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10
11 **UNITED STATES DISTRICT COURT FOR THE**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

14
15 MARGUERITE HIKEN and
16 THE MILITARY LAW TASK FORCE,

17 Plaintiffs,

18 v.

19 DEPARTMENT OF DEFENSE
20 and UNITED STATES
CENTRAL COMMAND,

21
22 Defendants.

Case No. CV-06-2812 (MHP)

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

HEARING ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT

Date: February 12, 2007

Time: 2:00 p.m.

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1 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

2 **I. INTRODUCTION**

3 Italian journalist Giuliana Sgrena was one of the only unembedded, independent journalists
4 covering the aftermath of the deadly, American-led attack on Fallujah, Iraq in April 2004.¹ She
5 was kidnapped on February 4, 2005, while interviewing refugees from the ill-fated city.² A month
6 later, Italian intelligence agent Nicola Calipari negotiated her release, as he had for five other
7 Italians kidnapped in Iraq.³ As Mr. Calipari and Ms. Sgrena headed to the Baghdad airport, the
8 Toyota Corolla in which they were riding came under a hail of at least eleven bullets fired by U.S.
9 soldiers, killing Mr. Calipari; leaving Ms. Sgrena with a bullet in her shoulder; and injuring driver
10 Andrea Carpani.⁴ The U.S. and Italian governments disagreed on the facts pertaining to incident,
11 but the Italians noted that the “immediate removal of the vehicle involved, and the destruction of
12 the US soldiers’ duty logs, made ‘objective conclusions’ impossible.”⁵

13 The assault on the car carrying Ms. Sgrena and the U.S.-led attack on Fallujah have
14 generated intense controversy and criticism of U.S. Foreign policy. Indeed, U.S. prestige in the
15 world is at a 50- to 75-year low.⁶ It was in this context that plaintiffs submitted their request under
16 the Freedom of Information Act (“FOIA”) to the U.S. Department of Defense (“DOD”). Defense
17

18 ¹ Giuliana Sgrena, *Napalm Raid on Fallujah?*, Il Manifesto, November 23, 2004,
19 <http://www.ilmanifesto.it/pag/sgrena/en/420dd721e0ff0.html>.

20 ² *UNESCO Calls for the Release of Italian Journalist Giuliana Sgrena*, United Nations
21 Educational, Scientific and Cultural Organization, September 2, 2005,
22 [http://portal.unesco.org/ci/en/ev.php-
URL_ID=18225&URL_DO=DO_TOPIC&URL_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=18225&URL_DO=DO_TOPIC&URL_SECTION=201.html).

23 ³ *Italian Journalist: U.S. Lied*, April 13, 2005,
24 <http://www.cbsnews.com/stories/2005/04/12/60II/main687555.shtml>;

25 ⁴ Peter Escobar, *They shoot journalists, don't they*, Asia Times Online, April 28, 2005,
26 http://www.atimes.com/atimes/Middle_East/GD28Ak01.html; *Iraq shooting: Differing accounts*,
27 BBC News, May 3, 2005, <http://news.bbc.co.uk/2/hi/europe/4325253.stm>; Fritzroy Sterling, *Still
28 Seeking Answers in U.S. Checkpoint Shooting*, Common Dreams News Center, June 24, 2006 at
<http://www.commondreams.org/headlines06/0624-06.htm>.

⁵ *Iraq shooting: Differing accounts*, BBC News, May 3, 2005,
<http://news.bbc.co.uk/2/hi/europe/4325253.stm>

⁶ Bob Woodward, *State of Denial*, Newsweek, Oct. 9, 2006,
<http://www.msnbc.msn.com/id/15075326/site/newsweek>.

1 Exhibit (“DE”) 1.⁷ Plaintiffs requested the documents to clarify whether the U.S. military was
2 acting lawfully during the siege on Falluja and in the attack on Ms. Sgrena. After repeated delays,
3 the government denied plaintiffs’ request. Then, more than half a year after plaintiffs commenced
4 this action, it provided several heavily redacted documents. DE 3; Plaintiff’s Exhibit (“PE”) G.

5 This case proceeds at a time when the Department of Justice promises to “support any
6 plausible refusal” of a FOIA request, and overclassification of documents is so rampant that as few
7 as 10 percent of classifications are legitimate. *See infra*, part IV. B. As is detailed in this brief, the
8 government justifies its refusal to make available the requested documents by asserting FOIA
9 exemptions it cannot legally justify. Further, the government so much as admits to overclassifying
10 responsive documents here at issue. For the most part, the government is unable to meet its burden
11 of demonstrating why the documents should not be released and has acted in bad faith by providing
12 plaintiffs with a heavily redacted version of a document that was declassified and made widely
13 available. Moreover, the government exaggerates the nature of plaintiffs’ request – e.g. claiming
14 that plaintiffs seek “sensitive information concerning vulnerabilities or capabilities of systems,
15 installations, infrastructures, projects, plans, or protection services relating to the national security”
16 – to create the impression that disclosure of requested materials threatens national security. See
17 Declaration of Major General Timothy F. Ghormley, para. 11 (“Ghormley Decl.”). Because the
18 government has failed to adequately describe responsive materials and has improperly withheld
19 information under Exemptions 1, 2, 3, 5 and 6 of the FOIA, its motion for summary judgment
20 should be denied.

21 22 **II. FACTUAL AND PROCEDURAL BACKGROUND**

23 **A. The Plaintiffs Seek to Prepare an Article on the Iraq War for Publication**

24 Plaintiff Military Law Task Force (“MLTF”), a subcommittee of the National Lawyers
25 Guild, is a nonprofit public interest organization that works on military law issues, including
26

27 ⁷ All defense exhibits were submitted as exhibits to defendants’ Motion for Summary
28 Judgment.

1 assisting soldiers, training and mentoring counselors who assist soldiers, and tracking changes in
2 military law and policy. The MLTF also publishes a newsletter, “On Watch,” which includes
3 articles and training materials for attorneys and non-attorney advocates, policy discussions, and
4 analysis of changes in military law, regulations and practice. The MLTF seeks to publish an article
5 on the war in Iraq using documents it requested from defendant agencies.

6 Plaintiff Marguerite Hiken serves as co-chair of the MLTF. Ms. Hiken seeks to prepare an
7 article for publication in “On Watch” concerning U.S. military action in Iraq based on the
8 requested documents. Ms. Hiken’s article will address allegations of potential human rights abuses
9 committed during the siege of Fallujah, including the use of chemical weapons, i.e., white
10 phosphorous, and the wide-scale and indiscriminate killing of the citizens of Fallujah, resulting in a
11 massive death toll. Additionally, the article will address the attack on the vehicle used in the rescue
12 of journalist Guiliana Sgrena and whether she was a target of the U.S. military due to the contents
13 of her reporting.⁸

14 15 **B. Giuliana Sgrena Was Shot by U.S. Soldiers Shortly After Her Release From** 16 **Kidnappers**

17 On March 4, 2005, soldiers from the Multinational Corps-Iraq (“MNC-I”) opened fire on
18 the car carrying Italian journalist Giuliana Sgrena as she was being transported to the Baghdad
19 airport shortly after being released from her kidnappers after exactly one month of sequestration.⁹
20 The soldiers’ gunfire killed Nicola Calipari, an Italian agent riding in the car who died protecting
21

22
23
24 ⁸ Eighty-six journalists and media assistants have been killed during the occupation, with
25 some allegedly targeted by US military personnel. *Slaughter in Iraq*, REPORTERS WITHOUT
26 BORDERS 7, March 2006, http://www.rsf.org/IMG/pdf/Survey_RSFIraq_06.pdf.

27 ⁹ Ms. Sgrena was kidnapped on February 4, 2005 in Baghdad, Iraq by armed men while
28 working on a story about refugees from Fallujah. *UNESCO Calls for the Release of Italian
Journalist Giuliana Sgrena*, United Nations Educational, Scientific and Cultural Organization,
September 2, 2005, [http://portal.unesco.org/ci/en/ev.php-
URL_ID=18225&URL_DO=DO_TOPIC&URL_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=18225&URL_DO=DO_TOPIC&URL_SECTION=201.html).

1 Ms. Sgrena from U.S. gunfire,¹⁰ and injured Ms. Sgrena, who took a bullet to the shoulder, and
2 Andrea Carpani, Ms. Sgrena's driver.¹¹ This incident has given rise to allegations of wrongdoing
3 by the soldiers who fired on the car and by the U.S. military¹² and strained relations between the
4 United States and Italy.¹³ It has also prompted critique of the Rules of Engagement ("ROE") under
5 which the soldiers were acting and inquiry into how the military distinguishes between civilians
6 and combatants on the roads in Iraq.¹⁴ The US Military cleared those soldiers involved in the
7 shooting of any wrongdoing, stating that they were acting within the Rules of Engagement.¹⁵

9 C. Fallujah: City Destroyed and Civilians Targeted by U.S. Military

10 Ms. Sgrena was one of the only unembedded, independent Western journalists in Fallujah
11 during the U.S. military-led siege on that city in April 2004.¹⁶ The siege was orchestrated in

14 ¹⁰ Ms. Sgrena told the BBC, "Nicola Calipari threw himself on me to protect me and
15 immediately, I repeat, immediately I heard his last breath as he was dying on me." *Iraq*
16 *Shooting; Differing Accounts*, BBC News, May 3, 2005,
17 <http://news.bbc.co.uk/2/hi/europe/4325253.stm>; "The death of Nicola Calipari carried the weight of
18 a national tragedy in Italy. But most Italians had never heard of him before he was killed. They
19 didn't know he was a secret agent who, over the months, had rescued a total of five kidnapped
20 Italians in Iraq." *Italian Journalist: U.S. Lied*, CBS News, April 13, 2005,
21 <http://www.cbsnews.com/stories/2005/04/12/60II/main687555.shtml>.

19 ¹¹ *Italian Journalist: U.S. Lied*, CBS News, April 13, 2005,
20 <http://www.cbsnews.com/stories/2005/04/12/60II/main687555.shtml>.

21 ¹² "Italian magistrates have accused Mario Lozano of the US Army's 69th Infantry Regiment
22 of 'voluntary homicide' for shooting agent Nicola Calipari at a checkpoint in March 2005." *Italian*
23 *Court Adjourns U.S. Soldier Shooting Case to February*, Gulf Times, November 30, 2006,
24 [http://www.gulf-](http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=120054&version=1&template_id=43&parent_id=19)

24 ¹³ *Hearing Delayed for Soldier in Italy Shooting Case*, Army Times, November 29, 2006,
25 <http://www.armytimes.com/story.php?f=1-292925-2389093.php>.

