Description of document:	**Two documents from FOIA litigation (Berman v. CIA CA #04-2699) provided by the Central Intelligence Agency (CIA) in response to a FOIA request for records relating to the releasability of historical Presidential Daily Brief documents, 2007**
Requested date:	13-December-2008
Released date:	22-September-2010
Posted date:	06-December-2010
Titles of documents:	CIA FOIA LOG 2008
Date/date range of document:	Declaration of Terry N. Buroker Directorate of Intelligence Information Review Officer Central Intelligence Agency United States Court of Appeals For The Ninth Circuit, Appeal from the United States District Court for the Eastern District of California, David F. Levi, District Judge, Presiding, No. 05-16820, D.C. No. CV -04-02699-DFL, OPINION
Source of document:	Information and Privacy Coordinator Central Intelligence Agency Washington, D.C. 20505 Fax: (703)613-3007

Central Intelligence Agency

Washington, D.C. 20505

22 September 2010

Reference: F-2009-00305

This is a final response to your 13 December 2008 Freedom of Information Act (FOIA) request for any documents relating to the releasability of older/historical Presidential Daily Brief documents or similar predecessor series used by the DCI to brief the President and key staff located in the following offices:

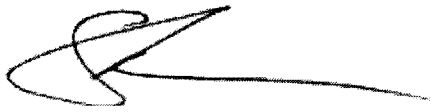
-the office of the Executive Director; or
-the Office of Information and Privacy; or
-the Declassification Office.

We processed your request in accordance with the FOIA, 5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 431, as amended. Our processing included a search for records as described in our 4 February 2009 acceptance letter existing through the date of that letter.

We completed a thorough search for records responsive to your request, located material, and determined that it is currently and properly classified and must be withheld in its entirety on the basis of FOIA exemptions (b)(1) and (b)(3). Exemption (b)(3) pertains to information exempt from disclosure by statute. The relevant statute is the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403, as amended, e.g., Section 6, which exempts from the disclosure requirement information pertaining to the organization, functions, including those related to the protection of intelligence sources and methods, names, official titles, salaries, and numbers of personnel employed by the Agency. As the Acting CIA Information and Privacy Coordinator, I am the CIA official responsible for this determination. You have the right to appeal this response to the Agency Release Panel, in my care, within 45 days from the date of this letter. Please include the basis of your appeal.

In an effort to assist you, however, we are enclosing two documents from a FOIA litigation Berman v. CIA CA#04-2699 which we believe to be responsive to your request.

Sincerely,



Scott Koch
Acting Information and Privacy Coordinator

Enclosures

C01188233

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY BERMAN, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, Defendant.	)	CIV. 04cv2699 DFL-DAD

DECLARATION OF TERRY N. BUROKER
DIRECTORATE OF INTELLIGENCE INFORMATION REVIEW OFFICER
CENTRAL INTELLIGENCE AGENCY

I, TERRY N. BUROKER, hereby declare and say:

1. I am the Information Review Officer (IRO) for the Directorate of Intelligence (DI) of the Central Intelligence Agency (CIA). I have held this position since April 5, 2004. I have held various administrative and professional positions within the CIA since October 17, 1971.

2. As IRO for the DI, I am responsible for the final review of documents containing information originated by components of the DI or that otherwise implicate DI interests when such documents are the subject of the Freedom of Information Act, 5 U.S.C. § 552 (FOIA) or other requests for public disclosure. I also task and coordinate records searches concerning files or documents reasonably

likely to be maintained by the DI. In addition and under a written delegation of authority pursuant to section 1.3(c) of Executive Order 12958, as amended,[1] I hold original classification authority at the TOP SECRET level. Therefore, I am authorized to conduct classification reviews and to make original classification and declassification decisions.

3. As part of my official duties, I ensure that determinations as to the release or withholding of information related to the CIA are proper and do not jeopardize CIA interests, personnel, or facilities, and ensure that they do not jeopardize intelligence activities, sources or methods.

4. Through the course of my official duties, I have become familiar with the FOIA claim brought by Plaintiff Larry Berman (Plaintiff) against the CIA as set forth in the complaint. The statements made herein are based upon my personal knowledge and upon information made available to me in my official capacity.

5. The purpose of this Declaration is to set out to the extent possible on the public record the bases for the

[1] Executive Order 12958 was amended by Executive Order 13292. See Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). All citations to Exec. Order No. 12958 are to the Order as amended by Exec. Order No. 13292. See, Exec. Order No. 12958, 3 C.F.R. 333 (1995), *reprinted as amended* in 50 U.S.C.A. § 435 note at 91 (Supp. 2004).

CIA's response to Plaintiff's FOIA request for the President's Daily Brief for the dates of August 6, 1965, March 31, 1968 and April 2, 1968 (hereinafter referred to as the "Requested PDBs")[2] pursuant to the FOIA. I have carefully reviewed the Requested PDBs to determine whether the Requested PDBs, or any part of them, could be released to Plaintiff.

6. I have determined that the Requested PDBs would reveal:

> (a) information about the application of intelligence sources and methods which the Director of Central Intelligence is responsible for protecting from unauthorized disclosure, in accordance with 50 U.S.C.A. § 403-3(c)(7), and which is therefore exempt from disclosure pursuant to FOIA Exemption (b)(3);
>
> (b) information that is currently and properly classified pursuant to Sections 1.4(b)and(c) of Executive Order 12958, as amended, as its disclosure reasonably could be expected to result in damage to the national security and that will be exempt from automatic declassification under § 3.3(b)(1) of that Executive Order, and is therefore exempt from disclosure pursuant to FOIA Exemption (b)(1); and
>
> (c) information that (1) is related to the pre-decisional deliberative process of a government agency, the disclosure of which would cause harm to the deliberative process, and (2) constitutes communications with the President made in the performance of his official duties, and is therefore exempt from disclosure pursuant to FOIA exemption (b)(5).

[2] All references to the Requested PDBs in this Declaration refer to the editions of the PDB dated August 6, 1965 and April 2, 1968. Upon investigation, the Agency has determined that no edition of the PDB was produced on March 31, 1968.

7. I have determined that the Requested PDBs must be withheld in their entirety, as no reasonably segregable, non-exempt portions of the documents exist.

8. This Declaration is divided into four parts. The first part sets forth the procedural history relating to Plaintiff's FOIA request and the CIA's administrative response thereto; the second part provides background and context on the nature of the Requested PDBs; the third part identifies and explains the FOIA exemptions claimed by the CIA; and I conclude this Declaration in part four.

I. PROCEDURAL HISTORY

9. By letter dated March 3, 2004, Plaintiff submitted to the CIA a FOIA request seeking "the President's Daily Brief (PDB) from August 6, 1965, August 8, 1965, March 31, 1968 and April 2, 1968."[3] Plaintiff requested a waiver of search and review fees based on Plaintiff's statement that he intended to use the documents for scholarly purposes supported by the University of California and not for individual commercial use.

10. By letter dated March 17, 2004, the CIA acknowledged receipt of the March 3, 2004 request, and assigned it Reference No. F-2004-00962.

[3] Plaintiff does not request in his complaint that the Agency provide a PDB from August 8, 1965.

11. By letter dated April 15, 2004, the CIA stated that "the President's Daily Brief contains inherently privileged, predecisional and deliberative material for the President and also requires withholding on this basis.... Therefore, your request is denied under FOIA exemptions (b)(1), (b)(3) and (b)(5)." The CIA informed Plaintiff of his right to appeal this final decision to the Agency Release Panel within 45 days.

12. By letter dated May 6, 2004, Plaintiff appealed the CIA's decision to withhold the Requested PDBs to the Agency Release Panel.

13. By letter dated May 13, 2004, the CIA informed Plaintiff that his appeal had been accepted and arrangements would be made for its consideration by the appropriate members of the review panel.

14. By letter dated June 21, 2004, the CIA informed plaintiff that in accordance with regulations set forth in part 1900 of title 32 of the Code of Federal Regulations (C.F.R.), the Agency Release Panel considered Plaintiff's appeal and determined that the records in question must continue to be withheld in their entirety on the basis of FOIA exemptions (b)(1), (b)(3) and (b)(5). Therefore, in accordance with 1900.41 of title 32 of the C.F.R., the Agency Release Panel denied Plaintiff's appeal. Finally,

the CIA informed Plaintiff of his right to seek judicial review.

15. On December 23, 2004, Plaintiff filed a Complaint for Declaratory Injunctive Relief for Violation of the Freedom of Information Act, 5 U.S.C. §552.

