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13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 OAKLAND DIVISION

16 VIETNAM VETERANS OF AMERICA, *et al.*,
 17 Plaintiffs,
 18 v.
 19 CENTRAL INTELLIGENCE AGENCY, *et al.*,
 20 Defendants.
 21

Case No. CV 09-0037-CW

**DEFENDANTS' NOTICE OF FILING
 DECLARATION IN SUPPORT OF
 DEFENDANT CIA'S PRIVILEGE
 ASSERTIONS UNDER 50 U.S.C. §
 403g**

1 As requested by this Court, (Dkt. 178 at 13), Defendant Central Intelligence Agency
2 (“CIA” or “Agency”) submits this supplemental memorandum of law and the declaration of
3 Martha M. Lutz, Information Review Officer, Director’s Area, CIA (“Lutz Declaration”), to
4 explain the basis for the CIA’s assertion of privilege under 50 U.S.C. § 403g.¹ As discussed
5 below, the CIA properly withheld information from the documents at issue concerning the
6 organization and functions of the CIA and the names and titles of its employees.
7

8 INTRODUCTION

9 Section 6 of the Central Intelligence Agency Act of 1949 (“CIA Act”), codified at 50
10 U.S.C. § 403g, states that “the Agency shall be exempted from the . . . provisions of any other law
11 which require the publication or disclosure of the organization, functions, names, official titles,
12 salaries, or numbers of personnel employed by the Agency.” It is an absolute privilege, not
13 subject to a showing of need. *See Kronisch v. United States*, No. 83 CIV 2458, 1995 WL 303625,
14 at *8 (S.D.N.Y. May 18, 1995) (“[T]he privileges conferred by Sections 403-3(c)(5) and 403g are
15 absolute. The court need only determine whether the privileges are properly asserted, not
16 whether a weighing of the equities favors one side or the other.”). Nor are the statute’s
17 protections subject to an inherent time limit. As this Circuit has stated, “there is nothing in §
18 403g to suggest that it should be construed to apply only to presently employed agents. . . . Use of
19 the word ‘employed’ without qualification indicates that Congress intended the statute to apply to
20 both current and former agents.” *Minier v. CIA*, 88 F.3d 796, 802 n.9 (9th Cir. 1996); *see also*
21 *Kronisch*, 1995 WL 303625, at *10 (“[W]hile we recognize that the documents at issue are
22 approximately forty years old . . . we must ultimately defer to the CIA’s considered judgment.”).
23 Accordingly, the CIA need only demonstrate that information to be protected pursuant to § 403g
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26 ¹ Defendants are submitting to chambers the unredacted documents *ex parte* and *in*
27 *camera* for the Court’s review.
28

1 describes the organization, function, names, official titles, salaries, or numbers of personnel
2 employed by the Agency. By way of the attached Lutz Declaration, the CIA has made this
3 showing.

4 **I. WHEN DETERMINING THE APPLICATION OF § 403g, COURTS LOOK AT**
5 **THE PLAIN MEANING OF THE STATUTE, REGARDLESS OF THE CONTEXT**
6 **IN WHICH IT IS INVOKED.**

7 Plaintiffs do not dispute that the CIA Act is a civil withholding statute. However,
8 Plaintiffs seem to assert that the CIA must meet a higher standard when it invokes § 403g to
9 protect information sought pursuant to the Federal Rules of Civil Procedure than in the context of
10 the Freedom of Information Act (“FOIA”). (*See, e.g.*, Pls.’ Mot. to Compel 30(b)(6) Deps. (Dkt.
11 125) at 7.) This argument is incorrect and has no support from the statute or the case law
12 interpreting it. As an initial matter, the plain language of the statute makes no such distinction. Its
13 protections apply notwithstanding the “provisions of any other law.” 50 U.S.C. § 403g. This
14 express and unambiguous language controls. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 831
15 (9th Cir. 2000) (“Statutory interpretation begins with the plain meaning of the statute’s language.
16 Where the statutory language is clear and consistent with the statutory scheme at issue, the plain
17 language of the statute is conclusive and the judicial inquiry is at an end.” (citation omitted)).

