UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEREMY BIGWOOD, Plaintiff, v. UNITED STATES DEPARTMENT OF DEFENSE and CENTRAL INTELLIGENCE AGENCY, Defendants.	Civil Action No. 1:11-cv-00602-KBJ Hon. Ketanji Brown Jackson

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY THE UNITED STATES DEPARTMENT OF DEFENSE

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Plaintiff Jeremy Bigwood respectfully submits this memorandum of law in opposition to the motion for summary judgment made by Defendant United States Department of Defense ("DOD"). Plaintiff does not oppose the branch of the motion made by Defendant Central Intelligence Agency ("CIA").

PRELIMINARY STATEMENT

Plaintiff is a respected journalist with a particular interest in Latin American politics, including the role of the United States in that region. After the June 28, 2009 coup d'état in Honduras, which ousted President Manuel Zelaya, Plaintiff submitted two requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to the United States Southern Command ("Southcom"), which is a component of DOD. On July 1, 2009, he sought information about the coup. On July 8, 2009, he specifically asked for records concerning Honduran Army General Romeo Vásquez Velásquez, who reportedly led the coup.

Twenty months later, DOD had not produced a single page. On March 23, 2011, Plaintiff filed this action to compel DOD to comply with its obligations under FOIA. Thereafter, on June 20 and July 7, 2011, DOD produced a total of 71 documents in response to both requests, many of them heavily redacted.

Upon review of those 71 documents, Plaintiff concluded that DOD failed to conduct an adequate search and, in many instances, over-redacted the documents it did produce. Among other things, DOD produced no emails, very little contemporaneous documentation of the coup, and no primary materials from the Soto Cano military air base—even though Zelaya was flown out of the country through Soto Cano, which is also the headquarters of Southcom's Joint Task Force Bravo. DOD also failed to produce any cables from the U.S. Embassy in Tegucigalpa—

although Plaintiff knew of at least one responsive cable, from the Embassy to Southcom, which he happened to have obtained through other channels.

After negotiations between the parties, DOD agreed to conduct a supplemental search. On September 26, 2013—three years and two months after Plaintiff submitted his FOIA requests—DOD produced another 88 responsive documents. Again, many of the documents were heavily redacted. Although DOD told Plaintiff that it did not withhold any responsive documents, it once again failed to produce any emails, any contemporaneous documentation of the coup, or any primary records from Soto Cano. Moreover, although DOD finally produced the single cable that Plaintiff already knew about, no other Embassy communications were released. Further negotiations failed to resolve the dispute concerning the adequacy of DOD's search, although the parties were able to narrow their disagreements concerning the redactions.

DOD now moves for summary judgment, arguing that its search was adequate and that its redactions were justified. In fact, as we show below, DOD has not even begun to satisfy the "burden of justifying nondisclosure," which lies with the agency. *Cudzich v. INS*, 886 F. Supp. 101, 104 (D.D.C. 1995).

First, DOD has failed to establish beyond a "material doubt…that it has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). DOD identified only six Southcom subcomponents (or "directorates and units") as "likely to have responsive documents," and limited its FOIA search to those six. It thereby overlooked another five subcomponents or components that should have been searched. The U.S. Army South, U.S. Navy South, U.S. Air Force South, U.S. Military Group in Honduras, and the National Military Command Center were all involved in monitoring or responding to the coup in Honduras and all are likely to possess documents responsive to

Plaintiff's FOIA requests. In addition, the record is unclear as to whether DOD searched seven distinct subcomponents of Joint Task Force Bravo, even though the documents that were produced reveal that some of the responsive information they contain was received from (or sent to) one or more of these subcomponents. Since "[t]he agency cannot limit its search to only one or more places if there are additional sources that are likely to turn up the information requested," *DiBacco v. Dep't of Army*, 2013 WL 5377060, *6 (D.D.C. Sept. 26, 2013), those subcomponents should also have been searched.

As to the subcomponents it did search, DOD has failed to "set forth the search terms and the type of search performed," which is the "minimum" required under FOIA. *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Only four paragraphs of its supporting declarations address the adequacy of its search, and those paragraphs fall far short of the standard established by case law. For example, although DOD lists *some* of the search terms used in its *initial* electronic search (including a misspelling of President Zelaya's first name), it pointedly stops short of representing that the list is complete—or even that all terms were searched across all databases. Nor does DOD explain how it used those search terms, which consist primarily of compound phrases poorly designed to retrieve relevant records. DOD is silent as to what connectors or Boolean logic it employed; what systems or software it ran the searches on; who performed the searches; and what instructions they were given. Most strikingly, DOD says virtually nothing about its *second* electronic search, which retrieved another 88 documents, or any of its manual searches.

On this record—and even if the production were not so conspicuously missing documents that any reasonable plaintiff would expect to see after an adequate search—DOD cannot satisfy its burden of establishing the adequacy of its search. Indeed, insofar as Plaintiff's electronic

search expert can determine, based on the scanty information provided, "DOD's searches were deficient in both their construction and their execution." *See* Declaration of Daniel Regard ("Regard Decl.") ¶ 5(b).

Second, DOD has failed to establish the propriety of many of its redactions. *See* 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"). For example, DOD over-used the (b)(1) exemption, intended to withhold properly classified information, and relied on it to excise whole pages—in their entirety—without any apparent attempt to produce the "reasonably segregable, non-exempt portions," as required by § 552(b). Further, DOD offers only vague and conclusory justifications for its sweeping excisions, rather than the "reasonable detail" required by law. DOD's use of other exemptions is less sweeping but frequently implausible. For example, it used the (b)(7)(E) exemption, designed to protect "law enforcement investigations or prosecutions," to redact one line of text in the middle of a discussion of an influenza pandemic warning system. At a minimum, DOD should be required to submit the contested documents to the Court for an *in camera* review. *See Ray v. Turner*, 587 F.3d 1187, 1195 (D.C. 1978) (trial court has broad discretion to require *in camera* review where the nature of the redactions produces "uneasiness").

BACKGROUND

Plaintiff Jeremy Bigwood is a freelance investigative journalist, researcher and photojournalist. *See* Declaration of Jeremy Bigwood ("Bigwood Decl.") ¶ 2. Mr. Bigwood spent a decade covering the Central American civil wars, from 1984 to 1994, and has retained an interest in Central American political and military developments and the involvement of the United States government in such developments. *Id*. In 2000, he received a grant from the John D. and Catherine T. MacArthur Foundation to study American-backed development of toxic

fungi to eliminate illicit drug crops in countries such as Colombia. *Id*. His work has been published in the American Journalism Review, the Village Voice, Huffington Post, and many other American publications, as well as overseas. *Id*. Mr. Bigwood resides in the District of Columbia and often utilizes FOIA as part of his research and investigation. *Id*.

