

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
4

5
6
7 August Term, 2011
8

9 (Argued: March 9, 2012 Decided: May 21, 2012)

10 Docket Nos. 10-4290-cv(L), 10-4289-cv(CON), 10-4647-cv(XAP),
11 10-4668-cv(XAP)
12
13

14
15 AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS,
16 INCORPORATED, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE,
17 VETERANS FOR PEACE,
18

19 *Plaintiffs-Appellees-Cross-Appellants,*
20

21 -v.-
22

23 DEPARTMENT OF JUSTICE, and its component Office of Legal
24 Counsel, CENTRAL INTELLIGENCE AGENCY,
25

26 *Defendants-Appellants-Cross-Appellees,*
27

28 DEPARTMENT OF DEFENSE, and its components Department of Army,
29 Department of Navy, Department of Air Force, Defense
30 Intelligence Agency, DEPARTMENT OF HOMELAND SECURITY, DEPARTMENT OF
31 STATE, DEPARTMENT OF JUSTICE components Civil Rights Division,
32 Criminal Division, Office of Information and Privacy, Office
33 of Intelligence, Policy and Review, Federal Bureau of
34 Investigation,
35

36 *Defendants.*
37
38
39

1 Before:

2 WESLEY, CARNEY, *Circuit Judges*, and CEDARBAUM, *District Judge*.*

3
4 Appeal and cross-appeal from a judgment of the United
5 States District Court for the Southern District of New York
6 (Hellerstein, *J.*), granting the parties' motions for partial
7 summary judgment with respect to Plaintiffs' Freedom of
8 Information Act request for the disclosure of records
9 concerning the treatment of detainees in United States
10 custody abroad since September 11, 2001. The Government
11 challenges the portion of the judgment requiring it to
12 disclose information in two memoranda pertaining to what the
13 Government considers a highly classified, active
14 intelligence method. Plaintiffs challenge the judgment
15 insofar as it sustained the Government's withholding of
16 certain records relating to the use of waterboarding and a
17 photograph of a high-value detainee in custody. We agree
18 with the district court that the materials at issue in
19 Plaintiffs' cross-appeal are exempt from disclosure. The
20 district court erred, however, in requiring the Government
21 to disclose the classified information redacted from the two
22 memoranda.

23
24 **AFFIRMED** in part and **REVERSED** in part.

25
26
27
28 TARA M. LA MORTE, Assistant United States Attorney
29 (Amy A. Barcelo, Sarah S. Normand, Assistant
30 United States Attorneys, *on the brief*), for
31 Preet Bharara, United States Attorney for the
32 Southern District of New York, New York, NY;
33 (Tony West, Assistant Attorney General, Ian
34 Heath Gershengorn, Deputy Assistant Attorney
35 General, Douglas N. Letter, Matthew M.
36 Collette, Attorneys, Civil Division, Appellate
37 Staff, Department of Justice, Washington,
38 D.C., *on the brief*), for Defendants-
39 *Appellants-Cross-Appellees*.

* The Honorable Miriam Goldman Cedarbaum, of the United States District Court for the Southern District of New York, sitting by designation.

1 ALEXANDER A. ABDO (Jameel Jaffer, Judy Rabinovitz,
2 American Civil Liberties Union Foundation, New
3 York, NY; Lawrence S. Lustberg, Alicia L.
4 Bannon, Gibbons, P.C., Newark, NJ; Michael
5 Ratner, Gitanjali Gutierrez, Emilou MacClean,
6 Shayana Kadidal, Center for Constitutional
7 Rights, New York, NY; Beth Haroules, Arthur
8 Eisenberg, New York Civil Liberties Union
9 Foundation, New York, NY, *on the brief*), *for*
10 *Plaintiffs-Appellees-Cross-Appellants*.
11
12
13

14 WESLEY, *Circuit Judge*:

15 The Central Intelligence Agency ("CIA"), the Department
16 of Justice ("DOJ"), and its component Office of Legal
17 Counsel ("OLC") (collectively the "Government") appeal from
18 a portion of an October 1, 2010 judgment of the United
19 States District Court for the Southern District of New York
20 (Hellerstein, *J.*), requiring the Government to disclose,
21 pursuant to the Freedom of Information Act ("FOIA"),
22 information redacted from two memoranda prepared by the OLC.
23 The Government contends that the redactions are justified
24 under FOIA because the information pertains to a highly
25 classified, active intelligence method. We conclude that
26 the Government may withhold this information under FOIA
27 Exemption 1. We thus reverse the district court's judgment
28 insofar as it required disclosure.

29 The American Civil Liberties Union ("ACLU"), Center for

1 Constitutional Rights, Incorporated, Physicians for Human
2 Rights, Veterans for Common Sense, and Veterans for Peace
3 (collectively "Plaintiffs") appeal from the same judgment
4 insofar as it upheld the Government's withholding of records
5 relating to the CIA's use of the Enhanced Interrogation
6 Technique ("EIT") of waterboarding and a photograph of high-
7 value detainee Abu Zubaydah, taken while he was in CIA
8 custody abroad. Plaintiffs contend that the records and
9 photograph may not be withheld under either FOIA Exemption 1
10 or 3 because the President has declared the practice of
11 waterboarding illegal and the Government has failed to
12 justify adequately its withholding of the photograph. We
13 disagree and hold that the President's declaration and
14 prohibition of the future use of waterboarding do not affect
15 the Government's otherwise valid authority to withhold the
16 records under Exemption 3. We agree with the district court
17 that both the records and photograph are exempt from
18 disclosure under FOIA Exemption 3 and thus affirm that part
19 of the judgment.

