978-79 (9th Cir. 1991) (internal quotation marks omitted); *accord*, *King*, 830 F.2d at 224
12 (“Categorical description of redacted material coupled with categorical indication of anticipated
13 consequences of disclosure is clearly inadequate”).

14
15 **1. Summary Judgment Is Inappropriate Because Defendants’ *Vaughn*
Index Does Not Adequately Describe the Withheld ROE Materials.**

16 Defendants claim that they “cannot describe the ROEs with any more specificity without
17 defeating the purpose of withholding them.” Ds’ Reply at 7. On the contrary, defendants do not
18 meet even the first requirement under *King* that they adequately describe the withheld documents.
19 *King v. U.S. Dep’t of Justice*, 830 F.2d at 223-224. For example, defendants describe neither the
20 purpose of the withheld ROE nor the tasks or levels to which they apply, and they fail in some
21 cases to specify such basic information as the date of the withheld ROE.

22
23 **a. *Vaughn* Index relies on indecipherable jargon and fails to
discuss purpose, task or level of the withheld ROE.**

24 In its description of the withheld ROE materials, defendants’ *Vaughn* Index offers little
25 more than indecipherable jargon, e.g. “Annex E (Rules of Engagement) to Frago 313 Transition of
26 Authority, Multi-National Corps – Iraq.” Ds’ *Vaughn* Index. Moreover, neither the defendants’
27 declarations nor their *Vaughn* Index explains which type of ROE soldiers were ordered to follow
28 and the purpose, task or level of withheld ROE materials.

1 ROE may serve different purposes – e.g. mission accomplishment or self defense. For
2 example, “multinational ROE [“MNF ROE”] will apply *for mission accomplishment* if authorized
3 by the President or Secretary of Defense. If not so authorized, the [Standing ROE] apply.” OLH at
4 93. Neither the defendants’ declarations nor their *Vaughn* Index explains, for example, whether the
5 soldiers were acting under the Standing ROE (“SROE”) for both mission accomplishment and self
6 defense, or the MNF ROE for mission accomplishment and SROE for self defense. Defendants’
7 own declaration explains that there are SROE that are “applicable to US forces in all environments
8 unless superceded or supplemented by operations-specific rules of engagement.” Ghormely Supp.
9 Decl. para. 7. However, it is unclear from Defendants’ *Vaughn* Index whether the materials they are
10 withholding include the SROE or “operations-specific” ROE which supercede or supplement the
11 SROE. Ds’ *Vaughn* Index.

12 Further, “[d]ifferent ROE must be drafted for different tasks and different levels, e.g.
13 information operations, counterdrug support operations, domestic support operations, and
14 maritime/land/air/space operations.” The Judge Advocate General’s School, United States Air
15 Force, *The Military Commander and the Law* 623 (2006).⁹ Yet, defendants fail to describe the
16 “tasks or levels” to which the withheld ROE apply.

17 In sum, because the defendants fail to describe, *inter alia*, the contents, purpose, level or
18 tasks of the withheld ROE in their *Vaughn* Index, the documents are not adequately described.
19 *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-224 (D.C. Cir. 1987). Because defendants’
20 *Vaughn* Index is inadequate, summary judgment is inappropriate, and *in camera* review is
21 necessary. *Id.* at 225; *Weiner v. F.B.I.*, 943 F.2d 972, 979 (9th Cir. 1991).

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⁹ <http://milcom.jag.af.mil/milcom2006-complete.pdf>.

1 **b. The ROE documents listed in defendants' *Vaughn* Index,**
2 **based on their dates, likely are unresponsive to plaintiffs'**
3 **request.**

4 The dates of the ROE documents listed in defendants' *Vaughn* Index indicate that these
5 documents likely are not responsive to plaintiffs' request – or at best it is unknown whether they
6 are responsive without further information from defendants. For example, the *Vaughn* Index lacks
7 the date of two of the four ROE documents withheld, and where a date is listed, it appears doubtful
8 that such ROE are responsive to plaintiffs' request. *See* Ds' *Vaughn* Index (“Date of Document:
9 Unknown” or listed as April 15, 2006 or April 21, 2006). *Id.*

10 However, plaintiffs asked for the ROE in effect for military personnel who participated in
11 the shooting on the car carrying Italian Journalist Giuliana Sgrena on March 4, 2005, and the “ROE
12 in effect for military personnel engaged in Fallujah, Iraq, from March through December 2004.”
13 Plaintiffs' Complaint, para. 10. It is unlikely that ROE documents dated in April 2006 would apply
14 to incidents that occurred in 2004 and 2005, considering that “ROE . . . must be dynamic and
15 changing as the mission evolves.” Ds' *Vaughn* Index; Judge Advocate General's School, *The*
16 *Military Commander and the Law* at 624. The dates in defendants' *Vaughn* Index raise questions as
17 to whether the ROE documents listed therein are responsive, rendering the index inadequate as a
18 basis on which this court may grant summary judgment to defendants. *E.g. King v. U.S. Dep't of*
19 *Justice*, 830 F.2d 210, 223-24, 225 (D.C. Cir. 1987). At minimum, more information from
20 defendants is needed.

21 **c. *Vaughn* Index Omits Potentially Relevant Documents.**

22 Defendants' *Vaughn* Index also is inadequate under *King* because it fails to list documents
23 responsive to plaintiffs' request. *King*, 830 F.2d at 223-224. For example, General Ghormley points
24 out that “documents containing diplomatic correspondence and originating with the Department of
25 State were identified.” Ghormley Supp. Decl., para. 9. But none of these documents is listed in
26 defendants' *Vaughn* Index. *See* Ds' *Vaughn* Index. Thus, the *Vaughn* Index omits any mention of
27 some responsive documents.

28 Furthermore, General Ghormley indicates that soldiers in “ongoing military operations”
operate under SROE, leading to the conclusion that the SROE are responsive to plaintiffs' request.

1 See Ghormley Supp. Decl., para. 7. However, no mention of SROE is made in defendants' *Vaughn*
2 Index. See Ds' *Vaughn* Index. Even if the SROE are classified, the *Vaughn* Index should describe
3 them and discuss the consequences of disclosing the responsive information. *King*, 830 F.2d at
4 223-24. In addition, the version of the AR 15-6 Report produced to plaintiffs is missing nine pages
5 that are present in the (less heavily redacted) version of the same report that defendants posted to
6 their own website. See *infra*, parts II.B.-II.C; Exhibit A; AR 15-6 Report, redacted. No mention is
7 made in the index of this withholding or the agency's justification for doing so.

8 In sum, defendants' failure to list the documents containing diplomatic correspondence and
9 the SROE in their *Vaughn* Index, plus their failure to mention or explain the lack of nine pages in
10 the AR 15-6 Report produced to plaintiffs, evidences the *Vaughn* Index's inadequacy. Accordingly,
11 summary judgment inappropriate in this case; *in camera* review is warranted. *King*, 830 F.2d at
12 223-24, 225. *Weiner v. F.B.I.*, 943 F.2d 972, 979 (9th Cir. 1991).

13 **2. Defendants' *Vaughn* Index Fails to Discuss the Consequences of** 14 **Disclosing the ROE.**

15 Defendants' *Vaughn* Index fails to meet the requirement under *King* that it discuss the
16 consequences of disclosing the requested information. *King*, 830 F.2d at 223-24. The index lists
17 four documents that contain withheld ROE materials, yet not one of the entries discusses the
18 consequences of releasing the materials. Ds' *Vaughn* Index. Each entry merely recites the
19 conclusory claim that the withheld ROE "are currently and properly classified in accordance with
20 Executive Order 12958, Section 1.4(a), military plans, weapons systems and operations and are
21 related solely to the internal personnel rules and practices of an agency." *Id.* These claims, at most,
22 provide the purported reasons for relying on the asserted exemptions, but they say nothing about
23 the consequences of disclosure. Accordingly, summary judgment is not appropriate here.

24 **3. By Improperly Relying on Boilerplate Language to Justify** 25 **Withholding, Defendants Fail to Adequately Explain the Relevancy** 26 **of Claimed Exemptions or Correlate the Exemptions to the** 27 **Documents Withheld.**

28 "Boilerplate explanations" are "clearly inadequate." *Weiner v. F.B.I.*, 943 F.2d 972, 978-79
(9th Cir. 1991) (internal quotation marks omitted). Reliance on such "categorical description[s]" of
redacted materials, along with "categorical indication[s] of anticipated consequences of disclosure
is clearly inadequate." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987); see also

1 *Appleton v. Food and Drug Admin.*, 451 F.Supp.2d 129, 141 (D.D.C. 2006) (“Agency statements in
2 the *Vaughn* Index cannot support summary judgment if they are ‘conclusory, merely reciting
3 statutory standards, or if they are too vague or sweeping’”).

4 Defendants’ *Vaughn* Index pertaining to the ROE relies on the kind of “boilerplate”
5 justification found “clearly inadequate” in *Weiner*, 943 F.2d at 978-979. In *Weiner*, the court found
6 that the FBI’s justifications for withholding were not tailored to specific documents withheld and
7 were “drawn from a master response filed by the FBI for many FOIA requests.” *Id.* at 978 (internal
8 quotation marks omitted). Here, all four entries in defendants’ *Vaughn* index pertaining to the ROE
9 refer to Exemptions 1 and 2 in a most cursory way, with no effort to tailor the explanation to the
10 specific document withheld. Ds’ *Vaughn* Index. Indeed, the justifications appear to be copied and
11 pasted from one entry to the next, drawn from a “master response,” as were the FBI’s justifications
12 rejected in *Weiner*, *Weiner*, 943 F.2d at 978-979, and “merely parrot the language of the Executive
13 Order.” *Allen v. CIA*, 636 F.2d 1287, 1292 (D.C. Cir. 1980).

14 **4. *Vaughn* Index Is Inadequate for Its Apparent Failure to Include All 15 Responsive Investigative Reports.**

16 Defendants’ *Vaughn* Index likely fails to identify all responsive investigative reports.
17 Defendants only list one AR 15-6 report pertaining to the Sgrena incident but list zero such
18 investigative reports pertaining to the U.S.-led military assault on Fallujah – a siege that lasted for a
19 month.¹⁰

20 It is highly doubtful that defendants have prepared zero investigative reports related to the
21 siege on Fallujah. On the other hand, it is highly likely that any such reports would be responsive,
22 at least in part, to plaintiffs’ request for any and all documents that “relate to, touch upon, or
23 concern the judgments of U.S. military personnel in Iraq in distinguishing between civilians and
24 combatants, including without limitation, such decision-making in Fallujah” Plaintiffs’
25 Complaint, para 10(4). As discussed above, plaintiffs have no way of knowing what responsive

26
27 ¹⁰ Melinda Liu, *The U.S. military is devising a plan to end the siege of Fallujah. But will it
28 win on the battleground of Iraqi public opinion?*, Newsweek, Web Exclusive, April 29, 2004,
<http://www.msnbc.msn.com/id/4865405>.