25 ¹⁴ Jeffrey Smith & Ann Scott Tyson, *Shootings by U.S. at Iraq Checkpoint Questioned*,
26 Washington Post, March 7, 2005, at A01.

26 ¹⁵ *Iraq Shooting; Differing Accounts*, BBC News, May 3, 2005,
27 <http://news.bbc.co.uk/2/hi/europe/4325253.stm>.

27 ¹⁶ Giuliana Sgrena, *Napalm Raid on Fallujah?*, Il Manifesto, November 23, 2004,
28 <http://www.ilmanifesto.it/pag/sgrena/en/420dd721e0ff0.html>.

1 retaliation against the people of Fallujah for the killing of four American paramilitary contractors.¹⁷
2 The four brutally slain men were not U.S. soldiers, but “elite commandos,” employed by
3 Blackwater USA, a private security firm, to guard employees of U.S. corporations.¹⁸ U.S. military
4 personnel taking part in the siege were criticized for targeting and killing civilians; blocking access
5 to hospitals; intentionally firing on ambulances;¹⁹ and using chemical weapons against the civilian
6 population, including white phosphorus.²⁰

7 The number of civilian Iraqi deaths resulting from the siege is disputed; however, on April
8 11, 2004, *The New Standard* reported that local medical authorities said over 600 bodies had been
9 counted at emergency medical facilities; “a significant number of victims [were] buried without
10 ever receiving care at a clinic or hospital... [; and] two entire football fields [were] converted into
11 cemeteries.”²¹ In light of the high number of Iraqi civilians who were killed during the siege on
12 Fallujah, the Sgrena incident generated additional questions about the ROE under which the
13 soldiers were acting in Fallujah.²² The high civilian death toll in Fallujah prompted further
14 questions about the use of chemical weapons against civilians and how the military distinguished
15 between civilians and combatants during the siege.²³

16 Release of the ROE is important so that the American people may better understand its
17 military’s legal justification for the destruction of a large city and the slaughter of its inhabitants.²⁴

19 ¹⁷ Dana Priest & Mary Pat Flaherty, *Slain Contractors Were in Iraq Working Security*
20 *Detail*, Washington Post, April 2, 2004, at A16.

21 ¹⁸ *Id.*

22 ¹⁹ *Picture Emerges of Fallujah Siege*, BBC News, April 23, 2004,
http://news.bbc.co.uk/2/hi/middle_east/3653223.stm.

23 ²⁰ *US Used White Phosphorus in Iraq*, BBC News, November 16, 2005,
http://news.bbc.co.uk/2/hi/middle_east/4440664.stm.

24 ²¹ Dahr Jamal, *No End in Sight as Fallujah Death Toll Approaches 700*, *The New Standard*,
April 11, 2004.

25 ²² *Id.*; Giuliana Sgrena, *Napalm Raid on Fallujah?*, *Il Manifesto*, November 23, 2004,
<http://www.ilmanifesto.it/pag/sgrena/en/420dd721e0ff0.html> (Villagers near Fallujah “helped bury
73 bodies of women and children completely charred, all in the same grave”).

26 ²³ *US Used White Phosphorus in Iraq*, BBC News, November 16, 2005,
http://news.bbc.co.uk/2/hi/middle_east/4440664.stm.

27 ²⁴ Rory McCarthy, *Film reveals true destruction to ghost city Fallujah*, *Guardian*
28 *Unlimited*, January 11, 2005, <http://www.guardian.co.uk/Iraq/Story/0,2763,1387502,00.html>.

1 The ROE also should be released to clear up the ambiguities surrounding the widely differing
2 accounts of the ROE. For example, according to a report published on GlobalSecurity.org, the ROE
3 the soldiers were given for the siege were “draconian”; the commanders in Fallujah did not
4 authorize the use of non-lethal munitions.²⁵ Instead, the ROE given to the soldiers focused on
5 protecting U.S. military forces with shoot-to-kill orders.²⁶ On the other hand, some have alleged
6 that the ROE tied the soldiers’ hands, placing them in greater peril. For example, “[a] Marine
7 officer caught up in the bloody fight to clear Fallujah was [harsh] in his assessment: ‘Blood,’ he
8 observed, ‘is on someone’s hands.’”²⁷

9 10 **D. Administrative and Procedural History**

11 In response to the military’s actions in the Sgrena incident and in Fallujah, on March 17,
12 2005, the Military Law Task Force of the National Lawyers Guild and Marguerite Hiken submitted
13 a Freedom of Information Act (“FOIA”) request to the Department of Defense requesting the ROE
14 and other documents for the soldiers involved in the shooting at Sgrena’s car and the soldiers
15 involved in the siege of Fallujah. DE 1. On August 15, 2005, U.S. Central Command
16 (“CENTCOM”) denied the request, DE 3, and on September 26, 2006, the plaintiffs submitted an
17 administrative appeal to the Department of Defense (“DOD”) as instructed by CENTCOM. DE 4.
18 In their Motion for Summary Judgment, defendants note that plaintiffs filed their complaint *before*
19 their administrative appeal had concluded. Defendant’s Motion for Summary Judgment (“MSJ”), at
20 5. In fact, plaintiffs waited seven months to bring this action: due to seven months of delays,
21 punctuated by DOD claims that plaintiffs’ appeal would be placed on the “front burner” and that it
22 would be “simple” to resolve. PE A. More than one year after plaintiffs submitted their appeal and
23 five and a half months after plaintiffs filed their complaint, the DOD denied plaintiffs’

24
25 ²⁵ *Fallujah*, GlobalSecurity.org, October 4, 2006,
<http://www.globalsecurity.org/military/world/iraq/fallujah.htm>.

26 ²⁶ *Id.*

27 ²⁷ Tom Miller, *Veterans’ Day Salute to Heroes*, Military.com, November 7, 2006,
<http://www.military.com/features/0,15240,118532,00.html> (quoting Patrick K. O’Donnell, *We*
28 *Were One, Shoulder to Shoulder with the Marines Who Took Fallujah*, DaCappo, 2006).

1 administrative appeal by letter dated October 6, 2006. DE 6. In line with their clients' inability to
2 meet deadlines, defendants' counsel has caused plaintiffs to withstand repeated delays in litigation.
3 In order to accommodate agency counsel, plaintiffs agreed to postpone the case management
4 conference from July 31, 2006 to September 13, 2006, the next date the Court had available.²⁸
5 Letter from Edward H. White Confirming Postponement of and Participation by Telephone in Case
6 Management Conference. Counsel subsequently negotiated a briefing schedule with dates arranged
7 to accommodate defendants who represented they needed additional time to finish processing the
8 requested documents. Joint Stipulation and Motion Regarding Submission of Cross-Motions for
9 Summary Judgment. The agreed upon schedule provided defendants with two months to prepare
10 their motion for summary judgment and accompanying documents. However, on October 17, 2006,
11 three days before their motion was due, defendants filed a request for a two-week extension to file
12 their motion for summary judgment. Motion for Extension of Time to File Motion for Summary
13 Judgment.

14 Regarding defendant agencies' response, on November 1, 2006, CENTCOM sent plaintiffs,
15 as a supplemental response, a heavily redacted Army Regulation 15-6 investigative report ("AR 15-
16 6 Report" or "the report") with associated Annexes A through M.²⁹ PE B, G, I-T. The report and
17 annexes concern the U.S. military's investigation into the attack by U.S. military personnel on the
18 car carrying Ms. Sgrena. The letter accompanying the report and annexes informed the plaintiffs
19 that defendants continue to withhold all other responsive materials. PE B. By letter dated
20 November 7, 2006, CENTCOM sent plaintiffs supplemental responsive documents from the
21 annexes to the AR15-6 Report, which it had failed earlier to disclose.³⁰ PE C, D.

23
24 ²⁸ In light of the parties' agreement to a briefing schedule, the court vacated the case
management conference. Clerk's Notice: Case Management Conference of 9/13/2006 Vacated.

25 ²⁹ CENTCOM failed to produce Annex K. Declaration of Major General Timothy F.
Ghormley, USMC ("Ghormley Decl."), para. 12 n.1.

26 ³⁰ Additionally, the letter informed plaintiffs that CENTCOM had located another eight
27 pages of documents that "fall under the purview of the Department of State (DOS)," and that those
28 pages were forwarded to DOS "for a direct response" to plaintiffs. So far, DOS has not contacted
plaintiffs regarding the eight pages of documents.

1 **E. Information at Issue in This Dispute**

2 In sum, defendants have located 1,026 responsive document pages. Vaughn Index, DE 2.
3 The government claims that sixty-two (62) of these pages, which are withheld in their entirety,
4 pertain to the Rules of Engagement. Ghormley Decl., paras. 3, 6, 7. A heavily redacted Army
5 Regulation 15-6 investigation report and accompanying annexes make up the remaining nine
6 hundred and sixty-four responsive document pages.³¹ An unredacted version of the AR 15-6
7 Report is available online from multiple sources.³² PE H. Because the report is available in full,
8 there is no reason for plaintiffs to have received a redacted version from the government. Even
9 though the report is available from unofficial sources, it is responsive to plaintiffs' request, and
10 therefore the government should disclose it, unredacted, to plaintiffs. The accompanying annexes,
11 on the other hand, are not available from non-governmental sources. To the extent that the
12 materials available in the report are reflected in the annexes, they should be disclosed. All other
13 nonexempt responsive materials in the annexes should also be disclosed.

14
15 **III. STATUTORY FRAMEWORK**

16 The Freedom of Information Act, 5 U.S.C. section 552 ("FOIA" or "the Act"), created a
17 right of access to federal government agency records. The Act "mandates a policy of broad
18 disclosure of government documents." *Church of Scientology v. Department of the Army*, 611 F.2
19 738, 741 (9th Cir. 1980). "The statute was designed to pierce the veil of administrative secrecy."
20 *U.S. Dept. of State v. Ray*, 502 U.S. 164, 173 (1991) (internal quotation marks omitted).
21 Accordingly, "the strong presumption in favor of disclosure places the burden on the agency to
22 justify the withholding of any requested documents" whether the agency seeks to withhold an

23
24

25 ³¹ Approximately 121 pages of Annexes C, D, G, H, I, & L produced by defendants are
26 illegible. However, on November 28, 2006, agency counsel agreed to have his clients Fed Ex
27 plaintiffs legible copies within a few days.