20 **BACKGROUND**

21 On October 7, 2003, Plaintiffs submitted a FOIA request
22 to the CIA, DOJ, and other federal agencies, seeking the

1 disclosure of records concerning (1) the treatment of
2 detainees; (2) the deaths of detainees while in United
3 States custody; and (3) the rendition, since September 11,
4 2001, of detainees and other individuals to countries known
5 to employ torture or illegal interrogation methods. On
6 January 31, 2005, Plaintiffs served a FOIA request on the
7 OLC, incorporating by reference their October 7, 2003
8 request and enumerating a non-exhaustive list of documents
9 falling within the scope of Plaintiffs' request.

10 Within a year of each request, Plaintiffs filed
11 separate complaints seeking to compel the Government to
12 release any responsive documents it had withheld from
13 disclosure. With respect to the first action, the district
14 court ordered the Government to produce or identify all
15 records responsive to Plaintiffs' request. *ACLU v. Dep't of*
16 *Def.*, 339 F. Supp. 2d 501, 505 (S.D.N.Y. 2004). Since that
17 time, the Government has disclosed thousands of documents in
18 response to Plaintiffs' FOIA requests.

19 **I. Facts and Procedural History Relevant to the Government's**
20 **Appeal**

21 Among the documents disclosed by the Government are
22 four memoranda authored by the OLC between August 1, 2002
23 and May 30, 2005, analyzing legal questions with respect to

1 the application of EITs to detainees held in CIA custody
2 abroad. The Government initially withheld these memoranda
3 in full, but subsequently, on April 16, 2009, released
4 unclassified versions of the memoranda with limited
5 redactions. The classified information at issue in the
6 Government's appeal is discussed in two of these memoranda,
7 dated May 10, 2005 and May 30, 2005, respectively. The
8 Government redacted references to the classified
9 information—along with other information not relevant to
10 this appeal—pursuant to FOIA Exemptions 1 and 3 on the basis
11 that records related to “intelligence methods,”
12 “intelligence activities,” and CIA “functions” are exempt
13 from disclosure.¹ The parties filed cross-motions for
14 summary judgment with regard to these redactions from the
15 OLC memoranda.

16 The district court reviewed the unredacted OLC

¹ Exemption 1 provides for the nondisclosure of matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). Exemption 3 provides for the nondisclosure of matters that are “specifically exempted from disclosure by statute,” provided that the statute “requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue” or “establishes particular criteria for withholding or refers to particular types of matters to be withheld.” *Id.* § 552(b)(3).

1 memoranda in a series of *ex parte, in camera* sessions. It
2 also reviewed several declarations from high-level executive
3 branch officials supporting the Government's withholding of
4 the redacted information. At the first session, the
5 district court issued a preliminary ruling that all but one
6 of the references to the classified information must be
7 disclosed, without explaining why it treated that sole
8 reference differently. With respect to the other
9 references, the district court held that publicly disclosing
10 that information would reveal not an intelligence method but
11 only a source of the CIA's authority. The district court
12 also found that the references are so general in nature that
13 their disclosure would not compromise national security.
14 The district court nevertheless permitted the Government to
15 submit additional declarations justifying its position that
16 the information was exempt from disclosure.

17 During a subsequent *in camera* session, the district
18 court reaffirmed its preliminary ruling and explained that
19 it viewed the classified information as a "source of
20 authority" for interrogation rather than a "method of
21 interrogation." As a compromise, however, the district
22 court offered to allow the Government to replace references

1 to the classified information with alternative language
2 meant to preserve the meaning of the text. The district
3 court acknowledged the national security concerns
4 potentially raised by the disclosure of some of the
5 classified information, but nevertheless ordered that the
6 Government either disclose the information or comply with
7 the court's proposed compromise. The district court also
8 ordered that references to the classified information in the
9 transcript of the first *ex parte, in camera* proceeding be
10 disclosed or otherwise released in accordance with the
11 compromise. The district court memorialized its oral ruling
12 in a December 29, 2009 order. The Government now appeals
13 from that order.