At issue on this motion are two FOIA requests that Mr. Bigwood submitted to Southcom in the wake of the Jun 28, 2009 coup d'état in Honduras. Plaintiff was particularly interested in uncovering whether and to what extent the United States military knew of the impending coup and/or played a role in ousting the democratically elected President, Manuel Zelaya. Bigwood Decl. ¶¶ 5-7. He submitted his requests to Southcom because Southcom is a unified command (incorporating elements of the Army, Navy, Air Force and Marines) responsible for providing contingency planning, operations, and security cooperation for Honduras. *Id*. ¶ 7. The United States Military Group ("MILGP"), which manages joint exercises and training with the Honduran armed forces, and Joint Task Force Bravo ("JTF-B"), which has 600 troops stationed at Soto Cano, both report to Southcom. *Id*. In addition, Southcom has also worked closely over the years with General Romeo Vásquez Velásquez, who was the Chief of Staff of the Honduran Army Forces at the time of the coup and played a key role in ousting President Zelaya. *Id.*

On July 1, 2009, Plaintiff submitted a FOIA request (the "Coup d'État Request") for records concerning the June 28 coup. Bigwood Decl. ¶ 3 & Ex. A. The request specifically sought "any observations or reports about the activities of the Honduran Armed Forces with respect to the coup–as well as the coup itself. This would definitely include any records of the passage of the kidnapped president through any military bases, such as Soto Cano… [and] any reports about the impeding [sic] coup d'état before it actually took place." *Id*. In addition, the Coup d'État Request sought "inter-agency communications to and from USSOUTHCOM." *Id*.

On July 8, 2009, Plaintiff submitted a second FOIA request (the "RVV Request"), specifically seeking records concerning General Romeo Vásquez Velásquez. Bigwood Decl. ¶ 8 & Ex. B. The RVV Request sought records dating back to May 1, 1979, when General Vásquez reportedly attended the U.S. Army School of the Americas in Georgia. *Id.*

Although Plaintiff requested expedited processing for both requests, Southcom failed to respond to either of them, in any way, for more than one year. Bigwood Decl. ¶ 9. On November 29, 2010—after repeated telephone calls, emails and letters from Mr. Bigwood—Southcom issued an "interim response" to the Coup d'État Request, acknowledging receipt and granting expedition and a fee waiver. *Id.* ¶ 10 & Ex. C. On December 16, 2010, Southcom acknowledged the RVV Request. *Id.* ¶ 10 & Ex. D.

Four months later, Southcom still had not produced a single page in response to either request. On March 23, 2011, after exhausting his administrative remedies without success, Mr. Bigwood filed his complaint in this action. Bigwood Decl. ¶¶ 11-12 & Exs. E-F.

On June 20, 2011—almost two years after Mr. Bigwood submitted his initial FOIA request and three months after he sued—DOD turned over 66 documents, consisting of 272 pages, which it described as a "complete release" of records responsive to the Coup d'État Request. Bigwood Decl. ¶ 13; Declaration of Pamela Spees ("Spees Decl."), ¶ 9 & Ex. C. On July 7, 2011, DOD produced five additional records, consisting of 26 pages, which it described as "all documents responsive" to Plaintiff's RVV Request. Bigwood Decl. ¶ 13; Spees Decl. ¶ 9 & Ex. D. All told, DOD's 2011 production (the "First Production") totaled 71 documents consisting of 298 pages—many of them heavily redacted. Bigwood Decl. ¶ 13; Spees Decl. ¶ 4.

Upon reviewing the First Production, Plaintiff's attorneys at the Center for Constitutional Rights ("CCR") promptly expressed concerns about the adequacy of the agency's search and the

extent of the redactions. CCR asked, among other things, which specific agencies or components conducted the searches, who processed them, the "specific databases that were reviewed," and what search terms were used. Spees Decl. ¶¶ 6-8 & Exs. A, B. Most of these questions went unanswered, except that on September 6, 2011, during a conference call, DOD's counsel identified the four Southcom directorates and units that were searched and provided a list of the search terms used. *Id*. ¶ 6.[1] DOD never sought or obtained Plaintiff's consent to that list. *Id*. ¶ 7. Nor did DOD ever disclose the connectors or Boolean logic it deployed to conduct its electronic searches, the databases it searched, or any information concerning its underlying systems or software. *See* Regard Decl. ¶¶ 16-34.

Among the troubling omissions that Plaintiff noticed, and that his counsel pointed out to DOD's counsel, was that the First Production did not include any emails, nor any primary records from Soto Cano—despite the fact that President Zelaya was flown out of the country through Soto Cano, right in the midst of Joint Task Force Bravo. *See* Bigwood Decl. ¶ 14; Spees Decl. ¶ 11(a). Moreover, the First Production did not include at least one document that Plaintiff knew to be responsive—because he had obtained a copy through a different FOIA request to a different agency. Bigwood Decl. ¶ 15. The missing document was a cable (the "Timeline Cable") from the U.S. Embassy in Tegucigalpa, addressed to numerous Southcom

[1] The list provided orally on September 6, 2011 is different, in non-trivial ways, from the list of search terms that DOD has provided to the Court in support of its summary judgment motion. *Compare* Spees Decl. ¶ 6 *with* Declaration of Major Lisa L. Bloom ("Bloom Decl.") ¶ 7. For example, the September 6, 2011 list included, "Biographical Information/Zelaya," "Reinstatement of General Zelaya," and "Supreme Court decision on General Zelaya," none of which appear on the list submitted to this Court. *See* Spees Decl. ¶ 6. On the other hand, the list in Major Bloom's declaration includes "Zelaya Exile," "Zelaya Oust," and "Zelaya Removal," which appear to be new. *See* Bloom Decl. ¶ 7. Moreover, DOD does not represent that the current list is exhaustive, or that it was used across all databases searched. *Id*. Plaintiff therefore remains unsure as to what search terms DOD actually used in connection with the First Production.

subcomponents and entirely devoted to a discussion of the coup and its aftermath. *Id*. ¶¶ 15-16; Spees Decl. Ex. 11(a). Plaintiff's counsel provided a copy of the Timeline Cable to DOD's counsel on December 22, 2011, pointing out that it should have been included with the First Production and noting that the "wholesale absence" of any cables or other Embassy communications "alone raises questions about the extent of Defendants' search." Spees Decl. ¶ 11(a) & Ex. F.

Although DOD claimed that its initial search was adequate, it agreed to perform a supplemental search. Spees Decl. ¶ 10 & Ex. E. The search and processing of responsive documents took another year. *Id*. ¶ 10.

On September 26, 2013—more than three years after Plaintiff submitted his FOIA requests—DOD produced 88 additional documents consisting of 784 pages (the "Second Production"). Bigwood Decl. ¶ 18. Among the documents included in the Second Production was the Timeline Cable. *Id*. ¶ 21(a). But no other cables or Embassy communications were produced. *Id*. Nor did DOD produce any emails, any further contemporaneous documentation from Soto Cano or Joint Task Force Bravo, or any one of a number of documents that were referenced in the First Production, that would clearly have been responsive to one or both of Plaintiff's Requests, and that were specifically pointed out to DOD during the negotiation process. *Id*. ¶¶ 21(a)-(h); Spees Decl. ¶¶ 11(a)-(e). Once again, many of the documents were heavily redacted. Bigwood Decl. ¶ 19; Spees Decl. ¶ 11(f).[2]

Upon review of the Second Production, Plaintiff's counsel again expressed concerns over the adequacy of DOD's search and the extent of its redactions. Spees Decl. ¶ 11 (e) & Exs. J &

[2] On December 20, 2013, DOD produced a revised version of the First Production. Spees Decl. n.2. The revised First Production "addresse[d] some concerns with the labeling of exemptions," but did not contain any new documents. *Id*.

L. During a conference call on December 23, 2013, DOD's counsel identified—for the first time—the Southcom components searched as part of the supplemental search, but did not identify the search terms or connectors used, the systems or software employed, the actual databases searched, or the personnel who searched them. *Id.* ¶ 10. The parties were able to narrow the scope of their disagreements concerning some of DOD's redactions. However, with respect to the extensive redactions that DOD made pursuant to 5 U.S.C. § 552(b)(1) (which permits an agency to withhold information that has been properly classified pursuant to executive order), DOD declined to provide any further information or reconsider its position. In a letter dated January 10, 2014, DOD's counsel explained: "Given the time and agency resources already committed to reviewing these records, Southcom does not believe that it is in a position to engage in further review." *Id.* Ex. L.