28 ³² *E.g.* http://www.globalsecurity.org/military/library/report/2005/15-6_calipari-sgrena.htm;
<http://www.css-auth.com/Unclassified.html>;
<http://download.repubblica.it/pdf/rapportousacalipari.pdf>;
<http://www.informationclearinghouse.info/article8713.htm>.

1 entire document or merely redact information from a document. *Id.*; 5 U.S.C. § 552(a)(4)(B).

2 On summary judgment, the government bears the burden of proving that all withheld
3 materials are exempt from FOIA's disclosure requirements. 5 U.S.C. § 552(a)(4)(B); *Bay Area*
4 *Lawyers Alliance for Nuclear Arms Control v. Dep't of State*, 818 F.Supp. 1291, 1295 (N.D. Cal.
5 1992). Only if the requested materials fall into one of nine statutory exemptions in section 552(b)
6 may an agency withhold the materials. See *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995); *Church*
7 *of Scientology*, 611 F.2d at 742. "[A]gency records which do not fall within one of the exemptions
8 are 'improperly' withheld." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989). FOIA
9 exemptions, moreover, "must be narrowly construed." *Maricopa Audubon Soc. V. U.S. Forest*
10 *Service*, 108 F.3d 1082, 1085 (9th Cir. 1997) (citing *Dep't of the Air Force v. Rose*, 425 U.S. 352,
11 361 (1976)). Because Congress "sought to insulate its product from judicial tampering and to
12 preserve the emphasis on disclosure," FOIA exemptions are "explicitly exclusive," meaning that
13 public availability of records "is not limited except as specifically stated." *Id.* (internal quotation
14 marks omitted).

15 16 **A. Defendants Are Not Entitled to Summary Judgment**

17 This Court has jurisdiction to enjoin the government from withholding the documents
18 sought by plaintiffs. 5 U.S.C. 552(a)(4)(B). Because the government has shown bad faith and
19 proffered insufficient evidence to justify its nondisclosure, it has not met its burden for summary
20 judgment purposes. Therefore, the Court should deny the government's motion for summary
21 judgment, and instead grant plaintiffs' motion. In the alternative, the Court should conduct an *in*
22 *camera* review of the documents to evaluate whether they are being improperly withheld and
23 whether any non-exempt material can be segregated from exempt material. *Ctr. For Auto Safety v.*
24 *EPA*, 731 F.2d 16, 21 (D.C. Cir. 1992). Any improperly withheld materials should be ordered
25 released. 5 U.S.C. 552(a)(4)(B).

26 An agency is able satisfy its burden of proving that information is properly withheld
27 pursuant to a claimed exemption by submitting detailed affidavits. *Minier v. C.I.A.*, 88 F.3d 796,
28 800 (9th Cir.1996). If the affidavits are submitted in good faith, the Court should accord them

1 substantial weight. *Id.* at 800. The government in this case has not provided detailed justifications
2 for withholding and has shown bad faith by providing plaintiffs with a heavily redacted version of a
3 document that is easily accessible in its entirety. *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir.
4 1984). Therefore, the Court should not accord substantial weight to its declaration.

5 To properly withhold from disclosure material responsive to a FOIA request, the
6 government must not only adequately describe all withheld material, *Schiller v. NLRB*, 964 F.2d
7 1205, 1209 (D.C. Cir. 1992), it must also produce a “relatively detailed justification, specifically
8 identifying the reasons why a particular exemption is relevant and correlating those claims with the
9 particular part of a withheld document to which they apply.” *Bay Area Lawyers Alliance for*
10 *Nuclear Arms Control v. Dep’t of State*, 818 F.Supp. 1291, 1295 (N.D. Cal. 1992). The government
11 has not met its burden to justify withholding the responsive documents under the FOIA. The
12 government is has refused to produce sixty-two pages of ROE materials; however, its declaration
13 and *Vaughn* index give little idea of what that material consists of. The government does little more
14 than provide a definition of ROE and try to intimidate the Court by repeatedly claiming that
15 disclosure would imperil U.S. soldiers in Iraq. Ghormley decl., para. 8, 9 and 10.

16 Because the government’s declaration and *Vaughn* index are inadequate to support a grant
17 of summary judgment, this Court may review the withheld documents *in camera*, require the
18 government to supplement its insufficient affidavit, and order any other appropriate disclosure and
19 discovery. See *Powell v. U.S. Dep’t of Justice*, 584 F.Supp. 1508 (N.D. Cal. 1984). Congress
20 granted courts *de novo* review of agency denials of records requests “in order that the ultimate
21 decision as to the propriety of the agency’s action is made by the court” and to prevent review from
22 becoming “meaningless judicial sanctioning of agency discretion.” Meredith Fuchs, *Judging*
23 *Secrets: The Role Court Should Play in Preventing Unnecessary Secrecy*, 58 Administrative Law
24 review 131, 159 (2006) (quoting S. Rep. No. 89-813, at 8 (1965)) (internal quotation marks
25 omitted).

26 The FOIA requires that agencies disclose all non-exempt information responsive to a
27 request; this requirement applies to all documents and all exemptions. *Ctr. For Auto Safety v. EPA*,
28 731 F.2d 16, 21 (D.C. Cir. 1992). Therefore, agencies must review responsive documents to see if

1 any portions of exempt records may be segregated and disclosed. *Id.* The government must then
2 address “why the remaining information is not segregable.” *Bay Area Lawyers Alliance for Nuclear*
3 *Arms Control*, 818 F.Supp. 1291, 1296 (N.D. Cal. 1992). Here, the government’s declarant makes
4 only a conclusory reference to segregation, stating, “I have determined that there is no
5 meaningful/reasonably segregable non-exempt information within these documents. The only non-
6 exempt information that could be segregated would consist of lists of references or heading titles
7 such as ‘General Guidance’ or ‘Definitions’ that, if released, would be of no informational value.”
8 Ghormley Decl., para. 7. Agencies must provide the court sufficient information with which to
9 make “specific factual findings on the issue of segregability to establish that the required *de novo*
10 review of the agency’s withholding decision has in fact taken place.” *Bay Area Lawyers Alliance*
11 *for Nuclear Arms Control*, 818 F.Supp. at 1296 (citing *Wiener v. FBI*, 943 F.2d 972, 988 (9th Cir.
12 1991)). The government has not adequately identified what information it has refused to disclose
13 nor has it provided sufficient language to determine whether it has adequately segregated properly
14 exempt information from material that should be disclosed to plaintiffs. Therefore, the government
15 has not met its burden and its motion for summary judgment should be denied.

16 17 **B. The Government’s Exemption 1 Claims Under Executive Order 12958 Fail**

18 Exemption 1 of the FOIA allows a governmental agency to deny public access to
19 documents that are “specifically authorized under criteria established by an Executive order to be
20 kept secret in the interest of national defense or foreign policy and . . . are in fact properly
21 classified” pursuant to such an order. 5 U.S.C. § 552(b)(1). “That is, to justify redactions or
22 withholdings for national security reasons, an agency must establish that it has both complied with
23 an appropriate Executive Order and properly classified materials pursuant to that order.” *Coldiron*
24 *v. U.S. Dep’t of Justice*, 310 F.Supp.2d 44, 49 (D.D.C. 2004). The agency “bears the ultimate
25 burden of proving that a particular document falls within” a FOIA exemption. *Sakamoto v. U.S.*
26 *Environmental Prot. Agency*, 443 F.Supp.2d 1182, 1188 (N.D. Cal. 2006). Such exemptions “are to
27 be narrowly construed.” *Id.* at 1200. Further, courts require that agencies “demonstrate a logical
28 connection between the documents at issue and the general standards that govern the national

1 security exemption.” *Coldiorn*, 310 F.Supp.2d at 53. (internal quotation marks omitted). The
2 agency may satisfy its burden by submitting affidavits that contain “reasonably detailed
3 descriptions of the documents,” but it “may not rely upon conclusory and generalized allegations of
4 exemptions.” *Sakamoto*, 443 F.Supp.2d at 1188. (internal quotation marks omitted).

5 The Supreme Court has emphasized that FOIA exemptions “do not obscure the basic policy
6 that disclosure, not secrecy, is the dominant objective of the Act.” *Department of the Air Force v.*
7 *Rose*, 425 U.S. 352, 361 (1976). “As the Supreme Court has repeatedly reminded us, in enacting
8 FOIA, ‘Congress sought to open agency action to the light of public scrutiny.’” *Consumer*
9 *Federation of America v. Department of Agriculture*, 455 F.3d 283, 287 (D.D.C. 2006). The
10 Supreme Court’s reminder is important because of the executive branch’s “tendency to keep too
11 many secrets” and because “information about military action [such as that at issue here] ranks
12 high among the categories of information that citizens of a democracy arguably have a strong need
13 to know.” Fuchs, *supra*, at 143, 147, 156. The Court’s reminder is important now because “[a]ll the
14 available data suggest[] that secrecy is on the rise.” *Id.* at 176. This secrecy “comes at a price,”
15 including “undermining the legitimacy of government actions, reducing accountability . . . and
16 breeding paranoia.” *Id.* at 136-37 (footnotes, internal quotation marks omitted).

17 The need for public scrutiny is especially acute under the current Bush Administration,
18 which is so averse to disclosing public documents that the policy of its Department of Justice is to
19 “support any plausible refusal of a [FOIA] request.” Chris Ford, *Fear of a Blackened Planet:*
20 *Pressured by the War on Terror, Courts Ignore the Erosion of the Attorney-Client Privilege and*
21 *Effective Assistance of Counsel in 28 C.F.R. § 501.3(d) Cases*, 12 Wash. & Lee J. C.R. & Soc. Just.
22 51, 75 (2006). Consonant with this policy is the government’s practice of aggressive document
23 classification, which has seen a sharp rise under the current administration. *E.g.* Ford, *supra* at 75;
24 Fuchs, *supra* at 133-34, 139, 176. For example, document classification jumped 40 percent
25 between 2001 and 2003 and had doubled by 2004 to an all-time high of 15.6 million classification
26 actions that year. Ford, *supra*, at 75; Fuchs, *supra* at 133. Even Donald Rumsfeld, who was
27 secretary of defense when the DOD and CENTCOM refused to divulge the documents here at
28 issue, admitted that “too much material is classified across the federal government as a general

1 rule.” Fuchs, *supra* at 133. (internal quotation marks omitted). Rumsfeld’s deputy undersecretary of
2 defense for counterintelligence and security, Carol A. Haave, conceded that *half* of the
3 classification decisions are “unnecessary over-classifications.” *Id.* Tom Blanton, director of the
4 National Security Archive at George Washington University puts the proportion of wrongly
5 classified documents higher: “We have it on good authority that from 50 [percent] to 90 [percent]
6 of our government’s secret documents should not actually be secret.” Tom Blanton, *The lie behind*
7 *the secrets*, Los Angeles Times, May 21, 2006, at M1 (only 10 percent of classification actions
8 were legitimate, according to a 1997 statement by Rodney McDaniel, President Reagan’s executive
9 secretary at the National Security Council and career Navy officer). A glaring example of
10 overclassification can be found in the government’s own affidavit, which admits that two of the
11 responsive ROE documents “contain both classified and unclassified information, but they are
12 classified as a whole as SECRET.” Ghormley Decl., para. 6.