18
19 This argument has also been rejected by the courts interpreting it. For instance, in
20 *Kronisch*, the court evaluated the applicability of § 403g in the context of discovery as compared
21 to FOIA. *See Kronisch*, 1995 WL 303625, at *8-9. The court found that, while the “factor of
22 need may in some contexts enter into the disclosure analysis,” the CIA Act was not such a statute.
23 *Id.* at *9. Given the Supreme Court’s interpretation of the National Security Act in *Sims*, which
24 relied on the “plain meaning” of the statute, the court found that that it was “impossible to
25 reconcile *Sims* with an interpretation of the statutory privileges whereby their applicability merely
26 depends on whether the suit is brought under FOIA or not.” *Id.* If the privileges covered by the
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1 CIA Act did not apply with equal force in discovery as in FOIA, it would “undermine the CIA’s
2 ability to rely on the statutory privilege as a means to guarantee” sensitive information. *Id.* The
3 court also cited seven other published and unpublished cases that “upheld the CIA’s assertion of
4 its statutory privilege in the context of civil discovery.” *Id.*

5
6 **II. CONGRESS HAS MADE THE DETERMINATION THAT THE PROTECTION
OF THIS INFORMATION IS IN THE NATIONAL INTEREST.**

7 When it passed the CIA Act, Congress recognized that the names, functions, and
8 “operation of the Central Intelligence Agency must of necessity be highly confidential.” H.R.
9 Rep. No. 1853, at 2 (1948). By providing a basis for the director of the CIA to withhold such
10 information, Congress sought to preserve and “protect[] the confidential nature of the Agency’s
11 functions.” *Id.*; *see also* S. Rep. No. 1570 (1956) (stating that the Act “gave protection to the
12 confidential nature of the Agency’s function”). Thus, Congress recognized that the names,
13 functions, titles and operations of the CIA by themselves implicate the national security of the
14 United States without requiring an additional showing from the Agency.

15
16 This Circuit has recognized Congress’s judgment that disclosure of the names, functions,
17 and operations of the CIA inherently implicates national security: “there is no question that the
18 CIA may refuse to disclose the names of its agents under 50 U.S.C. § 403g We need simply
19 read the statutes to arrive at this result” *Minier*, 88 F.3d at 803; *id.* at 801 (“Thus, the plain
20 language of § . . . 403g expressly provides that the CIA is exempted from disclosing the names of
21 its employees.”); *cf. Wiener v. FBI*, 943 F.2d 972, 983 (9th Cir. 1991) (“[A] withholding [by the]
22 agency relying upon section 403(d)(3) [of the CIA Act] to protect an intelligence source need not
23 demonstrate disclosure of the source will damage national security.”). Likewise, the D.C. Circuit
24 has held that the “plain meaning” of 403g demonstrates that “[t]here is certainly no specific
25 requirement that the CIA make a preliminary showing that the disclosure of the personnel
26 information will in fact jeopardize the functioning of the Agency.” *Baker v. CIA*, 580 F.2d 664,
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1 668 (D.C. Cir. 1978). It further found that, “in section 403g, Congress has already made any
2 required determinations concerning intelligence security.” *Id.* As a result, “the CIA is not
3 required under section 403g to make an independent showing of a nexus between the withholding
4 of personnel data and the security of foreign intelligence activities or the protection of
5 intelligence sources and methods.” *Id.* at 669.