ARGUMENT

1. STANDARD OF REVIEW

In a FOIA case, "the burden of justifying nondisclosure lies with the defendant agency." *Cudzich*, 886 F. Supp. at 104. Summary judgment is not warranted unless the agency can "prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [FOIA's] inspection requirements." *Id.* (quoting *Nat'l Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)). FOIA is grounded in the "fundamental principle of public access to Government documents," *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989), and in the American public's right to know "what their Government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citations and internal quotation marks omitted). Accordingly, "[i]n order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an

exemption to the FOIA." *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)). *See also Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (agency is not entitled to summary judgment where "the record leaves substantial doubt as to the sufficiency of the search"); *Voinche v. FBI*, 412 F. Supp. 2d 60, 64 (D.D.C. 2006) (summary judgment is inappropriate unless the agency has met its burden demonstrating that the exemptions claimed were properly applied).

When evaluating the sufficiency of a search, FOIA "directs the district courts to determine the matter *de novo.*" *ACLU v. Dep't of Homeland Sec.,* No. 11 Civ. 3786, 2013 WL 4885518, *15 (S.D.N.Y. Sept. 9, 2013) (citations omitted). Summary judgment is inappropriate where "the agency's response raises serious doubts as to the completeness of the agency's search," is "patently incomplete," or "is for some other reason unsatisfactory." *Davis v. Dep't of Homeland Sec*., No. 11–cv–203, 2013 WL 3288418, *6 (E.D.N.Y. June 27, 2013) (quoting *Nat'l Day Laborer Org. Network v. ICE*, 877 F. Supp. 2d 87, 96 (S.D.N.Y. 2012)). In order to meet its burden with regard to the adequacy of its search, the agency must describe the scope of the search and provide the search terms used or method employed. *Id*. (quoting *Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 231, 240–41 (D. Conn. 2012)). Its affidavits should also describe "at least the general structure of the agency's file system," so as to show that "any further search [is] unlikely to disclose additional relevant information." *Church of Scientology v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986)).

Trial courts also perform a *de novo* review of the agency's justifications for withholdings and redactions, including the applicability of any FOIA exemptions claimed, with all doubts resolved in favor of disclosure. 5 U.S.C. § 552(a)(4)(B); *see also Fed. Open Mkt. Comm. v.*

Merrill, 443 U.S. 340, 352 (1979).[3] Where the agency's proffered justifications for withholding are insufficient to sustain its burden of proof, it is not entitled to summary judgment. In fact, judgment for the plaintiff may be appropriate. *See, e.g., Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861, 870 (D.C. Cir. 1980); *Natural Resources Defense Council v. Nat'l Marine Fisheries Serv.*, 409 F. Supp. 2d 379, 385 (S.D.N.Y. 2006).

II. DOD FAILED TO CONDUCT AN ADEQUATE SEARCH.

In order to be adequate, a search must be "reasonably calculated to uncover all relevant documents." *Weisberg*, 705 F.2d at 1351. The agency bears the burden of establishing, "beyond [a] material doubt," that its search met this standard. *Id*.; *accord Nation Magazine v. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995); *Truitt v. Dep't of State,* 897 F.2d 540, 542 (D.C. Cir. 1990). In determining whether a search is "reasonable," courts must be mindful of FOIA's purpose, which is to prompt the broadest possible disclosure. *See Campbell v. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) (the "reasonableness" of an agency search must be assessed "consistent with congressional intent tilting the scale in favor of disclosure"). Adequacy of the search is a factual inquiry, dependent on the individual facts of each case. *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir. 1986); *see also Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (compliance with FOIA requires "both systematic and case-specific exercises of discretion and administrative judgment and expertise").

[3] Agency affidavits or declarations are entitled to substantial deference when articulating national security concerns, but only if they are sufficiently detailed. *Cf.* Defendant's Memorandum of Law in Support of their Motion for Summary Judgment ("Def. Mem."), at 5-6. *See Greenberg v. Dep't of Treasury*, 10 F. Supp. 2d 3, 14 (D.D.C. 1998) ("affidavits are only entitled to this extra weight" if they "describe the documents withheld and the justification for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed").

An agency may rely on an affidavit to discharge its burden, provided that the affidavit is "reasonably detailed" and "set[s] forth the search terms and type of search performed," so as to show that "all files likely to contain responsive materials . . . were searched." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *accord Amnesty Int'l USA v. CIA*, No. 07 Civ. 5435, 2008 WL 2519908, *9 (S.D.N.Y. June 19, 2008); *Davis*, 2013 WL 3288418 at *6. Affidavits cannot be "'so general as to raise a serious doubt whether the [agency] conducted a reasonably thorough search of its records.'" *Friends of Blackwater v. Dep't of Interior*, 391 F. Supp. 2d 115, 120 (D.D.C. 2005) (quoting *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994)).

Since the agency bears the burden of proving that it conducted a sufficient search, summary judgment is unavailable if the "record leaves substantial doubt" as to its efforts. *Truitt*, 897 F.2d at 542; *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 96. Moreover, a plaintiff may challenge the adequacy of the search by providing "countervailing evidence," which, if it raises "positive indications of overlooked materials," may not only defeat the agency's motion but "entitle the plaintiff to summary judgment." *Prison Legal News v. Lappin*, 603 F. Supp. 2d 124, 126 (D.D.C. 2009) (internal quotation marks and citations omitted).

A. DOD Has Not Demonstrated That It Conducted An Adequate Electronic Search of the Subcomponents It Identified.

In its brief, DOD states that "[d]escriptions of the searches conducted by Southcom . . . are set out in detail in the Attached [sic] Declaration of Lisa R. Bloom." Def. Mem. at 6. In fact, Major Bloom devotes only three paragraphs of her declaration to DOD's electronic search methodology. Bloom Decl. ¶¶ 7, 10, 12.[4] In those three paragraphs, Major Bloom:

[4] Bloom spends two additional paragraphs listing the Southcom subcomponents that were searched. *Id.* ¶¶ 8-9. In addition, General Thomas W. Geary attests, in entirely conclusory

- Provides what appears to be a partial list of search terms used for DOD's initial search (most of which are compound phrases), but
- Does not attest that the list is complete, nor that it was used uniformly across all of the databases searched;
- Does not discuss the discrepancies between the list presented to this Court and the somewhat different list described to Plaintiff's counsel in 2011, *see* Spees Decl. ¶ 6;
- Does not identify the connectors or Boolean logic operators, if any, that were used along with the search terms listed;
- Does not identify the operating systems or software used to conduct the searches, nor the systems and software used to store the underlying data (except to say that "Microsoft Outlook email files" were searched);
- Does not identify the personnel who designed, oversaw, or actually conducted the electronic searches;
- Does not provide any of the search terms used for DOD's supplemental search; and
- Does not provide any other information concerning the methodology used for that supplemental search, nor how it was different from the initial searches of the same Southcom directorates and units.