II. BACKGROUND AND NATURE OF THE PRESIDENT'S DAILY BRIEF

A. Background

16. The history and development of the PDB establish that it differs substantively and intrinsically from other intelligence products created by the Directorate of Intelligence. The PDB is a unique intelligence document prepared specifically for the President of the United States and his most senior advisors to provide them with the most important current intelligence on critical issues relating to national defense and foreign policy.

17. The first incarnation of the PDB, the President's Intelligence Checklist (PICL, pronounced "Pickle") was formulated in response to President Kennedy's dissatisfaction with other intelligence products that were not designed specifically to address matters of interest to the President and his most senior advisors. Because of their relatively broad distribution, these other intelligence products did not include the most highly sensitive intelligence information that the President and

his most senior advisors needed to conduct U.S. national defense and foreign policy. In contrast, the PICL was designed for the President and his top advisors. It was intended to select the most sensitive data and provide the best intelligence judgments available in order to give the President and his top advisors the most accurate, comprehensive, and timely information needed to make national defense and foreign policy decisions for the country.

18. During the Johnson administration, the PICL became the President's Daily Brief and its format, content, and presentation were modified to reflect the needs of President Johnson and his top advisors. Over the last forty years, the PDB has continued to be revised to meet the needs of the sitting President and his top advisors, with the same objective of providing them with a unique publication: a synthesis, in a few pages, of what immediate intelligence the Central Intelligence Agency determines is critical for the President and his most senior advisors to make effective U.S. national defense and foreign policy decisions. Leadership from various parts of the CIA are involved in making decisions about what to include in the PDB to ensure that it presents information

of sufficient importance to bring to the President's attention.

19. Throughout the history of the PDB, it has been common for the President to ask follow-up questions in response to information presented in the PDB or for the President's advisors to suggest areas that should be covered in the PDB. In this way, and by responding to questions and suggestions from the President's senior advisors, the PDB has become an ongoing dialog between the President, together with his most senior advisors, and the CIA; as such it has served as a key element in Presidential deliberations on the making of U.S. national defense and foreign policy.

B. Sensitive Information in the PDB

20. Plaintiff has requested three specific editions of the PDB. Later in this Declaration, in explaining the bases of the FOIA (b)(1) exemption claimed by the CIA, I will describe damage that reasonably could be expected to result from the disclosure of the Requested PDBs. First, however, I will explain the sensitivity of this unique intelligence document. Each individual edition of the PDB contains the information deemed most important for the President and his most senior advisors to see that day. Even more important than the contents of a single edition

of the PDB, however, is the highly sensitive nature of the PDB as a series, as described in subpart C of this section, below.

21. Because of its limited distribution and the high level of decision-making conducted by the PDB's readers, the PDB can and does provide more immediate information than would be feasible to share with a wider audience. In so doing, it sets aside the basic rules of intelligence documents in that it includes within its four corners information unavailable to the rest of the U.S. Intelligence Community, including a) undisseminated raw operational information, sometimes including true names of sources and/or cryptonyms, b) sensitive operational information added to the document by the Directorate of Operations after the Directorate of Intelligence has written or edited the material in the PDB, c) information restricted at the very highest levels of human and technical source intelligence gathering, d) information from covert technical operations, and e) information from specifically developed or acquired CIA-only methods.

22. Furthermore, because the PDB must provide the most important intelligence on any given day and provide that information in only a few pages, it fuses all of the available intelligence, including what is gathered through

the most sensitive intelligence sources and methods. As a result, classified information necessarily becomes inextricably intertwined with unclassified information that is also included in PDBs.

23. The PDB also presents an absolutely unique window of insight into the nation's critical intelligence priorities, collection platforms and turn-around time for the intelligence process. It provides a unique glimpse as to what the Intelligence Community is targeting and what the county's decision-makers know (or do not know) and when they know it.

24. In sum, on a day-to-day basis, the PDB is the most highly selective compendium of the most important intelligence available to the U.S. Intelligence Community. As such, it is uniquely sensitive in terms of risk of identification of intelligence sources and methods, including analytical methodology. The disclosure of the specific information in any individual edition of the PDB reasonably could be expected to result in exceptionally grave damage to national security.

C. Additional Sensitivity of the PDB Series

25. Although one edition of the PDB is presented as a single document each day, the CIA regards the PDB as a series of documents through which the DCI informs the

President and other top policymakers of the most important intelligence information available about the most critical national defense and foreign policy issues over time, and which informs decisions on what topics to focus intelligence collection and analysis activities.

26. While some information in specific PDBs may appear harmless to disclose when read in isolation, such information may be very valuable as part of a "mosaic" of information gleaned from various sources, including multiple PDBs prepared over time. That is, one datum may appear harmless by itself, out of context, but one cannot determine the potential harm of a single piece of information merely by examining it out of context or even within a review of the document from which it comes. Intelligence services specialize in collecting information from many sources and drawing conclusions from all of the information gathered. Information that seems innocuous on its face can provide the pieces necessary to complete a puzzle (or a mosaic) and expose targeting strategies, gaps in intelligence capabilities, or more specifically reveal a source or an intelligence capability. The least severe result of such exposure might be the end of a source's or capability's usefulness; additional consequences may include the death or other reprisal against the source or

his family or associates, and deception against the United States by manipulation of the exposed intelligence method before the U.S. is aware of the exposure.

27. Known as the "mosaic theory," this process is a theory in name only. It is one of the primary methods employed by all intelligence services. The CIA's Directorate of Intelligence, for example, is itself dedicated to collecting seemingly disparate pieces of information and assembling them into a coherent picture or foreign intelligence targets' activities and intentions.

28. The mosaic theory is particularly important in the context of the PDB. As I have previously observed in this Declaration, precautions taken to protect intelligence sources that are common in the creation of other intelligence products are not taken in the production of the PDB. The PDB contains information that is often known by only a few individuals at very high level and is often reported to the President on a real-time basis. The release of a PDB, therefore, presents an especially useful means for a foreign intelligence service, a sophisticated international terrorist organization, or other entity hostile to the United States, to dissect and analyze the information to identify specific intelligence sources and methods. For example, a hostile intelligence service may

reliably infer that a human source for information contained in the PDB is most likely one of a very few number of individuals with access to the subject information, and that the source must have provided the information very close in time to when it was reported in the PDB. Thus the nature of the PDB would allow a hostile entity to identify a source with far fewer pieces of the "mosaic" than would be needed if the information came from other intelligence products.

29. In addition to putting intelligence sources and methods at risk of exposure, disclosure of the Requested PDBs, evenly if heavily redacted, will begin a process of disclosing ever greater amounts of information contained in the PDB as a series. As I will explain further below, the PDB itself is an intelligence "method" as it is the means of providing the President and his closest advisors the most current, important intelligence information each day and is responsive to the interests expressed by the President and his most senior advisors. It thereby reflects not only the capabilities, accomplishments, and deficiencies of the CIA and the Intelligence Community as of a particular date, but also their decisions and judgments as to what topics are most important to have the

attention of the President and his closest advisors on that day.

30. The decision to disclose information in the Requested PDBs because such information appears harmless in isolation presents the danger that the same analysis will be applied repeatedly to individual pieces of information subject to future disclosure requests.[4] Indeed, if the information in the Requested PDBs is broken down and analyzed piecemeal in this case, it does not appear that there will be a principled point at which to stop disclosure of information in additional PDBs in the future on the grounds that each piece of information appears individually harmless. The result will be a detailed mosaic of the most important intelligence information

[4] Plaintiff points out in his complaint that the Agency has previously released portions of PDBs. The two PDBs that were included (in redacted form) in the Final Report of the National Commission on Terrorist Attacks on the United States, were released pursuant to the procedures established in Section 3.1(b) of the Executive Order that allow for the release, in some exceptional cases, of information that should otherwise remain classified, after the DCI, acting with specific authorization from the President, determined that the public interest in disclosure outweighed the damage to national security that might reasonably be expected from the release of this particular information. Additionally, ten issues of the PICL were released by the JFK Assassination Records Review Board, pursuant to the President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. 2107 note. The CIA had no authority to overrule the Board's decision. After investigation, I have also determined that the Agency has released PDBs on four occasions as a result of a mistake in fact as to what the document was that was being released because it was not identified as a PDB or as information from a PDB, and in two instances when the individual with the authority to release the document made a mistaken determination to do so.

available to the U.S. government being made available to entities hostile to the United States.