6
7 As demonstrated above, there is no support in either the statute or the case law for the
8 proposition that a different standard should apply in non-FOIA civil cases. For instance, when
9 dealing with a civil discovery dispute in *Neely v. CIA*, No. 79-3237 (D.D.C. Mar. 3, 1982), the
10 court held that “as long as documents fall within the parameters of section 403g they are exempt
11 from disclosure; the CIA does not have to make a threshold showing that the disclosure . . . will
12 actually jeopardize the functioning of the Agency.” Slip op. at 3. Similarly, when dealing with
13 the National Security Agency’s substantively identical statute in a non-FOIA civil case,² the D.C.
14 Circuit held that the “NSA was not required to provide any information as to the particular
15 security threats posed by the release of the documents.” *Linder v. NSA*, 94 F.3d 693, 696 (D.C.
16 Cir. 1996). Quoting a prior opinion of the circuit, the court noted that “[a] specific showing of
17 potential harm to national security . . . is irrelevant to the language of [that statute]. Congress has
18 already . . . decided that disclosure of NSA activities is potentially harmful.” *Id.* (quoting
19 *Hayden v. NSA*, 608 F.2d 1381, 1390 (D.C. Cir.1979)). Congress made that same determination
20 when it provided the absolute protections in the CIA Act.
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25 ² See National Security Act of 1959, Pub.L. No. 86-36, § 6, 73 Stat. 63, 64, quoted in 50
26 U.S.C. § 402 note (“[N]othing in this Act or any other law ... shall be construed to require the
27 disclosure of the organization or any function of the National Security Agency, of any
28 information with respect to the activities thereof, or of the names, titles, salaries, or number of the
persons employed by such agency.”).

1 **III. THE INFORMATION WITHHELD BY THE CIA IS PROPERLY PROTECTED**
2 **UNDER § 403g.**

3 Before the Court are currently forty-six entries on Defendants' privilege log.³ The
4 documents primarily fall into two categories (1) correspondence and other communications
5 relating to requests by the individual plaintiffs to this suit under FOIA and the Privacy Act, and
6 (2) correspondence among members of Congress, the individual plaintiffs, and the CIA. (Lutz
7 Decl. ¶ 4.) The vast majority of the documents were released, with only a small amount of
8 information withheld pursuant to the CIA Act. (*Id.* ¶ 5.) The Lutz Declaration explains in detail
9 why type of information was redacted pursuant to the CIA Act, and it also provides numerous
10 examples of where such information was redacted. For instance, the Lutz Declaration explains
11 that the CIA withheld the names of CIA personnel, including employees who work on FOIA
12 matters and in the Office of Congressional Affairs and the Office of General Counsel; it withheld
13 these employees' phone and fax numbers as well. (*Id.* ¶¶ 8-10.) Additionally, the Lutz
14 Declaration explains that the CIA redacted information reflecting its internal organization and
15 functions, such as information about the organization of its offices and how correspondence is
16 distributed and stored internally. (*Id.* ¶ 10.)

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19 The CIA did, however, withhold a small portion of documents in full. (*Id.* ¶ 11.) As
20 explained in the Lutz Declaration, these documents are replete with information on the internal
21 organization and function of the Agency, including information about the organization and
22 operation of the internal CIA computer databases and how the CIA conducts searches of those

23
24 ³ The privilege log sent to Plaintiffs in July 2010 contained twenty-one entries for
25 documents protected pursuant to 50 U.S.C. § 403g. (*See* Ex. B to Lutz Decl.) Some of those
26 entries contained several documents that were similar in nature. (Lutz Decl. p.3 n.1.) To aid the
27 Court in reviewing redactions to the produced documents, Defendant CIA has produced a revised
28 privilege log that now contains fifty-five entries that describe the documents in a more
individualized manner (and as they are kept in the normal course of business). (*Id.*) This revision
to the log, however, resulted in nine entries for documents that had been released in full. Thus,
only 46 entries are actually contested in front of this Court.

1 databases. (*Id.*) While the CIA confirms that it released all reasonably segregable information
2 from the documents described in the forty-six privilege log entries, it determined that release was
3 not appropriate for this limited selection of documents. (*Id.* ¶¶ 11, 12.)

4 **CONCLUSION**

5 For the reasons stated above, this Court should uphold the CIA's assertions of statutory
6 privilege over the forty-six privilege log entries currently before it.
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8
9 Dated: December 20, 2010

Respectfully submitted,

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