14 **II. Facts and Procedural History Relevant to Plaintiffs'**
15 **Cross-Appeal**

16
17 Many of the documents released by the Government in
18 response to Plaintiffs' FOIA requests relate to the use of
19 EITs. During the course of this litigation, the President
20 prohibited the future use of certain EITs, including
21 waterboarding, formerly authorized for use on high-value
22 detainees.² On May 7, 2009, the district court ordered the

² On January 22, 2009, the President issued an executive order terminating the CIA's detention and interrogation program

1 Government to compile a list of documents related to the
2 contents of 92 destroyed videotapes of detainee
3 interrogations that occurred between April and December 2002
4 and which would otherwise have been responsive to
5 Plaintiffs' FOIA requests. Pursuant to that order, the CIA
6 identified 580 documents and selected a sample of 65
7 documents for the district court to review for potential
8 release. Specifically, the sample records comprise:

- 9 • 53 cables (operational communications) between CIA
10 headquarters and an interrogation facility;
- 11 • 3 emails postdating the videotapes' destruction;
- 12 • 2 logbooks detailing observations of interrogation
13 sessions;
- 14 • 1 set of handwritten notes from a meeting between a
15 CIA employee and a CIA attorney;
- 16 • 2 memoranda containing descriptions of the contents
17 of the videotapes;
- 18 • 1 set of handwritten notes taken during a review of
19 the videotapes;
- 20 • 2 records summarizing details of waterboard exposures
21 from the destroyed videotapes; and
- 22 • 1 photograph of Abu Zubaydah dated October 11, 2002.

and mandating that individuals in United States custody "not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3." Exec. Order No. 13,491, 74 Fed. Reg. 4,893, 4,894 (Jan. 22, 2009). Moreover, in an April 29, 2009 news conference, the President explained the basis for his ban on the use of waterboarding: "[W]aterboarding violates our ideals and our values. I do believe that it is torture. I don't think that's just my opinion; that's the opinion of many who've examined the topic. And that's why I put an end to these practices." President Barack Obama, News Conference by the President (Apr. 29, 2009), <http://www.whitehouse.gov/the-press-office/news-conference-president-4292009>.

1
2 The Government withheld these records pursuant to FOIA
3 Exemptions 1 and 3, and the parties filed cross-motions for
4 summary judgment with regard to whether the records were
5 exempt from disclosure.³

6 The Government defended its withholding of the records
7 with three declarations of then-CIA Director Leon Panetta.
8 The declarations explained that the records consist
9 primarily of communications to CIA headquarters from a
10 covert CIA facility where interrogations were being
11 conducted, and include "sensitive intelligence and
12 operational information concerning interrogations of Abu
13 Zubaydah." Panetta Decl. ¶ 5, June 8, 2009. With respect
14 to Exemption 3, the declarations explained that, if
15 disclosed, the records would "reveal intelligence sources
16 and methods" employed by the CIA, as well as "the
17 organization and functions of the CIA, including the conduct
18 of clandestine intelligence activities to collect
19 intelligence from human sources using interrogation
20 methods." *Id.* ¶¶ 32, 35. With respect to Exemption 1, the

³ The Government also withheld portions of the records pursuant to other FOIA Exemptions. Plaintiffs do not challenge those withholdings on appeal.

1 declarations asserted that the records were properly
2 classified pursuant to Executive Order No. 12,958 and that
3 their disclosure could reasonably be expected to result in
4 harm to national security.

5 In response, Plaintiffs argued that the EITs were not
6 "intelligence methods" within the meaning of the CIA's
7 withholding authorities because they had been repudiated,
8 and, in the case of waterboarding, declared unlawful by the
9 President. Plaintiffs also argued that the CIA had failed
10 to provide any explanation for withholding the photograph of
11 Abu Zubaydah under either Exemption 1 or 3.

12 On September 30, 2009, the district court reviewed the
13 photograph and a portion of the sample records in an *ex*
14 *parte, in camera* session. The district court made
15 preliminary rulings upholding the Government's nondisclosure
16 of all but one document. That document is not at issue in
17 Plaintiffs' cross-appeal. With respect to the photograph of
18 Abu Zubaydah, the Government asserted that it was "actually
19 a CIA photo of a person in custody," and the court accepted
20 the Government's position that a photograph of a detainee
21 reveals "a lot more information" than the detainee's
22 identity. During the public hearing, the district court

1 rejected Plaintiffs' argument that the President's
2 declaration was a sufficient basis for rejecting the
3 Government's position. The district court explained that it
4 would "decline to rule on the question of legality or
5 illegality in the context of a FOIA request." J.A. 1105-06.
6 Rebuffing Plaintiffs' argument that the photo should be
7 produced because the Government offered no justification for
8 its withholding, the district court sustained the
9 withholding and explained that "the image of a person in a
10 photograph is another aspect of information that is
11 important in intelligence gathering." J.A. 1115.

12 The district court memorialized its rulings in an
13 October 13, 2009 order. In sustaining the withholding of
14 the records under FOIA Exemption 3, the district court
15 concluded that the CIA had satisfied its burden of showing
16 that the release of the records could reasonably be expected
17 to lead to unauthorized disclosure of intelligence sources
18 and methods. The district court also rejected Plaintiffs'
19 argument that records relating to illegal activities are
20 beyond the scope of Exemption 3.

21 In a July 15, 2010 order, the district court denied
22 Plaintiffs' motion for reconsideration of its October 2009

1 order. In doing so, the district court reaffirmed its view
2 that neither statutory language nor case law supports
3 Plaintiffs' contention that the legality of the underlying
4 intelligence source or method bears upon the validity of an
5 Exemption 3 withholding.

