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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

THERESA CAMERANESI, et al.,

Plaintiffs,

No. C 12-0595 PJH

v.

**ORDER RE CROSS-MOTIONS FOR  
SUMMARY JUDGMENT**

U.S. DEPARTMENT OF DEFENSE,  
et al.,

Defendants.

\_\_\_\_\_ /

This is an action for declaratory and injunctive relief brought under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). The parties’ cross-motions for summary judgment came on for hearing before this court on February 13, 2013. Plaintiffs appeared by their counsel Duffy Carolan and Kent Spriggs, and defendants appeared by their counsel Ann Marie Reding. Having read the parties’ papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS plaintiffs’ motion and DENIES defendants’ motion as follows.

**THE FREEDOM OF INFORMATION ACT**

“Congress enacted FOIA to overhaul the public-disclosure section of the Administrative Procedures Act.” Milner v. Dep’t of Navy, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1259, 1262 (2011); see also Department of Air Force v. Rose, 425 U.S. 352, 361 (1976) (discussing Congress’ creation of FOIA). Congress recognized that no statute effectively provided for disclosure to the public by the “hundreds of [governmental] departments, branches and agencies which are not clearly responsible to the people.” SDC Dev. Corp. v. Mathews,

1 542 F.2d 1116, 1119 (9th Cir. 1976). Congress believed that “the public as a whole has a  
2 right to know what its Government is doing.” Id. (quoting S.Rep. No. 813, 89th Con., 1st  
3 Sess. 5 (1965)).

4 Congress enacted FOIA to “clos[e] the loopholes which allow agencies to deny  
5 legitimate information to the public.” U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136,  
6 150 (1989) (citations and quotations omitted). FOIA’s purpose was thus to “ensure an  
7 informed citizenry, vital to the functioning of a democratic society, needed to check against  
8 corruption and to hold the governors accountable to the governed.” John Doe Agency v.  
9 John Doe Corp., 493 U.S. 146, 152 (1989) (quotations omitted). Accordingly, FOIA  
10 mandates a “strong presumption in favor of disclosure.” U.S. Dep’t of State v. Ray, 502  
11 U.S. 164, 173 (1991). “[D]isclosure, not secrecy is the dominant objective of the act.”  
12 Rose, 425 U.S. at 361.

13 However, Congress also contemplated that some information can legitimately be  
14 kept from the public through the invocation of certain exemptions to disclosure. Yonemoto  
15 v. Department of Veterans Affairs, 686 F.3d 681, 687 (9th Cir. 2012); see Tax Analysts,  
16 492 U.S. at 150-51 (agency must disclose records to “any person” unless the records may  
17 be withheld pursuant to one of the enumerated exemptions listed in § 552(b)); see also  
18 Lion Raisins, Inc. v. U.S. Dep’t of Agriculture, 354 F.3d 1072, 1079 (9th Cir. 2004)  
19 (Supreme Court’s broad interpretation of FOIA requires full agency disclosure except where  
20 specifically exempted).

21 FOIA includes nine statutory exemptions. See 5 U.S.C. § 552(b)(1)-(9). These  
22 statutory exemptions “must be narrowly construed.” Lion Raisins, 354 F.3d at 1079  
23 (quoting John Doe Agency, 493 U.S. at 152); see also Milner, 131 S.Ct. at 1265-66 (FOIA  
24 strongly favors openness and “broad disclosure” with narrowly construed exceptions).  
25 Moreover, even when material falls within one of FOIA’s nine exemptions, an agency must  
26 disclose “any reasonably segregable portion of a record . . . after deletion of the portions  
27 which are exempt.” 5 U.S.C. § 552(b). An agency invoking an exemption bears the burden  
28 of proving that it applies. Yonemoto, 686 F.3d at 688.

## BACKGROUND

1  
2 Plaintiffs Theresa Cameranesi and Judith Liteky seek access to information  
3 regarding students and instructors at the Western Hemisphere Institute for Security  
4 Cooperation (“WHINSEC”), which is operated by the U.S. Department of Defense (“DOD”)  
5 and was formerly known as the U.S. Army School of the Americas (“SOA”). Originally  
6 established by the U.S. Army in 1946 as the Latin American Training Center, SOA was run  
7 by the United States Army and housed at Fort Benning, Georgia. It trained military leaders  
8 from countries throughout the Western Hemisphere in combat and various counter-  
9 insurgency techniques. See Bourgeois v. Peters, 387 F.3d 1303, 1306 (11th Cir. 2004).