The sketchy information provided by DOD falls far short of the detail required to establish, "beyond material doubt," that a FOIA search was "reasonably calculated to uncover all relevant documents." *Nat'l Day Laborer Org. Network,* 877 F. Supp. 2d at 95. Where, as here, that search involves electronically stored information ("ESI"), the agency must show, at the outset, that the search was designed and executed by properly trained personnel. Simply asking lay custodians to review their files for documents responsive to a FOIA request is ordinarily insufficient, because "designing legally sufficient electronic searches in the discovery or FOIA context is not part of their daily responsibilities." *Id.* at 108. *See also* Regard Decl. ¶¶ 8(b),

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terms, that the J2 (intelligence) directorate of Southcom "conducted thorough manual searches of paper files and electronic searches for documents responsive to the Plaintiff's FOIA requests." Declaration of Thomas W. Geary ("Geary Decl.") ¶ 6.

19(b), 25-26. The agency must also set forth "the search terms and the type of search performed," *Iturralde,* 315 F.3d at 313-14, so that the plaintiff—and the court—can evaluate whether the search was reasonably designed to uncover all relevant documents. Further, the agency must "identify the searched files and describe at least generally the structure of the agency's file system," so as to demonstrate that any further search would be "unlikely to disclose additional relevant information." *Katzman v. CIA,* 903 F. Supp. 434, 438 (E.D.N.Y 1995); *see also Nat'l Day Laborer Org. Network,* 877 F. Supp. 2d at 96; Regard Decl. ¶¶ 8(a), 8(c), 20-24, 27-34. (determining the adequacy of an electronic search requires information concerning the systems and software in place and the search terms and connectors used).

1. DOD has not even provided a complete list of search terms, nor specified where or when those terms were used.

The adequacy of an electronic search depends in large part on whether the correct search terms were used. *Iturralde,* 315 F.3d at 313-14; Regard Decl. ¶ 27**.** Unless the agency provides a complete list of those terms—together with assurances that all such terms were searched for across all relevant databases—it cannot meet its burden under FOIA. *See. e.g. Habeas Corpus Resource Ctr. v. Dep't of Justice,* No. 08 Civ. 2649, 2008 WL 5111224 (N.D. Cal. Dec. 2, 2008) (declarations that only specified two or three search terms were insufficient to establish adequacy). The terms themselves, of course, must be reasonably calculated to uncover all relevant documents. *Serv. Women's Action Network*, 888 F. Supp. at 249 (denying summary judgment to agency where it failed to explain why it did not use additional search terms to locate responsive documents).

In this case, DOD tells the Court that the search terms used for its initial effort, in 2011, "included" the following words or phrases:

> Coups/Coups d'États; Zelaya; Honduras 2009; Elections 2009; Zelaya's Arrest; Zelaya Resignation; Military Activities/Zelaya; Court Decisions/Zelaya; Manual [sic] Zelaya; Zelaya Exile; Zelaya Oust; Zelaya Arrest; Zelaya Removal; Honduras Coups; Romeo Vásquez; CHOD Vásquez; and General Vásquez.

Bloom Decl. ¶ 7.[5] Nowhere in the Bloom declaration—or elsewhere in DOD's papers—does the agency attest that it used all of these search terms across all of the databases it searched. Nor does it specify what additional words or phrases, if any, were "included" in its electronic search efforts, or where those additional terms were used. These questions must be answered before the adequacy of the search can be evaluated, Regard Decl. ¶¶ 26-34, and are particularly significant here because DOD has now provided two different lists of search terms, each allegedly used to find the documents released in the First Production. *See* Spees Decl. ¶ 6.

Moreover, DOD never lists *any* of the search terms used during its supplemental search. *See* Bloom Decl. ¶ 12. Because the Second Production contained 88 documents not previously released, DOD must have used different terms, applied different connectors, or searched different databases. But DOD has not disclosed what it did differently the second time around.[6] It is therefore not entitled to summary judgment. *Iturralde,* 315 F.3d at 313-14.

2. DOD has not disclosed the systems, software, or personnel involved in the search.

Even if DOD had listed every search term used to query every relevant database, its declarations would be insufficient, because they do not describe any of its in-place operating systems or software. This information is necessary to determine whether DOD's systems had the

[5] The first name of the deposed President of Honduras is spelled "Manuel," not "Manual." Plaintiff cannot determine whether DOD used a misspelled version of the name in its electronic searches or simply made a typographical error in its summary judgment papers.

[6] On January 10, 2014, DOD's counsel informed Plaintiff's counsel by letter that the units and directorates involved in the supplemental search looked for responsive records using "various search terms" involving the coup against President Zelaya. Spees Decl. Ex. L. No further detail has ever been provided concerning those "various search terms."

technical functionality necessary to support the search as designed, such as the use of root expanders, wild card characters or Boolean logic operators. *See* Regard Decl. ¶¶ 8(a), 19(a), 20. In addition, it is important to know how the agency's systems handle a multi-word phrase, *see* id. ¶¶ 21-24, and whether those systems had significant limitations that could affect the adequacy of a search. On some systems, for example, a search of Microsoft Outlook email files does not reach the attachments to the emails, which could potentially be a significant population of responsive records. *Id.* ¶ 23; *see also* Bloom Decl. ¶ 12 (stating that Southcom searched Microsoft Outlook email files). DOD, however, provides none of this information to the Court.

Nor does DOD identify—either by name or by position—any of the individuals who designed, supervised, or conducted the search. *See* Bloom Decl. ¶ 10 (unspecified "personnel" were sent to Honduras); Regard Decl. ¶¶ 8(b), 25 (explaining the importance of properly trained personnel). This in turn makes it difficult to determine whether the actual searchers received proper instructions and supervision. *See Nat'l Day Laborer Org. Network.*, 877 F. Supp. 2d at 108; Regard Decl. ¶ 26.

3. DOD has not disclosed the connectors and Boolean operators, if any, that it used.

Assuming that Southcom's systems support modern search tools, the agency was required to explain not only what search terms it used but also "[t]he method in which they are combined and deployed." *Families for Freedom v. United States Customs and Border Protection*, 837 F. Supp. 2d 331, 225 (S.D.N.Y. 2011). "[S]earch results will change dramatically" depending on the use of "logical connectives" such as "and," "or," and "w/10" to determine what documents to include within the scope of a search. *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 107. Absent this information, it is impossible to evaluate the adequacy of a search. *Id*.

For example, DOD lists "Zelaya's Arrest" as one of its initial search terms. Bloom Decl. ¶ 7. If DOD only searched for this precise phrase, as written, it would miss documents containing phrases like "arrest of Zelaya," "Zelaya was arrested," or "President Zelaya's arrest." Regard Decl. ¶ 31. But if DOD used root expanders and connectors intelligently, it could capture a much larger number of relevant documents. *Id*. ¶ 35. DOD provides no information, however, concerning the method by which it combined and deployed its search terms.