6 On October 1, 2010, the district court entered partial
7 final judgment pursuant to Federal Rule of Civil Procedure
8 54(b), granting Plaintiffs summary judgment with regard to
9 the Government's withholding of the classified information
10 in the two OLC memoranda, and granting the Government
11 summary judgment with regard to the nondisclosure of records
12 related to the contents of the destroyed videotapes and the
13 photograph. Plaintiffs limit their cross-appeal to those
14 records reflecting the CIA's use of waterboarding and to the
15 photograph of Abu Zubaydah.

16 **DISCUSSION**

17 The Freedom of Information Act "calls for broad
18 disclosure of Government records." *CIA v. Sims*, 471 U.S.
19 159, 166 (1985). But public disclosure of certain
20 government records may not always be in the public interest.
21 Thus, Congress provided that some records may be withheld
22 from disclosure under any of nine exemptions defined in 5

1 U.S.C. § 552(b). *Id.* at 167.

2 An agency withholding documents responsive to a FOIA
3 request bears the burden of proving the applicability of
4 claimed exemptions. *Wilner v. NSA*, 592 F.3d 60, 68 (2d Cir.
5 2009). "Affidavits or declarations . . . giving reasonably
6 detailed explanations why any withheld documents fall within
7 an exemption are sufficient to sustain the agency's burden."
8 *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.
9 1994). We review the adequacy of the agency's
10 justifications *de novo*. *Wilner*, 592 F.3d at 73. In the
11 national security context, however, we "must accord
12 *substantial weight* to an agency's affidavit concerning the
13 details of the classified status of the disputed record."
14 *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (internal
15 quotation marks omitted); *see also Sims*, 471 U.S. at 179.
16 Summary judgment is appropriate where the agency affidavits
17 "describe the justifications for nondisclosure with
18 reasonably specific detail, demonstrate that the information
19 withheld logically falls within the claimed exemption, and
20 are not controverted by either contrary evidence in the
21 record nor by evidence of agency bad faith." *Wilner*, 592
22 F.3d at 73. Ultimately, an agency may invoke a FOIA

1 exemption if its justification "appears logical or
2 plausible." *Id.* (internal quotation marks omitted).

3 **I. The Government's Appeal—The OLC Memoranda**

4 The Government contends that the information redacted
5 from the OLC memoranda may be withheld from disclosure under
6 either FOIA Exemption 1 or 3. In our view, Exemption 1
7 resolves the matter easily.⁴ Exemption 1 permits the
8 Government to withhold information "specifically authorized
9 under criteria established by an Executive order to be kept
10 secret in the interest of national defense or foreign
11 policy" if that information has been "properly classified
12 pursuant to such Executive order." 5 U.S.C. § 552(b)(1).
13 The Government contends that the redacted information was
14 properly classified under Executive Order No. 12,958, as
15 amended, which authorized the classification of information
16 concerning "intelligence activities (including special
17 activities), intelligence sources or methods, or
18 cryptology." Exec. Order No. 12,958 § 1.5(c), 60 Fed. Reg.
19 19,825 (Apr. 17, 1995), *as amended by* Exec. Order No.

⁴ Because the FOIA Exemptions are independent of each other, we need only discuss why we conclude that the Government may invoke FOIA Exemption 1 to justify withholding the redacted information in the OLC memoranda. *See Wilner*, 592 F.3d at 72 (citing *Larson v. Dep't of State*, 565 F.3d 857, 862-63 (D.C. Cir. 2009)).

1 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003) (hereinafter
2 "Exec. Order No. 12,958").⁵ Executive Order No. 12,958 also
3 required as a condition to classification that an original
4 classification authority "determine[] that the unauthorized
5 disclosure of the information reasonably could be expected
6 to result in damage to the national security" and "is able
7 to identify or describe the damage." *Id.* § 1.1(a)(4), 68
8 Fed. Reg. at 15,315.⁶

9 The district court held that the exemption was
10 inapplicable because, in its view, the information pertains
11 to a "source of authority" rather than a "method of
12 interrogation." J.A. 1174-75.⁷ On appeal, as it did in the
13 district court, the Government contends that the information
14 pertains to an intelligence method and an intelligence

⁵ Executive Order No. 12,958 and all amendments thereto have since been superseded by Executive Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). For purposes of Exemption 1, the propriety of a classification decision is considered under the criteria of the executive order that applied when the decision was made. See *Halpern v. FBI*, 181 F.3d 279, 289 (2d Cir. 1999).

⁶ The parties do not dispute whether the remaining criteria for proper classification have been satisfied. See Exec. Order No. 12,958 § 1.1(a), 68 Fed. Reg. at 15,315.

⁷ Addressing only the applicability of Exemption 3, the district court concluded that the information does not pertain to an "intelligence method" and therefore was not exempt. It made no express ruling on whether the information relates to an "intelligence activity" under FOIA Exemption 1.

1 activity, and that each category provides a basis for
2 classification under Executive Order No. 12,958. In support
3 of this contention, the Government has submitted
4 declarations from General James L. Jones, then-Assistant to
5 the President for National Security and National Security
6 Advisor; General Michael V. Hayden, then-Director of the
7 CIA; Leon Panetta, then-Director of the CIA; and Wendy M.
8 Hilton, Information Review Officer for Detainee-Related
9 Matters for the CIA.