10 In 1990, the School of the Americas Watch (“SOA Watch”), a non-profit advocacy  
11 organization, was formed for the purpose of raising awareness of activities of SOA and in  
12 response the 1989 killing of six Jesuit priests, their housekeeper and her 16-year-old  
13 daughter in El Salvador, after it came to light that a majority of the individuals implicated in  
14 the murders were soldiers who had been trained at SOA. SOA Watch contends that the  
15 SOA bolstered military dictatorships by training their leaders how to kill, torture, and  
16 otherwise suppress their citizens. See id. Plaintiffs Theresa Cameranesi and Judith Liteky  
17 helped form the School of the Americas Watch San Francisco Research Group, a local  
18 adjunct of SOA Watch.

19 In 2000, SOA was replaced by WHINSEC, also located at Ft. Benning. See National  
20 Defense Authorization Act for Fiscal Year 2001, P.L. 106-398, § 911, 114 Stat. 1654, 2000  
21 HR 4205, codified at 10 U.S.C. § 2166. WHINSEC provides professional education and  
22 training to eligible military, law enforcement, and civilian personnel of nations of the  
23 Western Hemisphere. In addition to foreign nationals, U.S. military, civilian, and contractor  
24 personnel attend WHINSEC as students or work as instructors.

25 The bill establishing WHINSEC also provided for the creation of a 14-member  
26 “Board of Visitors,” composed of members of the Senate and House Armed Services  
27 Committees; representatives from the State Department, U.S. Southern Command, U.S.  
28 Northern Command, the U.S. Army Training and Doctrine Command (“TRADOC”); and six

1 members designated by the Secretary of Defense (including persons from academia and  
2 the religious and human rights communities). Id. § 2166(e). The Board is tasked with  
3 inquiring into the curriculum, instruction, physical equipment, fiscal affairs, and academic  
4 methods of WHINSEC, and with reporting to the Secretary of Defense as to whether the  
5 curriculum complies with U.S. laws and regulations, is consistent with U.S. policy goals  
6 toward Latin America and the Carribean, and adheres to U.S. doctrine. Id.

7 According to the Declaration of Lee A. Rials, a Department of the Army employee  
8 and a Public Affairs Specialist for WHINSEC, the Board's annual report in the years since  
9 2002 has shown that WHINSEC is performing its missions in an excellent manner, legally,  
10 morally, and ethically. In addition, since Fiscal Year ("FY") 2005, the DOD has provided  
11 Congress (in classified format) names and other data for all WHINSEC students and  
12 instructors.

13 Beginning in approximately 1994, the DOD disclosed to SOA Watch the names of  
14 SOA students and instructors dating back to 1946. Thereafter, through FY 2004, the DOD  
15 routinely disclosed upon request the names of the students attending SOA/WHINSEC, and  
16 their countries of origin. From these disclosures, SOA Watch created a data base  
17 containing the names, countries of origin, and courses taught or taken by the students and  
18 instructors. This database contains more than 60,000 names, covering the period 1946 to  
19 2004, when the government stopped its practice of publicly disclosing this information.  
20 Using the prior disclosures, SOA Watch has created reports linking names from the data  
21 base to human rights abuses described in various governmental and media documents.

22 Plaintiffs contend that the analysis and review of the human rights records of SOA  
23 and WHINSEC graduates provided by SOA Watch, and other nonprofits such Amnesty  
24 International, based on the prior disclosures, has been utilized by members of Congress  
25 seeking to make decisions about the school and other foreign policies.