III. FOIA EXEMPTIONS CLAIMED

31. I have determined that the Requested PDBs are exempt from disclosure based on three of the statute's exemptions, set forth more fully below: information protected under another statute, in this case the National Security Act's requirement that the Director protect intelligence sources and methods (exemption (b)(3)), classified information (exemption (b)(1)), and inter-agency or intra-agency information that would be protected in litigation, in this case by both the deliberative process privilege and the presidential communications privilege (exemption (b)(5)). Each of these exemptions in my judgment applies to the Requested PDBs in their entirety.

A. FOIA Exemption (b)(3)

32. FOIA exemption (b)(3), 5 U.S.C. §552(b)(3), as amended, protects matters that are specifically exempted from disclosure by statute (other than the FOIA), provided that such statute:

> (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
>
> (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

33. FOIA exemption (b)(3) protects any information contained in the Requested PDBs that is also protected by Section 103(c)(7) of the National Security Act of 1947, 50 U.S.C. §403-3(c)(7), as amended, which requires the Director to protect intelligence sources and methods from unauthorized disclosure. It applies without regard to any determination whether disclosing the specific information would cause damage to the national security.[5] (I will, nevertheless, discuss that potential damage in the following section in the context of the (b)(1) Exemption.)

1. Specific Revelations of Intelligence Sources and Methods within the Requested PDBs.

34. The Requested PDBs contain information that could, by itself or with other information, expose the existence of specific intelligence sources and methods. These include human sources, foreign liaison sources, and technical collection methods. Each of the Requested PDBs contains information specifically stating sensitive sources or methods of collection; in addition, the nature of the information contained in each of the Requested PDBs provides substantial information about its provenance to an educated reader.

[5] This is one way in which FOIA exemption (b)(3) differs from exemption (b)(1), which I discuss below, since national security classification rests on an assessment of the damage to the national security that unauthorized disclosure of Confidential, Secret, or Top Secret information might cause. *See* Executive Order 12958, as amended, § 1.2(a). Any information that is properly classified on the basis that it relates to intelligence sources and methods is, to at least the same extent, also subject to the Director's statutory obligation to protect such sources and methods.

2. The PDB is an Intelligence Method.

35. In addition to containing information about intelligence methods, which I shall also describe below, the PDB itself is an intelligence method, to be protected under the National Security Act. The PDB is part of the process by which the CIA advises the President and his most senior advisors regarding the subject areas most important to them, the CIA receives feedback concerning the intelligence priorities upon which it should focus more closely, and the President and his most senior advisors are provided the intelligence necessary to make highly sensitive determinations concerning national defense and foreign policy.

36. The daily decisions where to focus the CIA's resources and energy, from operations officers in the field to analysts at CIA headquarters, are directly affected by the PDB process of presenting analysis, discussing its implications, and receiving questions and taskings from the President and his most senior advisors. The PDB process affects the conduct of intelligence both on a daily and more long-term basis.

37. The PDB is thus no less an intelligence method than the CIA's budget, which has been held to be exempt from disclosure under FOIA exemption 3 because it relates to intelligence methods, namely the allocation, transfer and funding of intelligence programs. See Aftergood v. Central Intelligence Agency, ---F.Supp.2d --- , 2005 WL

29983 (C.A. No. 1-2524, February 9, 2005). Since the PDB is itself an intelligence method, it follows that any PDB information, including both the obviously classified revelations of sensitive methods and the information remaining after such specific revelations are removed, constitutes information about the application of an intelligence method.

3. The Mosaic of Information About Intelligence Sources and Methods.

38. In addition to the PDB being an intelligence method in and of itself, each edition of the PDB is a piece of a "mosaic" of information reflecting the most sensitive, as well as the mundane, intelligence sources and methods employed by the CIA and the Intelligence Community over time. I have described the nature of this mosaic earlier in this Declaration. If significant numbers of individual editions of the PDB (no matter how old) were publicly disclosed, even after redaction of the obvious revelations of specific collection methods and sources, due to regular or even sporadic disclosure (by CIA policy or court order), patterns of application of intelligence methods including those by which the U.S. sets priorities, collects intelligence, and analyzes it would emerge. The unique nature of the PDB makes disclosure of any of its contents particularly dangerous because, as I have described earlier in this Declaration, it is the only finished intelligence product that synthesizes all of the best available

intelligence on topics that the U.S. government has determined to be the most important foreign policy issues facing the county at a given time.

39. Any evaluation of whether a reference to a source or a collection method that is reflected in a single edition of the PDB should be deemed sensitive must be done with awareness that any information released can be analyzed in light of other information (i.e., other pieces of the "mosaic") that might lead to the exposure of an intelligence source or a still-secret method. As I explained earlier in this declaration, the immediacy of the PDB and the nature of its audience implicitly provide some information about any human source of the information the PDB contains. Similarly, even portions of PDBs may provide insights to knowledgeable readers as to the CIA's capabilities, accomplishments, methodologies, and judgments over time. As a result, it provides a bigger piece of any "mosaic" that a hostile entity might assemble to use against the United States and its sources than most other intelligence documents would provide.

40. I have determined that, as documents that reveal specific information about the sources and methods by which the intelligence reported in them was obtained, as an intelligence method, and as a part of a mosaic of information that reveals intelligence sources and methods, the Requested PDBs must be protected from disclosure pursuant to Section 103(c)(7) of the National Security Act

and, consequently, they are protected under FOIA exemption (b)(3).

B. FOIA Exemption (b)(1)

41. FOIA Exemption (b)(1), 5 U.S.C. § 552(b)(1), provides that the FOIA does not apply to 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.

1. The Definition of "Specifically Authorized Under . . . an Executive Order"

42. The authority of a CIA official to classify documents is derived from a succession of Executive Orders, of which Executive Order 12958, as amended (the "Executive Order"), is the most recent. Under the criteria of § 1.1 of the Executive Order, information may be originally classified only if it:

(1) is owned by, produced by or for, or is under the control of the United States Government; (2) falls within one or more of the categories of information set forth in § 1.4 of the Order; and (3) is classified by an original classification authority who determines that its unauthorized disclosure reasonably could be expected to result in damage to the national security that the original classification authority can identify or describe. For documents over 25 years old, the criteria for continued classification after December 31, 2006, and which we apply

in reviewing such documents for possible declassification, are found in § 3.3(b) of the Executive Order. Section 3.3(a) of the Executive Order calls for the automatic declassification of previously-classified information that is more than 25 years old after 31 December 2006 unless the information is properly exempted under § 3.3(b). As explained more fully below, information withheld from release in the Requested PDBs meets the Executive Order criteria for classification under § 1.4 and is exempt from declassification under § 3.3 and thus is properly withheld under FOIA exemption (b)(1).

2. The Definition of Information that is "Properly Classified"

43. Section 6.1(h) of Executive Order defines "classified national security information" or "classified information" as "information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form."

44. Under § 1.3(a)(2) of the Executive Order, the President designated the Director of Central Intelligence as an official authorized to exercise original TOP SECRET classification authority. The Director has delegated such authority, under § 1.3(c)(2) of the Executive Order, to a limited number of CIA officials whom he has determined have a demonstrable and continuing need to exercise this authority. As noted above (paragraph 2), I am one such

official. I am therefore authorized to conduct classification reviews and to make original classification and declassification decisions.

45. Under the CIA's FOIA Declassification Review Program, information responsive to FOIA requests and classified under the Executive Order cited above or its predecessor Orders is reviewed to determine whether the information is currently and properly classified. Section 1.2 of the Executive Order requires the classification of information at the CONFIDENTIAL, SECRET, OR TOP SECRET level, depending on whether the unauthorized disclosure of the information reasonably could be expected to cause damage, serious damage, or exceptionally grave damage, respectively, to the national security.

46. I have reviewed the Requested PDBs and have determined that the information contained therein continues to meet the standards for classification under the Executive Order and is properly classified in that it:

(1) comprises information that is owned by, produced by or for, or is under the control of the CIA;

(2) falls within one or more of the following categories of information set forth in § 1.4 of the Order: foreign government information (§ 1.4(b)), and intelligence activities, sources and methods (§ 1.4(c)),;

(3) if disclosed, reasonably could be expected to result in damage to the national security that I can identify or describe.

In addition, the contents of the Requested PDBs fall within § 3.3(b)(1) of the Executive Order, which exempts from automatic declassification after 31 December 2006 information that could be expected to reveal the identity of a confidential human source, or a human intelligence source, or reveal information about the application of an intelligence source or method.