4. The use of compound phrases is generally an ineffective search strategy.

As noted above, most of the search terms listed in DOD's summary judgment papers are compound phrases, some of them including slash marks. Bloom Decl. ¶ 7. The use of compound phrases is generally an ineffective search strategy. Regard Decl. ¶ 31. As explained above, a deliberate search for a precise two or three word phrase (usually conducted by placing the entire phrase inside quotation marks when inputting it into the search engine) will only return documents containing those exact words, in that exact order—thereby, in all likelihood, missing documents equally responsive to the FOIA request. *Id.*[7]

On the other hand, if the phrase is input without quotation marks, different search engines can interpret the query differently, leading to ambiguous and inconsistent results. For example, the phrase "Honduras Coups," if input without quotations marks, could be understood by different systems to mean "Honduras Coups," "Honduras" and "Coups," or "Honduras" or "Coups." Regard Decl. ¶ 32. Phrases like "Military Activities/Zelaya" are particularly troubling, because the slash mark does not have any recognized meaning among ESI

[7] In this case, the fact that DOD lists two closely related phrases as separate search terms ("Zelaya's Arrest" and "Zelaya Arrest") suggests that it did, in fact, search for each phrase separately—rather than constructing a more efficient search using root expanders and connectors, like "Zelaya! *and* Arrest!" or "Zelaya! w/10 Arrest!".

professionals as a connector or Boolean operator. *Id*. ¶ 33. Thus, many search engines will treat two words connected by a slash mark as a single word ("Activities/Zelaya"), in which case they will only return a syntax error, or documents containing those precise characters in that precise order. *Id.*

DOD's search terms are poorly constructed for other reasons as well. The first name of President Zelaya is misspelled (it is "Manuel," not "Manual"). *See* Bloom Decl. ¶ 7. There is no mention of the Presidential plane (either by model or by tail number), no acknowledgment of the full name of General Romeo Vásquez Velázquez,[8] and only limited synonyms for key words like "arrest" and "coup." Regard Decl. ¶ 35; Bigwood Decl. ¶ 22. These deficiencies tend to show that even if DOD used appropriate connectors and Boolean operators, its search would be inadequate. *See Fox News Network, LLC. v. Dep't of the Treasury,* 678 F. Supp. 2d 162, 166 (S.D.N.Y. 2009) (failure to use an obvious acronym made the search inadequate); *Hasbrouck v. United States Customs and Border Protection*, No. 10 Civ. 3792, 2012 WL 177563 (N.D. Cal. Jan 23, 2012) (failure to search spelling variants rendered the search inadequate); *Serv. Women's Action Network*, 888 F. Supp. at 249 (failure to search for "Sexual Assault" in addition to "Sexual Harassment" and "Sexual Trauma" rendered search inadequate).

5. DOD failed to produce documents that would have been turned up by an adequate search.

Although "the failure of an agency to turn up one specific document in its search does not alone render a search inadequate," *Iturralde,* 315 F.3d at 315, a more widespread failure to produce relevant records can be indicative of an underlying inadequacy in the search process. *Weisberg*, 705 F.2d at 1351. Similarly, if the agency "ignored indications in documents found in

[8] "Romeo Vasquez," which is the only form of the name on Southcom's list of search terms, *see* Bloom Decl. ¶ 7, is a fairly common name—used by, among others, the Filipino matinee idol (born Roberto Sumilang) who starred in *Pretty Boy* (1957) and *Kilabot Sa Makiling* (1959).

its initial search that there were additional responsive documents elsewhere," the court can infer, that the search was not adequate. *Campbell*, 164 F. 3d at 28. In this case, DOD failed to produce whole categories of responsive records, and similarly failed, in its supplemental search, to locate responsive documents that were cited, described, or otherwise referred to in the First Production. For example:

Emails. DOD tells this Court that Southcom's FOIA office directed all six subcomponents involved in responding to Plaintiff's requests to "conduct electronic searches of their desktops, hard drives, shared drives, storage databases, and Microsoft Outlook email files." Bloom Decl. ¶ 10. Yet DOD has not produced any emails, or documents that can be recognized as emails, in either its First Production or its Second Production. Bigwood Decl. ¶21(a). It seems implausible, at best, that no-one in any of these directorates or units so much as mentioned the coup d'état in Honduras on email before, during, or for years after that high-profile event.

Embassy Cables. The First Production contained no cables or other communications to or from the U.S. Embassy in Tegucigalpa. Bigwood Decl. ¶ 14. The Second Production contained one—the July 9, 2009 Timeline Cable sent to Southcom and devoted entirely to the coup—but only after Plaintiff himself brought it to DOD's attention, having previously received a version of it from a different agency. *Id*. ¶ 21(a); Spees Decl. Ex. G.

DOD has yet to produce any other Embassy communications concerning the coup or General Vásquez. That such cables exist is clear. Indeed, they are cited and discussed in Intelligence Reports released as part of the First Production. *See* Bigwood Decl. ¶ 21(h); Spees Decl. ¶ 11.e., Exs. P & K. These cables have titles like, "Open and Shut: The Case of the Honduran Coup," and "Justice for My Enemies: De Facto Government Vigorously Pursues Prosecutors [sic] Against Zelaya Team," which make it clear that they are responsive to

Plaintiff's FOIA requests. Yet DOD has failed to produce any of them, except for the one that Plaintiff already had.

SitReps. DOD produced a number of daily Situation Reports ("SitReps") prepared by MILGRP, which reports to Southcom but is "an integral part of the country team" in Honduras. Bigwood Decl. ¶ 21(d); Spees Decl. Ex. Q. However, despite repeated requests, DOD has not produced a single SitRep from the day of the coup (June 28, 2009) or the days and weeks leading up to it. Bigwood Decl. ¶ 21(d).

Headline News. Southcom prepares a daily compilation of published articles and commentary—none of it classified—which it calls "Headline News." Bigwood Decl. ¶ 21(e); Spees Decl. Ex. R. In response to Plaintiff's FOIA requests, DOD produced a single edition of Headline News, dated July 9, 2009. *Id*. Many other editions, throughout the summer of 2009, were full of coup news. *Id*. Southcom has offered no explanation for its failure to produce those editions.

Primary Documents from Soto Cano. DOD has not produced any primary records from Soto Cano Air Base, the home of 600 U.S. troops, where President Zelaya was taken on June 28, 2009, and then flown to Costa Rica. That no Southcom documents exist relating to the incoming or outgoing flights of a deposed foreign leader seems implausible. *See* Bigwood Decl. ¶ 21(c). Moreover, there is a clear statement in one of the documents contained in the First Production that JTF-B (Joint Task Force Bravo) "confirmed that a fixed wing aircraft departed Soto Cano Air Base for CRI" shortly after news of the coup broke. *Id*. ¶ 21(f): Spees Decl. Ex. H. That confirmation was never produced.

AARs. One of Southcom's "key tasks," in connection with the coup, was to conduct a "comprehensive AAR" or After-Action Report. *See* Bigwood Decl. 21(g); Spees Decl. Ex. H. DOD has never produced that AAR. Bigwood Decl. ¶ 21(g).

B. DOD Has Not Demonstrated That It Conducted An Adequate Manual Search of Its Non-Electronic Documents.

Southcom tells this Court that the six subcomponents initially selected to respond to Plaintiff's FOIA requests were also "directed to conduct manual searches of their paper files." Bloom Decl. ¶ 10. Two years later, as part of the second search, the four subcomponents deemed most likely to possess relevant documents again "conducted thorough manual searches of their paper files." *Id*. ¶ 12. No further detail is provided. Southcom does not identify who directed the manual searches, who conducted those searches, what instructions they were given, what methodologies they used, what supervision or oversight they received, or even what files were searched. While an inadequate electronic search does not automatically imply an inadequate manual search, *see Amnesty Int'l,* 2008 WL 2519908 at *15, in this case Southcom has provided even less information about its manual searches than it has about its electronic searches. DOD has therefore failed to carry its burden of demonstrating that Southcom adequately searched its paper documents.