26 Plaintiffs also assert that this information is relevant to the analysis of whether and to  
27 what effect the government is vetting individual officers and noncommissioned officers prior  
28 to admitting them to WHINSEC, and monitoring military units for human rights certification

1 in accordance with the 1997 Foreign Operations Appropriations Act, which requires that  
2 U.S. assistance be denied to military “units” if the Secretary of State has credible evidence  
3 of human rights abuses by that unit, and successive amendment to the Defense  
4 Appropriations Act, extending the same restrictions to training assistance to foreign  
5 military.<sup>1</sup>

6 WHINSEC opened in late 2001. After that date, DOD continued to disclose the  
7 names of students and instructors, as it had with SOA. According to plaintiffs, many  
8 members of Congress expressed the view that until a student at WHINSEC could be tied to  
9 a human rights violation, they were inclined to support the renamed school. In response,  
10 the San Francisco Research Group of SOA Watch took the names of WHINSEC graduates  
11 and instructors previously disclosed by DOD and matched those names with human rights  
12 reports prepared by the U.S. Department of State and other groups. The group’s findings,  
13 which documented five cases where individuals were allowed to attend WHINSEC despite  
14 existing human rights records, were presented to the office of U.S. Rep. Jim McGovern.  
15 Plaintiffs assert that it was soon after this report to Rep. McGovern’s office that DOD first  
16 reversed its longstanding practice of releasing the names of SOA and WHINSEC  
17 attendees.

18 On March 1, 2011, plaintiffs served a FOIA request on DOD and TRADOC, seeking  
19 access to “all documents that contain the names, ranks, branches, countries of origin, lists  
20 of courses taken or taught, and/or dates and years in attendance of students, instructors,  
21 and guest instructors” at WHINSEC from FY 2005-2010, including “documents known as  
22 ‘Student List,’ ‘Instructor List,’ and ‘Guest Instructor List.’”

23 On March 22, 2011, plaintiffs added a request for information about the military units  
24 of those attending WHINSEC, but also clarified that the request for “all documents” should  
25 be interpreted to mean simply “sufficient records to allow [plaintiffs] to learn the names,  
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27 <sup>1</sup> See Foreign Operations, Export Financing, and Related Programs Appropriations Act,  
28 1998, Pub. L. No. 105-118, § 570, 111 Stat. 2386, 2429 (1997); Dep’t of Defense and  
Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 8085, 125 Stat. 38, 71  
(2011).

1 ranks, branches, countries of origin, lists of courses taken or taught, and the dates and  
2 years in attendance of students, instructors, and guest instructors at WHINSEC” for FY  
3 2005-2010.

4 On April 5, 2011, TRADOC responded to the FOIA request with some responsive  
5 records. Along with the letter, TRADOC sent what it referred to as “the responsive records,  
6 located from the record search.” TRADOC indicated that portions of the records had been  
7 redacted, that “the FOIA exemption that prohibits the information disclosure is cited,” and  
8 that the decision is considered “a partial denial of [the] FOIA request.” The only FOIA  
9 exemption cited in the letter was Exemption 6, which exempts from disclosure matters that  
10 are “personnel and medical files and similar files the disclosure of which would constitute a  
11 clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The letter  
12 asserted that “[t]here is no discretion in release of information/records that qualify for  
13 withholding pursuant to [Exemption 6].”

14 According to plaintiffs, TRADOC’s letter was accompanied by a disk containing 19  
15 .pdf files that had apparently been converted from an Excel format. None of the 19 files  
16 contained any names of WHINSEC students or instructors or their military units. Plaintiffs  
17 contend that many of the files were transmitted without any indentifying information or title,  
18 such that it was not possible to know what the information purported to represent.<sup>2</sup>  
19 Plaintiffs contend that aside from a complete denial of access to the names and military  
20 units of the students and instructors – the substance of the request – other information  
21 requested was sometimes provided and sometimes withheld or missing from the files  
22 produced.

23 On May 11, 2011, plaintiffs filed an administrative appeal of TRADOC’s partial  
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25 <sup>2</sup> According to the Declaration of Judith Liteky, when the Excel files were converted  
26 into .pdf files, “much of the native formatting was lost such that cell information normally  
27 reflected in a single frame view of an Excel file was separated from other cell information in the  
28 PDF.” Liteky Decl. ¶ 13. To make sense of the information, one had to piece the latter half  
of the .pdf file together with the first half and “make assumptions as to the native format.” *Id.*  
Liteky asserts that “the government’s haphazard production compromises the information’s  
integrity.” *Id.*

1 denial of their request. In their appeal, plaintiffs claimed that TRADOC's invocation of  
2 Exemption 6 was not appropriate because the public's interest in disclosure of the names  
3 and units of WHINSEC students and instructors outweighs the privacy interests, if any, of  
4 those individuals in their names and units.