10 Based on our *ex parte* and *in camera* review of the
11 unredacted OLC memoranda and the Government's classified
12 declarations, we agree with the Government that the redacted
13 information was properly classified because it pertains to
14 an intelligence activity. Plaintiffs concede that, even if
15 we were to characterize the information as a "source of
16 authority," "withholding [a] source of authority itself is
17 . . . proper if disclosing it would reveal . . .
18 intelligence sources, methods, or activities." Pls.' Br.
19 40-41. We give substantial weight to the Government's
20 declarations, which establish that disclosing the redacted
21 portions of the OLC memoranda would reveal the existence and
22 scope of a highly classified, active intelligence activity.

1 *See Doherty v. U.S. Dep't of Justice*, 775 F.2d 49, 52 (2d
2 Cir. 1985).

3 We reject any notion that to sustain the Government's
4 assertion that the withheld information concerns a protected
5 "intelligence activity" under Executive Order No. 12,958 is
6 effectively to exempt the CIA from FOIA's mandate. In
7 response to Plaintiffs' FOIA requests and related court
8 orders, the Government has already produced substantial
9 information about its use of EITs, including almost all of
10 the contents of the OLC memoranda. With regard to the
11 limited material it has withheld from disclosure, the
12 Government has sustained its burden by "giving reasonably
13 detailed explanations" of how the information pertains to a
14 classified intelligence activity. *Carney*, 19 F.3d at 812.

15 On appeal, Plaintiffs do not dispute that the
16 Government has established that public disclosure of the
17 redacted information "reasonably could be expected to result
18 in damage to the national security." Exec. Order No. 12,958
19 § 1.1(a)(4), 68 Fed. Reg. at 15,315. Nor do we. "[W]e have
20 consistently deferred to executive affidavits predicting
21 harm to the national security, and have found it unwise to
22 undertake searching judicial review." *Ctr. for Nat'l Sec.*

1 *Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C.
2 Cir. 2003). "Recognizing the relative competencies of the
3 executive and judiciary, we believe that it is bad law and
4 bad policy to second-guess the predictive judgments made by
5 the government's intelligence agencies" regarding whether
6 disclosure of the information redacted from the OLC
7 memoranda would pose a threat to national security. *Wilner*,
8 592 F.3d at 76 (internal quotation marks omitted).

9 The Government's declarations describe in persuasive
10 detail how revealing the redacted information would cause
11 exceptionally grave harm to national security by (1)
12 "damaging on-going activities and relationships with foreign
13 intelligence liaison partners, which are of utmost
14 importance to the CIA's overseas intelligence operations,"
15 Hilton Decl. ¶ 9(a), May 7, 2010; (2) "alerting our
16 adversaries of the existence of [the] intelligence method,
17 which would give them the opportunity to alter their conduct
18 to adapt to this new information and make future
19 intelligence operations more dangerous and less effective,"
20 *id.* ¶ 9(b); and (3) "increasing the risks for all
21 individuals involved in those operations, including CIA
22 officers and assets," *id.* ¶ 9(c). According substantial

1 weight and deference to the CIA's declarations, see *Doherty*,
2 775 F.2d at 52, we conclude that it is both logical and
3 plausible that the disclosure of the information pertaining
4 to a CIA intelligence activity would harm national security.

5 Furthermore, we reject the district court's suggestion
6 that certain portions of the redacted information are so
7 general in relation to previously disclosed activities of
8 the CIA that their disclosure would not compromise national
9 security. It is true that the Government has disclosed
10 significant aspects of the CIA's discontinued detention and
11 interrogation program, but its declarations explain in great
12 detail how the withheld information pertains to intelligence
13 activities unrelated to the discontinued program. Hilton
14 Decl. ¶ 6. And even if the redacted information seems
15 innocuous in the context of what is already known by the
16 public, "[m]inor details of intelligence information may
17 reveal more information than their apparent insignificance
18 suggests because, much like a piece of jigsaw puzzle, each
19 detail may aid in piecing together other bits of information
20 even when the individual piece is not of obvious importance
21 in itself." *Wilner*, 592 F.3d at 73 (alterations and
22 internal quotation marks omitted); see also *Sims*, 471 U.S.

1 at 178; *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 625
2 (D.C. Cir. 2011). Again, it is both logical and plausible
3 that disclosure of the redacted information would jeopardize
4 the CIA's ability to conduct its intelligence operations and
5 work with foreign intelligence liaison partners.