1 documents defendants are hiding behind the cloak of national security or (over)classification of
2 documents. But it is highly likely that there are responsive AR 15-6 or other investigative reports
3 pertaining to Fallujah that defendants have failed to list on their *Vaughn* Index. As a result, the
4 index is inadequate. *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

5
6 **C. Defendants Failed to Demonstrate That Their Search for Responsive Documents Was Adequate.**

7 Summary judgment generally is inappropriate where serious doubts are raised regarding the
8 completeness of the agency's search, or the search is otherwise found to be unsatisfactory, or the
9 agency acted in bad faith. *Perry v. Block* 684 F.2d 121, 127 (D.C. Cir. 1982); *Nation Magazine*,
10 *Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995); *Defenders of Wildlife v.*
11 *U.S. Dep't of Interior*, 314 F.Supp.2d 1, 8 (D.D.C. 2004); *Friends of Blackwater U.S. Dept. of*
12 *Interior*, 391 F.Supp.2d 115, 120 (D.D.C. 2005). An agency may rely on its affidavits to establish
13 the sufficiency of its search for records, but "only if . . . [the affidavits] are nonconclusory and not
14 impugned by evidence of bad faith." *Lahr v. Nat'l Transp. Safety Bd.*, 453 F.Supp.2d 1153, 1169-
15 70 (C.D. Cal. 2006) (internal quotation marks omitted); *see also Minier v. CIA*, 88 F.3d 796, 800
16 (9th Cir. 1996) (court to accord substantial weight to agency affidavits,

17 "The legal burden resides with the agency to demonstrate beyond material doubt that its
18 search was reasonably calculated to uncover all relevant documents." *Friends of Blackwater*, 391
19 F.Supp.2d at 121 (quoting *Nation*, 71 F.3d at 890) (internal quotation marks omitted). Defendants
20 have not done so here. For example, in light of plaintiffs' request for documents pertaining to the
21 high-profile Sgrenna incident and the massive U.S.-led assault on the city of Fallujah, there likely
22 are many memoranda, reports, e-mail messages and other communiqués that are responsive to
23 plaintiffs' request for responsive documents but that defendants have failed to identify in their
24 *Vaughn* Index. *See* Plaintiffs' Complaint, at para. 10; Defendants' *Vaughn* Index, Exhibit A to
25 Ghormley Decl. ("Ds' *Vaughn* Index").

26 In particular, for an agency to prevail on summary judgment, its affidavits pertaining to its
27 search for responsive documents "must be reasonably detailed . . . setting forth the search terms
28 and the type of search performed, and averring that all files likely to contain responsive materials

1 (if such records exist) were searched.” *Nation*, 71 F.3d at 890 (D.C. Cir. 1995) (internal quotation
2 marks omitted); *accord*, *Friends of Blackwater*, 391 F.Supp.2d at 119; *see also Lahr*, 453
3 F.Supp.2d at 1169-70 (C.D. Cal. 2006) (agency affidavits sufficient for purposes of summary
4 judgment “only if they are relatively detailed in their description of the files searched *and the*
5 *search procedures*” (emphasis added) (internal quotation marks omitted)).

6 Defendants in this case have failed to meet the standards enunciated in *Nation*, *Friends of*
7 *Blackwater* and *Lahr*. Their search purportedly consisted of having employees of the MNF-I
8 Operations Center in Iraq “conduct[] a physical search of their filing cabinets and safes, and
9 conduct[] an electronic search of their web-based computer data repositories.” Ghormley Decl. to
10 Ds’ MSJ, para, 3. In addition, defendants claim, the DOD’s Office of Freedom of Information
11 “conducted a subsequent search” over its intranet system. *Id.*, paras. 3, 5. Nowhere, however, do
12 defendants “set[] forth the search terms and the type of search performed.” *Nation*, 71 F.3d at 890.
13 Nor do they “aver[] that *all* files likely to contain responsive materials . . . were searched.” *Id*
14 (emphasis added). Their search, therefore, fails to meet the standard set out in *Nation* and related
15 cases, so summary judgment would be inappropriate in this case.

16 Thus, summary judgment is inappropriate here because defendants’ search for materials was
17 deficient. *E.g. Jones v. FBI*, 41 F.3d 238, 242-43 (6th Cir. 1994). This Court should deny
18 defendants’ Motion for Summary Judgment (“Ds’ MSJ”) and order the requested materials
19 released, or at minimum conduct *in camera* review to determine which responsive documents are
20 releasable. *See id.* at 243.

21
22 **D. If the Court Elects Not to Order Disclosure of All Responsive Documents, *In***
23 ***Camera* Review Is “Particularly Appropriate” Under the Present**
24 **Circumstances.**

25 A district court has broad discretion to conduct *in camera* review, and in some cases it “may
26 be required.” *Fiduccia v. DOJ*, 185 F.3d 1035, 1043 (9th Cir. 1999). “[I]n camera inspection may
27 be particularly appropriate when either the agency affidavits are insufficiently detailed to permit
28 meaningful review of exemption claims or there is evidence of bad faith on the part of the agency.”
Quinon v. F.B.I., 86 F.3d 1222, 1228 (D.C. Cir. 1996); *see also Weiner v. FBI*, 943 F.2d 972, 979
(9th Cir. 1991) (where *Vaughn* Index is inadequate, court may resort to *in camera* review). When

1 the number of withheld documents is relatively small, and “when the dispute turns on the contents
2 of the withheld documents, and not the parties’ interpretations of those documents, *in camera*
3 review may be more appropriate.” *Id.*

4 The U.S. Court of Appeals for the Sixth Circuit provides relevant criteria on which a court
5 may base a decision to review documents *in camera*:

6 1) *judicial economy* – every court on record has expressed significant concern about
7 imposing a line by line review upon trial and appellate courts in resolving FOIA
8 requests involving hundreds or thousands of documents; 2) *actual agency bad faith* –
9 where it becomes apparent that the subject matter of a request involves activities
10 which, if disclosed, would publicly embarrass the agency or that a so-called "cover
11 up" is presented, government affidavits lose credibility; 3) *strong public interest* –
12 where the effect of disclosure or exemption clearly extends to the public at large,
13 such as a request which may surface evidence of corruption in an important
14 government function, there may be a reason to give lesser weight to factors like
15 judicial economy; 4) *the parties request in camera review* – obviously the court
16 cannot be required to conduct a review upon demand, but a request would
17 ameliorate concern that in camera inspection was precluding vigorous adversary
18 proceedings or that a court was stepping into an area, as national security, which is
19 the province of the Executive.

20 *Jones v. FBI*, 41 F.3d 238, 243 (6th Cir. 1994).

21 Defendants claim to be holding 964 pages. See Ds’ *Vaughn* Index. However, concerns
22 raised by the *Jones* Court regarding judicial economy, *Jones*, 41 F.3d at 243, are of minimal
23 consequence here. Although the *Jones* Court was concerned with judicial economy and having to
24 review “hundreds or thousands” of pages of documents, *Id.*, the ROE documents at the center of
25 the present dispute number only 62 pages. Ds’ *Vaughn* Index. The AR 15-6 Report is
26 approximately 26 pages. *E.g.* AR 15-6 Investigation,
27 http://www.globalsecurity.org/military/library/report/2005/15-6_calipari-sgrena.htm. The bulk of
28 the withheld pages comprise annexes to the report, some of which may exceed the scope of
29 plaintiffs’ request. *See* Ds’ *Vaughn* Index; Plaintiffs’ Complaint. Thus, judicial economy is not a
30 significant factor here.

31 On the other hand, the court should discount the government’s affidavits as lacking in
32 credibility where, as here, there is evidence of bad faith and the subject matter of the request
33 “involves activities which, if disclosed, would publicly embarrass the agency,” or that a cover-up is

1 involved. *Jones*, 41 F.3d at 243. Here, defendants' bad faith has been demonstrated. *See supra*, part
 2 I. C. Additionally, defendant agencies appear to have attempted to cover up what happened in the
 3 Sgrenna incident and the siege on Fallujah.¹¹ If the defendants' actions regarding the Sgrenna incident
 4 and Fallujah assault were disclosed, they likely would cause embarrassment.

5 The government has brought further embarrassment upon itself through the numerous
 6 mistakes it has made in this litigation. In particular, the defendants

- 7
- 8 • Did not know or failed to determine that the AR 15-6 Report posted to their website
 could be unredacted with "two simple clicks of the mouse." David Willey, *Italy
 Media Reveals Iraq Details*, BBC News, May 1, 2005,
 9 <http://news.bbc.co.uk/2/hi/europe/4504589.stm>.
- 10 • Incorrectly labeled redactions under Exemptions 2 & 6 then blamed the plaintiffs
 apparently for not reading their minds. See Ds' Reply, at 19 & n.11 ("Contrary to
 11 plaintiffs' assertions, the names . . . have been redacted pursuant to Exemption 6,
 not Exemption 2. . . . To the extent Exemption 'b(2) low' was noted next to any
 12 individual name redacted, such a notation was done inadvertently and should have
 been noted as 'b(6).'"");
- 13 • Mistakenly disclosed the name of a soldier after claiming that disclosing soldiers'
 14 names would make them vulnerable to terrorist attacks. Ds' Reply, at 28 n.19;
- 15 • Maintained that the redacted AR 15-6 Report was "leaked" onto their own website.
 Ds' Reply, at 3-4;
- 16 • Justified producing a heavily redacted version of the AR 15-6 Report because
 further disclosure might "result in damage to the national security," but posted a
 17 less-heavily redacted version to their own website. Ghormley Decl., para 13a;
 Exhibit A.
- 18 • Produced to plaintiffs a version of the AR 15-6 Report that is missing its last nine
 19 pages. AR 15-6 Report, redacted.

20 These examples not only highlight the government's mistakes, but they also provide further
 21 evidence of bad faith in addition to that detailed *supra*, in part I. A. Where, as here, an agency acts
 22 in bad faith or engages in a cover-up, its "affidavits lose credibility." *Jones*, 41 F.3d at 243.