5 Plaintiffs also asserted that TRADOC had failed to provide an index to the withheld  
6 records, as required under Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973) ("Vaughn  
7 index"). A Vaughn index "identifies each document withheld and the statutory exemption  
8 claimed for each document, and sets forth 'a particularized explanation of how disclosure of  
9 the particular document would damage the interest protected by the claimed exemption."  
10 Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1092 n.1 (9th Cir. 1997)  
11 (quoting Weiner v. F.B.I., 943 F.2d 972, 977 (9th Cir. 1991)). The purpose of the index is  
12 to "afford the . . . requester a meaningful opportunity to contest, and the district court an  
13 adequate foundation to review, the soundness of the withholding." King v. U.S. Dep't of  
14 Justice, 830 F.2d 210, 218 (D.C. Cir. 1987).<sup>3</sup>

15 On June 8, 2011, DOD denied the appeal, reasserting FOIA Exemption 6, but also  
16 citing for the first time Exemption 3, which exempts from disclosure matters that are  
17 "specifically exempted from disclosure by statute" if that statute either "requires that matters  
18 be withheld from the public" or "establishes particular criteria for withholding or refers to  
19 particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). DOD claimed that  
20 Exemption 3 warranted withholding the information, based on the requirement in  
21 § 1083 of the National Defense Authorization Act that DOD disclose the information, and  
22 the provision that allows the Secretary to waive that requirement if warranted by the  
23 "national interest."

24 On February 6, 2012, plaintiffs filed the present action against DOD and TRADOC,

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26 <sup>3</sup> A Vaughn index is not required in every case. For example, if the affidavit provided  
27 by the agency is sufficient to show that the requested documents should not be disclosed, a  
28 Vaughn index is not required. See Weiner, 943 F.2d at 978 n.5. As another example, if an  
exemption is based on a general exclusion, which is dependent on the category of the  
requested records rather than on the individual subject matters contained within each  
document, a Vaughn index is unnecessary. Id.

1 seeking an order enjoining defendants from withholding the names and assigned military  
2 units of students, instructors, and guest instructors at WHINSEC for the fiscal years 2005-  
3 2010. Each side now seeks summary judgment.

4 Plaintiffs argue that DOD cannot meet its heavy burden of proof under FOIA to  
5 justify withholding the information plaintiffs have requested. DOD contends that it properly  
6 withheld the requested information pursuant to Exemption 3 and Exemption 6 of FOIA.

## 7 DISCUSSION

### 8 A. Legal Standard

9 A party may move for summary judgment on a “claim or defense” or “part of . . . a  
10 claim or defense.” Fed. R. Civ. P. 56(a). Summary judgment is appropriate when there is  
11 no genuine dispute as to any material fact and the moving party is entitled to judgment as a  
12 matter of law. Id.

13 FOIA cases are typically decided on motions for summary judgment. Defenders of  
14 Wildlife v. U.S. Border Patrol, 623 F.Supp. 2d 83, 87 (D.D.C. 2009); Bigwood v. U.S.  
15 Agency for Int'l Dev., 484 F.Supp. 2d 68, 73 (D.D.C. 2007). Because FOIA cases rarely  
16 involve issues of disputed fact, the court need not utilize the typical summary judgment  
17 standard. Yonemoto, 686 F.3d at 688; Minier v. Central Intelligence Agency, 88 F.3d 796,  
18 800 (9th Cir. 1996). Instead, the court conducts a two-step inquiry.

19 First, the court weighs whether the agency has established that it fully discharged its  
20 obligations under FOIA. Zemansky v. U.S. E.P.A., 767 F.2d 569, 571 (9th Cir. 1985). An  
21 agency can establish this by showing that it conducted a search reasonably calculated to  
22 uncover all relevant documents. Id.; Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344,  
23 1350-51 (D.C. Cir. 1983).