13 Considering that up to 90 percent of document classifications lack legitimacy, Fuchs, *supra*,
14 at 133; Blanton, *supra*, at M1, it is key to this Court’s examination of the government’s Exemption
15 1 claims that while the court is to accord an agency’s affidavits substantial weight, “deference is
16 not equivalent to acquiescence.” *American Civil Liberties Union v. F.B.I.*, 429 F.Supp.2d 179, 187-
17 88 (D.D.C. 2006) (parenthesis omitted). “Exemption 1 does not relieve the courts of their
18 ‘independent responsibility’ to review the agency’s decision.” *Id.* at 187 (citing *Goldberg v. Dep’t*
19 *of State*, 818 F.2d 71, 76-77 (D.C. Cir. 1987)) (parenthesis omitted). “Therefore, to justify
20 summary judgment, an agency affidavit invoking Exemption 1 must provide ‘detailed and specific’
21 information demonstrating both why the material has been kept secret and why such secrecy is
22 allowed by the terms of an existing executive order,” *Id.*, and it must not be “controverted by
23 contrary evidence in the record or by evidence of [agency] bad faith.” *Gordon v. FBI*, 388
24 F.Supp.2d 1028, 1034 (2005) (alteration in the original) (internal quotation marks omitted).
25 Moreover, where, as here, the government’s excuse for hiding documents revolves around the
26 threat posed by those it has deemed terrorists, e.g. Ghormley Declaration, para. 13b, this Court
27 should take into account that little evidence exists that the government’s policy of hiding and over-
28 classifying public documents has averted a single terrorist act. Ford, *supra*, at 94.

1 The materials for which the government here claims Exemption 1 protection were classified
2 under Exec. Order No. 12958, Classified National Security Information (“E.O. 12958”).³³ E.O.
3 12958 allows an agency to classify information if the appropriate classification authority
4 “determines that the unauthorized disclosure of information reasonably could be expected to result
5 in damage to the national security, which includes defense against transnational terrorism, and the
6 original classification authority is able to identify or describe the damage.” E.O. 12958, § 1.1(a);
7 *American Civil Liberties Union v. Dep’t of Defense*, 389 F.Supp.2d 547, 558 (S.D.N.Y. 2005)
8 (“*ACLU*”). This power, however, is not a blank check for the government to classify documents.
9 Materials are “in no case” to be classified to “conceal violations of law,” “prevent embarrassment
10 to a person, organization or agency,” or “prevent or delay the release of information that does not
11 require protection in the interest of national security.” E.O. 12958, § 1.7; *ALCU*, 389 F.Supp.2d at
12 559. When considering whether the materials requested by plaintiffs were properly classified, this
13 Court should take into account the words of former U.S. Solicitor Erwin Griswold: “the principal
14 concern of the classifiers is not with national security, but with governmental embarrassment of
15 one sort or another.” Blanton, *supra*, at M6 (quoting Erwin Griswold, the U.S. solicitor who
16 prosecuted the Pentagon Papers case in 1971).

17
18 **1. The Government Cannot Withhold the ROE to Prevent**
19 **Embarrassment, and Their Release Will Not Endanger the Troops**

20 Here, the government’s arguments that the ROE were properly classified stand on infirm
21 ground. There has been significant public controversy in both the United States and Italy
22 surrounding the March 4, 2005 U.S. military firearm assault on the car carrying Giuliana Sgrena,
23 leaving her with a gunshot wound and slaying Nicola Calipari, the Italian agent protected Ms.
24 Sgrena with his body from the fusillade of U.S. bullets.³⁴ Amidst this controversy, allegations have

25
26 ³³ E.O. 12958 was amended by Executive Order 13292. See 68 Fed.Reg. 15315; *American*
27 *Civil Liberties Union v. Dep’t of Defense*, 389 F.Supp.2d 547, 558 (S.D.N.Y. 2005).

28 ³⁴ *Iraq Shooting; Differing Accounts*, BBC News, May 3, 2005,
<http://news.bbc.co.uk/2/hi/europe/4325253.stm>.

1 arisen that U.S. service members who took part in the armed attack engaged in wrongdoing, and
2 the U.S. military refused to release the relevant ROE to conceal such misconduct.³⁵ That there are
3 sharply differing accounts of the Sgrena incident can only increase concerns that the soldiers and
4 their supervisors had something to hide.³⁶ In addition, the military assault on the city of Fallujah
5 has been denounced for rampant human rights abuses.³⁷ Thus, there is a likelihood that the real
6 reason the defendants insist on withholding the ROE based on their classification is to prevent
7 “embarrassment” to the military. E.O. 12958, § 1.7; *ALCU*, 389 F.Supp.2d at 559. Since the
8 defendants appear to classify the ROE for improper reasons, this Court should provide the antidote
9 of “clarity and openness” and order the release of the ROE requested by plaintiffs, or at least
10 review the ROE *in camera* to ascertain that they are not being withheld merely to prevent
11 “embarrassment” to the soldiers involved in the Sgrena incident or their superiors. *ALCU*, 389
12 F.Supp.2d at 559, 578; E.O. 12958, § 1.7.

13 Moreover, the government’s argument that release of the ROE could provide military
14 adversaries with “a considerable strategic advantage” and “jeopardize the lives” of U.S. service
15 members is specious. Defendants’ MSJ, at 13; Ghormley Decl., at para. 8. More than a year and a
16 half have passed since the March 4, 2005 gunfire attack on Ms. Sgrena, and more than two and a
17 half years have elapsed since the assault on Fallujah in April 2004. Furthermore, the U.S. has been
18 waging war in Iraq since March 2003, and it is quite likely that anti-U.S. forces there are well
19 aware of U.S. attack procedures, having received daily doses. Certainly, residents of Fallujah are
20 intimately aware of the steps U.S. soldiers take in hostile situations given the breadth and intensity
21 of the attack on that city.³⁸ In addition, ROE for U.S. Soldiers in Iraq have been made available on
22

23 ³⁵ Jeffrey Smith & Ann Scott Tyson, *Shootings by U.S. at Iraq Checkpoint Questioned*,
24 Washington Post, March 7, 2005, at A01.

25 ³⁶ *Iraq Shooting: Differing Accounts*, BBC News, May 3, 2005,
<http://news.bbc.co.uk/2/hi/europe/4325253.stm>.

26 ³⁷ Dahr Jamal, *No End in Sight as Fallujah Death Toll Approaches 700*, The New Standard,
27 April 11, 2004; Giuliana Sgrena, *Napalm Raid on Fallujah?*, Il Manifesto, November 23, 2004,
<http://www.ilmanifesto.it/pag/sgrena/en/420dd721e0ff0.html>; *US Used White Phosphorus in Iraq*,
BBC News, November 16, 2005, http://news.bbc.co.uk/2/hi/middle_east/4440664.stm.

28 ³⁸ *Id.*

1 the eBay Internet auction site and have been purchased for as little as 99 cents. PE E. The ROE
2 were auctioned off without interference from any U.S. government agency claiming that their sale
3 would provide military adversaries with “a considerable strategic advantage;” place U.S. forces “at
4 deadly risk;” or “cause serious damage to the national security.” Defendants’ MSJ, at 13;
5 Ghormley Decl., at paras. 9, 10; PE F. Accordingly, the release of the ROE requested by plaintiffs
6 could *not* “reasonably . . . be expected to result in damage to national security” as required for an
7 Exemption 1 claim under E.O. 12958 to succeed. E.O. 12958, § 1.1(a); *ALCU*, 389 F.Supp.2d at
8 558. This Court therefore should order the ROE disclosed.

9 Further, the government has failed to provide “reasonably detailed descriptions” of the ROE
10 in its affidavit, which also is required to protect the materials from disclosure under Exemption 1.
11 *Sakamoto v. U.S. Environmental Prot. Agency*, 443 F.Supp.2d 1182, 1188 (N.D. Cal. 2006). In
12 fact, the description of the 62 pages of ROE documents identified in the government’s affidavit is
13 sparse. Ghormley Decl., paras. 3, 6, 8. It includes an abridged definition of ROE from the *DoD*
14 *Dictionary of Military and Associated Terms* (omitting the reference to the law of war and
15 international law) and the following terse and general definition: “ROEs are pre-planned steps
16 taken by military forces when they encounter certain hostile or potentially hostile situations.”
17 Ghormley Decl., para. 8. Courts will not exempt documents from FOIA disclosure requirements
18 based on such “conclusory and generalized allegations of exemptions.” *Sakamoto*, 443 F.Supp.2d
19 at 1188 (internal quotation marks omitted.) Because the government failed to satisfy its burden in
20 the submission of its affidavit, *Id.*, the Court should conduct in camera review to determine whether
21 Exemption 1 applies. *Irons v. Gottschalk*, 548 F.2d 992, 996 (D.C. Cir. 1976).

22 Finally, the government exaggerates the nature of plaintiffs’ request. The government
23 argues at length against disclosure of the ROE by grouping them with other documents beyond the
24 scope of plaintiffs’ request. For example, the government claims that plaintiffs seek “sensitive
25 information concerning vulnerabilities or capabilities of systems, installations, infrastructures,
26 projects, plans, or protection services relating to the national security.” Ghormley Decl., para. 11.
27 However, the plaintiffs requested the ROE in effect for the assaults on Fallujah and the car carrying
28 Giuliana Sgrena, any other documents “*bearing on any purported justification for the actions taken*

1 *by the military, or any personnel*” involved in the attack on the car carrying Ms. Sgrena, and
2 documents which “relate to, touch upon or concern” how U.S. military personnel distinguish
3 between civilians and combatants, particularly such decision-making in Fallujah and along the road
4 to Baghdad Airport. Complaint for Injunctive Relief, at 4 (emphasis added). There is nothing in the
5 plaintiffs’ request, for example, about techniques for detecting bombs or intelligence relating to the
6 tactics of anti-U.S. forces. Ghormley Decl., para. 13a. On the other hand, the government likely has
7 not identified all responsive documents. Considering that the plaintiffs seek documents bearing on
8 any purported justification for the military’s acts in relation to the Sgrena incident, there no doubt
9 are numerous memoranda, e-mail messages and other communiqués that are responsive to this
10 request that the government has failed to identify in its Vaughn Index. In any case, the government
11 is attempting to conflate responsive with nonresponsive materials to create the appearance that
12 plaintiffs seek potentially sensitive military information that could be legitimately withheld.