23

24 ¹¹ *See, e.g.*, AR 15-6 Report, redacted, at BS 42; *Iraq Shooting; Differing Accounts*, BBC
 25 News, May 3, 2005, <http://news.bbc.co.uk/2/hi/europe/4325253.stm>; *Dueling views of the Sgrenna
 shooting*, Christian Science Monitor, May 25, 2005, [http://www.csmonitor.com/2005/0505/p07s01-
 woiq.htm](http://www.csmonitor.com/2005/0505/p07s01-

 26 woiq.htm); Colin Brown, *US Lied to Britain over use of napalm in Iraq war*, The Independent
 (London), June 17, 2005, <http://news.independent.co.uk/uk/politics/article226119.ece>; George
 27 Monbiot, *The US used chemical weapons in Iraq – then lied about it*, Guardian Unlimited
 (London), Nov. 15, 2005, <http://www.guardian.co.uk/Columnists/Column/0,5673,1642831,00.html>.

1 Moreover, the public has a strong interest in the materials at issue here. *Jones*, 41 F.3d at
2 243. The public has an elevated interest in disclosure of the ROE and all other documents
3 pertaining to the judgments of U.S. military personnel in Iraq in distinguishing between civilians
4 and combatants. The release of such information could promote a more complete public dialogue
5 on the propriety of the way the war in Iraq has been conducted than has so far taken place.

6 Because plaintiffs request *in camera* review, all four factors in *Jones* have been met. *Jones*,
7 41 F.3d at 243. Moreover, plaintiffs' request that this court review responsive materials *in camera*
8 ameliorates concerns the court may be stepping into an area, such as national security, which is the
9 province of the executive branch. *Id.* In addition, because the defendants' search for documents was
10 inadequate, their affidavits and *Vaughn* Index insufficient, and many of their actions were taken in
11 bad faith, *see supra*, parts I. A.-D., *in camera* review is authorized, and indeed "particularly
12 appropriate." *Kay v. FCC*, 976 F.Supp 23, 33 (D.D.C. 1997); *Quinon*, 86 F.3d at 1228; *Weiner*,
13 943 F.2d at 979.

14 **II. DEFENDANTS WAIVED EXEMPTION OF THE UNREDACTED AR 15-6** 15 **REPORT THAT THEY POSTED TO THEIR OWN WEBSITE.**

16 Although the government's explanation regarding how the unredacted version of the AR
17 15-6 Report became public leaves many important questions unanswered, plaintiffs no longer argue
18 that defendants have waived exemption under the FOIA of the unredacted report available on the
19 Internet. However, defendants have waived exemption of the version of the report that they posted
20 onto their own website,¹² considering that it contains fewer and different redactions than the

21
22 ¹² At some point, defendant agencies placed a redacted copy of the AR 15-6 Report on their
23 Multinational Force-Iraq ("MNF-I") website. Ghormley Supp. Decl., para. 3. The version that
24 defendants posted to their website was in an electronic format that allowed for the material that had
25 been redacted to be restored "with two simple clicks of the mouse." David Willey, *Italy Media*
26 *Reveals Iraq Details*, BBC News, May 1, 2005, <http://news.bbc.co.uk/2/hi/europe/4504589.stm>. A
27 medical student in Italy was able to remove the redactions, and the unredacted report subsequently
28 became widely available on the Internet. *Id.*; Ps' MSJ, at 14 & 14 n.32. Only upon discovering the
availability of the unredacted report did defendants remove the redacted version from their MNF-I
website. Ghormley Decl., para. 4. Moreover, defendants' declaration fails to identify who redacted
the version of the report posted to their MNF-I website, who posted it, who was aware of the
posting and had the authority to remove it but did not until it had been discovered that an

(Continued...)

1 version that defendants produced to plaintiffs. Exhibit A; AR 15-6 Report, redacted. Plaintiffs have
 2 a copy of what purports to be the unredacted report, but because it came from an unofficial source,
 3 it cannot be authenticated. Defendants therefore should be ordered to release the version of the
 4 report that they posted to their website. Defendants claim that the report was placed on their
 5 website “inadvertently.” However, it appears that what was inadvertent was not the *release* of the
 6 report, but that it was released in a form that could so easily be unredacted.

7
 8 **A. Redacted Report Plaintiffs Seek Matches That Which Defendants Released
 to the Internet.**

9 Contrary to their assertions otherwise, defendants have waived exemption from the FOIA of
 10 the redacted version of the AR 15-6 Report that appeared on their website. “[O]nce there is
 11 disclosure, *the information belongs to the general public.*” *Natural Resources Defense Council v.*
 12 *Dep’t of Defense*, 442 F.Supp.2d 857, 866 (C.D. Cal. 2006) (“NRDC”) (quoting *Nat’l Archives &*
 13 *Records Admin. v. Favish*, 541 U.S. 157, 174 (2004)). Furthermore,

14 [b]y providing evidence that the information being withheld is already within the
 15 public domain, a FOIA plaintiff *brings into question* the government’s
 16 determination that release of such information might reasonably be expected to
 17 damage the national security. Such contrary evidence, in turn, requires the Court to
 investigate the agency’s declarations more closely and determine whether the
 agency has answered the questions raised by the plaintiff’s evidence.

18 *Wash. Post v. U.S. Dept. of Defense*, 766 F.Supp. 1, 12 (D.D.C. 1991) (emphasis added).

19 The party claiming waiver bears “the initial burden of pointing to specific information in the
 20 public domain that appears to duplicate that being withheld.” *Afshar v. Dep’t of State*, 702 F.2d
 21 1125, 1130 (D.C. Cir. 1983). Plaintiffs can do so here. They seek the redacted AR 15-6 Report,
 22 which appears to be an exact match of what defendants posted to their website. *Fitzgibbon V. CIA*,
 23 911 F.2d 755, 765 (D.C. Cir. 1990).

24
 25 _____
 (...Continued)

26 unredacted version was available on the Internet, and who ultimately made the decision to take it
 27 down once they became aware of the unredacted version. Defendants also fail to identify for whom
 28 the redactions were made – i.e. whether the redactions were tailored to release to the public, press,
 or a specific group.

1 Defendants disclosed the AR 15-6 Report to the public on their MNF-I website. Ghormley
2 Supp. Decl., para. 3. Because they made the report available on the Internet, “*the information*
3 *belongs to the general public.*” *Id.* To now deny production of the same report to the plaintiffs that
4 they made available to the public via their website, even if for a discrete period of time, would
5 amount to the kind of preferential treatment that the FOIA will not tolerate. *NRDC*, 442 F.Supp.2d
6 at 866. Defendants have waived exemption to the version of the report that was posted on their
7 website.

8 **B. The Disclosure of the Redacted AR 15-6 Report Was Official and**
9 **Documented.**

10 Moreover, plaintiffs are able to show that disclosure is compelled over defendants’
11 exemption claims because the materials were disclosed via an official and documented disclosure.
12 *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 765 (C.D. Cir. 1990). A court may compel disclosure of
13 materials over an agency’s otherwise valid exemption claim where the information has been
14 officially acknowledged. *Id.* To be “officially acknowledged,” the information sought must be as
15 specific as and match that previously disclosed, and it must have been made public through an
16 “official and documented disclosure.” *Edmonds v. U.S. Dept. of Justice*, 405 F.Supp.2d 23, 30
(D.D.C. 2005) (quoting *Fitzgibbon*, 911 F.2d at 765) (internal quotation marks omitted).

17 Disclosure of the redacted AR 15-6 Report was official because it was posted to the MNF-I
18 website, which proclaims itself to be the “Official Website of Multi-National Force - Iraq” and is
19 operated by the U.S. military to promote the war in Iraq. *See* <http://www.mnf-iraq.com>. The
20 disclosure was documented by General Ghormley, who conceded that the report was in fact
21 released to the website. Ghormley Supp. Decl., para. 3. True, General Ghormley claims the release
22 was “unofficial,” *Id.*, but this claim does not withstand scrutiny. Defendants make only conclusory
23 statements that the release was “unofficial,” yet provide no further relevant information. *See*
24 Ghormley Supp. Decl., para. 3.

25 Furthermore, the release was made to the MNF-I website, the “Official Website of Multi-
26 National Force – Iraq.” <http://www.mnf-iraq.com>. The Internet domain “[mnf-iraq.com](http://www.mnf-iraq.com),” on which
27
28

1 the MNF-I website resides, is hosted on a computer server at Ft. Huachaca, Arizona, a military
2 installation operated by the U.S. Army and home to the U.S. Army Intelligence Center.¹³ To claim,
3 as do defendants, that the AR 15-6 Report was “inadvertently” placed on or “leaked” to a computer
4 server controlled by the U.S. Army Intelligence Center reflects poorly on the management of that
5 computer by the Intelligence Center. One would expect the U.S. Army Intelligence Center to
6 maintain strong security safeguards over its computers.

7 **C. The Report Was Not “Leaked” to Defendants’ Own Website.**

8 Accordingly, the report was placed on a website that defendants alone control. Defendants’
9 contention that the report was “inadvertently” placed on the website – and especially that it was
10 “leaked,” *e.g.* Ds’ Reply, at 3, 4 – is risible. If the report was “leaked,” someone intentionally
11 disclosed information she or he knew should be kept secret. Oxford American Dictionaries, Apple
12 Computer, Inc., version 1.0.1. Defendants do not claim that their posting the report to their own
13 website was the result of a person intentionally disclosing information that was supposed to be kept
14 secret. Therefore, defendants cannot substantiate their claim that the report was “leaked.”

15 Moreover, the Justice Department’s claim that the report appeared on the Internet as a result
16 of a leak constitutes a distortion of General Ghormley’s declaration, evidencing bad faith on the
17 part of the government. General Ghormley’s declaration describes the release of the AR 15-6
18 Report as accidental. Ghormey Supp. Decl. para. 4. General Ghormley explains that “MNF-I
19 personnel *corrected their mistaken release* by removing the redacted AR 15-6 Report from the
20 MNF-I website immediately upon learning of the existence of the . . . unredacted version of the
21 report.” *Id.* (emphasis added).

22
23
24 ¹³ The IP (Internet protocol) address, the computer equivalent of a street address, for the
25 MNF-I website is located at Fort Huachaca, a U.S. Army fort in Arizona, which is operated in part
26 by the U.S. Army Intelligence Center. *See* <http://whois.domaintools.com/mnf-iraq.com>;
27 http://en.wikipedia.org/wiki/IP_address; <http://huachuca-www.army.mil/sites/about/history.asp>. In
28 addition, at the bottom of the home page on the MFN-I site, viewers are advised to “[p]lease send
questions and comments to: mnfi.webmaster@iraq.centcom.mil.” <http://www.mnf-iraq.com>. The
domain “centcom.mil” is the home page for one of the defendants here, the U.S. Central Command.
<http://www.centcom.mil/sites/uscentcom1/default.aspx>. Thus, the MNF-I website ????