47. Finally, even text that in isolation may be considered unclassified may be classified as part of a compilation of information that is classified in the aggregate. Section 1.7(e) of the Executive Order provides:

> Compilations of items of information that are individually unclassified may be classified if the compiled information reveals an additional association or relationship that (1) meets the standards for classification under this order; and (2) is not otherwise revealed in the individual items of information. As used in this order, "compilation" means an aggregate of pre-existing unclassified items of information.

If all the information that is classified piece-by-piece for the reasons explained below were redacted out of the Requested PDBs, the information remaining would presumably, standing alone, not be classified. However, that remaining text (if there would be enough to be comprehensible) would still be part of the mosaic of information that, in the

aggregate, provides insights into the intelligence process; in hostile hands, those aggregated insights reasonably could be expected to result in exceptionally grave damage to the national security.

48. The information contained within the Requested PDBs and being withheld in this case is properly classified TOP SECRET because the unauthorized disclosure of this information reasonably could be expected to cause exceptionally grave damage to the national security.

3. Foreign Government Information

49. The first category of Exemption (b)(1) information withheld concerns information provided to the CIA from foreign governments and through foreign intelligence liaison relationships with the CIA. The Requested PDBs contain explicit references to information provided by foreign officials as well as other information that may incorporate information from foreign liaison relationships. Disclosure of any of this information could itself, or in conjunction with other information otherwise obtained by foreign intelligence services, betray particular intelligence sources and could be exploited by third-party governments to determine what countries' representatives were talking to the United States and when they were talking to us.

50. Foreign liaison services can also be intelligence sources, since such services covertly provide the CIA with

foreign intelligence. Moreover, the establishment of relationships with foreign liaison services is also an intelligence method exempt under Exemption (b)(3) as set forth previously in this Declaration.

51. The information provided to the CIA by the intelligence services of foreign countries with which the CIA maintains a liaison relationship is provided only upon a guarantee of absolute secrecy. If this agreement were abrogated by the CIA, the results could include domestic or diplomatic difficulties for, or reprisals against, the country whose service cooperated with the United States. The impact on the liaison relationship would lead to a loss to the U.S. government of valuable foreign intelligence.

52. Any disclosure by the CIA of information that could lead to the exposure of a past or current liaison relationship could cause serious damage to the CIA's ability to maintain current relationships, even with countries other than the source of the disclosed information, or to establish new ones. The consequent loss of intelligence information for the United States Government reasonably could be expected to cause exceptionally grave damage to national security. Therefore, I have determined that information which could reveal the fact or the nature of CIA's liaison relationships is properly classified TOP SECRET pursuant to the criteria of Executive Order 12,958, as amended, as its disclosure could reasonably be expected to cause

exceptionally grave damage to the national security of the United States. This information is thus exempt from disclosure pursuant to FOIA Exemption (b)(1). Moreover, because foreign government information also constitutes information about intelligence sources and the application of intelligence methods, such information is exempt from declassification under Section 3.3(b)(1) of the Executive Order.

4. Intelligence Sources

53. The CIA collects foreign intelligence through a variety of sources, including individual human sources and relationships with other entities including foreign governments and intelligence services. Disclosure of the information at issue in this case would tend to reveal the identities of intelligence sources, both as a result of the disclosure of the specific documents requested and as part of a mosaic of information as discussed above. The exposure of such sources would undermine the CIA's ability to collect intelligence in the future, which reasonably could be expected to result in exceptionally grave harm to national security.

54. The Requested PDBs each contain references to intelligence obtained from individual human sources and from confidential liaison relationships. The exposure of a source's relationship with the CIA could lead to embarrassment, political ruin, retribution, and for individual human sources imprisonment, torture or even

death of the source or the source's family and friends. Understandably, such sources can only be expected to furnish information to the CIA when they are assured that their relationship with the CIA will be protected from exposure. Sources must be able to rely on the total secrecy surrounding their relationship with the CIA for all time.[6]

55. Intelligence information that may reveal an intelligence source does not automatically lose its need for protection after a period of even thirty or forty years. Individual people may have long lives and careers, and foreign governments and intelligence services may exist in perpetuity. Also, individuals may have colleagues, family members and friends who may suffer repercussions if the fact of an individual's cooperation with the CIA ever came to light.

56. In addition, the damage to national security caused by the exposure of a source's relationship with the CIA is not limited to the impact upon that source. Disclosure of information leading to the exposure of an intelligence source, no matter how inadvertent, could cripple the CIA's ability to recruit new individuals, establish new relationships, or even to maintain current relationships with intelligence sources. Potential new

[6] As I have previously discussed in this Declaration, information in the Requested PDBs that does not explicitly reference identities of intelligence sources or contain information that would directly identify the sources may contribute to or complete a mosaic of information that exposes an intelligence source.

sources must be assured of the security or their relationship for all time. At the time a new source chooses to provide information to the CIA, there is no way to know how long the identity of that source will need to remain secret. If it is believed that, after a period of time, the CIA will disclose information that could potentially lead to the exposure of an intelligence source, such sources would be understandably reluctant to work with the CIA.

57. Further, while the CIA recognizes that in some circumstances there may be information provided by human sources or foreign liaison services that can be declassified, declassification decisions must be made with awareness that any information released can be analyzed in light of other information (i.e., other pieces of a "mosaic") that might lead to the exposure of an intelligence source. As I have explained, the PDB would be an especially large piece of any mosaic of intelligence information; this is the case even after the identifiable pieces of specifically source-revealing information are redacted out of a PDB. The remnants of a series of PDBs would tend to reveal source information to the educated reader that would not be apparent from a single, specific document.

58. Therefore, I have determined that unauthorized disclosure of information responsive to Plaintiff's FOIA request that could reveal intelligence sources reasonably

could be expected to cause exceptionally grave damage to the national security of the United States and is therefore properly classified as TOP SECRET. Moreover, because such unauthorized disclosure could be expected to reveal the identity of a confidential human source, or a human intelligence source or reveal information about the application of an intelligence source or method, the Requested PDBs are exempt from declassification under Section 3.3(b)(1) of the Executive Order. Thus, such information is currently properly classified and is coextensively exempt from disclosure pursuant to FOIA exemption (b)(1) and, as discussed previously, (b)(3).

5. Intelligence Methods

59. Generally, intelligence methods are the means by which, and the manner in which, an intelligence agency accomplishes its mission. Most organized professions or businesses employ methods that are common to and, in some cases, unique to that business or profession, to accomplish their goals and objectives. Certain methods used in intelligence activities imbue any resulting records with a special character that necessitates protecting the fact of their use, as well as the details of their use, from unauthorized disclosure. The release of the information in each of the Requested PDBs would disclose specific intelligence methods, including technical collection methods.

60. Intelligence methods must be protected in situations where a certain capability or technique, or the application thereof, is unknown to those individuals or entities that would otherwise take countermeasures. Secret information-collection techniques, capabilities, or technological devices are valuable from an intelligence-gathering perspective only so long as they remain unknown. Once the nature of an intelligence method or the fact of its use in a certain situation is discovered, the method may become useless.

61. Many times, the mere fact of acknowledging a specific piece of information in isolation can expose a collection method, even though the source is never mentioned. Just as disclosure of a piece of information known to only a small handful of people may make it a simple process to determine who must have provided the information to the CIA, so entities hostile to the United States may be able to deduce the method by which the CIA gathered a piece of information based upon the nature of the information itself along with other available information.

62. In addition to revealing specific intelligence methods, the Requested PDBs are part of a mosaic of PDBs that would reveal information about the application of intelligence methods even excluding any text that reveals specific methods as such. To the extent that there may be remnants of information in either individual PDB that would

not be classified standing alone, when pieced together with other information available to a foreign intelligence service the remnants would reveal information about the application of intelligence methods employed by the CIA to obtain the intelligence reported. Should multiple PDBs become publicly available over time, the pattern of information then disclosed would provide foreign intelligence services an understanding of the various intelligence methods used by the United States to gather specific kinds of information from various locations around the world, as well as an understanding of gaps in our collection, of what the United States knew and didn't know, when, and the effectiveness of the methods we have used.

63. Although the intelligence included in the Requested PDBs is over 30 years old, its disclosure would reveal to educated observers information about the application of intelligence methods in use at the time of the Requested PDBs and subsequently. The effective collection, analysis and exploitation of intelligence requires the CIA to prevent disclosure of such information to foreign governments, intelligence services or other entities hostile to the United States who could use it to undermine the current collection and analysis of foreign intelligence.