1. Southcom has not disclosed the instructions given to the custodians who conducted the manual searches.

Just as electronic searches are only as good as the search terms used (and the manner in which those search terms are deployed), Regard Decl. ¶ 27, a defending agency must establish the adequacy of its manual searches. *Cozen O'Connor v. Dep't of Treasury,* 570 F. Supp. 2d 749, 766 (E. D. Pa. 2008). Therefore, an agency seeking summary judgment as to the adequacy of its FOIA search must reveal what it told its human search agents to do. *See*, *e.g.*, *Safety*

Research & Strategies, Inc. v. Dept. of Transp., 903 F. Supp. 2d 1, 7 (D.D.C. 2012) (summary judgment denied where the agency failed to provide any information explaining what instructions were given to document custodians); *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 106 n.95 (summary judgment denied when agency failed to provide details concerning its manual search). If the human search agents all worked from a "standardized search protocol," the agency must describe that protocol. *Id*. In the absence of a standardized protocol, the agency "must explain how each document custodian conducted the search of his or her own files." *Id*.

In this case, almost no information has been provided concerning Southcom's manual searches, except the conclusory assertion that the second search was "thorough." Bloom Decl. ¶ 12. It is not even clear whether the manual searchers were given the same search terms that were used for the electronic searches. *See id*. Nor do DOD's summary judgment papers disclose any other search protocols used to locate responsive non-electronic documents. DOD does not even tell the Court what paper files were searched or how they were selected for search. Without, at minimum, some description of what information was given to custodians before they executed their search, it is impossible to conclude that the manual searches were conducted adequately. *Safety Research & Strategies, Inc.*, 903 F. Supp. 2d at 7.

2. Southcom has not established that the manual searches were conducted or overseen by qualified personnel.

It is difficult for an agency to conduct an adequate search of files without the participation of custodians who are familiar with the type of documents subject to the search and the filing system used to store them. The defending agency must provide the court with specific information about the way that the manual search was conducted. *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 106 n.95. Thus, information concerning the identity of the searching custodian(s), or at least those who designed and supervised the search, is key to

evaluating the adequacy of a search. *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 473 (S.D.N.Y. 2010). The degree and quality of attorney oversight, "including the ability to review, sample, or spot-check the collection efforts," is also important. *Id*. At bottom, "[t]he adequacy of each search must be evaluated on a case by case basis." *Id*.

No such evaluation is possible here, because Southcom has not provided this Court with any information about how its manual search was conducted. Without at least providing some insight into the methods used to execute the manual search—and the personnel who designed, supervised or conducted it—DOD cannot establish, for summary judgment purposes, that it adequately searched its paper files.

C. DOD Failed to Search All Units, Directorates and Commands Reasonably Likely to Possess Responsive Documents.

In evaluating the adequacy of a FOIA search, courts must also consider whether the agency searched all units or "components" that were reasonably likely to possess responsive documents. *Banks v. Dep't of Justice,* 700 F.Supp 2d 9, 15 (D.D.C. 2010). Although one specific location may be the "most likely" to turn up records, the agency has an obligation to search other locations that are also likely to turn up relevant records. *See. e.g. Oglesby*, 920 F.2d at 68 ("the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested"); *DiBacco,* 2012 WL 5377060 at *6 ("[t]he agency cannot limit its search to only one or more places if there are additional sources that are likely to turn up the information requested") (citations omitted). A search is inadequate if the documents produced by the agency reveal that a search of another record system would have

produced additional responsive documents. *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 326 (D.D.C. 1999) (citing *Campbell*, 164 F.3d at 28).[9]

In this case, DOD failed to search all appropriate subcomponents of Southcom, and also failed to forward Plaintiff's requests to any DOD components outside of Southcom. Initially, DOD searched six subcomponents of Southcom: the Intelligence Directorate ("J2"); the Operations Directorate ("J3"); Plans ("J5"); the Public Affairs Office ("PAO"); the Security Cooperation Office ("SCO") at the U.S. Embassy; and Joint Task Force-Bravo ("JTF-B") in Comayagua, Honduras. *See* Bloom Decl. ¶ 8.

By limiting its search in this manner, DOD overlooked five other locations that should have been searched. The U.S. Army South ("USARSO"), U.S. Navy South ("NAVSO"), and U.S. Air Force South ("AFSOUTH"), which are all part of Southcom, were actively monitoring Honduras' political climate immediately following the coup and formulating contingency plans to deal with security concerns over pro-Zelaya demonstrations. *See* Bigwood Decl. ¶ 31-32; Spees Decl. Ex. O. Moreover, AFSOUTH was responsible for "command and control of air activity in the USSOUTHCOM area," as well as "an Air Force operations group responsible for Air Force forces in the area." Bigwood Decl. ¶ 31. Given that President Zelaya was flown out

[9] Within the DOD, moreover, "[m]isdirected requests shall be forwarded promptly to the DOD Component or other Federal Agency with the responsibility for the records requested." 32 C.F.R. 286.23(g). DOD is well aware of this policy and has honored it in the past. *See* Bigwood Decl. ¶ 36 & Ex. G. Thus, failure by one DOD component (like Southcom) to refer a FOIA request to another component that is "likely to have" responsive documents "is sufficient to render an agency's search inadequate." *Blackwater*, 391 F. Supp. 2d at 121 (interpreting a similar Department of the Interior regulation to require the United States Fish and Wildlife Service to forward a FOIA request to the Secretary of the Interior, who was likely to possess responsive documents).

of Honduras through a U.S.-staffed military air base, a reasonable search for records responsive to Plaintiff's FOIA requests should have included AFSOUTH, USARSSO, and NAVSO.

MILGRP, as noted above, was considered part of the "country team" at the U.S. Embassy—though it reported to Southcom—and routinely engaged in joint exercises with the Honduran Armed Forces. Bigwood Decl. ¶ 33. DOD's declarations, submitted in support of its summary judgment motion, do not mention MILGRP, but DOD's counsel represented on January 10, 2014 that MILGRP "was tasked with locating all daily Situation Reports during the relevant time frame." Spees Decl. Ex. L. There is no indication that MILGRP was searched for other responsive documents, such as the source material that it used to prepare its SitReps. Since MILGRP was highly likely to possess responsive records above and beyond the SitReps themselves, a more general search should have been conducted.

The National Military Command Center ("NMCC") also possessed responsive documents. Documents included in the First Production revealed NMCC was "notified" of the coup, *see* Bigwood Decl. ¶ 37; Spees Decl. Ex. H, but was never searched for that notification—nor for any other relevant documents. DOD's failure to search NMCC, which was "reasonably likely" to possess additional responsive records, further rendered its FOIA response inadequate. *See Banks*, 700 F. Supp. 2d at 15.

In addition, the record is unclear as to whether DOD searched seven distinct subcomponents of Joint Task Force Bravo: the Staff Judge Advocate ("CJA"); Army Forces Battalion ("ARFOR"); Joint Security Forces ("JSF"); Medical Element ("MEDEL"); the 1st Battalion 228th Aviation Regiment ("1-228th"); the 612th Air Base Squadron ("612th") and the Army Support Activity command ("ASA"). *See* Bigwood Decl. ¶ 30. Documents released as part of the First Production reveal that some of the responsive information they contain was

received from (or sent to) one or more of these subcomponents—and that all of them played a part in Joint Task Force Bravo's coup-related tasks. *Id*. ¶ 28. Since "[t]he agency cannot limit its search to only one or more places if there are additional sources that are likely to turn up the information requested," *DiBacco*, 2013 WL 5377060 at *6, these subcomponents should also have been searched.