1 The Justice Department distorts General Ghormley’s declaration in an apparent attempt to
2 bootstrap a legal argument that does not apply under the circumstances of the present case. The
3 defendants argue that agencies can continue to withhold leaked information, and the government
4 can protect “leaked information . . . to some degree” by not producing it, because its validity
5 remains in doubt. Ds Reply, p. 3-4. Not only was the information not leaked, but to support this
6 theory defendants rely on cases that are readily distinguishable.

7 For example, in *Public Citizen Health Research Group v. Food and Drug Admin.*, 953
8 F.Supp. 400 (D.D.C. 1996), the defendants, a *private* entity, claimed a trade secret interest in the
9 materials at issue, which had been released by a government agency. *Id.* at 401-02, 405. There was
10 no waiver in that case because the entity seeking protection was not the one that (inadvertently)
11 released the information. *Id.* at 404. Also, the protective order sought in that case was “only
12 temporary” *Id.* at 404. Here, the entities that seek to permanently hide the requested information –
13 defendant agencies – are the ones that released the materials. Similarly, the court in *Fitzgibbon v.*
14 *C.I.A.*, 911 F.2d 755 (D.C. Cir. 1990), declined to find a waiver where a congressional committee –
15 not the CIA – had made the earlier disclosure. In *Edmonds v. F.B.I.*, 272 F.Supp.2d 35 (D.D.C.
16 2003), the information requested had been released via newspaper accounts attributed to
17 anonymous sources and thus was not an exact match to the materials that were sought. *Id.* at 49.
18 Here, plaintiffs seek the redacted AR 15-6 Report that matches the report that defendants posted to
19 their website.

20 Accordingly, defendants’ waiver arguments fail here because the authority on which they
21 rely is inapposite. Defendants released the redacted AR 15-6 Report on their own website. The
22 release was official – made to the “Official Website of Multi-National Force - Iraq” – and
23 documented, *see* <http://www.mnf-iraq.com>; Ghormley Supp. Decl., para. 3, and therefore meets the
24 requirements under *Fitzgibbon v. C.I.A.*, 911 F.2d 755 (C.D. Cir. 1990). Thus, to the extent that the
25 redacted AR 15-6 Report that was released via the MNF-I website contains materials that are
26 responsive to plaintiffs’ request and have not been disclosed, their release is compelled. *Fitzgibbon*,
27 911 F.2d at 765.

28

1 Indeed, the evidence shows that the redacted report probably would be available on the
 2 MNF-I website to this day had defendants not been embarrassed by the revelation that a report they
 3 posted on the Internet could so easily be unredacted. *See supra*, this part; Ghormley Supp. Decl.,
 4 para 4 (MNF-I personnel removed redacted AR 15-6 Report “immediately upon learning of the
 5 existence of the . . . unredacted version of the report”).

6
 7 **III. THE COURT SHOULD EXAMINE DEFENDANTS’ CLASSIFICATION**
DECISIONS AND ORDER DISCLOSURE OF DOCUMENTS INVALIDLY
 8 **CLASSIFIED AND WITHHELD PURSUANT TO EXEMPTION 1.**

9 **A. The Court *Should* “Second-Guess” the Executive Branch Because**
Defendants’ Justifications Are Inadequate and They Acted in Bad Faith.

10 Defendants’ Reply resuscitates the same argument made in their Motion for Summary
 11 Judgment that the courts should not “second-guess” the Executive Branch regarding their failure to
 12 release documents that implicate national security. *E.g.* Ds’ MSJ at 9-10; Ds’ Reply at 9-10. Citing
 13 *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980), defendants further argue that courts should
 14 not conduct a detailed inquiry into whether they agree with agency opinions. *E.g.* Ds’ MSJ at 10;
 15 Ds’ Reply at 9-10.

16 However, “[w]hile an agency’s declarations setting forth the reasons that information falls
 17 within [an] exemption are entitled to substantial weight, they must nevertheless afford the requester
 18 an ample opportunity to contest, and the court to review, the soundness of the withholding.”
 19 *American Civil Liberties Union v. FBI*, 429 F.Supp.2d 179, 187 (D.D.C. 2006) (“*ACLU*”).

20 Moreover, defendants’ citations to *Halperin* leave out a key requirement: that agency affidavits are
 21 only due substantial deference where they offer “reasonable specificity of detail rather than merely
 22 conclusory statements, and if they are not called into question by contradictory evidence in the
 23 record or by evidence of agency bad faith.” *Halperin*, 629 F.2d at 148.

24 As detailed *supra* in part I., defendants fall short of the requirement in *Halperin* with respect
 25 to both the ROE and the AR 15-6 Report. Their search was incomplete, their *Vaughn* Index was
 26 inadequate and supported by sweeping, exaggerated and conclusory justifications, their declaration
 27 gives a misleading description of the ROE, and they acted in bad faith. *See supra*, part I. Such
 28 failures deprive plaintiffs of an “ample opportunity to contest, and the court to review, the
 soundness of the withholding.” *ACLU*, 429 F.Supp.2d at 187. Consequently, plaintiffs urge the

1 court not to accord substantial weight to defendant agencies' declarations and instead to conduct a
2 detailed inquiry into their justifications. As defendants' justifications are inadequate, plaintiffs
3 further request that the court order materials released or at minimum conduct *in camera* review to
4 determine whether disclosure is appropriate. *See supra*, part I.E.

5
6 **B. Defendants Likely Are Withholding the Requested Documents to Prevent
Embarrassment and Hide Evidence of Law-Breaking.**

7 What the court is likely to find should it scrutinize defendants' classification decisions is
8 that defendants violated Exec. Order No. 12958, Classified National Security Information ("E.O.
9 12958"),¹⁴ section 1.7 by classifying the requested materials not because their release would harm
10 national security but because their release would reveal defendants' violation of the law and cause
11 embarrassment to the Bush Administration and military leaders.

12 Defendants predict that if they released records requested by plaintiffs, U.S. armed forces
13 would be placed in "grave danger" because enemies of the United States would gain a
14 "considerable strategic advantage." *E.g.* Ds' MSJ at 13. Defendants bolster these claims by
15 accusing plaintiffs of seeking a vast array of sensitive documents that that are far beyond the scope
16 of plaintiffs' FOIA request. *E.g.* Ds' MSJ at 13-14 (defendants claim plaintiffs' request includes
17 "information concerning vulnerabilities or capabilities of system, installations, infrastructures,
18 projects, plans, or protection services relating to national security"); Plaintiffs' Complaint, para. 10.

19 Meanwhile, defendants dismiss as "based on nothing more than rank speculation" plaintiffs'
20 contention that fear of embarrassment and concerns over law-breaking are the real reasons
21 defendants endeavor to hide the responsive materials. On the contrary, the Sgrena shooting, for
22 example, was a major international incident involving allegations requiring the intervention of
23 heads of state and major factual disputes between the United States and an important ally. See Ps'
24 MSJ, p. 7 n.1-6, 9-12 n.8-27.

25
26
27 ¹⁴ E.O. 12958 was amended by Executive Order 13292. *See* 68 Fed.Reg. 15315; *American*
28 *Civil Liberties Union v. Dep't of Defense*, 389 F.Supp.2d 547, 558 (S.D.N.Y. 2005).

1 Because evidence demonstrates that defendants are withholding responsive documents
2 pursuant to Exemption 1 to avoid governmental embarrassment and conceal violations of the law,
3 the materials were not properly classified. E.O. 12958, § 1.7; *American Civil Liberties Union v.*
4 *Dep't of Defense*, 389 F.Supp.2d 547, 559 (S.D.N.Y. 2005). Where, as here, the requested
5 documents were improperly classified, they cannot be withheld. 5 U.S.C. § 552(b)(1); *Coldiron v.*
6 *U.S. Dep't of Justice*, 310 F.Supp.2d 44, 49 (D.D.C. 2004). Thus, the court should order the
7 requested materials released.

8 **C. Governmental Practice of Massive Overclassification of Documents**
9 **Impugns Defendants' Classification Decisions.**

10 That the government's massive overclassification of documents is chronicled in respected
11 publications brings into question the assertion that defendants properly classified the documents
12 plaintiffs seek in the present case.¹⁵ In fact, defendants themselves turn what they contend is "the
13 musing of . . . law professors" into practice: They admit to overclassifying documents. Ds' Reply at
14 8; Ghormley Decl., para. 6 (two of the responsive ROE documents "contain both classified and
15 unclassified information, but they are classified as a whole as SECRET"). Indeed, defendants
16 concede that it is their "standard policy" to overclassify. Ds' Reply, at 9 n.6 (defendants' standard
17 policy is to "classify[] a document *as a whole* at the highest level of classification of *any* classified
18 information contained therein" (emphasis added)).

19 The government's practice of massively overclassifying public documents should give this or
20 any court pause. *See* Ps' MSJ at 18-19. Because defendants' classification decisions appear based

21
22
23 ¹⁵ Defendants dismiss concerns over an overclassification rate of up to 90 percent as
24 "musings of . . . law professors." Ds' Reply at 8; Ps' MSJ at 19. To the contrary, those concerns
25 were raised by a career Navy officer and high-placed Reagan Administration official, as well as a
26 deputy undersecretary of defense for counterintelligence and security under former Defense
27 Secretary Donald Rumsfeld, and merely *made public* by law reviews and newspapers. Ps' MSJ at
28 18-19. More recently, an assistant editor of the Los Angeles Times reported that former Attorney
General John Ashcroft "instructed federal agencies to err on the side of nondisclosure." and that
"[t]he Bush-Cheney administration has systematically limited or flouted many of the post-
Watergate laws introduced by the reform-minded Congress of 1974." Matt Welch, *The long
nightmare hasn't ended*, Los Angeles Times, Jan. 7, 2007, at M6.

1 on concerns over embarrassment to or law-breaking by civilian and military leaders, plaintiffs urge
2 the court to find that the documents were not properly classified and should be disclosed.