64. Moreover, as I described in the previous section of this Declaration, the PDB process is itself an intelligence method. Disclosure of individual editions of

the PDB would, necessarily, reveal information about the application of an intelligence method.

65. Therefore, I have determined that the unauthorized disclosure of the Requested PDBs would tend to reveal specific intelligence methods and, even after redaction of material that is classified in isolation, disclosure would tend to reveal as part of a mosaic information about the CIA's intelligence methods that could reasonably be expected to cause exceptionally grave damage to the national security of the United States and are therefore properly classified as TOP SECRET. Also, because such unauthorized disclosure could be expected to reveal the identity of a confidential human source, or a human intelligence source or reveal information about the application of an intelligence source or method, the Requested PDBs are exempt from declassification under Section 3.3(b)(1) of the Executive Order. Thus, the requested information is currently and properly classified and is coextensively exempt from disclosure pursuant to FOIA exemption (b)(1) and (b)(3).

C. FOIA Exemption (b)(5)

66. FOIA Exemption (b)(5), 5 U.S.C. § 552(b)(5), as amended, protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." I have determined that the Requested PDBs are 1) inter-agency and intra-agency documents that comprise pre-decisional,

deliberative information protected by the deliberative process privilege and 2) communications with the President in the exercise of his official duties, and thus fall with the protection of FOIA exemption (b)(5).

67. FOIA exemption (b)(5) exempts those documents normally privileged in the civil discovery context.

1. The Deliberative Process Privilege

68. The deliberative process privilege is a governmental privilege that permits the government to withhold documents or information that reflects advisory opinions, recommendations, and deliberations that are part of a process by which government decisions and policies are formulated. It allows the government to protect the internal deliberations of policymakers, recommendations, analyses, speculation and other information that is prepared in order to inform decision-making. It protects deliberative, pre-decisional information or documents used in the decision-making process as well as the candor and confidentiality that are integral to the deliberative process itself.

69. The Requested PDBs constitute deliberative documents in two respects. First, they reflect the overarching deliberative process of U.S. foreign policy decision-making. As I have previously described in this Declaration, the contents of the PDB reflect the foreign policy priorities of the U.S. government by showing what subjects are of interest to the President and when. The

Requested PDBs also expose the deliberative process of providing intelligence to the President with regard to these foreign policy priorities. Producing the PDB requires the PDB analysts and writers to comb through thousands of pieces of information in determining what must be briefed to the President. Determining what information to include is the height of the deliberative process.

70. The deliberative process privilege protects not only the analysis in the Requested PDBs, but also factual information, because the specific facts contained in the PDBs were selected and highlighted out of a wide body of other potentially relevant facts and background material. In addition, many of the facts contained in the PDB are also intertwined with CIA analysis, making it impossible to segregate specific hard facts from the analytical content of the PDB.

71. The Requested PDBs contain predecisional analysis in the area of U.S. foreign policy. By definition the PDB is meant to provide the President and his most senior advisors information upon which to base foreign policy decisions. The Requested PDBs include analysis of the political, economic, military and social conditions in a multitude of countries around the world. Clearly, the President and his advisors were engaged in foreign policy decisions with respect to these countries on an ongoing basis. Moreover, the specific countries and individuals on which the Requested PDBs reported would likely have

influenced decision-making in other areas of foreign policy not specifically mentioned in the PDB.

72. On a daily basis, various senior officials within the CIA must determine which subjects merit reporting to the President and his most senior advisors. This determination is based on the expressed requirements of the President, the content and urgency of raw intelligence, current events and foreign policy priorities of the U.S. government. On occasion, information will also be provided in the PDB that responds directly to questions from the President or one of his advisors.

73. Essentially, the PDB, as a series, is an ongoing dialogue between the President and his most senior advisors and the CIA. As the basis for this dialogue and the catalyst for foreign policy discussion and decision-making, each edition of the PDB is the quintessential pre-decisional, deliberative document. The CIA, in conjunction with the President, must determine what issues on which to report, and must determine what information to provide out of the thousands of pieces of information available on certain subjects and what information, out of all of the information available, on which to base its analysis.

74. Intelligence is not a perfect science, and the fresh intelligence and real-time analysis included in the PDB is subject to revision and even refutation over time. Timely intelligence necessarily includes judgments based upon available information that evolves as additional

information and insight emerge through further collection and through policy-makers' comments, questions, and deliberation. Disclosure of the pre-decisional policy analysis and deliberation reflected in the PDB would effectively stifle and "chill" the presentation of timely intelligence collection and analysis. Analysts and others who contribute to the decision-making process would hesitate to report information that appears at odds with previously-accepted understandings, or to voice opinions or points of view that may at first blush appear radical or "outside the box," or could be subject to misinterpretation or taken out of context by others. Their worries about such problems could lead them to refrain from providing their best judgments about what is the unvarnished truth in their analyses to policy-makers, who would then be left with an incomplete and therefore flawed foundation on which to base their ultimate decisions.

75. Those producing the PDB are producing a document meant to provide a current snapshot of intelligence about the most important areas of foreign policy in the world today. They must present their judgments and conclusions based on the best information available to the Intelligence Community at the moment. If those contributing to and producing the PDB believe that their work will be critiqued years later by those with the benefit of twenty-twenty hindsight and their own agenda to pursue, there is a risk that they will be less willing to offer speculative

analysis that might later be mischaracterized or proved wrong, with the eventual result that the PDB will be of less use to policymakers' deliberative processes.

76. Thus, I have determined that disclosure of any part of the Requested PDBs in response to Plaintiff's FOIA request would cause harm to the CIA's and the Government's internal deliberative process and would therefore harm U.S. policymaking generally. The Requested PDBs are therefore exempt from disclosure under FOIA exemption (b)(5).

2. The Presidential Communications Privilege

77. As I have previously discussed in this Declaration, the PDB is prepared for the President and his most senior advisors to provide that intelligence which is necessary to the effective development of U.S. national security and foreign policy. As such it is a communication directly with the President used in the conduct of his official duties. Therefore, I have determined that the Requested PDBs would normally be privileged in the civil discovery context and are therefore exempt from disclosure pursuant to FOIA Exemption (b)(5).

D. Segregability

78. The FOIA requires that "[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 under this subsection." 5 U.S.C. § 552(b). Following a careful review and consideration of the Requested PDBs, as distinct records and in the context

of the Requested PDBs as part of a series of intelligence documents that reflect both the development of the Intelligence Community's collection and analyses over time and the evolution of national defense and foreign policy decisions by the President and his most senior advisors, I have determined that the Requested PDBs must be protected from release in their entirety, on the basis of FOIA exemptions (b)(1), (b)(3) and (b)(5), and that no reasonably segregable, non-exempt portions of the documents exist. All of the information in the Requested PDBs is related to intelligence activities, sources and methods, foreign government information, foreign relations and activities and/or the deliberative process. Any information is so inextricably intertwined with the exempt information that release of the non-exempt information would produce little, if anything, more than fragmented, unintelligible sentences composed of isolated, meaningless words. Any intelligible information that is not properly classified as a specific item is nevertheless a part of a mosaic of PDB information such that a compilation of PDBs would tend to reveal gravely damaging insight into how the CIA conducts its intelligence business.

79. Therefore, I have determined that there is no non-exempt information that can be reasonably segregated from the exempt information.

IV. Conclusion

80. I have determined for the reasons set forth above that the Requested PDBs must be protected from release because their disclosure could reasonably be expected to cause harm to the national security, to reveal intelligence sources and methods and to harm the deliberative process.

81. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 1st day of April 2005.

Terry N. Buroker
Information Review Officer
Directorate of Intelligence
Central Intelligence Agency

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY BERMAN, *Plaintiff-Appellant,* v. CENTRAL INTELLIGENCE AGENCY, *Defendant-Appellee.*	No. 05-16820 D.C. No. CV-04-02699-DFL OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
July 10, 2007—San Francisco, California

Filed September 4, 2007

Before: David R. Thompson, Pamela Ann Rymer and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

COUNSEL

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OPINION

FISHER, Circuit Judge:

For nearly half a century, the CIA has each day sent the President a highly classified summary of the most important and timely intelligence relating to this country's national defense and foreign policy priorities. We must decide in this case whether two of these reports — known as the President's Daily Brief (PDB) — from the administration of President Lyndon B. Johnson are exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. We hold that the CIA has provided ample justification that the disclosure of the two PDBs would reveal protected intelligence sources and methods, and thus these PDBs are protected by FOIA exemption 3 and the National Security Act (NSA), 50 U.S.C. §§ 403-1(i)(1), 403g.