24 If the agency meets this burden, the court then considers whether the agency has  
25 shown that any information not disclosed falls within one of the FOIA exemptions. Where  
26 the government withholds documents pursuant to one of the enumerated exemptions, “the  
27 burden is on the agency to sustain its action.” 5 U.S.C. § 552(a)(4)(B); see Ray, 502 U.S.  
28 at 173 (burden remains with agency when it seeks to justify redaction of identifying

1 information as well as when it seeks to withhold entire document); see also Dobronski v.  
 2 F.C.C., 17 F.3d 275, 277 (9th Cir. 1994). “A basic policy of FOIA is to ensure that  
 3 Congress and not administrative agencies determines what information is confidential.”  
 4 Lessner v. U.S. Dep’t of Commerce, 827 F.2d 1333, 1335 (9th Cir. 1987). For this reason,  
 5 the courts do not give deference to a federal agency’s determination that the requested  
 6 information falls under a particular FOIA exemption. Carlson v. U.S. Postal Serv., 504 F.3d  
 7 1123, 1127 (9th Cir. 2007).

8 Thus, to prevail on a summary judgment motion in a FOIA proceeding, where the  
 9 underlying facts and possible inferences are construed in favor of a FOIA requester, an  
 10 agency must prove that it has adequately searched for documents and that any withheld  
 11 documents or information falls within one of the specified exemptions.

12 B. The Parties’ Motions

13 The dispute between the parties centers on whether the requested identifying  
 14 information was properly withheld under FOIA Exemptions 3 and 6.

15 1. Exemption 3

16 Exemption 3 originally covered material “specifically exempted from disclosure by  
 17 statute.” Church of Scientology of Calif. v. U.S. Postal Serv., 633 F. 2d 1327, 1329 (9th  
 18 Cir. 1980). In its current form, Exemption 3 permits agencies to withhold matters that are  
 19 “specifically exempted from disclosure by [a] statute” other than FOIA itself. See 5 U.S.C.  
 20 § 552(b)(3). To qualify, the statute must either

21 (A)(i) require[ ] that the matters be withheld from the public in such a manner  
 22 as to leave no discretion on the issue; or

23 (ii) establish[ ] particular criteria for withholding or refer[ ] to particular types of  
 matters to be withheld[.]

24 Id. § 552(b)(3)(A).<sup>4</sup>

25 “[O]nly explicit nondisclosure statutes that evidence a congressional determination  
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27 <sup>4</sup> A statute enacted after the OPEN FOIA Act of 2009, Pub. L. No. 111-83, 123 Stat.  
 28 2142, 2184 (2009), must also specifically cite to the relevant paragraph of FOIA. 5 U.S.C.  
 § 552(b)(3)(B).

1 that certain materials ought to be kept in confidence will be sufficient to qualify under the  
2 exemption.” Wisconsin Project on Nuclear Arms Control v. U.S. Dep’t of Commerce, 317  
3 F.3d 275, 280 (D.C. Cir. 2003) (citation and quotation omitted); see also Church of  
4 Scientology, 633 F.2d at 1329 (only “explicit nondisclosure statutes . . . will be sufficient to  
5 qualify under the exemption”).

6 When an agency relies on a statute to deny a FOIA request under Exemption 3, a  
7 reviewing court must ask (1) whether the statute meets Exemption 3’s requirements, and  
8 (2) whether the information that was withheld falls within the statute’s coverage. Newport  
9 Aeronautical Sales v. Dep’t of the Air Force, 684 F.3d 160, 165 (D.C. Cir. 2012); Cal-  
10 Almond, Inc. v. U.S. Dep’t of Agriculture, 960 F.2d 105, 108 (9th Cir. 1992).

11 Here, DOD cites § 1083 of the National Defense Authorization Act of 2010 as the  
12 exempting statute. Section 1083 provides as follows:

13 (a) Disclosure –

14 (1) In General – The Secretary of Defense shall release to the public, upon  
15 request, the information described in paragraph (2) for each of fiscal years  
2009 and 2010.

16 (2) Content – The information to be released under paragraph (1) shall  
17 include, with respect to the fiscal year covered, the entire name, including the  
18 first, middle, and surnames, with respect to each student and instructor at the  
Western Hemisphere Institute for Security Cooperation.

19 (b) Waiver – The Secretary of Defense may waive the requirement under  
subsection (a) if the Secretary determines it to be in the national interest.

20 PL 111-84, § 1083, 123 Stat 2190, 2009 HR 2647 (2009). DOD has not specified the  
21 “national interest” that warranted waiving the requirement – but simply asserts that “the  
22 particular criteria have been met because the Secretary of Defense exercised his waiver  
23 authority over the requested information on June 16, 2010.”