3 **IV. DEFENDANTS ARE IMPROPERLY WITHHOLDING ROE AND AR 15-6**
4 **MATERIALS PURSUANT TO EXEMPTION 2.**

5 Defendants continue to improperly withhold materials pursuant to Exemption 2, continue to
6 misstate the law, and have misrepresented facts.¹⁶

7 **A. Through Misapplication of the Law and Misrepresentation of the Facts,**
8 **Defendants Are Improperly Withholding Redacted Sections of the AR 15-6**
9 **Report and Associated Annexes.**

10 Defendants misstate the law by claiming both “b(2)high” and “b(2)low” can be applied
11 *together* to justify redactions in the AR 15-6 Report and annexes.¹⁷ Ds’ Reply at 19. However, it is
12 impossible for the information redacted to meet both standards at the same time. *Dep’t of the Air*
13 *Force v. Rose*, 45 U.S. 352 (1976), affirming the distinction the court made in *Vaughn v. Rosen*
14 *(II)*, 523 F.2d 1136 (D.C. Cir. 1974) “between minor or trivial matters and those more substantial
15 matters which might be the subject of legitimate public interest.” *Id.* at 1142. As defendants
16 themselves explain, “Trivial agency matters redacted under Exemption 2 are also known as ‘low
17 two’ matters, whereas agency matters of significant public interest whose disclosure might risk
18 circumvention of agency rules and practices are known as ‘high two’ matters.” Ds’ Reply at 7 n.10;
19 *see Rose*, 425 U.S. 352 (1976). As information cannot be both trivial, i.e., not in the public’s
20 interest to know, and also be a matter of significant public interest, these redactions represent
21 another agency error, reflecting the government’s ignorance of the law. The Department of
22 Justice’s attempt to use such a glaring example of agency error to attack plaintiffs’ argument
23 regarding the agencies’ improper invocation of FOIA exemptions lacks any merit. Ds’ Reply at

24 ¹⁶ As the court considers defendants’ Exemption 2 claims, undersigned counsel urges the
25 court to remember that Exemption 2 must be construed narrowly because, otherwise, “virtually
26 everything undertaken by a federal agency could be said to be related to the internal personnel ...
27 practices of ... [that] agency... and the potentially all-encompassing sweep of a broad exemption
28 ... undercuts the vitality of any such approach.” *Lahr v. Nat’l Transp. Safety Bd.*, 453 F.Supp.2d
1153, 1171 (C.D. Cal. 2006) (internal citations omitted) (citing *Maricopa Audubon Society v. U.S.*
Forest Service, 108 F.3d 1082, 1085 (9th Cir. 1997).

¹⁷ As the redactions in the AR 15-6 Report and associated annexes are extensive, plaintiffs
have not addressed every exemption claimed for every redaction but instead have tried to pull out
key examples of incorrect and over-redactions by defendant agencies.

1 19.¹⁸

2 Defendants also have misstated the facts. For example, by implying that internal names,
3 such as road names, are military secrets, the government misleadingly claims that defendants have
4 properly redacted such information pursuant to Exemption 2. Ds' Reply at 16-17; Ghormley Supp.
5 Decl. para. 8. To support their argument that this information is properly withheld, defendants cite
6 *Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994), which held that the FBI had properly deleted "symbol
7 numbers and file numbers" used *internally* to identify *confidential* sources. *Id.* at 44-45. As
8 explained below, the information here withheld is not confidential because it is used both internally
9 and publicly by the military. Because this information fails to meet Exemption 2's "solely internal"
10 criteria for withholding, *see* Ps' MSJ at 29; 5 U.S.C. § 552(b)(2), it should be disclosed.

11 For example, in their Motion for Summary Judgment, plaintiffs point out that defendants
12 have incorrectly redacted the words "Route Irish"¹⁹ throughout the report and associated annexes
13 pursuant to Exemption 2.²⁰ Ps' MSJ at 29. In response, defendants state that "the names that the
14 military has assigned to these routes are used internally by military personnel to plan and conduct
15 sensitive military operations" and "disclosure of the military's names for such routes could enable
16 our enemies to anticipate strategic movements and allow them to plan in advance in order to
17 sabotage military operations and objectives." Ds' Reply at 16-17; Ghormley Supp. Decl. para. 8.

18 _____
19 ¹⁸ On the same page, defendants admit to other errors in their use of FOIA exemptions.
20 Where defendants redacted individual names pursuant to Exemption 2, they now state those
21 notations were incorrect and that Exemption 6 should have been noted as the claimed exemption.
D's Reply at 19 n.11.

22 ¹⁹ Defendants cite no law to support their allegation that plaintiffs "inappropriately rely" on
23 the unredacted version of the AR 15-6 Report to point to examples of improper redactions. Ds'
24 Reply at 15. Unfortunately, plaintiffs have no other choice but to give the court examples of agency
25 error from unofficial copies of the unredacted report when defendants refuse to produce the
26 materials themselves. *See Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994) ("Where material has
27 been withheld by the government agency, the plaintiff must argue that the withholding goes beyond
28 that allowed by the statute. But the plaintiff is handicapped in this endeavor by the fact that only
the agency truly knows the content of the withheld material. Except in cases in which the court
takes the entire set of responsive documents *in camera*, even the court does not know.") (internal
citations omitted).

²⁰ For another example of the government's improper invocation of Exemption 2 *see* Ps'
MSJ at 28-29.

1 However, evidence to the contrary abounds. For example, defendant CENTCOM
2 apparently did not share the general's concerns regarding disclosure when, on January 11, 2007, it
3 posted an article to its MNF-I website whose first paragraph reads, "The Airport Road here [in
4 Iraq] was once one of the most violent and dangerous roads in the country... Visiting dignitaries,
5 news reporters, and the soldiers tasked with providing security were well aware of these dangers
6 along this five-mile stretch, known to the coalition forces as *Route Irish*." Special Police Transition
7 Team, *Iraqi Police Serve as Reaction Force*, Jan. 11, 2007, [http://www.mnf-](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=8996&Itemid=128)
8 [iraq.com/index.php?option=com_content&task=view&id=8996&Itemid=128](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=8996&Itemid=128) (emphasis added).

9 "Route Irish," so named by the U.S. military, is also widely covered in media stories
10 regarding Iraq.²¹ There are even t-shirts for sale adorned with four-leaf clovers and the ironic
11 phrase "I have the luck of Route Irish, Iraq."²² Such exposure proves that this information is not
12 secret and that, even if it did qualify as "internal personnel rules and practices of an agency" under
13 Exemption 2, its disclosure would not risk their circumvention. *Rose*, 425 U.S. 352, 364 (1976).

14 Furthermore, this widespread use of the term "Route Irish" by the military, the media, and
15 beyond, shows the government is making a disingenuous argument that disclosing withheld
16 materials will endanger U.S. troops by aiding anti-U.S. fighters. The government's fearmongering
17 – claiming release of the redacted material would endanger U.S. soldiers – is nothing short of bad
18 faith.

19 The government then goes so far as to ask the court to disregard the weakness of the
20 supposed link between the withheld information and Exemption 2, claiming "the sensitive nature of
21 the military's names for these routes warrants their protection from disclosure even if their relation

22 ²¹ "The Army units that operate on Route Irish--the military's name for the airport road--
23 hardly consider it the worst of Baghdad's byways." Lawrence F. Kaplan, *The Airport Road*, Wall
24 Street Journal, Jan. 27, 2005, <http://www.opinionjournal.com/editorial/feature.html?id=110006214>;
25 "Between April and June, 14 car bombs went off along the airport road, called Route Irish by the
26 military." Jackie Spinner, *Once Deadly Baghdad Road is Much Safer*, San Diego Union Tribune,
27 Nov. 5, 2005, http://www.signonsandiego.com/uniontrib/20051105/news_1n5road.html; "The
28 Baghdad Airport Road is a 12 kilometer stretch of highway in Baghdad, Iraq linking the Green
Zone to Baghdad International Airport (BIAP). It is sometimes referred to as Route Irish."
Baghdad Airport Road, Wikipedia Jan. 15, 2007, http://en.wikipedia.org/wiki/Route_Irish.

²² Route Irish t-shirts are available at <http://www.cafepress.com/niceraqshirts>.

1 to internal personnel practices is indirect.” Ds’ Reply at 17 n.9. Immediately after making this
2 specious argument, the government proffers the ill-placed assertion that the general’s declarations
3 were “submitted in good faith and are entitled to substantial weight.” D’s Reply at 17; *Minier v.*
4 *CIA*, 88 F.3d 796, 800 (9th Cir. 1996) (A district court must give substantial weight to agency
5 affidavits unless the justifications for nondisclosure are controverted by contrary evidence). As a
6 result, neither the government’s pleadings nor the general’s declarations can be taken at face value.

7 There is also evidence controverting General Ghormley’s justification for withholding the
8 names of “units and divisions deployed overseas” which he claims are agency personnel rules and
9 practices pursuant to Exemption 2.²³ Ghormely Supp. Decl. para. 8. The first page of the
10 unredacted version of the AR 15-6 Report explains that it was soldiers from A Company 1-69
11 Infantry, attached to the 10th Mountain Division, who, patrolling Route Irish the night of March 4,
12 2005, fired on Ms. Sgrena. AR 15-6 Report, unredacted, Exhibit H to Ps’ MSJ (“AR 15-6 Report,
13 unredacted”), at 4. The general declares that should the names of military units or divisions be
14 made public, it “could assist hostile forces in subverting sensitive military missions and jeopardize
15 the safety and security of military personnel.” Ghormley Supp. Decl. para. 8. This is another
16 disingenuous argument on behalf of the government. Not only does this information lack the
17 characteristic of being an agency “rule or practice” so as to fall under Exemption 2, such as agency
18 manuals, *Hardy v. BATF*, 631 F.2d 653, 655 (9th Cir. 1980), or agency processing guidelines,
19 *Dirksen v. Dep’t of Health and Human Services*, 803 F.2d 1456, 1458-59 (9th Cir. 1986), it is not
20 “internal.” 5 U.S.C. §552(b)(2). The “1-69 Infantry,” has its own homepage at
21 <http://www.69inf.com/>, and a Google search of “10th Mountain Division” results in a link to the
22 U.S. Army webpage for Fort Drum, “Home to the 10th Mountain Division.”

23 <http://www.drum.army.mil/sites/local/>. Not only is this information clearly not secret, the name
24 “10th Mountain Division” is emblazoned on flags, patches, key chains, baseball caps and license
25

26
27 ²³ There is no mention in defendants’ Reply regarding defendants’ withholding of names of
28 “units” or “divisions.”