I.

The practice of specialized presidential intelligence briefing dates back to the administration of President John F.

Kennedy. After taking office, President Kennedy asked the CIA to produce a special briefing that succinctly summarized recently collected intelligence information that would be of interest to the President and his senior advisors. That briefing, which was then called the President's Intelligence Checklist (PICL), became an important medium of communication between the leadership of the CIA and the White House. When President Johnson took office, the PICL's format was modified to suit his particular tastes, and was renamed the President's Daily Brief. The PDBs of that era reported on international developments based on intelligence sources that included satellite photographs, signal intercepts, individual recruits, Department of State communications, published news accounts and other publicly available information. Because the PDBs were high-level intelligence documents, they were then and still are classified documents that are available only to the President and his senior advisors.

Over the years, a handful of the more than 13,500 existing PICLs and PDBs have made their way into the public domain, either deliberately or by mistake. Ten redacted PICLs from the Kennedy administration were released pursuant to the President John F. Kennedy Assassination Records Collection Act of 1992. *See* 44 U.S.C. § 2107 note. Two more recent PDBs were released as a part of the Final Report of the National Commission on Terrorist Attacks on the United States, commonly known as the 9/11 Report. These PDBs were declassified after the Director of Central Intelligence determined that the public interest in disclosure outweighed the potential damage to national security that could result from disclosure. *See* Exec. Order No. 12,958, 68 Fed. Reg. 15315, § 3.1(b) (as amended by Exec. Order No. 13,292).

At least 15 redacted PDBs from the Johnson administration have also been released. These PDBs illustrate the format and content that was common during that period. They were produced in a two-column format with particular countries listed on the left and one or two paragraphs about recent events in

each country on the right. The content of these PDBs are generally factual, although in some cases the author provides predictions about where current events might lead. The tone is generally informal.

Larry Berman, a political science professor at the University of California, Davis, filed a FOIA request seeking two Johnson-era PDBs: from August 6, 1965 and from April 2, 1968. The CIA denied his request, asserting FOIA exemptions for classified national security information (exemption 1); for protected intelligence sources and methods (exemption 3); and for privileged communications (exemption 5). *See* 5 U.S.C. § 552(b)(1), (b)(3), (b)(5). After his administrative appeal was denied, Berman filed a declaratory judgment action in the Eastern District of California seeking disclosure.

In the district court proceedings, the CIA supported its asserted exemptions with the 39-page declaration and three-page supplemental declaration of CIA information review officer Terry Buroker. In his declarations, Buroker asserts that the PDBs "must be withheld in their entirety, as no reasonably segregable, non-exempt portions of the documents exist." Buroker provides two related factual bases for the claimed necessity of keeping the PDBs secret.

First, Buroker describes the general content and function of PDBs. He explains that during the Johnson administration, PDBs were used to synthesize, in a few pages, the most recently gathered and critical intelligence information the CIA possessed. Because of their condensed format, the Johnson PDBs contained only that information that leadership within the CIA believed would be most important to the President and his senior advisors. Buroker explains that PDBs served as a starting point for high level discussions regarding intelligence and national security between the President and the CIA. As a result, the PDBs themselves reflect one side of this ongoing dialogue. According to Buroker, the Johnson PDBs include sensitive information such as: "a) undisseminated raw

operational information, sometimes including true names of sources and/or cryptonyms, b) sensitive operational information added to the document by the Directorate of Operations after the Directorate of Intelligence has written or edited the material in the PDB, c) information restricted at the very highest levels of human and technical source intelligence gathering, d) information from covert technical operations, and e) information from specifically developed or acquired CIA-only methods."

Second, Buroker discusses why the specific PDBs requested in this case would result in harm to the CIA's intelligence gathering interests. Buroker states that the specific PDBs Berman requests "contain explicit references to information provided by foreign officials as well as other information that may incorporate information from foreign liaison relationships," including foreign governments and foreign intelligence services. The PDBs also "contain references to intelligence obtained from individual human sources and from confidential liaison relationships." Buroker warns that such information was provided "only upon a guarantee of absolute secrecy," and disclosure of the requested PDBs "would tend to reveal the identities of intelligence sources." This could lead to severe harms to the sources of the information, including "embarrassment, political ruin, retribution . . . imprisonment, torture or even death of the source or the source's family and friends." Moreover, Buroker states that disclosure of the requested PDBs "would disclose specific intelligence methods, including technical collection methods." For all of these reasons, disclosure "reasonably could be expected to cause exceptionally grave damage to the national security of the United States."

The district court granted summary judgment in favor of the CIA, holding that the CIA had made an adequate showing that the documents were shielded from disclosure by exemptions 3 and 5. *See Berman v. CIA*, 378 F. Supp. 2d 1209 (E.D. Cal. 2005). This timely appeal followed.

II.

The district court's grant of summary judgment in a FOIA case is reviewed under a two-step test. *See Lion Raisins v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1078 (9th Cir. 2004). First, we ask whether the district court had an adequate factual basis for its decision. We review the district court's determination that a particular set of documents (here the Buroker declarations) provided an adequate factual basis de novo. Second, we ask whether the district court's decision regarding applicability of FOIA's exemptions was correct. If the district court's determination turns mainly on findings of fact, we review for clear error. *Id.* However, where as here the district court's determination turned on its interpretation of the law, we review de novo. *See generally Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir. 1996) ("Although any factual conclusions that place a document within a stated exemption of FOIA are reviewed under a clearly erroneous standard, the question of whether a document fits within one of FOIA's prescribed exemptions is one of law, upon which the district court is entitled to no deference" (citation and internal quotation marks omitted)).

III.

A.

[1] FOIA exemption 3 permits government agencies to maintain the secrecy of information that is "specifically exempted from disclosure by [certain] statute[s] . . . ." *See* 5 U.S.C. § 552(b)(3). The National Security Act is such a statute. *See CIA v. Sims*, 471 U.S. 159, 167 (1985). That statute instructs the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1); *see also* 50 U.S.C. § 403g.[1]

[1]The statute formerly referred to the Director of Central Intelligence. *See Sims*, 471 U.S. at 167. The change in titles and responsibilities has no impact on this case. *See Wolf v. CIA*, 473 F.3d 370, 377 n.6 (D.C. Cir. 2007).

[2] The NSA provides the Director with "very broad authority to protect all sources of intelligence information from disclosure." *Sims*, 471 U.S. at 168-69. Because of this "sweeping power," *id.* at 169, courts are required to give "great deference" to the CIA's assertion that a particular disclosure could reveal intelligence sources or methods, *id.* at 179. The term "sources" is to be broadly construed and encompasses not only "secret agents," but instead reaches all sources of information the CIA relies upon, including publicly available information. *Id.* at 170-71.

[3] We have acknowledged that after *Sims*, there exists "a near-blanket FOIA exemption" for CIA records. *Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992). Indeed, *Sims* leaves courts "only a short step from exempting all CIA records from FOIA." *Id.* (internal quotation marks and alteration omitted). Concerned that this broad reading of CIA authority might be contrary to congressional intent, we have invited Congress to "take the necessary legislative action to rectify" that disparity. *Id.*; *see also Minier v. CIA*, 88 F.3d 796, 804 (9th Cir. 1996) ("Only Congress can override the plain language of [the NSA]."). Congress, however, has to date left the NSA materially unaltered and so we must continue to afford the CIA broad deference. Nonetheless, just as Congress has not reduced the CIA's authority under the NSA, neither has it expanded the CIA's protection from FOIA from a "near-blanket" exemption to a blanket exemption. We therefore continue to conduct some meaningful — albeit restrained — review of the CIA's assertions.

[4] The CIA bears the burden of proving the applicability of the exemption. *Minier*, 88 F.3d at 800. Although the CIA's reasons are entitled to deference, the CIA's declarations must still "describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemptions, and show that the justifications are not controverted by contrary evidence in the record or by evidence of CIA bad faith." *Hunt*, 981 F.2d

at 1119. The CIA must do more than show simply that it has acted in good faith. *See Wiener v. FBI*, 943 F.2d 972, 983 n.19 (9th Cir. 1991).

B.