13
14 **2. The Government Waived Exemption 1 Protection of the**
15 **AR-15-6 Report and Acted in Bad Faith By Providing a Heavily**
16 **Redacted Copy to Plaintiffs After Declassifying and Releasing the**
17 **Report**

18 The government has waived whatever claim it may have in asserting Exemption 1 against
19 disclosure of the AR 15-6 Report by declassifying it and making it widely available to the public.
20 *See supra*, note 32; *Cooper v. Dep’t of the Navy*, 594 F.2d 484, 486-88 (5th Cir. 1979) (Navy
21 waived right to withhold portions of secret Navy report under FOIA exemptions after unauthorized
22 circulation); *Chilivis v. Sec. & Exch. Comm’n*, 673 F.2d 1205, 1212 (11th Cir. 1982) (agencies
23 waive FOIA exemptions by disclosing materials to private individuals or nonfederal agencies);
24 *Steinberg v. DOJ*, 179 F.R.D. 366, 371 (D.D.C. 1998) (“Having chosen to release the names of its
25 sources, the Justice Department cannot plausibly argue that it is still protecting their identities when
26 it withholds the contents of their interviews”). Because the defendants have waived Exemption 1,
27 this Court thus should order disclosure of the entire AR 15-6 Report and related information in the
28 annexes.

1 Also, by declassifying the AR 15-6 Report and making it available online, but then claiming
2 in its affidavit that portions of the report and its annexes were “classified as SECRET,” Ghormley
3 Decl., para. 13a, the government has shown bad faith. After declassifying and disclosing the report,
4 the government cannot in good faith argue that “disclosure of this information could reasonably be
5 expected to result in damage to national security.” *Id.* Nor can it argue in good faith that a
6 document is “properly classified as SECRET” when the materials are already widely available. *Id.*
7 Where, as here, there is “evidence of [agency] bad faith,” the agency has failed to meet its burden
8 to justify withholding. *Gordon v. FBI*, 388 F.Supp.2d 1028, 1034 (N.D. Cal. 2005) (alteration in
9 the original). Accordingly, the entire AR 15-6 Report and responsive portions of its annexes should
10 be ordered disclosed.

11 12 **C. The Government Improperly Withheld Documents Under Exemption 2**

13 The government has failed to release requested documents and portions of documents
14 pursuant to Exemption 2 on two grounds: (1) that disclosure of ROE information would risk
15 circumvention of those rules and endanger U.S. soldiers, and (2) that initials of service personnel
16 and administrative information on unit logs in the AR 15-6 Report and associated annexes are
17 trivial agency matters. The government has improperly relied on this exemption by construing it
18 too broadly and has failed to provide adequate factual support for its invocation.

19 Exemption 2 applies to matters that are “related solely to the internal personnel rules and
20 practices of an agency.” 5 U.S.C. § 552(b)(2). The courts have interpreted the exemption to
21 encompass two categories of information: (1) matters of a rather trivial, routine nature, in which the
22 public does not have any substantial interest (“low two”), and (2) matters of public interest where
23 disclosure would risk circumvention of agency regulations (“high two”). *Department of the Air
24 Force v. Rose*, 425 U.S. 352 (1976); *Lesar v. U.S. Dep’t of Justice*, 636 F.2d 472 (D.C. Cir. 1980).
25 Exemption 2 was intended by Congress to be “narrowly and specifically interpreted.” *Rose*, 425
26 U.S. at 365, quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir 1975).

27 The Supreme Court in *Rose* stated that “the general thrust of the exemption is simply to
28 relieve agencies of the burden of assembling and maintaining for public inspection matter in which

1 the public could not reasonably be expected to have an interest.” *Id.* at 369-70. The Court went on
2 to explain that the exemption could also apply to matters of public interest, but “only where
3 necessary to prevent the circumvention of agency regulations.” *Id.* at 364. In *Rose*, the Air Force
4 argued that summaries of hearings concerning violations of the Air Force Academy’s Honor and
5 Ethics Code fell within Exemption 2. *Id.* at 355-57. The Supreme Court disagreed. *Id.* at 369-70.
6 The court required disclosure because, even though the summaries clearly related to internal
7 personnel matters, the public’s interest in the integrity of its armed forces removed the summaries
8 from the category of matters of internal significance. *Id.* Like in *Rose*, in this case, the public has a
9 substantial interest in the material withheld by the government under Exemption 2, and the
10 material’s disclosure will not lead to a “circumvention” of agency regulations. *Rose*, 425 U.S. at
11 369.

12 **1. The Public Interest in Disclosure of the ROE Is High**

13 The government should disclose the four ROE documents withheld under Exemption 2
14 because the public’s interest in disclosure is high and the withheld information is relevant beyond
15 its internal agency significance. Here, like in *Rose*, the integrity of the armed forces has been called
16 into question. *Rose*, 425 U.S. at 368; Complaint for Injunctive Relief, at 4-5. In particular, the
17 question of whether or not the ROE are in conformity with international law is of “genuine and
18 significant” public interest. *Rose* at 369. The rules not only govern the conduct of U.S. soldiers
19 themselves, but also impact the Iraqi people who are, in many ways, at the mercy of America’s
20 heavily-armed occupying forces.

22 **2. Disclosure Will Not Lead to “Circumvention” of Law**

23 As explained below, the release of the ROE documents would not lead to circumvention of
24 the law, thus jeopardizing the lives of U.S. soldiers in Iraq, as defendants claim, because (1) the
25 requested ROE documents are a restatement of international law regulating armed conflict, (2) the
26 ROE in effect for the soldiers who fired on Ms. Sgrena have been identified and discussed at length
27 in the AR 15-6 Report, and (3) other ROE from the war in Iraq are readily available on the
28

1 Internet.³⁹

2 In their motion for summary judgment, defendants cite the definition of “ROE” from the
3 *DoD Dictionary of Military and Associated Terms*,
4 <http://www.dtic.mil/doctrine/jel/doddict/data/l/03069.html> (“DoD Dictionary”). Defendants’ MSJ,
5 at 14; Ghormley Decl., para. 8; DoD Dictionary,
6 <http://www.dtic.mil/doctrine/jel/doddict/data/r/04687.html>. However, they do not include the entire
7 definition. Under “Rules of Engagement,” the full entry states, “(DOD) Directives issued by
8 competent military authority that delineate the circumstances and limitations under which United
9 States forces will initiate and/or continue combat engagement with other forces encountered. Also
10 called ROE. *See also law of war.*” DoD Dictionary (emphasis added). The DoD Dictionary
11 definition for “Law of War” states, “[t]hat part of international law that regulates the conduct of
12 armed hostilities. Also called the law of armed conflict. *See also rules of engagement.*” DoD
13 Dictionary (emphasis added.) The definition of ROE explicitly refers to the law of war, a “part of
14 international law.” To the extent that the ROE documents sought in this case communicate the
15 limits on combat engagement imposed by international law to U.S. soldiers, they should not be
16 exempt from disclosure; the dissemination of public, international law regulating “the conduct of
17 armed hostilities” cannot be interpreted as potentially leading to the circumvention of the law.
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19

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21 Additionally, the ROE the soldiers were subject to when they fired on Ms. Sgrena are
22 discussed in detail in the readily available, unredacted AR 15-6 Report on the incident. *See supra*,
23 note 32. The report explicitly states that “[t]he ROE taught to the Soldiers was shout, show, shove,
24 shoot.... For the night of 4 March 2005 at [Blocking Position] 541, the Soldiers were told the ROE
25 was: Shout, i.e., use the spotlight on an approaching vehicle as far in advance of the Alert Line as
26

27
28 ³⁹ *E.g.* <http://www.army.mil/features/507thMaintCmpy/AttackOnThe507MaintCmpy.doc>

1 possible; Show, i.e., use the green laser light, aimed at the driver, at the Alert Line; Shove, i.e., fire
2 warning shots, and Shoot, i.e., disabling shots first, then, if necessary, shoot to kill.” AR 15-6
3 Report, unredacted, at 22; AR 15-6 Report, redacted, at BS 29.

4 The report also explains that

5 [t]he Soldiers were trained on ROE as part of their deployment preparation.... The
6 training [] centered on basic ROE concepts of the escalation of force, hostile intent,
7 hostile act, and positive identification. Specifically, soldiers were briefed on the
8 right of self defense, which allows them to defend themselves and Coalition Forces
9 with all necessary force to negate the potential threat. Soldiers also received training
10 in graduated force, which is designed to allow them to employ escalating measures
11 of non-lethal force to properly discern hostile intent and prevent accidental civilian
12 injury. Soldiers were briefed on positive identification (PID), which requires
Soldiers to have a reasonable certainty that the object of attack is a proper military
target. Soldiers were also briefed on the protections afforded detainees and civilians,
their duty to care for the wounded and sick, military necessity, proportionality,
discrimination, and collateral damage.

13 AR 15-6 Report, unredacted, at 23; AR 15-6 Report, redacted at BS 28. The report goes on to give
14 the ROE’s definitions of “Hostile Act” and “Hostile Intent” as well as the definitions of “proper
15 military targets,” “proportionality,” “discrimination,” and “collateral damage.” AR 15-6 Report,
16 unredacted, at 22; AR 15-6 Report, redacted, at BS 29.

17 Because the public has a legitimate and substantial interest in the requested ROE documents
18 and because they have been discussed in detail in the AR 15-6 report and are the means by which
19 international law is communicated to the soldiers, their release would not lead to a circumvention
20 of the law. Therefore, Exemption 2 does not bar their disclosure. Nevertheless, if the Court finds
21 that Exemption 2 applies to the four withheld ROE documents, any “reasonably segregable”
22 portion must be disclosed. 5 U.S.C. §552(b); *Schreibman v. U.S. Dept. of Commerce*, 785 F.Supp.
23 164, 166 (D.D.C. 1991).