1 plate frames available for sale on numerous internet sites.²⁴ Moreover, these unit and division
 2 names, redacted from the beginning of the AR 15-6 Report, are not redacted pursuant to Exemption
 3 2, but redacted pursuant to Exemptions 3, 6, and “130b.” AR 15-6 Report, redacted, at BS 10; AR
 4 15-6 Report, unredacted, at 4. Defendants’ arguments, based on General Gormley’s declarations
 5 that the withheld information is secret and must be protected from disclosure, are completely
 6 without merit. Consequently, the court should not give substantial weight to the general’s
 7 declarations. Plaintiffs ask that, instead, the court conduct an *in camera* review and order
 8 improperly withheld documents disclosed.

9 **B. Principles of Equity Should Bar Defendants’ Exemption 2 Claims As to the
 10 ROE.**

11 Notwithstanding the court’s decision in *Louis v. U.S. Dep’t of Labor*, 419 F.3d 970 (9th Cir.
 12 2005), adjudicating Privacy Act issues, defendants should be barred from evoking Exemption 2 as
 13 a rationale for withholding ROE documents. *Friends of the Coast Fork v. U.S. Dep’t of the*
 14 *Interior*, 110 F.3d 53, 55 (9th Cir. 1997) (“On judicial review, the agency must stand on whatever
 15 reasons for denial it gave in the administrative proceeding”). Defendants first evoked Exemption 2
 16 as to the withheld ROE materials in their denial of plaintiffs’ administrative appeal.²⁵ Exhibit 6 to
 17 Ds’ MSJ. Defendants’ response to plaintiffs’ appeal was due October 24, 2005. 5 U.S.C. §552
 18 (a)(6)(A)(ii). However, defendants failed to meet their statutory obligation to respond to plaintiffs’
 19 FOIA appeal by nearly a year. Defendants raised the additional exemption in their response to
 20 plaintiffs on October 6, 2006, over five months after plaintiffs filed their complaint.²⁶ Exhibit 6 to

21 ²⁴ *E.g.* Soldier City at [http://www.soldiercity.com/search-](http://www.soldiercity.com/search-exec/nodecode/true/search_term/10th+mountain/affiliate_id/1202/keyword/10th+mountain+division/campaign/usarmydivs)
 22 [http://www.cafepress.com/buy/10th+mountain+division/?click=true&CMP=KNC-G-GJ-](http://www.cafepress.com/buy/10th+mountain+division/?click=true&CMP=KNC-G-GJ-MIL&ovchn=GGL&ovcpn=Military+Basic&ovcrn=sr2GJ1go103442sb7117pi9ai1911+10th+mou)
 23 [http://www.cafepress.com/buy/10th+mountain+division/?click=true&CMP=KNC-G-GJ-](http://www.cafepress.com/buy/10th+mountain+division/?click=true&CMP=KNC-G-GJ-MIL&ovchn=GGL&ovcpn=Military+Basic&ovcrn=sr2GJ1go103442sb7117pi9ai1911+10th+mou)
 24 [ntain+divisi&ovtac=PPC&SR=sr2GJ1go103442sb7117pi9ai1911](http://www.cafepress.com/buy/10th+mountain+division/?click=true&CMP=KNC-G-GJ-MIL&ovchn=GGL&ovcpn=Military+Basic&ovcrn=sr2GJ1go103442sb7117pi9ai1911+10th+mou); 4 Armed Forces at
 25 <http://www.4armedforces.com/category/4xunit.army.10thmountaindivision/?referrer=AdWords10t>
 26 [h&gclid=CPWe-L6mgooCFQ0fggodXiUhrw](http://www.4armedforces.com/category/4xunit.army.10thmountaindivision/?referrer=AdWords10t).

26 ²⁵ In the initial denial of plaintiffs’ March 15, 2005 FOIA request, defendants claimed
 27 Exemption 1 as their only rationale for withholding the ROE documents. DE 3.

27 ²⁶ Although plaintiffs do not believe the exemption applies, they do not challenge as
 28 untimely the government’s invocation of Exemption 6, where defendant agencies incorrectly

(Continued...)

1 Ds' MSJ. Defendants should not be allowed to benefit from their total disregard of their statutory
2 obligations under the FOIA. Therefore, defendants should be barred from invoking Exemption 2 as
3 to responsive ROE materials. As a result, all non-classified sections of the withheld ROE materials,
4 Ghormley Decl., para. 6, should be ordered produced. Non-classified materials cannot be withheld
5 under Exemption 1, the only other exemption invoked as to the ROE materials, because in order to
6 be appropriately withheld under Exemption 1, information must be properly classified pursuant to
7 an Executive Order. 5 U.S.C. § 552(b)(1).

8 **C. Because the Public Interest is High, and the Risk of Circumvention is Low,
9 Defendants Are Improperly Withholding the ROE.**

10 Even if the court should accept defendants' Exemption 2 arguments as to the ROE
11 materials, the records nevertheless cannot be properly withheld pursuant to Exemption 2. As
12 explained in plaintiffs' Motion for Summary Judgment, the public's interest in the disclosure of the
13 ROE materials is high and disclosure will not lead to circumvention of the agency rules or
14 practices. Ps' MSJ at 25-26; *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976).

15 Defendants mischaracterize plaintiffs' explanation of ROE's connection to international
16 law, yet do not give any clarification of their own. Defendants only provide the conclusory rebuttal
17 that "these particular Rules of Engagement are classified as SECRET and their disclosure would
18 heighten the risk that adversaries of the United States would be able to circumvent their
19 application." Ds' Reply at 14; Ghormley Supp. Decl. para. 7-10. Defendants' arguments are
20 conclusory and speculative. They give no concrete examples of how the availability of other ROE
21 *Weiner v. F.B.I.*, 943 F.2d 972, 978-79 (9th Cir. 1991) ("boilerplate explanations," lacking any
22 attempt to tailor the explanation to the specific document withheld, are "properly rejected . . . as
23 clearly inadequate.") (internal quotation marks omitted). It defies reason that release of ROE such
24 as "treat all prisoners humanely and with respect and dignity" or "Looting and the taking of war
25

26 _____
27 (...Continued)

28 redacted materials pursuant to exemption "b(2) low" and only now, in their Reply, claim that they
meant to redact them pursuant to Exemption 6. Ds' Reply at 19 – 19 n.11.

1 trophies is prohibited,” would endanger U.S. soldiers in Iraq. Desert Storm Rules of Engagement,
2 *in* OLH at 119.

3 Defendants fail to even address whether or to what extent the withheld ROE are a
4 restatement of international law. While defendants misconstrue plaintiffs’ characterization of the
5 ROE, stating that plaintiffs assert the ROE are “merely a restatement of public international law,”
6 the truth is that “customary and conventional law principles regarding the right to self defense and
7 the laws of war” are the “legal factors which serve as a foundation for ROE.” OLH at 89.

8 Moreover, ROE and the international law regulating war are inextricably linked. For
9 example, ROE are subsumed by and cannot authorize anything that would violate the Law of
10 Armed Conflict (“LOAC”). *The Military Commander and the Law*, The Judge Advocate General’s
11 School 2006, at 622, <http://milcom.jag.af.mil/milcom2006-complete.pdf>. LOAC is international
12 law that the U.S. military has a legal duty to observe. *Id.* However, ROE can be more restrictive
13 than LOAC, prohibiting acts permitted by the LOAC. *Id.* Important factors which can influence the
14 promulgation of ROE include “domestic law and concerns, e.g. Executive Order 11,850 limiting
15 use of riot control agents; National security policy (protect interests of United States and allies);
16 Operational concerns (protection of our forces and those of our allies); and International law and
17 concerns (LOAC, status of forces agreements, host nation law),” *Id.* ROE, essentially policy
18 decisions that must be within the confines of the law, delineate the limitations on the use of force
19 necessary to accomplish the military’s missions and the government’s goals. *Id.* This is precisely
20 the type of information the American public should be able scrutinize in order to determine if their
21 military’s actions are lawful and if the rules given to the soldiers reflect their values. To the extent
22 the ROE reflect tenets of law – domestic or international – they should be disclosed, as well as all
23 other segregable portions.

24 As defendants did not “properly withhold various types of internal agency information
25 pursuant to Exemption 2” as they profess, they are therefore not entitled to summary judgment on
26 those claims. Ds’ Reply at 19.

27 //

28

1 **V. DEFENDANTS HAVE FAILED TO SHOW THAT THE WITHHELD**
2 **MATERIALS ARE EXEMPTED BY 10 U.S.C. §§ 130b, 130c AND**
3 **EXEMPTION 3.**

4 Defendants are withholding responsive material under Exemption 3 by claiming that disclosure
5 is specifically exempted by statutes 10 U.S.C. § 130c and 10 U.S.C. § 130b. *See* 5 U.S.C. §
6 552(b)(3). Despite the defendants' arguments in their Motion for Summary Judgment and in their
7 Reply and Opposition memorandum, the court should place no reliance on the defendants'
8 invocation of those statutes.²⁷

9 **A. 10 U.S.C. § 130c Has Not Been Properly Invoked to Withhold Responsive Materials.**

10 Defendants' arguments in their Reply and Opposition largely cloud the issue of whether they
11 have properly withheld responsive materials under Exemption 3 via 10 U.S.C. § 130c. *See* Ds'
12 Reply at 20-21. Plaintiffs' Motion for Summary Judgment focused this court's attention on the fact
13 that defendants have not produced *any* showing that they have followed the "particular criteria for
14 withholding" clearly set forth in 10 U.S.C. § 130c. 5 U.S.C. § 552(b)(3); *and* Ps' MSJ at 32.
15 Instead of making such a showing, defendants replied that they "referred the documents containing
16 sensitive foreign government information to the Department of State for it to make a determination
17 of whether the documents could be released or if they should be withheld" under 10 U.S.C. § 130c.
18 Ds' Reply at 20. Defendants' reliance on this argument is confusing.

19 By its plain language, 10 U.S.C. 130c does not implicate the State Department. In fact, 10
20 U.S.C. 130c exclusively authorizes the Secretaries of Defense, Homeland Security, and Energy to
21 withhold materials. *See* 10 U.S.C. §§ 130c(a), 130c(h)(1). Thus, while the Secretary of Defense's
22

23
24
25 ²⁷ As the court considers the defendants' Exemption 3 assertions, undersigned counsel
26 respectfully request the court to remember that an agency seeking to withhold materials under
27 Exemption 3 carries a burden to "show *specifically and clearly* that the requested materials fall into
28 the category" exempted by statute. *Hayden v. Nat'l Sec. Agency*, 608 F.2d 1381, 1390 (D.D.C.
1979) (*emphasis added*). Here, the defendants have not done so for either 10 U.S.C. § 130c or 10
U.S.C. § 130b.