6 Both parties contend that the district court's
7 compromise, whereby the Government could avoid public
8 disclosure of the redacted information by substituting a
9 purportedly neutral phrase composed by the court, exceeded
10 the court's authority under FOIA. We agree. FOIA does not
11 permit courts to compel an agency to produce anything other
12 than responsive, non-exempt records. See 5 U.S.C.
13 § 552(a)(4)(B). If the Government altered or modified the
14 OLC memoranda in accordance with the compromise, the
15 Government would effectively be "creating"
16 documents—something FOIA does not obligate agencies to do.
17 See, e.g., *Kissinger v. Reporters Comm. for Freedom of the*
18 *Press*, 445 U.S. 136, 152 (1980); *Pierce & Stevens Chem.*
19 *Corp. v. U.S. Consumer Prod. Safety Comm'n*, 585 F.2d 1382,
20 1388 (2d Cir. 1978). Moreover, given the "relative
21 competencies of the executive and judiciary," the district
22 court erred in "second-guess[ing]" the executive's judgment

1 of the harm to national security that would likely result
2 from disclosure, by crafting substitute text that—in its own
3 view—would avoid the harms that could result from disclosure
4 of the information in full. See *Wilner*, 592 F.3d at 76.

5 The district court's apparent reliance on the
6 Classified Information Procedures Act ("CIPA"), 18 U.S.C.
7 app. 3, §§ 1-16, as a basis for the compromise was
8 erroneous.⁸ Contrary to the district court's assertion,
9 CIPA applies exclusively to criminal cases. See 18 U.S.C.
10 app. 3, §§ 2-3, 5. Indeed, CIPA is codified as the third
11 appendix to Title 18 of the U.S. Code, which concerns *crimes*
12 *and criminal procedure*, and we have found no case law
13 supporting the district court's adoption of CIPA in a FOIA
14 context such as this.⁹

⁸ Although the district court referred to the "CISA, Confidential Information Securities Act," J.A. 1184-85, it appears that the court intended to refer to CIPA because there is no Confidential Information Securities Act and the court described the statute as providing a procedure for the introduction of classified information at trial. *Id.*

⁹ The procedures of CIPA contrast sharply with those of FOIA. For example, under CIPA, when the court authorizes a defendant to disclose classified information during trial, the Government may move for the substitution of a summary of such classified information in lieu of the information itself, 18 U.S.C. app. 3, § 6(c), "to harmonize a defendant's right to obtain and present exculpatory material upon his trial and the government's right to protect classified material in the national interest," *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996) (internal quotation marks omitted). Significantly, the

1 The Government sufficiently explained that the withheld
2 information pertains to an "intelligence activity" and that
3 disclosure of the information would likely result in harm to
4 national security. The Government's declarations are not
5 contradicted by the record, and there is no evidence of bad
6 faith by the Government in this regard. Accordingly, the
7 Government has sustained its burden of proving that the
8 information redacted from the OLC memoranda is exempt from
9 disclosure under FOIA Exemption 1. *See Wilner*, 592 F.3d at
10 73. We therefore reverse the district court's judgment
11 insofar as it required disclosure of the information—either
12 in full or in accordance with the district court's
13 compromise—in the OLC memoranda and the transcript of the
14 district court's *ex parte*, *in camera* proceeding.

15 **II. Materials at Issue in Plaintiffs' Cross-Appeal**

16 The district court agreed with the Government that the
17 records related to the contents of destroyed videotapes of
18 detainee interrogations and a photograph of high-value

Government retains ultimate control and may prevent a criminal defendant from disclosing classified information, with the consequence of the court either dismissing the indictment or taking another action adverse to the prosecution. *See* 18 U.S.C. app. 3, § 6(e). By contrast, the Government cannot walk away from a FOIA case in order to avoid disclosure of classified information.

1 detainee Abu Zubaydah in CIA custody may be withheld from
2 disclosure under FOIA Exemption 3. Plaintiffs challenge the
3 withholding of only those records relating to the CIA's use
4 of waterboarding and the photograph.

5 Exemption 3 permits the Government to withhold
6 information from public disclosure provided that: (1) the
7 information is "specifically exempted from disclosure by
8 statute"; and (2) the exemption statute "requires that the
9 matters be withheld from the public in such a manner as to
10 leave no discretion on the issue" or "establishes particular
11 criteria for withholding or refers to particular types of
12 matters to be withheld." 5 U.S.C. § 552(b)(3); see *Sims*,
13 471 U.S. at 167-68. Here, the Government contends that the
14 records and photograph pertain to an "intelligence method"
15 under section 102A(i)(1) of the National Security Act of
16 1947 ("NSA") and CIA "functions" under section 6 of the
17 Central Intelligence Act of 1949, which include the
18 collection of intelligence through human sources, see 50
19 U.S.C. § 403-4a(d).¹⁰ Plaintiffs do not dispute that these

¹⁰ Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 401 *et seq.*, requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1). Section 6 of the Central Intelligence Act of 1949, as amended, 50 U.S.C. § 403 *et seq.*, provides that the CIA shall be exempted

1 statutes qualify as exemption statutes under Exemption 3.
2 See *Larson*, 565 F.3d at 865; *Baker v. CIA*, 580 F.2d 664, 667
3 (D.C. Cir. 1978). Thus, our only remaining inquiry is
4 whether the withheld material relates to an intelligence
5 method or functions of the CIA. *Larson*, 565 F.3d at 865;
6 *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir.
7 1976).¹¹

8 **A. The Interrogation Records**

9 Plaintiffs contend that the records regarding the use
10 of waterboarding in particular instances do not relate to an
11 "intelligence method" because the President has declared the
12 practice of waterboarding illegal. Relying on the Supreme
13 Court's decision in *CIA v. Sims*, Plaintiffs argue that the
14 CIA may decline to disclose only records relating to those
15 intelligence methods that fall within the CIA's charter.
16 Plaintiffs argue that because an illegal activity cannot be
17 said to "fall within the Agency's mandate to conduct foreign

from "the provisions of any other law which require the
publication or disclosure" of the "functions" of the Agency. 50
U.S.C. § 403g.