Buroker asserts that exemption 3 applies because the PDBs could "expose the existence of specific intelligence sources and methods."[2] He explains that each of the requested PDBs contains "information specifically stating sensitive sources or methods of collection" and would reveal "substantial information about its provenance to an educated reader." Buroker adds that "each edition of the PDB is a piece of a 'mosaic' of information reflecting the most sensitive, as well as the mundane, intelligence sources and methods employed by the CIA and the Intelligence Community over time."

In *Wiener*, we held that a CIA affidavit was inadequate to support the CIA's invocation of exemption 3 because it "fail[ed] to discuss the facts or reasoning upon which [the declarant] based his conclusion." *Wiener*, 943 F.2d at 983. This was problematic because it denied the plaintiff the opportunity to contest the CIA's conclusions, and thus distorted the adversary process. *See id.* The CIA affidavit we rejected stated without justification that "disclosure of [the withheld] portions reasonably could be expected to lead to identification of the source of the information." *Id.* (alteration in original, internal quotation marks omitted).

[5] Unlike the affidavit in *Wiener*, Buroker's declaration provides the facts and reasoning upon which his conclusion is based. He explains that each PDB contains the most sensitive and important intelligence information available to the CIA

[2]Because we hold that the PDBs are protected under exemption 3, we do not decide whether the CIA's claims that they are also protected under exemption 1 and exemption 5 are valid. *See Minier*, 88 F.3d at 800 n.5; *Hunt*, 981 F.2d at 1118.

on the day it is released and that the requested PDBs specifically identify intelligence sources and methods. He also explains how PDBs convey important contextual information that could reveal sources or methods even if the PDBs were produced in redacted form. Because they are released on a daily basis and typically contain only the most current information fresh from the field, PDBs reveal when particular intelligence information became available to the CIA. This is important, as Buroker observes, because sophisticated foreign intelligence services might use that information to "reliably infer that a human source for information contained in the PDB is most likely one of a very few number of individuals with access to the subject information, and that the source must have provided the information very close in time to when it was reported in the PDB." An educated observer could also determine other sensitive information, such as what intelligence was most important to the President and to senior officials within the CIA at a particular time. *See Sims*, 471 U.S. at 176-77 ("A foreign government can learn a great deal about the Agency's activities by knowing the . . . sources of information that interest the Agency."). Furthermore, Buroker explains, the release of PDBs would diminish the CIA's ability to assure current intelligence sources that their identities will be kept secret in the future.

[6] Finally, in addition to the Buroker affidavit, Berman has access to several other Johnson PDBs that undisputedly contain a similar form and content to the ones he requests. He also has access to volumes of other information regarding intelligence and foreign policy during the Johnson administration, including National Security Files available through the Johnson Presidential Library. Access to these documents has enabled him specifically to contest the CIA's claim that the PDBs would divulge protected sources and methods. Berman therefore has sufficient facts at his disposal for the adversary process to function properly and thus he has been given "a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withhold-

ing." *Weiner*, 943 F.3d at 977 (citation and internal quotation marks omitted). Because of the broad deference we are to give the CIA under *Sims*, and because judges are poorly positioned to evaluate the sufficiency of the CIA's intelligence claims, *see Sims*, 471 U.S. at 176, 178, we doubt that the CIA's provision of a more detailed declaration would enable Berman to argue more effectively for their release. *See Weiner*, 943 F.2d at 983 (stating that the CIA affidavit was sufficient with regard to one withholding because "[n]o further disclosure would have enabled Weiner to argue for their release").

[7] Berman argues nonetheless that the CIA should be required to provide even greater detail regarding the content of the requested PDBs and how that content is tied to the harms the CIA fears. We are satisfied, however, that the Buroker declaration strikes the appropriate balance between justifying the applicability of the exemption with sufficient specificity to permit Berman meaningfully to challenge it and the CIA's need to avoid providing a description that is so specific that it risks revealing protected sources and methods. As *Sims* observed, "[i]t is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency." 471 U.S. at 179; *see also Church of Scientology of Cal. v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1979) (stating that in asserting a FOIA exemption "the government need not specify its objections in such detail as to compromise the secrecy of the information"). We were mindful of this concern in *Hunt*, where we permitted the CIA to respond to a FOIA request by providing a so-called "*Glomar* response" in which the CIA refused to confirm or deny the existence of records pertaining to a foreign national. 981 F.2d at 1117. We did not require the CIA to identify particular harms that would occur if the documents were disclosed. Instead, we were satisfied with the CIA's statements that a more specific response might allow foreign intelligence agents to "determine the contours and gaps of CIA intelligence operations and make informed

judgments as to the identities of probable sources and targets in other countries," and that disclosure might prove to be a disincentive to future sources providing assistance the CIA. *Id.* at 1119. We cited with approval *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982), in which the CIA justified a *Glomar* response by averring that disclosure might allow foreign operatives to discover the identities of covert CIA sources and the CIA research interests: *Hunt*, 981 F.2d at 1119-20 (citing *Gardels*, 689 F.2d at 1103-04). It was therefore unnecessary for the affidavits in that case to "mention harms to particular individuals." *Id.* The CIA's declarations here are comparable in specificity to those in *Hunt* and *Gardels*. We therefore hold that they are sufficient.[3]

[8] Berman next argues that Buroker's declarations are insufficient because Buroker states only that disclosure of the PDBs "could" reveal sources and methods, rather than stating definitively that the PDBs *would* divulge such protected matter. But Buroker's declaration speaks in more certain terms than Berman suggests, in stating that the disclosure of the requested PDBs "*would* disclose specific intelligence methods, including technical collection methods," that disclosure "*would* tend to reveal the identities of intelligence sources," and that "[e]ach of the Requested PDBs contains information specifically stating sensitive sources or methods of collection." (Emphases added). More fundamentally, the CIA Director need not demonstrate to a certainty that disclosure will result in intelligence sources or methods being revealed. Instead, the NSA entrusts the Director with the discretion to determine that documents should remain secret because the

[3]In arguing that the CIA is required to disclose even more details regarding the contents of the requested PDBs, Berman cites precedent from this court and elsewhere regarding the appropriate standard where exemption 1 is at issue and where the CIA is not involved. But given the especially broad deference that we must accord the CIA under *Sims*, standards established under exemption 1 cannot be uncritically imported into the exemption 3 context. *See Fitzgibbon v. CIA*, 911 F.2d 755, 764 (D.C. Cir. 1990).

substantial risk that sources and methods will be compromised outweighs the public interest in disclosure. In *Sims*, the Supreme Court deferred to the CIA's conclusion that disclosure of the requested information "posed an unacceptable risk of revealing protected 'intelligence sources.' " 471 U.S. at 179; *see also Wolf*, 473 F.3d at 377 ("[I]nformation is exempt under [the NSA] if the Agency demonstrates that an answer to the query can *reasonably be expected* to lead to unauthorized disclosure." (emphasis added) (citation and quotation marks omitted)). We must therefore defer to the CIA's determination that disclosure would run the unacceptable risk that sources or methods would be revealed. Buroker has asserted that such risks are present here, not only with regard to revelation of sources and methods, but also in his warning that disclosure "reasonably could be expected to cause exceptionally grave damage to the national security of the United States." Because the CIA is better situated to gauge the national security implications of disclosure, *see Sims*, 471 U.S. at 179, we defer to its judgment.

[9] Berman also objects to the CIA's reliance on the "mosaic theory," which Buroker explains as the concept that "[w]hile some information in specific PDBs may appear harmless to disclose when read in isolation, such information may be very valuable as part of a 'mosaic' of information gleaned from various sources, including multiple PDBs prepared over time." The Supreme Court endorsed the mosaic theory in *Sims*, commenting that

> [B]its and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself. Thus, [what] may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. Accordingly, the Director, in exercising his authority under [the NSA], has the power to withhold superficially innoc-

> uous information on the ground that it might enable an observer to discover the identity of an intelligence source.

471 U.S. at 178 (citations and internal quotation marks omitted; second alteration in original). We permitted the CIA to rely upon the mosaic theory in *Hunt*, when we accepted the CIA's argument that "disclosure . . . must not be viewed in isolation but rather as one tile in a mosaic of intelligence gathering." 981 F.2d at 1119; *accord Fitzgibbon*, 911 F.2d at 763; *see also Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (endorsing the mosaic theory in context of the government's assertion of the state secrets privilege against civil discovery requests). To be sure, the CIA's invocation of the mosaic theory does not excuse it from meeting its burden of proof or from its obligation to provide a reasonably specific explanation of why the exemption applies. But nothing prevents the CIA from relying on the common sense premise that the impact of disclosing protected documents must be evaluated not only based upon the information appearing within the four corners of the document, but also with regard to what secrets the document could divulge when viewed in light of other information available to interested observers.