III. DOD OVER-REDACTED THE RECORDS IT PRODUCED AND FAILED TO PROVIDE ADEQUATE JUSTIFICATIONS FOR ITS EXCISIONS.

As noted above, courts review the applicability of the FOIA exemptions claimed by an agency *de novo*. *See* 5 U.S.C. § 552(a)(4)(B). Such a review is "essential to prevent courts . . . from issuing a meaningless judicial imprimatur on agency discretion." *Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 141 (2d Cir. 1994). When the agency withholds documents or portions thereof under any of the exemptions listed in FOIA, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B).

Because "disclosure, not secrecy, is the dominant objective of the Act," all FOIA exemptions must be narrowly construed. *John Doe Agency*, 493 U.S. at 152; *accord, Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355-56 (2d Cir. 2005); *Associated Press v. DOD*, 410 F. Supp. 2d 147,150 (S.D.N.Y. 2006). Doubts should be "resolved in favor of disclosure." *Michael's Piano*, 18 F.3d at 143; *see also Weisberg*, 705 F.2d at 1350 (facts to be viewed "in the light most favorable to the requester"). Even where a FOIA exemption applies, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). *See also Roth v. Dep't of Justice,* 642 F.3d 1161, 1167 (D.C. Cir. 2011) ("even if [the] agency establishes an exemption, it must nonetheless disclose all reasonably segregable, nonexempt portions of the requested record(s)") (citations omitted).

Moreover, "[t]o discharge its burden before the district court, the agency 'must provide a reasonably detailed justification rather than conclusory statements to support its claim that the non-exempt material in a document is not reasonably segregable.'" *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 27 (D.D.C. 2011) (quoting *Schoenman v. FBI*, 763 F. Supp. 2d 173, 202 (D.D.C. 2011)). The supporting documents submitted by DOD do little more than make conclusory statements and restate statutory authority, and are insufficient to justify the exemptions claimed. *See. e.g. COMPTEL v. FCC*, 910 F. Supp. 2d 100, 124 (D.D.C. 2013) (agency's justifications were insufficient where its *Vaughn* Index and declarations merely restate the law and do not specifically address the exemptions claimed).

FOIA's central goal is to provide government accountability, *John Doe Agency*, 493 U.S. at 151, and its drafters intended that courts interpret the legislation broadly. 112 Cong. Rec. 13654 (June 20, 1966). Therefore, in reviewing the validity of an agency's exemption claim, a court "may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld." 5 U.S.C. § 552(a)(4)(B). *In camera* review is a vital tool to enable courts to conduct meaningful review, particularly in light of the inherently "anomalous situation" of FOIA plaintiffs litigating—and judges ruling on—documents they have not seen. *Patterson v. FBI*, 893 F.2d 595, 600 (3d Cir. 1990); *see also Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994); *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). Government officials may "reflect an inherent tendency to resist disclosure, and judges may take this natural inclination into account." *Ray*, 587 F.2d at 1195.

To facilitate the right of review and adversarial testing of agency withholdings, the agency's declarations and *Vaughn* Index must describe "in adequate specificity" the information withheld and set forth a "proper justification" for the withholding. *Vaughn*, 484 F.2d at 824.

This requirement "forces the government to analyze carefully any material withheld," allows the trial court to "fulfill its duty," and "enables the adversary system to operate by giving the requester as much information as possible." *Judicial Watch, Inc, v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006). *See also Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir. 1999) ("Absent a sufficiently specific explanation from an agency, a court's *de novo* review is not possible and the adversary process envisioned by FOIA litigation cannot function."); *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (court requires a "detailed public justification for any claimed right to withhold a document," to remedy the "defect" of an *in camera* review "conducted without benefit of criticism and illumination by a party with actual interest in forcing disclosure").

A. This Court Should Conduct An *In Camera* Review Of Documents That DOD Appears To Have Over-Redacted, Without Adequate Justification, Under Exemption (b)(1).

It is often difficult for a FOIA plaintiff to show, or a court to determine, that an agency has over-redacted material that neither the plaintiff nor the court can see. The task is made even more difficult where, as here, the agency provides only conclusory justifications in its declarations, and boilerplate language in its *Vaughn* Index, which together fail to provide a meaningful basis upon which to assess the legitimacy of the redactions. In this case, DOD has also made aggressive redactions—frequently producing whole pages with no text left visible—that suggest, in context, that the agency has overstepped its bounds under FOIA. Further, DOD has failed to comply with the technical requirements of Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29. 2009), which governs redactions of material that has been properly classified, in the name of national security, pursuant to 5 U.S.C. § 552(b)(1). Taken together, these factors demonstrate the need for an *in camera* review of at least some of the material that DOD has excised under exemption (b)(1).

1. DOD's supporting documents fail to support its (b)(1) redactions.

The entries in DOD's *Vaughn* Index, ECF No. 25-5, provide scant basis for determining the validity of any particular withholding. Similarly, the Bloom and Geary Declarations simply parrot the language of the FOIA exemptions at issue and assert their applicability in conclusory terms. General Geary, for example, only mentions two documents specifically (out of 159 that he claims to have redacted) to serve as examples. Geary Decl. ¶¶ 15, 17. Even as to these two, the basis for the redactions, purportedly made pursuant to exemption (b)(1), is stated in general and conclusory terms, *id*., rendering the justification insufficient under FOIA. *See Ray,* 587 F.2d at 1196; *Campbell,* 164 F.3d at 30 (agency declarations are insufficient where they are "conclusory, merely reciting statutory standards").

2. DOD appears to have over-used exemption (b)(1) to excise entire pages, which likely contain segregable information.

Not only is DOD's formal justification for its (b)(1) redactions thin; it is clear from the face of the documents produced that at least some of them have been far more aggressively redacted than exemption (b)(1) could justify. For example, DOD produced a PowerPoint presentation, entitled "Mission Analysis: Potential Support to DOS in Honduras" (Southcom 177-220), that has been redacted to the point at which it can no longer be determined what general type or kind of information has been withheld. *See* Spees Decl. ¶ F & Ex. M. A total of 17 pages of this 43-page document (pages 189-198, 207-209, and 216-218) have been excised entirely—including all titles and headings—purportedly on the basis of exemption (b)(1). Other pages are also heavily redacted.

Although the burden is on the government to justify its decision to withhold responsive material, DOD offers no explanation for its aggressive treatment of the "Mission Analysis" presentation beyond the boilerplate language in its declarations and *Vaughn* Index—discussed

above—asserting that the document "contains information related to the details of a particular foreign operation that is properly classified and withheld under FOIA exemption (b)(1)." Geary Decl. ¶ 15; *see also Vaughn* Index at 11.

It is highly unlikely that there is not a single word, phrase or sentence on any of the 17 pages withheld by DOD that was not "reasonably segregable as non-exempt." The lack of adequate justification by DOD—together with the extent of the redactions—creates a triable issue of fact rendering summary judgment for the agency inappropriate. *See. e.g. , Washington Post v. DOD*, 766 F. Supp. 1, 31 (D.D.C. 1991) (summary judgment is unavailable where the agency's declaration provides an insufficient basis for classification).