24 25 26 **3. The Government Improperly Redacted the AR 15-6 Report and** 27 **Accompanying Annexes**

28 Pursuant to Exemption 2, the government claims to have redacted from the AR 15-6 Report

1 and associated annexes information pertaining to the Rules of Engagement; internal guidelines for
2 Army investigations⁴⁰; information regarding operational routes, roadside security, and other
3 military operations; Standard Operating Procedures regarding TCPs and BPs; training information
4 and schedules for ROEs; IED detection and response; duty functions of combat personnel; enemy
5 threats and attack analysis; military attack assessments; base defense plans; maps/diagrams of
6 checkpoint configurations; and flight logs detailing equipment information and flight schedules for
7 Baghdad International Airport. Vaughn Index.

9 The government claims that the much of the material in the AR 15-6 Report and associated
10 annexes was properly redacted pursuant to Exemption “high two.” However, the government has
11 redacted, pursuant to Exemption “high two” much more material than it claims, much of it having
12 nothing to do with agency “personnel rules and practices.” Nor is the material “solely” internal,
13 since the report is now public and unclassified. 5 U.S.C. § 552(b)(2). In order to argue that the
14 withheld materials in the AR 15-6 Report and associated annexes are exempt under Exemption
15 “high two” because disclosure would risk circumvention of agency regulations, the government
16 must first prove that the materials fall under Exemption 2 in that they are “related solely to the
17 internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2); *see also Stern v.*
18 *Richardson*, 367 F. Supp. 316 (D.D.C. 1973); *Berg v. Commodity Futures Trading Comm’n*,
19 93C6741 (N.D. Ill. June 23, 1994). One of the many examples of the improper withholding appears
20 on the first page of the report, where the seven issues reviewed in the report are listed; the
21 government has redacted number six, “the Rules of Engagement (ROE) employed during the
22 incident.” AR 15-6 Report, unredacted, at 3; AR 15-6 Report, redacted, at BS 10. It is
23 unsupportable to argue that reference to ROE in a list makes them exempt from disclosure as
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25
26

27 ⁴⁰ The Army Regulation 15-6 “Procedure for Investigating Officers and Board of Officers”
28 (Unclassified) 30 October 1996, is available in full at http://www.usma.edu/EO/regspubs/r15_6.pdf.

1 “personnel” rules or practices; it is a mere fact, a subject of discussion in a report. It appears that, in
2 redacting the report pursuant to Exemption 2, the government does not understand what
3 information falls within the exemption. For example, the words “Route Irish” are redacted
4 throughout the Report. *E.g.* AR 15-6 Report, redacted at BS 10, 11, 13, 14, 15, 16, 17; AR 15-6
5 Report, unredacted 3, 4, 5, 6, 7, 8, 9, 10. “Route Irish” is a road, a place, a location of an incident;
6 it is not part of an agency’s “personnel” rules or practices. The report goes on with multiple
7 redactions of other facts, citing “b(2)high” as the justification for the redaction. AR 15-6 Report,
8 redacted, at BS 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30,
9 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42. Similar information appears to be redacted in Annexes
10 C, D, F, G, H, I, K, M. Because the redacted material is not “related solely to the internal personnel
11 rules and practices of an agency,” 5 U.S.C. § 552(b)(2), it is improperly withheld under Exemption
12 2. Therefore, the government has improperly relied on Exemption 2 and, to the extent that the
13 redacted information does not fall within another claimed exemption, it should be disclosed.
14

15
16 Even if they have properly relied on Exemption “high two” in redacting the AR 15-6
17 Report, the government has waived its Exemption 2 argument by the public release of the report
18 which is readily available, unredacted, to the public from multiple sources. *See supra*, note 32;
19 *Cooper v. Dep’t of the Navy*, 594 F.2d 484, 486-88 (5th Cir. 1979) (Navy waived right to withhold
20 portions of secret Navy report under FOIA exemptions after unauthorized circulation); *Chilivis v.*
21 *Sec. & Exch. Comm’n*, 673 F.2d 1205, 1212 (11th Cir. 1982) (agencies waive FOIA exemptions by
22 disclosing materials to private individuals or nonfederal agencies); *Steinberg v. DOJ*, 179 F.R.D.
23 366, 371 (D.D.C. 1998) (“Having chosen to release the names of its sources, the Justice
24 Department cannot plausibly argue that it is still protecting their identities when it withholds the
25 contents of their interviews.”).

26 27 **4. The Government’s “Low Two” Redactions Cannot Withstand Scrutiny**

28 The government claims to have only withheld, through redaction, initials of service

1 personnel and administrative information on unit logs that appear in the 15-6 report and associated
2 annexes, pursuant to Exemption “low two,” claiming that they pertain only to “trivial agency
3 matters.” Defendants’ MSJ, at 14, n.5; Ghormley decl., para. 13b.

4 As to the AR 15-6 Report, defendants have waived their Exemption “low two” argument by
5 their public release of an unclassified, unredacted version of the report. *See supra*, note 32; *Cooper*
6 *v. Dep’t of the Navy*, 594 F.2d at 486-88; *Chilivis v. Sec. & Exch. Comm’n*, 673 F.2d at 1212;
7 *Steinberg v. DOJ*, 179 F.R.D. at 371. Even if the government has not waived Exemption 2 as to the
8 AR 15-6 Report, its description of the withheld “administrative information” material is
9 insufficient to discern whether the withheld material in both the report and the annexes falls under
10 Exemption 2, because the government fails to describe what this “administrative information”
11 consists of or to what unit logs it is referring. *Church of Scientology of California v. Dep’t of Army*,
12 611 F.2d 738, 742 (9th Cir. 1979). However, by comparing the unredacted version of the report
13 with the redacted version provided to plaintiffs by the government, it appears that the government
14 has withheld much more than just “initials” and “administrative information,” and that, as with
15 “high two,” its use of the “low two” exemption has been improper and arbitrary. In light of these
16 facts, an *in camera* review is necessary. *Id.*

17 As an example of how the government has redacted more than it claims to have withheld, in
18 Annex D the names of those questioned regarding the incident, as well as portions of the questions,
19 appear to have been redacted. Annex D to AR 15-6 Report, BS 83-84. The identities of those
20 involved in the incident and the preparation of the report and the questions put to them are in no
21 way “trivial,” because the public has an interest in knowing who was questioned and what they had
22 to say about the incident. Further, names do not constitute “internal personnel rules and practices of
23 an agency.” *See. e.g. Army Times Publishing Co. v. Dep’t. of the Army*, 684 F.Supp. 720 (D.D.C.
24 1998) (holding Exemption 2 inapplicable to records containing the name, addresses, grade levels
25 and installation location of all active duty Army personnel in the U.S.). As with Exemption “high
26
27
28

1 two,” it seems that location names have been redacted pursuant to Exemption “low two.”⁴¹ Clearly,
2 the government has withheld information that cannot reasonably be construed as an internal agency
3 “rule” or “practice,” 5 U.S.C. § 552(b)(2), or in which the public would have no interest. *Stern v.*
4 *Richardson*, 367 F. Supp. 316 (D.D.C. 1973) (FBI’s COINTELPRO – domestic surveillance
5 program – documents had nothing to do with the internal personnel rules and practices of the
6 agency); *Berg v. Commodity Futures Trading Comm’n*, 93C6741 (N.D. Ill. June 23, 1994)
7 (materials dealing with how an agency responds to customer surveys and correspondence does not
8 “bring the (b)(2) exemption into play.”).

9 The government has arbitrarily and improperly withheld materials pursuant to Exemption
10 “low two.” The withheld materials are not agency personnel rules or practices. Nor are they trivial,
11 and the public has a strong interest in their disclosure. Accordingly, this Court should order
12 defendants to disclose the materials.

13
14 **D. The Government Has Not Shown That Withheld Materials Are Exempted by**
15 **Any Statute Per Exemption 3**

16 Exemption 3 provides, in relevant part, that the government may withhold documents
17 specifically exempted from disclosure by a statute that “establishes particular criteria for
18 withholding or refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3). An
19 agency seeking to withhold documents under Exemption 3 “must show specifically and clearly that
20 the requested materials fall into the category of the exemption.” *Hayden v. Nat’l Sec. Agency*, 608
21 F.2d 1381, 1390 (D.D.C. 1979). Even where Exemption 3 may be successfully asserted, “an entire
22 document is not exempt merely because an isolated portion need not be disclosed.” *Irons v.*
23 *Gottschalk*, 548 F.2d 992, 996 (1976). In such cases, nonexempt materials must be segregated and
24 disclosed. *Id.* As with other FOIA exemptions, a court has discretion to review materials in camera
25 “in order to make a responsible de novo determination on the claims of exemption.” *Ray v. Turner*,
26 587 F.2d 1187, 1195 (D.C. Cir. 1978).

27 ⁴¹ “Have you subsequently learned that someone [130b] knew about Ms. Sgrena’s release
28 and movement to [b(2)low]?” Annex D BS 185.

1 The government here asserts that Exemption 3 applies to redacted portions of the AR 15-6
2 Report and its related annexes via 10 U.S.C. § 130c, which exempts from disclosure “sensitive
3 information of foreign governments.” Defendants’ MSJ, at 17; 10 U.S.C. § 130c(a). The statute
4 creates a clear procedural framework for the government to follow when withholding documents
5 under Exemption 3. First, the agency must show that “the information was provided by, otherwise
6 made available by, or produced in cooperation with a foreign government or international
7 organization.” 10 U.S.C. § 130c(b)(1). Second, the agency must show that the foreign government
8 or international organization has represented in writing that it “is withholding the information from
9 public disclosure.” 10 U.S.C. § 103c(b)(2). Lastly, the agency additionally must show that (1) the
10 foreign government or international organization “requests in writing that the information be
11 withheld,” (2) the information was made available to the U.S. Government “on the condition that it
12 not be released to the public,” or (3) a national security official has specified that disclosure of the
13 information “would have an adverse effect on the ability of the United States Government to obtain
14 the same or similar information in the future.” 10 U.S.C. § 130c(b)(3). The government has made
15 no such showing here. Instead, the government makes the conclusory statement that it has
16 “withheld diplomatic correspondence with foreign governments that qualify as sensitive foreign
17 information.” Defendants’ MSJ, at 17; *see Ghormley Decl.*, para. 13c. The Government has not
18 complied with the requirements of 10 U.S.C. § 130c, and, as a result it has not shown “specifically
19 and clearly that the requested materials fall into the category of the exemption.” *Hayden*, 608 F.2d
20 at 1390. Thus, the government should disclose any documents it seeks to withhold under
21 Exemption 3 by resort to this statute, 10 U.S.C. § 130c.