24 Plaintiffs argue that § 1083 does not qualify as an Exemption 3 statute because it  
25 does not give complete discretion to withhold information, and does not establish “particular  
26 criteria for withholding” or refer to “particular types of matters to be withheld.”

27 Plaintiffs contend that federal courts have repeatedly rejected the “national interest” as a  
28 sufficiently particularized criterion for purposes of Exemption 3. In support, they cite

1 American Jewish Congress v. Kreps, 574 F.2d 624 (D.C. Cir. 1978); and CNA Financial  
2 Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987).

3 In American Jewish Congress, the court determined that the government could not  
4 invoke Exemption 3 pertaining to a provision of the Export Administration Act that permitted  
5 the government to withhold foreign trade information about private corporations unless it  
6 determined that the withholding was “contrary to the national interest.” Id., 574 F.2d at 631.  
7 The court considered that the “public interest” standard in the statute gave the government  
8 carte blanche to determine whether or not to withhold information, which it stated was  
9 “precisely the kind of situation that Exemption 3 was amended to avoid.” Id. Similarly, in  
10 CNA, the court held that the Trade Secrets Act, which establishes penalties for the  
11 disclosure of trade secrets, was not covered by Exemption 3 because it gave “the kind of  
12 administrative carte blanche that Congress intended to curb by its amendment of  
13 Exemption 3.” Id., 830 F.2d at 1139.

14 An Exemption 3 statute’s “identified class of nondisclosable matters” must be narrow  
15 to meet the requirements of Exemption 3. See Carlson, 504 F.3d at 1129; Lessner, 827  
16 F.2d at 1336. A statute purporting to give “total discretion” to restrict access to any of an  
17 agency’s investigatory files provides insufficient specificity to qualify for Exemption 3. See  
18 Church of Scientology, 633 F.3d at 1333.

19 Defendants argue that § 1083 qualifies as a statute for purposes of Exemption 3,  
20 and the names of WHINSEC instructors and students for FY 2009 and 2010 falls within its  
21 scope. They also contend that § 1083 establishes “particular criteria for withholding”  
22 information, because it authorizes the Secretary to withhold documents if it is doing so “in  
23 the national interest.”

24 Plaintiffs reiterate, however, that Exemption 3 does not apply because § 1083 does  
25 not establish the required “particular criteria” for withholding the names of WHINSEC  
26 instructors and students. They also argue that defendants have ignored the cases plaintiffs  
27 cited for the proposition that the use of “national interest” is an insufficiently particular  
28 criterion for withholding information under FOIA, because such a standard would simply

1 grant the agency carte blanche to withhold any information it chose to.

2 Defendants respond that the Ninth Circuit's decision in Lessner provides support for  
3 the Secretary's decision to withhold information regarding names and military units of  
4 WHINSEC attendees based on "national interest." In Lessner, the court held that a statute  
5 providing for non-disclosure of information except when disclosure would be in the "national  
6 interest" was an Exemption 3 statute because it contained sufficiently particularized criteria  
7 and did not grant the agency excessive discretion. Id., 827 F.2d at 1335-36.

8 The court noted that "[w]hether information is exempt from disclosure is a  
9 Congressional determination, not an administrative one[;]" and that in determining whether  
10 material is exempt under Exemption 3, "a court must consider the underlying congressional  
11 intent to exempt material from the FOIA." Id. at 1335 (quoting Church of Scientology, 633  
12 F.2d at 1330). Where the district court finds that Congress intended that material be  
13 exempted from FOIA, the court must determine "whether Congress has 'articulated  
14 "particular criteria"' to guide the agency charged with administering the law." Id. If only  
15 "very general benchmarks for secrecy" are set forth, the agency is delegated too much  
16 discretion and the criteria of Exemption 3 cannot be met. Id. (citations and quotations  
17 omitted).

18 Defendants have effectively conceded that because § 1083 references only the  
19 information for FY 2009 and 2010, Exemption 3 does not apply to the information for FY  
20 2005, 2006, 2007, 2008, 2011, and 2012. In addition, by its terms, § 1083 does not govern  
21 disclosure of military units of students and instructors at WHINSEC. Thus, the only  
22 question is whether § 1083 qualifies as an Exemption 3 statute for FY 2009 and 2010 with  
23 regard to disclosure of the names of WHINSEC students and instructors, and whether DOD  
24 has met its burden.