¹¹ Because, as previously discussed, FOIA exemptions are independent of each other, we explain only our conclusion that the Government may invoke FOIA exemption 3 to justify withholding the interrogation records and the photograph. See *supra* note 4. We do not address the possible coverage provided these materials by Exemption 1.

1 intelligence," *Sims*, 471 U.S. at 169, waterboarding cannot
2 be an "intelligence method" within the meaning of the CIA's
3 withholding authorities.¹²

4 We do not agree. *Sims* offers no support for
5 Plaintiffs' proposed limitation upon the CIA's ability to
6 protect information relating to intelligence methods. On
7 the contrary, the *Sims* Court emphasized that the NSA "vested
8 in the Director of Central Intelligence very broad authority
9 to protect all sources of intelligence information from
10 disclosure," and that judicial "narrowing of this authority
11 not only contravenes the express intention of Congress, but
12 also overlooks the practical necessities of modern
13 intelligence gathering—the very reason Congress entrusted
14 this Agency with sweeping power to protect its 'intelligence
15 sources and methods.'" *Sims*, 471 U.S. at 168-69. According
16 to the Court, the "plain meaning" of "intelligence sources
17 and methods" in this context, "may not be squared with any

¹² Plaintiffs concede that an illegal act may produce information that may be properly withheld under FOIA Exemptions 1 and 3. Plaintiffs do not seek disclosure of information that may otherwise be classified for reasons apart from the fact that it would disclose details of the use of waterboarding. To the extent the records discuss such information, such as questions asked during an interrogation or intelligence gathered from an interrogation session, Plaintiffs agree that the information should be segregated and may remain classified.

1 limiting definition that goes beyond the requirement that
2 the information fall within the Agency's mandate to conduct
3 foreign intelligence." *Id.* at 169.¹³

4 Here, Plaintiffs argue that the provision of the NSA
5 requiring the Director of National Intelligence to "ensure
6 compliance with the Constitution and laws of the United
7 States," see 50 U.S.C. § 403-1(f)(4), delimits the
8 Director's obligation under section 102A(i)(1) to "protect
9 intelligence sources and methods from unauthorized
10 disclosure," see 50 U.S.C. § 403-1(i)(1), and the
11 concomitant rights under FOIA to decline to disclose. The
12 statutory language does not, however, draw any such
13 limitation, and to do so by judicial device would flout
14 *Sims*'s clear directive against constricting the CIA's broad
15 authority in this domain. Again, *Sims* expressly rejected
16 any limitation on the CIA's duty to protect information
17 "beyond the requirement that the information fall within the
18 Agency's mandate to conduct foreign intelligence." *Sims*,
19 471 U.S. at 169. Plaintiffs' argument lacks support in
20 either the statute's text or in the case law interpreting

¹³ The statutory provision at issue in *Sims* was a materially identical precursor to section 102A(i)(1) of the NSA. See *Sims*, 471 U.S. at 167-68.

1 that text.

2 Moreover, we are wary of the practical difficulties
3 that would likely arise were the category of protectable
4 intelligence methods circumscribed as Plaintiffs propose.
5 In FOIA actions in which the government seeks to withhold
6 information related to an intelligence method, an
7 information officer and then the court would potentially be
8 forced to engage in a complex inquiry to determine whether
9 the government has sufficiently demonstrated the legality of
10 the method to justify withholding. In this respect, we
11 question how the court and the agency would handle varying
12 assessments of legality. What becomes of information
13 concerning a method that the President, on advice of
14 counsel, considers legal, but which is later declared
15 unlawful by a federal court or by a subsequent
16 administration? Relatedly, is the legality of a method to
17 be determined as of the time of the method's use or may a
18 forward-looking proscription also apply retroactively to
19 prevent reliance on an exemption? The matter currently
20 before us helps illustrate the point. Even if we assumed
21 that a President can render an intelligence method "illegal"
22 through the mere issuance of public statements, or, more

1 formally, through adoption of an executive order, and if we
2 further assumed that President Obama's Executive Order
3 coupled with his statements describing waterboarding as
4 "torture" were sufficient in this regard, we would be left
5 with the difficult task of determining what retroactive
6 effect, if any, to assign that designation. In our view,
7 such an "illegality" inquiry is clearly beyond the scope and
8 purpose of FOIA. See *Wilner*, 592 F.3d at 77.