22 As well, the government also asserts that Exemption 3 protects from disclosure portions of
23 the AR 15-6 Report and related annexes under 10 U.S.C. § 130b. This statute provides that the the
24 secretary of defense “may . . . authorize” the withholding of “personally identifying information”
25 of any member of the armed forces, e.g. name, rank, duty, address, official title and pay-related
26 data. 10 U.S.C. § 130b(a), (c). However, the defendants in this case have not shown that the
27 secretary of defense has authorized the withholding of the names they seek to keep from public
28 view. Lacking such authorization, the government should disclose any documents it seeks to

1 withhold under Exemption 3 by resort to this statute. 10 U.S.C. §130b.

2 Moreover, even if Exemption 3 applies here, the Court should order disclosure because the
3 government has waived the exemption by publicly releasing the AR 15-6 Report. *See supra*, note
4 32; *Cooper v. Dep't of the Navy*, 594 F.2d at 486-88; *Chilivis v. Sec. & Exch. Comm'n*, 673 F.2d at
5 1212; *Steinberg v. DOJ*, 179 F.R.D. at 371 (“Having chosen to release the names of its sources, the
6 Justice Department cannot plausibly argue that it is still protecting their identities when it withholds
7 the contents of their interviews”). Should the court nonetheless find that some of the materials in
8 the AR 15-6 Report and its annexes fall under Exemption 3, the government must segregate and
9 disclose the nonexempt material. *Gottschalk*, 548 F.2d at 996.

10 In conclusion, because the government has not “specifically and clearly” shown that
11 withheld material is exempted by any statute per Exemption 3, the defendants should be required to
12 disclose the information in the AR 15-6 Report and its annexes to the extent that it has improperly
13 relied on Exemption 3. Alternatively, if Exemption 3 applies, the defendants should disclose the
14 withheld documents because they have waived Exemption 3 by public disclosure. In any case, non-
15 exempt information should be segregated and disclosed.

16
17 **E. Exemption 5 Is Inapplicable to Requested Materials Because They Are Not**
18 **Privileged**

19 The government, pursuant to Exemption 5, has allegedly redacted from the AR 15-6 Report
20 and associated annexes agency counsel legal reviews of the 15-6 Report pursuant to the attorney-
21 client and attorney work product privileges. Defendants’ MSJ, at 21. It also claims to have
22 redacted, pursuant to the deliberative process privilege, advice such as “opinions and
23 recommendations regarding fault and potential disciplinary actions and changes to policies.” *Id.*

24 Exemption 5 exempts from mandatory disclosure “inter-agency or intra-agency
25 memorandums or letters which would not be available by law to a party... in litigation with the
26 agency.” 5 U.S.C. § 552(b)(5). This exemption protects from disclosure “those documents,
27 normally privileged in the civil discovery context.” *National Labor Relations Board v. Sears,*
28 *Roebuck & Co.*, 421 U.S. 132, 149 (1975) (“*NLRB*”). This exemption incorporates (1) the

1 deliberative process privilege, which protects from mandatory disclosure documents that reflect
2 agency pre-decisional deliberations, *Id.* at 150, (2) the attorney-client privilege, which protects
3 confidential communications, including facts from a client to an attorney, and from an attorney to a
4 client, if the communication is based on confidential information provided by the client, *Id.* at 154,
5 and (3) the attorney work product privilege, which protects documents prepared by an attorney
6 which reveal the theory of her case or litigation strategy. *Id.* at 154-55.

7
8 **1. The Requested Documents Are Neither Confidential Communications**
9 **Between Attorney and Client Nor Prepared for Litigation**

10 The government claims the attorney-client privilege and the attorney work product privilege
11 apply only to materials redacted in the report. The government has waived its ability to make the
12 claim that the redacted information in the report is properly withheld pursuant to Exemption 5
13 because Exemption 5 claims are waived if the agency has disclosed the documents to third parties.
14 Here, the government has released the report, unclassified, to the public. The report is now easily
15 accessible from multiple sources. *See supra*, note 32; *Chilivis v. Ec. & Exch. Comm'n*, 673 F.2d
16 1205, 1212 (11th Cir. 1982); *Cooper v. Dep't of the Navy*, 594 F.2d 484, 486 (5th Cir. 1979); *Shell*
17 *Oil Co. v. IRS*, 772 F.Supp. 202 (D. Del. 1991). If the exemption is not waived by the government's
18 disclosure, the material should still be disclosed to the extent that it does not fall under Exemption
19 5.

20 The government claims to have redacted, pursuant to the attorney-client and attorney work
21 product privileges incorporated under Exemption 5, "agency counsel legal reviews" in the AR 15-6
22 Report. Defendants' MSJ, at 21; Vaughn Index. However, two sections of the report are redacted:
23 (1) information pertaining to the local security situation in Iraq, and (2) recommendations regarding
24 Blocking Positions, Traffic Control Points, and Standard Operating Procedures. AR 15-6 Report,
25 unredacted, at 7, 23; AR 15-6 Report, redacted, at BS 14, 30. Neither of these sections appears to
26 be confidential attorney-client communications that would give rise to the attorney-client privilege
27 or prepared by an attorney in anticipation of litigation so as to invoke the work product privilege.

28 The first section of the report redacted under Exemption 5 is in the "Local Security

1 Situation” section. This section contains factual information about security conditions in Iraq and
2 has nothing to do with “agency counsel legal reviews.” The government invoked several
3 exemptions in redacting this section. AR 15-6 Report, redacted at BS 13-14. The portions of the
4 section partially redacted under other exemptions describe the number of attacks against Coalition
5 Forces in Iraq, the population of Baghdad, the “deadliest road in Iraq,” etc. According to the
6 unredacted version of the report, the material withheld under Exemption 5 describes the number of
7 attacks along Route Irish, the attack density along Route Irish, the timing of IED attacks, and the
8 percentage of attacks that occur between 1900 and 2100. AR 15-6 Report, unredacted, at 7; AR 15-
9 6 Report, redacted, at BS 14. It seems completely arbitrary that about half of the section is redacted
10 pursuant to Exemption 5, and the other half contains redactions pursuant to other exemptions. For
11 no explicable reason, the last sentence of the section, which describes the location of where most
12 attacks occur, is not redacted pursuant to Exemption 5, but pursuant to Exemption “high two.”

13 The second section of the report redacted pursuant to Exemption 5 is the
14 “Recommendations” section. The report does not show, and the government has not demonstrated,
15 that the recommendations constitute a confidential communication between the agency client and
16 the agency’s attorney or that the recommendations were prepared by an attorney and would reveal
17 the theory of her case or litigation strategy. Therefore, this material does not fall under the attorney-
18 client privilege or the attorney work product privilege and is not protected by Exemption 5.

19

20 **2. The Requested Documents Are Not Protected by the Deliberative**

21 **Process Privilege**

22 The purpose of the deliberative process privilege is “to prevent injury to the quality of
23 agency decisions” and to assure candid internal debate by protecting deliberations before a decision
24 is reached.” *NLRB*, 421 U.S. at 150-51. The Supreme Court has made a distinction between
25 “materials reflecting deliberative or policy-making processes on the one hand, and purely factual,
26 investigative matters on the other.” *EPA v. Mink*, 410 U.S. 73, 89 (1973). The agency must
27 segregate and disclose facts in a predecisional document, unless they are “inextricably intertwined”
28 with exempt portions. *Ryan v. DOJ*, 617 F.2d 781, 790-91 (D.C. Cir. 1980). Moreover,

1 predecisional materials “are not exempt merely because they are pre-decisional; they must also be a
2 part of the agency give-and-take of the deliberative process by which the decision itself is made.”
3 *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The burden rests upon the government to
4 establish that a true predecisional process existed and how it reached its decision. *Id.*; *SafeCard*
5 *Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1204-05 (D.C. Cir. 1991). Successful assertion of the
6 deliberative process privilege depends “upon the individual document and the role it plays in the
7 administrative process.” *Playboy Enterprises, Inc. v. DOJ*, 677 F.2d 931, 935 (D.C. Cir. 1982).

8 The government has not shown that the information it has withheld pursuant to the
9 deliberative process privilege is part of any predecisional process. Nor has it shown that there was a
10 predecisional process. *Vaughn*, 523 F.2d at 1144. The government has done nothing more than
11 assert that the information it withheld is similar to that which could be excluded. Defendant’s MSJ,
12 at 21.

13 The Local Security Situation section, redacted pursuant to Exemption 5, is purely factual; it
14 in no way reflects the deliberative or policy-making processes. *Mink*, 410 U.S. at 89. As to the
15 Recommendations section, the government has not shown that it is “a part of the agency give-and-
16 take of the deliberative process.” *Vaughn*, 523 F.2d at 1144. Even if the Recommendations section
17 were found to fall within the deliberative process privilege, the government has waived the
18 privilege by declassifying the AR 15-6 Report and releasing it to the public. *Cooper v. Dep’t of the*
19 *Navy*, 594 F.2d at 486-88; *Chilivis v. Sec. & Exch. Comm’n*, 673 F.2d at 1212; *Steinberg v. DOJ*,
20 179 F.R.D. at 371.

21 Regarding the two entire pages of Annex G redacted pursuant to Exemption 5, the
22 government does not explain what is on those pages or how its claimed privilege justifies the
23 withholding. The government’s conclusory arguments that the information was withheld because it
24 contains “opinions and recommendations regarding fault and potential disciplinary actions and
25 changes to policies,” Defendant’s MSJ at 21, sheds no light on whether the materials in Annex G
26 were part of any predecisional process or how the government reached its decision. *Vaughn*, 523
27 F.2d at 1144; *SafeCard Services, Inc.*, 926 F.2d at 1204-05. Further, the government’s incorrect
28 and arbitrary application of exemptions, as explained above, demonstrates that it cannot be trusted

1 to redact responsive materials correctly. Because the government has redacted information that
2 could not possibly fall under Exemption 5, and because the government has not met its burden of
3 explaining how the asserted privileges apply to the redacted information, the court should conduct
4 an *in camera* review and order disclosure of responsive materials. *Irons v. Gottschalk*, 548 F.2d
5 992, 996 (D.C. Cir. 1976).