1 willingness to seek the counsel of the State Department is admirable, the Secretary of State’s—or
2 her Department’s—involvement is of no matter in the central question of whether the defendants
3 have shown that they have followed 10 U.S.C. § 130c’s “particular criteria for withholding.” 5
4 U.S.C. § 552(b)(3).

5
6 Furthermore, even if the State Department were the proper action agency in the Defense
7 Department’s view, the referral of the plaintiffs’ FOIA request to the State Department does not
8 allow the Defense Department to escape its obligations to respond. The defendants cited *Stone v.*
9 *Defense Investigative Service*, 1992 WL 52560 (D.D.C. 1992), for the proposition that inter-agency
10 referrals “are commonplace and appropriate in FOIA litigation.” Ds’ Reply at 20. Plaintiffs take no
11 issue with this practice. However, more relevantly, defendants cannot escape *Stone*’s holding that,
12 in any case, the original defendant agency “has a continuing obligation to respond to plaintiff’s
13 FOIA request with regard to the referred documents” despite their referral. *Stone*, 1992 WL 52560,
14 at *1; see also *Matter of Wade*, 969 F.2d 241, 248-49 (7th Cir. 1992). Here, the defendants cannot
15 escape their obligation by simply claiming referral to another agency, which is not even
16 empowered to make use of the exempting statute.²⁸ Thus, the defendants’ Exemption 3 withholding
17 of materials via 10 U.S.C. § 130c is not valid; disclosure, or at minimum, *in camera* review is
18 appropriate.
19

20 **B. 10 U.S.C. § 130b Has Not Been Properly Invoked to Withhold Responsive Materials.**

21 In their Reply, defendants suggest that plaintiffs have not produced any legal support showing
22 that 10 U.S.C. § 130b’s grant of power is limited to the Secretary of Defense and is not also shared
23

24 ²⁸ As well, the defendants’ reliance on *Snyder v. CIA*, 230 F. Supp. 2d 17 (D.D.C. 2002) is
25 misplaced. The *Snyder* court excused a substantial delay in circumstances of “a complex request
26 that required three separate CIA Directorates to gather and ferret out relevant documents” and
27 where the “plaintiff received his records (albeit somewhat belatedly)” with a sufficient *Vaughn*
28 index. *Snyder*, 230 F. Supp. 2d at 25. Here, the instant request is a relatively simple one, the
defendants have the materials at hand, and the defendants are striving to permanently withhold
requested materials from the plaintiffs. *Snyder* is inapposite.

1 by military officers—such as General Ghormley. Ds’ Reply at 21. Defendants’ Justice Department
2 counsel understandably take this position, because, in their own *civilian* agency, the Attorney
3 General can delegate his statutory powers within the Justice Department. *See* 28 U.S.C. § 510.²⁹
4 However, the *civilian* head of the U.S. *military* establishment’s power to delegate his supervisory
5 authority to his or her *military* officers is far different. In contrast to the Attorney General, the
6 Secretary of Defense can “transfer” any “function, power or duty” to make the Department of
7 Defense “more effective, efficient and economical” unless that “function, power or duty” was
8 “vested [...] by law” in a particular “officer, official, or agency” of the Department of Defense. 10
9 U.S.C. § 125 (a),³⁰ *see also* 5 U.S.C. § 301; *compare* 28 U.S.C. § 510 (Attorney General’s
10 delegation powers). Here, 10 U.S.C. § 130b’s withholding power is specifically vested in the
11 civilian person of the Secretary of Defense, and, thus, cannot be delegated or exercised by military
12 officers such as General Ghormley.³¹ The defendants’ argument that limiting 10 U.S.C. § 130b’s
13 withholding power to the Secretary of Defense is “utterly impractical,” *see* Ds’ Reply at 21, is, in
14 effect, an argument against the civilian supervision of the U.S. military whenever such civilian
15 supervision is “impractical.” That position is clearly without merit. As such, the defendants’
16 Exemption 3 withholding of materials via 10 U.S.C. § 130b is not valid.
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22 ²⁹ 28 U.S.C. § 510 provides that “[t]he Attorney General may from time to time make such
23 provisions as he considers appropriate authorizing the performance by any other officer, employee,
24 or agency of the Department of Justice of any function of the Attorney General.”

24 ³⁰ Illuminating congressional intent for this limitation, 10 U.S.C. § 125 cross references 50
25 U.S.C. § 401, which sets forth a policy statement providing, *inter alia*, “for [the military services’]
26 unified direction under *civilian control* of the Secretary of Defense.” 50 U.S.C. § 401 (*emphasis*
27 *added*).

26 ³¹ Furthermore, while 10 U.S.C. § 113 empowers the Secretary of Defense to “exercise any
27 of his powers through, or with the aid of, such persons in, or organizations of, the Department of
28 Defense as he may designate,” this general grant of delegation power is limited if “specifically
prohibited by law.” 10 U.S.C. § 113(d). 10 U.S.C. § 125(a) is such a specific prohibition.

1
2 **VI. DEFENDANTS ARE IMPROPERLY WITHHOLDING RESPONSIVE**
3 **MATERIALS PURSUANT TO EXEMPTION 5.**

4 Defendants contend that Exemption 5 allows them to protect from disclosure factual
5 materials, recommendations, and agency counsel legal reviews redacted from the AR 15-6 Report
6 and associated annexes. Ds' Reply at 23. Defendants initially claimed to have only redacted 1)
7 agency counsel legal reviews, and 2) opinions and recommendations from the AR 15-6 Report
8 materials pursuant to Exemption 5. D's MSJ at 21. However, after reviewing the redacted report,
9 plaintiffs pointed out that defendants also redacted *factual* material regarding the local security
10 situation. Ps' MSJ at 34.

11 **A. Release of Withheld Factual Material Would Not Reveal Defendant**
12 **Agencies' Deliberative Process.**

13 "The key to the [deliberative process privilege] inquiry is whether revealing the information
14 exposes the deliberative process." *Assembly of State of California v. U.S. Dep't of Commerce*, 968
15 F.2d 916, 921 (9th Cir. 1992). Here, however, release of the factual information in the "Local
16 Security Situation" section of the AR 15-6 would not provide any further insight into the
17 deliberative process of defendant agencies than they have themselves already exposed through the
18 redacted version of the AR 15-6 Report produced to plaintiffs. For example, defendants did not
19 withhold the fact that the local security situation is a topic in the report, nor did they withhold other
20 facts from the section such as, "From July 2004 to late March 2005, there were 15,257 attacks
21 against Coalition Forces throughout Iraq." AR 15-6 Report, unredacted, at BS 13. Defendants
22 should not be permitted to arbitrarily redact some facts and not others without any explanation as to
23 how only the redacted facts might expose their purported deliberative process.

24 Further, to qualify as properly withheld pursuant to the deliberative process privilege under
25 Exemption 5, "a document must be both (1) 'predecisional;' and (2) 'deliberative.'" *Nat'l*
26 *Resources Defense Council v. Dep't of Defense*, 442 F.Supp.2d 857, 871 (C.D. Cal. 2006) (citing
27 *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988)); *Carter v. U.S.*
28 *Dep't of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002). Here, defendants never say if a decision
was made, do not describe the decision-making process, and fail to identify any decision maker.
Hence, they have not shown that the withheld document was predecisional. *See Mapother v. Dep't*

1 *of Justice*, 3 F.3d 1533, 1537, 1539 (D.C. Cir. 1993) (quoting *Petroleum Information Corp. v. U.S.*
2 *Dep't of Interior*, 976 F.2d 1429, 1437 (D.C. Cir. 1992)) (Report was predecisional where it was
3 given to the Attorney General before he made his decision, and “a ‘salient characteristic’ of
4 information eligible for protection under deliberative process privilege is its ‘association with a
5 significant *policy* decision”).

6 Even where a document is predecisional, it will only be exempted from disclosure by the
7 deliberative process privilege “if, and only if, its contents are ‘deliberative’ in character.”
8 *Mapother*, 3 F.3d at 1537. Defendants have not met the first requirement that the document be
9 predecisional. Nevertheless, even if the facts withheld are considered predecisional, they are not
10 deliberative. “The deliberative character of agency documents can often be determined through ‘the
11 simple test that factual material must be disclosed but advice and recommendations may be
12 withheld.’” *Mapother*, 3 F.3d at 1537 (citing *Wolf v. Dep't of Health and Human Services*, 839
13 F.2d 768, 774 (D.C. Cir. 1988)). Although factual material can be withheld in some instances, the
14 Ninth Circuit has noted that regarding Exemption 5, it was not Congress’ intent to create a
15 “wooden exemption permitting the withholding of factual material ... merely because it was placed
16 in a memorandum with matters of law, policy, or opinion.” *Nat'l Wildlife Fed'n*, 861 F.2d 1114,
17 1120 (9th Cir. 1988); *see also Assembly of State of California*, 968 F.2d at 921-22 (“The
18 fact/opinion distinction offers a quick, clear and predictable rule of decision for most cases”)
19 (citing *Wolf v. Dep't of Health and Human Services*, 839 F.2d 768, 774 (D.C. Cir. 1988)(en banc))
20 (internal citations omitted). “[T]he public has a vital interest in knowing the facts that are available
21 to the agency.” *Nat'l Resources Defense Counsel*, 442 F.Supp.2d at 877.

22 Moreover, defendants’ reliance on *Mapother*, 3 F.3d at 1539, and *Heggstad v. Dep't of*
23 *Justice*, 182 F.Supp.2d 1, 12 n.10 (D.D.C. 2000), is inapposite. In *Mapother*, the court held that
24 withholding factual material as part of the deliberative process privilege requires that a majority of
25 the withheld report be created through an agency employee having had to use his or her judgment
26 to sift through a large number of documents for the benefit of an official whose task it is to take
27 discretionary action. *Mapother*, 3 F.3d at 1539. Defendants here do not show that the factual
28 materials withheld are comprised of such summaries.

1 Similarly, in *Heggestad*, the court found that the factual material in that case could not be
2 segregated from the deliberative material because

3 (1) the factual material was intertwined with deliberative material; (2) most of the
4 factual material was otherwise exempt from disclosure pursuant to Fed.R.Crim.P.
5 6(e) and the work-product privilege; and (3) the facts contained within these
6 documents were selected by authors from a larger body of factual material and
disclosing these facts would thus reveal the author's deliberative process.