We are to consider the sufficiency of the CIA's declarations in light of contrary evidence adduced by Berman. *See Hunt*, 981 F.2d at 1119. Berman relies upon the several PDBs that have been publicly disclosed to argue that there is nothing about PDBs generally that necessitates secrecy and thus the CIA was required to provide more detail regarding the PDBs requested in this case. Buroker's declaration explains, however, that each additionally disclosed PDB would provide more clues regarding intelligence sources and methods, as well as the ongoing dialogue between the President and the CIA. If multiple PDBs within a short time period were available, then an informed observer would be able to trace precisely when new information became available and, in the case of multiple entries on the same country, what types of

sources were employed. The CIA's explanations are entitled to deference and, in light of the overall showing made in Buroker's declarations, provide a sufficient factual basis for the district court's decision. *Cf. Sims*, 471 U.S. at 180-81 (rejecting the argument that the CIA was "somehow estopped" from withholding the identities of some intelligence sources because it had already disclosed others).

Berman also contends that much of the information contained in PDBs is similar if not identical to information set forth in publicly available Central Intelligence Bulletins (CIBs). Like PDBs, CIBs are brief summaries of intelligence information distributed to senior members of the executive branch. Buroker explains, however, that unlike PDBs, CIBs are not developed exclusively for the President; they are circulated throughout the government, including to policy, security and military officials. CIBs do not contain raw intelligence or direct source information and are written at a greater level of generality than PDBs The distinction drawn by Buroker is supported by the record. Although the CIBs in some cases contain similar text to contemporaneous PDBs, the majority of the information presented in the publicly available PDBs does not overlap with the same-day CIBs. Even if we assume that all the information in a particular PDB eventually makes its way into the CIBs — an assumption the record does not support — revelation of the PDBs would still divulge *when* that information became available and therefore potentially signal what sources or methods were in play. It might also reveal what information was of primary interest to the President at a given time. *See Sims*, 471 U.S. at 178 ("Foreign intelligence services have an interest in knowing what is being studied and researched by our agencies dealing with national security . . . .").

[10] Accordingly, we hold that the Buroker affidavits and other evidence in the record provided an adequate factual basis for the district court's decision. The CIA did not need to provide a more specific declaration.

C.

[11] Because Buroker has stated explicitly that the requested PDBs would reveal protected sources and methods if disclosed, and because his declarations adequately support that assertion, exemption 3 applies. If Berman were seeking more recent PDBs there would be little room for dispute that they would reveal highly sensitive intelligence sources and methods. Berman's request therefore relies heavily upon the assumption that the passage of time — around 40 years — has eroded any support for the assertion that the PDBs contain information about sources or methods that has not already been revealed.

Buroker explains, however, that the passage of time has not vitiated the CIA's interest in maintaining the secrecy of the requested PDBs. In this regard, some of Buroker's explanations are little more than truisms — for example, that "[i]ndividual people may have long lives and careers, and foreign governments and intelligence services may exist in perpetuity" — without any indication that these particular PDBs involve sources who could be threatened by disclosure at this late date, or who could not be protected by redactions. If a source were threatened, the CIA's concerns would be quite compelling, but we cannot discern that from such generalizations.

[12] Nonetheless, Buroker does raise a related concern that the revelation of sources that are even 40 years old could hinder the CIA's current efforts to recruit individuals or governments as sources. Such potential sources may be frightened off if they believe promises of confidentiality are subject to an implicit time-based sunset clause at the discretion of the judiciary. Courts have permitted the CIA to maintain the secrecy of similarly dated material based on this concern. In *Sims*, for example, the Supreme Court held that exemption 3 applied to information that was about 20 to 30 years old. *See Sims*, 471 U.S. at 161. In so holding, the Court cited the necessity that

the CIA be able to give potential sources "an assurance of confidentiality that is as absolute as possible." *Id.* at 175. The Court explained that "[e]ven a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.' " *Id.* The CIA therefore has a "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Id.* (citation and internal quotation marks omitted). Following *Sims*' instructions, other courts have permitted the CIA to maintain the secrecy of fairly old documents. *See Maynard v. CIA*, 986 F.2d 547, 555 n.6 (1st Cir. 1993) ("[T]he passage of thirty years, by itself, is insufficient to require [the CIA] to disclose the information."); *Fitzgibbon*, 911 F.2d at 763-74. The CIA's assertion that disclosure of old sources would detrimentally affect its ability to enlist new sources is entitled to deference, *see Sims*, 471 U.S. at 179, and warrants application of exemption 3 here.[4]

[13] Accordingly, we hold that the requested PDBs are protected from disclosure by exemption 3. Critical to our analysis — both with regard to the adequacy of the declarations and the applicability of the exemption — is the uniqueness of the PDBs as potentially the most important and classified intelligence document in this nation's intelligence apparatus. As Buroker summarizes, "the PDB is the most highly selective compendium of the most important intelligence available to the U.S. Intelligence Community." One observer has commented more succinctly that the PDB is "the most restricted

[4]This does not necessarily mean, as Berman suggests, that the CIA may use this rationale to keep documents secret in perpetuity. Although our broad deference to the CIA requires us to accept its assertion here, it is far less plausible that current sources would "close up like a clam" if they knew that their involvement with the CIA would be revealed four or five generations later. At the very least, the CIA would need to provide a better explanation of why documents of that vintage would need to remain secret.

document in Washington." Bob Woodward, *Bush at War* 132 (2002). The extreme sensitivity of the PDB enhances the plausibility of the CIA's assertion that disclosure of the requested PDBs could cause harm even 40 years after their generation. It also justifies Buroker's failure to describe in more detailed terms the relationship between the requested PDBs and protected sources and methods. We do not suggest that PDBs are categorically exempt from FOIA. But we are satisfied that Buroker's affidavit, when taken as a whole and viewed in light of other evidence in the record, justifies the application of exemption 3.

D.

As an alternative to his assertion that disclosure of the contents of the requested PDBs would reveal protected sources or methods, Buroker submits that PDBs are *themselves* protected intelligence methods. This is true, Buroker states, because "[t]he PDB is part of the process by which the CIA advises the President and his most senior advisors regarding the subject areas most important to them" and therefore intelligence decisions "are directly affected by the PDB process." Notwithstanding the great deference we typically afford the CIA's affidavits, we reject Buroker's attempt to create a per se status exemption for PDBs.

[14] Although PDBs will typically contain information that reveals intelligence sources and methods, this does not mean that PDBs *themselves* are intelligence methods. As can be gleaned from the PDBs that are publicly available, PDBs are nothing more than simple memoranda the CIA uses to communicate with the President. Historians have documented the PDB process in such great detail that even if that process could be deemed a "method," that method has already been fully disclosed to the public. If we were to accept the CIA's logic, then every written CIA communication — regardless of content — would be a protected "intelligence method" because it is a method that CIA uses in doing its work. The

CIA would then be able to avoid entirely our requirement that it provide a specific justification that explains why the particular document requested fits within exemption 3. *See Hunt*, 981 F.2d at 1119. We decline to adopt such a boundless definition, and instead hold that whether or not a particular document used by the CIA in its ordinary course of business is an intelligence method depends upon the content of the document.

[15] The CIA cites *Aftergood v. CIA*, 355 F. Supp. 2d 557, 562 (D.D.C. 2005), as supporting its expansive definition of intelligence methods. In that case the district court held that exemption 3 excused the CIA from disclosing its budget. The court did not, however, hold that the budget itself is an intelligence method, but rather that "intelligence budget information *relates to* intelligence methods, namely the allocation, transfer and funding of intelligence programs." *Id.* (emphasis added) (citation and internal quotation marks omitted). There, as here, it was the content of the documents sought, not the documents themselves, that deserved protection under exemption 3.[5]

IV.

We hold that exemption 3 excuses the CIA from release of these requested PDBs. We reject, however, the CIA's argument that the PDBs are themselves protected intelligence methods.

AFFIRMED.

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[5]Berman argues that if we reject the CIA's claim that the PDBs are themselves intelligence methods, we must also reject the CIA's claim that disclosure of the PDBs would reveal intelligence methods because the second argument is inextricably intertwined with the first. Buroker's declaration specifically warns, however, that the requested PDBs "would disclose specific intelligence methods, including technical *collection* methods." (Emphasis added.) Buroker's prediction that intelligence methods would be disclosed is not grounded in the premise that PDBs are themselves methods.