3. DOD has not complied with E.O. 13526.

Moreover, DOD's (b)(1) redactions do not comply with the procedural requirements of E.O. 13526, which dictates that certain information "be indicated in a manner that is immediately apparent" "at the time of the original classification." E.O. 13526, § 1.6. Among the "identification and markings" required to be made apparent are the "identity, by name and position, or by personal identifier, of the original classification authority" and the date or event for declassification or review. *Id.* at §§ 1.6(1) & 1.6(4). *See also Judicial Watch. v. Dep't of Def.*, 715 F.3d 937, 941 (D.C. Cir. 2013) ("classified documents must be marked with several pieces of information, including the identity of the classifier and instructions for declassification"); *Allen v. CIA,* 636 F.2d 1287, 1291 (D.C. Cir. 1980) (holding that agency affidavits were procedurally defective where they did not indicate "the identity of the original classifier" and substantively defective because their "conclusory nature" did not permit the court to conclude classification was in conformity with the order's substantive requirements),

overruled on other grounds, *Founding Church of Scientology v. Smith*, 721 F.2d 828, 830 (D.C. Cir. 1983).

In this case, the documents with redactions made pursuant to the order do not provide the identity of the original classifier at the time of classification. *See, e.g.* Spees Decl. Exs. M & P. Plaintiff raised this concern with DOD early on, after receiving the First Production. Spees Decl. ¶ 11(f) & Exs. A-B. DOD's declarations fail to resolve the issue. Although General Geary identifies himself as having "original classification authority" responsible for making (b)(1) redaction decisions, *see* Geary Decl. ¶ 11, he also states that he did not assume his present role until August 2013, long after many of the documents were produced in redacted form. *Id.* ¶ 1. Geary also describes a process wherein "[s]ubject matter experts within the J2, USSOUTHCOM, then determine whether responsive records, or portions thereof, should be withheld under any applicable statutory FOIA or Privacy Act exemptions." *Id.* ¶ 3. The Bloom Declaration uses essentially the same language and adds that "original classification authorities (OCAs)," reviewed the documents to determine if they were "properly classified, both procedurally and substantively, in accordance with Executive Order 13526." Bloom Decl. ¶¶ 1, 17. It is clear from the documents themselves that they were not classified in procedural accordance with the order. The declarations make no attempt to remedy these defects. *See Allen*, 636 F.2d at 1292.

4. This Court should review the contested documents *in camera*.

At a minimum, an *in camera* review of the disputed document should be undertaken. Such a review is appropriate "where the record show[s] the reasons for withholding were vague or where the claims to withhold were too sweeping," or "where it might be possible that the agency ha[s] exempted whole documents simply because there [is] some exempt material in them." *Halpern*, 181 F.3d at 292 (finding government evidence insufficient and remanding for

district court to order supplemental affidavits, *in camera* review, and/or discovery). In this instance, 17 of the 43 pages of the "Mission Analysis" document have been excised completely, without leaving a single word on any of those pages, and without any explanation other than the conclusory statement that the material "related to the details of a particular foreign operation." Geary Decl. ¶ 15. This is precisely the kind of "sweeping" claim, justified by "vague" reasons, that makes *in camera* review appropriate. *Halpern*, 181 F.3d at 292.

A reviewing court enjoys broad discretion in deciding whether to undertake *in camera* review. *See Spirko v. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998). No finding of bad faith is required. *Id.* The vagueness of the claimed exemption, together with the extent of the redaction, is more than sufficient to trigger the review. *Id.*; *see also Halpern*, 181 F.3d at 292. Indeed, a trial judge may require an *in camera* review "on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination." *Ray*, 587 F.2d at 1195. *Accord Meeropol v. Meese*, 790 F.2d 942, 958 (D.C. Cir. 1986); *Ferri v. Bell*, 645 F.2d 1213, 1226 (3d Cir. 1981); *Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 566 (S.D.N.Y. 1989).

This Court has ample reason to be "uneasy" about DOD's (b)(1) exemption claims. Not only are the claims sweeping and the justification conclusory; when Plaintiff sought more information concerning these redactions, DOD refused to discuss the matter further, stating that it did not wish to commit additional time or resources to the issue. *See* Spees Decl. ¶ 11 (f) & Ex. L (letter from AUSA Zimpleman declining to respond to Plaintiff's inquires because, "[g]iven the time and agency resources already committed to reviewing these records, Southcom does not believe that it is in a position to engage in further review"). Such a dismissive response

to what appears to be a systematic over-use of the (b)(1) exemption should prompt a distinct sense of "uneasiness" and an *in camera* review. *Ray*, 587 F.2d at 1195.

In camera inspection is particularly appropriate where, as here, there is a strong public interest in disclosure. *See, e.g.*, *Jones*, 41 F.3d at 243; *Allen*, 636 F.2d at 1299; *Founding Church of Scientology*, 721 F.2d at 830. In this case, a respected journalist is investigating the role of the United States in the events surrounding a coup d'État that deposed the democratically-elected President of Honduras and flew him out of the country through a U.S.-manned military air base. The subject is important, the investigation is serious, and DOD should be required to justify its (b)(1) redactions in accordance with the law.

B. This Court Should Conduct An *In Camera* Review Of Documents That DOD Appears To Have Over-Redacted, Without Adequate Justification, Under Exemption (b)(7).

DOD has also made extensive use of the (b)(7) exemption, which permits the agency to withhold "records or information compiled for law enforcement purposes" only if one or more of six specified types of harm would result. 5 U.S.C. § 552(b)(7). Some of the (b)(7) redactions are implausible on their face. For example, in an "Intelligence Executive Highlight" produced as Southcom 783-92, *see* Spees Decl. Ex. N, DOD has relied on the (b)(7) exemption to redact a portion of what appears to be a news item concerning an influenza warning program:

> USSOUTHCOM established a regional influenza pandemic warning problem [sic] defined as a disease outbreak that could overwhelm regional healthcare facilities and instigate regional instability. USSOUTHCOM assumed . . .

Spees Decl. Ex. N, at Southcom 784. The rest of the sentence—less than one line of text—is redacted, purportedly pursuant to exemption (b)(7)(E). *Id*.

Exemption (b)(7)(E) is intended to shield information that is:

> [C]ompiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information would disclose *techniques and procedures for law enforcement investigations or prosecutions*, or

> would disclose *guidelines for law enforcement investigations or prosecutions* if such disclosure could reasonably be expected to *risk circumvention of the law*.

5 U.S.C. § 552(b)(7)(E) (emphasis added).

It is difficult, if not impossible, to credit DOD's assertion that the missing line of text would disclose techniques, procedures, or guidelines for law enforcement investigations or prosecutions, the disclosure of which could risk "circumvention of the law." It is hard to imagine an "investigation or prosecution" component of a regional influenza warning program that was presumably developed in response to what was—in the summer of 2009—a growing concern over the spread of the H1N1 ("swine flu") virus. Moreover, nothing in the Geary or Bloom Declarations, or the *Vaughn* Index, sheds any further light on this issue. *See* Bloom Decl. ¶ 32 (parroting the language of the statute). The supporting documents submitted do little more than make conclusory statements and restate statutory authority, and are insufficient to justify the (b)(7) exemption claimed. *See Campbell*, 164 F.3d 20, 30 (An agency's declarations are insufficient where they are "conclusory, merely reciting statutory standards, or if they are too vague or sweeping."). This example raises a feeling of "uneasiness" which, at a minimum, calls for an *in camera* review of the document. *Ray*, 587 F.2d at 1195.

CONCLUSION

Because DOD has not established that it conducted an adequate search for the records sought by Plaintiff, nor that its redactions are all justified under one or more FOIA exemptions, it is not entitled to summary judgment. Plaintiff respectfully requests that this Court deny DOD's motion, direct DOD to conduct a further search, reasonably designed to locate the records sought, and order DOD to submit its questionably redacted documents for an *in camera* review.

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Respectfully submitted,

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