6 *Id.* at 12 n.10.

7 Here, the redacted factual material is not “intertwined” with the rest of the report as it is
8 separated in its own section; neither the work-product privilege nor Fed.R.Crim.P. 6(e) has been
9 invoked as to this material; and defendants have not offered evidence that the factual material has
10 been culled from a large body of material or that it would reveal the author’s deliberative process.
11 Nevertheless, it is clear from even the unredacted version of the report that the author’s intent is to
12 clear the soldiers of any wrongdoing, evinced by his inclusion of several pages, near the beginning
13 of the report, of an historical overview of attacks against Coalition Forces in Iraq, the
14 dangerousness of the location of the incident, and “Known Insurgent Tactics, Techniques, and
15 Procedures” such as “Improvised Explosive Devices (IEDs), Hand Grenades, Indirect Fire
16 (mortars, rockets, and unidentified indirect fire),” etc. AR 15-6 Report, unredacted, at BS 13-17.
17 Releasing the withheld factual material would in no way further expose what the available material
18 already shows to be the author’s deliberative process. As such, release of the factual information
19 withheld pursuant to Exemption 5 is appropriate.

20 **B. Defendants Must Disclose Responsive Materials That Do Not Constitute**
21 **Recommendations.**

22 Defendants also assert they have redacted “opinions and recommendations regarding fault
23 and potential disciplinary actions and changes to policies” pursuant to Exemption 5 and the
24 deliberative process privilege. Ghormley Decl. para. 13.d; Ds’ Reply at 24. The AR 15-6 Report
25 contains two “Recommendations” sections: the first after the discussion of “Traffic Control Points,
26 Blocking Positions, and Training,” and the second after discussion of “The Incident at BP
27 [Blocking Position] 541.” AR 15-6 Report, redacted, at BS 8, 9, 30; AR 15-6 Report, unredacted, at
28 23, 38. However, the second “Recommendations” section was not redacted pursuant to Exemption

1 5 or any other exemption, as it falls within the final 9 pages of the report, which defendants failed
2 to produce to plaintiffs.³²

3 Plaintiffs concede that agencies can properly withhold advisory opinions and
4 recommendations under Exemption 5 and the deliberative process privilege. *Nat'l Wildlife Fed'n v.*
5 *U.S. Forest Service*, 861 F.2d 1114 (9th Cir. 1988). However, there is information in the withheld
6 sections that is merely factual and does not amount to a recommendation. For example, the
7 following is redacted from the first "Recommendation" section: "As of this writing, MNF-I has
8 already embarked on a comprehensive analysis of Entry Control Points (ECPs), [Traffic Control
9 Points] TCPs, and [Blocking Positions] BPs." AR 15-6 Report, unredacted, at 37. Plaintiffs ask that
10 all information in the "Recommendations" sections which does not qualify as such, and is not
11 otherwise exempt, be ordered released.

12 **C. Defendants Must Disclose Responsive Materials That Do Not Constitute**
13 **Agency Counsel Legal Reviews.**

14 Plaintiffs also concede that agency counsel legal reviews can be protected under Exemption
15 5 and the attorney work-product doctrine or the attorney-client privilege, notwithstanding
16 defendants reliance on an unpublished case to support that proposition. Ds' Reply at 25. However,
17 to the extent that defendants have improperly withheld information pursuant to Exemption 5
18 plaintiffs request that the court order it disclosed.

19 **VII. DEFENDANTS ARE IMPROPERLY WITHHOLDING NAMES UNDER**
20 **EXEMPTION 6.**

21 Defendants contend that Exemption 6 allows them to withhold names and photos from
22 responsive materials. Defendants' MSJ at 18-19. In response to plaintiffs' Motion for Summary
23 Judgment, defendants argue that the presence of names – without other personal information
24 present – transform those documents into personnel, medical or similar files protected by
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26
27 ³² Defendants did not produce the final nine pages of the AR 15-6 report to plaintiffs in any
28 form, redacted or unredacted, and there is no mention in defendants' *Vaughn* Index of the
justification for withholding these pages.

1 Exemption 6. *See* 5 U.S.C. § 552(b)(6); Ds’ Reply, at 25-27. This argument does not withstand
2 scrutiny.³³

3 Defendants’ discussion of *Gordon v. FBI*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005), misconstrues
4 the issue.³⁴ Contrary to defendants’ assertions, *Gordon* is not premised on defendant Transportation
5 Security Administration being a non-law enforcement organization. *See* Ds’ Reply at 26. Instead,
6 the *Gordon* Court found that courts have been unwilling to hold that Congress intended to allow
7 Exemption 6 to cover *all* materials which merely contain a person’s name. *Gordon*, 388 F. Supp. at
8 1040 (collecting cases). As such, in contrast to the TSA’s argument in *Gordon* and the defendants’
9 same arguments here, Congress explicitly limited Exemption 6’s coverage to personnel, medical or
10 “similar files,” and *not* any file with a person’s name in it. 5 U.S.C. §552(b)(6); *Gordon*, 388 F.
11 Supp. at 1040. Thus, courts should only consider whether an Exemption 6 withholding is needed to
12 protect privacy interests, *see* 5 U.S.C.(b)(6), if the personal information at issue comprises more
13 than just a name. This court should follow *Gordon*’s holding to avoid rendering Congress’s
14 “‘personnel, medical or similar file’ condition [as] surplusage.” *Gordon*, 388 F. Supp. at 1040
15 (quoting 5 U.S.C. §552(b)(6)). No balancing of privacy is necessary.

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17
18 Defendants also argue that the *Gordon* court found “the names of law enforcement officials
19 with the FBI were justifiably withheld because ‘revealing these agents’ names could attract the
20 attention of terrorists’ and thus subject these officials to intimidation, harassment, or harm.” Ds’
21

22
23 ³³ The plain language of “clearly unwarranted” in the Exemption 6 provision “instructs the court to
24 tilt the balance in favor of disclosure.” *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971), *stay*
denied, 404 U.S. 1204 (1971).

25 ³⁴ *Gordon* is a FOIA case in which plaintiffs challenged the government’s Exemption 6
26 withholding of names of officials working with the Transportation Security Administration’s
27 terrorist ‘No-Fly’ watchlist. *Gordon v. FBI*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005). The *Gordon*
28 court held that the presence of an official’s name alone—absent other information, *e.g.*, home
address—does not authorize an Exemption 6 withholding of the document, or the name itself. *Id.* at
1040.

1 Reply at 26 (quoting *Gordon*, 388 F. Supp. at 1044-45). The defendants fail to inform this court
2 that the *Gordon* court so held, *not* under Exemption 6, but under Exemption 7(c) after spilling
3 considerable ink discussing how “Exemption 7(c) is limited to ‘law enforcement materials,’ [and]
4 is broader than exemption 6” for several discussed reasons. *Gordon*, 388 F. Supp. 2d at 1042. At
5 issue here is Exemption 6, not Exemption 7(c). Thus, this argument does not help the defense’s
6 Exemption 6 claim.
7

8 In addition, defendants heavily rely on three unpublished opinions in which FOIA requests
9 were denied – *Falzone v. Dep’t of the Navy*, 1988 WL 128474 (D.D.C. 1988); *Hudson v. Dep’t of*
10 *the Army*, 1987 WL 46755 (D.D.C. 1987); *Jernigan v. Dep’t of the Air Force*, 1998 WL 658662
11 (9th Cir. 1998). Should the court consider these opinions notwithstanding court rules disapproving
12 citation to unpublished decisions,³⁵ it should take into account the following: First, in both *Falzone*
13 and *Hudson*, the FOIA plaintiff clearly requested *both* names and addresses. *See Falzone*, 1988 WL
14 128474, at *1; and *Hudson v. Dep’t of Army*, 1987 WL 46755 (D.D.C. 1987), at *1. As such, both
15 cases are clearly in line with the *Gordon* court’s above analysis and do not offer support to the
16 defense’s Exemption 6 claim. The defendants’ suppositions of how those courts may have
17 responded if the plaintiffs had only requested names are unhelpful and contrary to the published
18 holding of *Gordon*. *See* Ds’ Reply at 27 n18.
19

20 Second, in *Jernigan*, the government properly redacted “names and identifying information of
21 Air Force personnel” from 16 pages of responsive materials. *Jernigan*, 1998 WL 658662, at *1.
22 The court’s unpublished opinion was brief and summary. *Id.* It is unclear what information beyond
23

24
25 ³⁵ *E.g.*, Ninth Circuit Rule 36-3(b). Also, defendants argue that recently enacted Federal Rule of
26 Appellate Procedure 32.1 prohibits courts from preventing citation to unpublished federal judicial
27 opinions on a prospective basis. *See* Ds’ Reply at 27 n17. However, this rule only applies to
28 decisions handed down after January 1 of 2007. *See* Fed. R. App. P. 32.1(a)(ii). None of the cited
unpublished cases fit that timeframe.

1 names was present in the withheld *Jernigan* materials. *Id.* But, considering that information beyond
2 mere names was present, this court should regard *Jernigan* as conforming to the cited unpublished
3 and published authorities. Thus, *Jernigan* is unhelpful to the defense.

4 In sum, courts only apply Exemption 6 privacy interest balancing if the requested FOIA
5 materials are personnel, medical or similar files. *See generally, e.g., Wash. Post Co. v. U.S. Dep't of*
6 *Health & Human Svc.*, 223 U.S. App. D.C. 139 (D.C. Cir. 1982); 5 U.S.C. 552(b)(6). The mere
7 presence of names—absent more personal information—does not create such a “file.” *Gordon*, 388
8 F. Supp. at 1040. Thus, the court should deny the defense’s Exemption 6 claims without further
9 analysis, because Exemption 6’s coverage simply does not extend to the materials at issue.³⁶
10

11
12 **CONCLUSION**

13 For the foregoing reasons and based on the foregoing authorities, this Court should deny
14 summary judgment to defendants and grant summary judgment for plaintiffs.

15 DATED: February 2, 2007

16 Respectfully submitted,

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18
19
20 BY: /s/ Colleen Flynn
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24 _____
25 ³⁶ As well, defendants acknowledge – as indeed they must – that they inappropriately redacted non-
26 personal information from responsive documents under Exemption 6. *See* Ds’ Reply at 29. As
27 such, the incorrectly redacted information should be disclosed in the government’s FOIA
28 production. And furthermore, plaintiffs respectfully request the court to consider this error when
considering whether or not to conduct a de novo *in camera* review of the responsive materials. *See*
generally Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978).