9 Finally, we also note that prior courts faced with
10 similar questions have declined to address the legality of
11 an intelligence method as part of a FOIA analysis. In *ACLU*
12 *v. U.S. Department of Defense*, the District of Columbia
13 Circuit rejected the very argument raised by Plaintiffs
14 here: that an interrogation technique formerly authorized
15 for use on high-value detainees is no longer a protectable
16 "intelligence method" for FOIA purposes if the President
17 bans its future use. See 628 F.3d at 622. After noting
18 that *Sims* "says nothing suggesting that the change in the
19 specific techniques of intelligence gathering by the CIA
20 renders unprotected sources and methods previously used,"
21 the court held that "the President's prohibition of the
22 future use of certain interrogation techniques . . . does

1 not diminish the government's otherwise valid authority to
2 . . . withhold [information] from disclosure under
3 exemptions 1 and 3." *Id.*

4 In *Wilner v. NSA*, our Court considered whether the
5 government could refuse to confirm or deny the existence of
6 records obtained under the since-discontinued Terrorist
7 Surveillance Program ("TSP"). 592 F.3d at 64-65. The
8 plaintiffs in *Wilner* claimed that the government had
9 illegally obtained information about them through the TSP.
10 They argued that the NSA improperly refused to disclose this
11 information because any such records would have been
12 obtained in violation of the U.S. Constitution. *Id.* at 77.
13 In concluding that the government properly withheld the
14 information at issue under FOIA Exemption 3, we declined to
15 reach "the legality of the underlying Terrorist Surveillance
16 Program," reasoning that this question was "beyond the
17 scope" of the plaintiffs' FOIA action. *Id.* at 77.

18 We recognize that the plaintiffs in *Wilner* did not make
19 the precise argument advanced here: that the statutory
20 meaning of "intelligence methods" precludes the government
21 from employing that label for a technique that the President
22 has declared to be unlawful and thus outside the CIA's

1 charter. But in our view, *Wilner's* principle is equally
2 applicable here—a judicial determination of the legality of
3 waterboarding is beyond the scope of this FOIA action. For
4 the foregoing reasons, we reject Plaintiffs' argument that
5 the Government could not withhold information relating to
6 waterboarding on the grounds that waterboarding is now
7 "illegal" and therefore beyond the CIA's mandate.

8 According substantial weight to the CIA's declarations,
9 *see Wolf*, 473 F.3d at 374, we have no difficulty in
10 concluding that the records in question, which we have
11 reviewed *in camera*, relate to an intelligence method within
12 the meaning of the NSA, and, accordingly, may be withheld.
13 The parties agree that waterboarding was an interrogation
14 method used by the CIA in connection with its foreign
15 intelligence-gathering activities. Because the CIA's
16 declarations are not contradicted by the record or
17 undermined by any allegations of bad faith,¹⁴ the Government
18 has sustained its burden of proving that the records
19 relating to the CIA's use of waterboarding are exempt from

¹⁴ In addition, Director Panetta confirmed that the records were withheld not to suppress evidence of any unlawful conduct but rather to protect intelligence sources and methods. We accord a "presumption of good faith" to this declaration, *Carney*, 19 F.3d at 812.

1 disclosure under FOIA Exemption 3. See *Wilner*, 592 F.3d at
2 73, 76-77.

3 **B. The Photograph of Abu Zubaydah**

4 Plaintiffs contend that the CIA failed to provide any
5 justification for withholding a photograph of Abu Zubaydah
6 taken while he was in CIA custody abroad and that the post
7 hoc explanations offered by the Government's counsel do not
8 suffice to justify the withholding. We disagree. In a June
9 8, 2009 unclassified declaration, Director Panetta explained
10 that all of the records he reviewed in connection with his
11 invocation of FOIA Exemptions 1 and 3, including the
12 photograph, are "related to the contents of 92 destroyed
13 videotapes of detainee interrogations that occurred between
14 April and December 2002." Panetta Decl. ¶ 3, June 8, 2009.
15 Director Panetta further declared that "miscellaneous
16 documents" in the sample records, including the photograph,
17 "contain[] TOP SECRET operational information concerning the
18 interrogations" of Abu Zubaydah. *Id.* ¶ 5. On appeal, the
19 Government has expanded upon Director Panetta's
20 justification for withholding by explaining that the
21 photograph necessarily "relates to" an "intelligence source
22 or method" because it records Abu Zubaydah's condition in

1 the period during which he was interrogated.

2 We have reviewed the photograph *in camera*. Our
3 examination has been informed by our contemporaneous review
4 of other sample records. Like the district court, we
5 observe that a photograph depicting a person in CIA custody
6 discloses far more information than the person's identity.
7 We agree with the district court that the image at issue
8 here conveys an "aspect of information that is important to
9 intelligence gathering," J.A. 1115, and that this
10 information necessarily "relates to" an "intelligence source
11 or method." The Government's justification for withholding
12 the photograph is thus both "logical and plausible." See
13 *Wilner*, 592 F.3d at 75. Moreover, Director Panetta's
14 declaration is entitled to substantial weight, see *Wolf*, 473
15 F.3d at 374, and this Court must adopt a "deferential
16 posture in FOIA cases regarding the uniquely executive
17 purview of national security," *Wilner*, 592 F.3d at 76
18 (internal quotation marks omitted). Accordingly, we affirm
19 the district court's conclusion that the Government has
20 adequately justified its withholding of the photograph under
21 FOIA Exemption 3.