7 **F. Exemption 6 Claim Fails Because Invasion of Privacy is Minimal**

8 **1. Names Alone Are Insufficient to Justify Withholding**

9 Exemption 6 allows the government to withhold only records that are “personnel and
10 medical files and similar files the disclosure of which would constitute a clearly unwarranted
11 invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The phrase “clearly unwarranted” “*instructs*
12 *the court to tilt the balance in favor of disclosure.*” *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir.
13 1971), *stay denied*, 404 U.S. 1204 (1971) (emphasis added). The Supreme Court has defined
14 “similar files” as “government records containing ‘information which applies to a particular
15 individual.’” *Minnis v. Dept. of Agriculture*, 737 F.2d 784, 786 (9th Cir. 1984); 5 U.S.C. §
16 552(b)(6). In order to justify withholding of information pertaining to a particular person, the
17 invasion of privacy must be substantial; “Exemption 6 was directed at threats to privacy interests
18 more palpable than mere possibilities.” *Rose*, 425 U.S. at 380 n.19. “[A]n employee’s name alone
19 [does not] make[] a document a personnel, medical or ‘similar file.’” *Gordon v. FBI*, 388
20 F.Supp.2d 1028, 1040 (N.D. Cal. 2005).

21 Here, the government has failed to cite one published opinion to support the proposition that
22 a document containing names, without home addresses, falls under Exemption 6. *Gordon*, 388
23 F.Supp.2d at 1040-41 (collecting cases requiring names and home addresses). The government
24 does not contend that the AR 15-6 Report and accompanying annexes contain home addresses; nor
25 do plaintiffs seek such information. Furthermore, the government has not provided information
26 regarding how many names and how much other information it has redacted from the AR 15-6
27 Report and annexes. However, the unredacted version of the report contains a section on
28 “Personnel Involved,” including the names of ten U.S. military personnel and those of Mr. Nicola

1 Calipari, Mr. Andrea Carpani, and Ms. Guiliana Sgrena. AR 15-6 Report, unredacted, at 26-27; AR
2 15-6 Report, redacted, at BS 33-34. In contrast, in the redacted version, the names of all military
3 personnel and Mr. Carpani are redacted. AR 15-6 Report, redacted, at BS 33-34. Considering that
4 information regarding his involvement in the incident was widely reported,⁴² Mr. Carpani’s privacy
5 is not protected by the government’s redaction. Further, for no logical reason, the name of one
6 soldier – “Sergeant Luis Domangue, Louisiana National Guard... the second gunner” – was left
7 unredacted. AR 15-6 Report, redacted, at 24. The government does not explain why it need not
8 protect Mr. Domangue’s privacy interests, while it claims to protect those of the other soldiers.
9 Because the information withheld pursuant to Exemption 6 is widely available to the public, none
10 of the individuals whose information was redacted have a substantial interest in preventing its
11 release to plaintiffs. Defendants’ MSJ, at 18-19. Thus, the government’s withholding of requested
12 information under Exemption 6 is invalid for a lack of substantial privacy concerns.

13 In any case, by disclosing the names of soldiers and others in the unredacted AR 15-6
14 Report, the government waives its claim that the names and photos of the soldiers and others
15 involved in the incident are exempt pursuant to Exemption 6. Defendants’ MSJ, at 18-19; AR 15-6
16 Report, unredacted, at 26-27; *cf. e.g. Detroit Free Press v. DOJ*, 73 F.3d, 96-97 (6th Cir. 1996)
17 (release of mug shots implicated no privacy rights where defendants’ names had already been
18 released); *Steinberg v. DOJ*, 179 F.R.D. 366, 371 (D.D.C. 1998) (after disclosing names of FBI
19 sources, the government could not argue that the contents of FBI interviews should be withheld to
20

21 ⁴² Fritzroy Sterling, *Still Seeking Answers in U.S. Checkpoint Shooting*, Common Dreams
22 News Center, June 24, 2006 at <http://www.commondreams.org/headlines06/0624-06.htm> (“Upon
23 the successful negotiation of her release, Sgrena and two Italian intelligence officers, Nicola
24 Calipari and Andrea Carpani, drove along the dark, wet road to Baghdad International Airport”);
25 *CPJ: Baghdad Shooting Highlights Checkpoint Shortcomings*, Committee to Protect Journalists
26 2005 News Alert, May 2, 2005 at <http://www.cpj.org/news/2005/Iraq02may05na.html> (“A March 4
27 shooting in Baghdad in which U.S. forces killed Italian intelligence agent Nicola Calipari and
28 wounded Italian journalist Giuliana Sgrena and agent Andrea Carpani might have been avoided if
the military had used basic warning measures such as signs and speed bumps to alert civilians to
the presence of a roadblock, the Committee to Protect Journalists said today”); *Calipari:
Prosecution, “Objectively a Political Crime,”* AGI, November 29, 2006,
[http://www.agi.it/english/news.pl?doc=200611291813-1202-RT1-CRO-0-
NF11&page=0&id=agionline-eng.oggitalia](http://www.agi.it/english/news.pl?doc=200611291813-1202-RT1-CRO-0-NF11&page=0&id=agionline-eng.oggitalia).

1 protect the sources' identities).

2 Furthermore, the government has withheld information that cannot possibly be construed to
3 fall within Exemption 6. The government claims to have withheld, pursuant to Exemption 6, "the
4 names, descriptions, and pictures of military personnel assigned to overseas units, sensitive units,
5 or routinely deployable units as well as the names, descriptions, and pictures of other individuals
6 involved in the incident of March 4, 2005." Defendants' MSJ, at 18-19. However, comparing the
7 redacted and unredacted versions of the report makes clear that the government has redacted much
8 more than what it claims is exempt. The following names and other information were redacted,
9 pursuant to Exemption 6,⁴³ from the AR 15-6 report on the first two pages alone: the name of Mr.
10 Andrea Carpani, the Italian agent driving the car when it came under fire from U.S. soldiers on
11 March 5, 2005; "A Company of 1-69 Infantry (attached to 2d Brigade Combat Team, 10th
12 Mountain Division," whose soldiers fired at Ms. Sgrena's car; "Route Vernon," the road or
13 highway on which Ms. Sgrena's car was traveling before it came under fire; "Third Infantry
14 Division," whose general directed an investigation to be conducted the night of the incident; and
15 "2d" from "2d Brigade" and "10th Mountain" from "10th Mountain Division." AR 15-6 Report,
16 unredacted, at 3-4; AR 15-6 Report, redacted at BS 10-11. Such locations and military units have
17 nothing to do with privacy issues implicated by Exemption 6. In making such redactions, defendant
18 agency personnel demonstrated a gross misunderstanding of what information falls under
19 Exemption 6, as they did with respect to Exemption 2.

20
21 **2. The Government's Refusal to Disclose Fails Under All Four Factors of**
22 **Ninth Circuit Test for Exemption 6 Cases**

23 The Ninth Circuit has set out a four-factor test for weighing Exemption 6 claims: "(1) the
24 plaintiff's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of
25 personal privacy, and (4) the availability of alternative means of obtaining the requested
26

27 ⁴³ The examples redacted pursuant to Exemption 6 are also redacted pursuant to other
28 exemptions.

1 information.” *Church of Scientology v. Dep’t of the Army*, 611 F.2d 738, 746 (9th Cir. 1979); see
2 also *Dobronski v. FCC*, 17 F.3d 275, 278-279 (9th Cir. 1994).

3
4 **a. Requesters Have a Substantial Interest in Disclosure**

5 The government does not challenge that the plaintiffs have an interest in the disclosure of
6 the requested documents and could not rationally make such a challenge. *Church of Scientology*,
7 611 F.2d at 746. The plaintiffs plan to publish an article on the war in Iraq using the documents
8 here at issue in their widely distributed newsletter, “On Watch,” which publishes articles and
9 training materials for attorneys and non-attorney advocates, policy discussions, and analysis of
10 changes in military law, regulations and practice. Complaint for Injunctive Relief, at 3. Plaintiffs
11 have a strong interest in full disclosure of the requested materials so they may more fully inform
12 and provide analysis to their readers.

13
14 **b. The Public’s Interest In Disclosure Is Great**

15 The attack on the car carrying Ms. Sgrena garnered international media attention and
16 influenced relations between the United States and European nations. The government makes the
17 implausible argument that “there is no countervailing public interest” in the disclosure of the names
18 of individuals involved in the shooting attack, because such disclosure “would not serve the core
19 purpose of the FOIA, i.e., it would not shed light on government activities.” Defendants’ MSJ, at
20 19; *U.S. Dep’t of Justice v. Reporter Committee for Freedom of the Press*, 489 U.S. 749, 775
21 (1989). Nothing could be further from the truth. The public interest in who was involved in and
22 who authorized the gunfire assault is enormous. *Church of Scientology*, 611 F.2d at 746. Moreover,
23 the public has a profound interest in coverage of a war effort that has proven controversial and is
24 costing U.S. taxpayers \$7 billion per month – nearly equal to Iraq’s gross domestic product.⁴⁴
25 Disclosure of the requested materials would indeed shed light on government activities.

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27 ⁴⁴ *Iraq war costs could hit \$570 billion US by 2010, troop levels not sustainable*, CBCnews,
28 Nov. 29, 2006, <http://www.cbc.ca/cp/world/051006/w100670.html>; *Iraq*, Central Intelligence Agency, The World Factbook, <https://www.cia.gov/cia/publications/factbook/geos/iz.html>.

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c. The Degree of Invasion of Personal Privacy is Minimal

The government – citing unpublished authority for legal propositions contained therein, in contravention of Ninth Circuit rules – asserts that the balance tips in favor of nondisclosure of redacted portions of the report and annexes because identifying service members by name, description or photograph could expose them to risks of “terrorist attacks.” Defendants’ MSJ, at 19; see Ninth Circuit Rule 36-3(b). However, the unredacted AR 15-6 Report has been available for approximately one year, yet the defendants have not identified one single attempted terrorist attack on any service members involved in the incident. Therefore, the government’s concerns about privacy are not well-founded. *Church of Scientology*, 611 F.2d at 746.

d. Alternative Means of Obtaining the Requested Information Are Unavailable

Plaintiffs are aware that the AR 15-6 Report is available on the Internet. However, the annexes are not, and plaintiffs are unaware of any alternative means to obtain the documents. *Church of Scientology*, 611 F.2d at 746. There are 12 annexes to the report (Annexes A-M, except K, which the government claims to not have found). These annexes likely contain materials responsive to the plaintiffs’ request, since they bear on purported justifications for the actions taken by the military, or any personnel, in firing on Ms. Sgrena’s car on March 4, 2005, including information on the individuals involved. Plaintiff’s Complaint for Injunctive Relief at 4.

Accordingly, the Court should find that, to the extent that the information is not barred from disclosure by another exemption, the material withheld pursuant to Exemption 6 must be made available to plaintiffs and to the public.

IV. CONCLUSION

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

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Respectfully submitted,

BY: /s/ Colleen Flynn
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