25 The court is not persuaded that § 1083 qualifies as an Exemption 3 statute, primarily  
26 because it does not provide any specific criteria for withholding information. Section 1083  
27 purports to give the Secretary of Defense unbounded discretion to disclose or withhold the  
28 names of WHINSEC attendees for FY 2009 and 2010 in the "national interest," but provides

1 no guidance whatsoever for the exercise of that discretion.

2 As noted above, Exemption 3 originally provided that “[t]his section does not apply to  
3 matters that are . . . specifically exempted from disclosure by statute.” In Administrator,  
4 FAA v. Robertson, 422 U.S. 255 (1975), the Supreme Court applied a broad interpretation  
5 of Exemption 3 to include a statute which granted an agency almost unlimited discretion to  
6 withhold documents. In response, Congress amended the statute to preclude agencies  
7 from avoiding FOIA disclosure provisions on general and nonspecific discretionary grounds.  
8 See Seymour v. Barabba, 559 F.2d 806, 807 (D.C. Cir. 1977).

9 The amended text and its legislative history make clear that Congress did not  
10 want the exemption to be triggered by every statute that in any way gives  
11 administrators discretion to withhold documents from the public. On the  
contrary, Congress intended exemption from the FOIA to be a legislative  
determination and not an administrative one.

12 Wisconsin Project, 317 F.3d at 280 (quoting Irons & Sears v. Dann, 606 F.2d 1215, 1220  
13 (D.C. Cir. 1979) (footnote omitted). Put another way, a statute qualifies as a withholding  
14 statute under Exemption 3 where “Congress ha[s] itself made the basic decision, and ha[s]  
15 left to the administrator only the task of implementation.” Am. Jewish Cong., 574 F.2d at  
16 630.

17 However, even if § 1083 did qualify as an Exemption 3 statute, DOD has not met its  
18 burden. The “strong presumption” under FOIA is that information is to be disclosed, and it  
19 is the burden of the federal agency to justify withholding information. See Ray, 502 U.S. at  
20 173. Defendants argue that the statute at issue in Lessner – a statute providing for non-  
21 disclosure of information except when disclosure would be in the “national interest” – uses  
22 language that is “remarkably similar” to the language in § 1083 – which provides that “upon  
23 request,” the Secretary of Defense “shall release” the names of students and instructors at  
24 WHINSEC, unless the Secretary determines that non-disclosure would be in the “national  
25 interest.” The court finds, however, that apart from the fact that both statutes allow the  
26 agency head to make a determination based on “national interest,” the language and intent  
27 of the two statutes are remarkably un-similar.

28 The statute at issue in Lessner presumed that certain information was to be exempt

1 from FOIA, whereas the presumption is the opposite in this case, where disclosure is  
2 presumptively mandated.<sup>5</sup> In addition, the court in Lessner focused on whether the statute  
3 at issue was an Exemption 3 statute, and then analyzed the legislative history to determine  
4 the congressional intent (which was that certain material not be disclosed), but was not  
5 concerned with whether the “national interest” language purported to grant unbridled  
6 discretion to the agency. Here, however, defendants have not provided any insights from  
7 the legislative history behind § 1083 to support their position, and in addition, argue that the  
8 statute gives the agency total discretion to determine whether it is in the “national interest”  
9 to withhold the names of WHINSEC students and instructors.

10 In short, in Lessner, the statute plainly indicated a presumption that the information  
11 will not be disclosed, whereas here, the statute clearly provides that the information is to be  
12 disclosed unless the agency determines some national interest requires that it not be  
13 disclosed. Thus, the fact that the court in Lessner found that the court’s ruling that “in the  
14 national interest” was a sufficient “criteria” to disclose information is not persuasive in this  
15 case – particularly given that up until 2005, DOD routinely released this information in  
16 response to FOIA requests.

17 2. Exemption 6

18 Exemption 6 permits an agency to withhold “personnel and medical files and similar  
19 files the disclosure of which would constitute clearly unwarranted invasion of personal  
20 privacy.” 5 U.S.C. § 552(b)(6). Exemption 6 is “intended to protect ‘individuals from the  
21 injury and embarrassment that can result from the unnecessary disclosure of personal  
22 information.’” Bowen v. U.S. Food & Drug Admin., 925 F.2d 1225, 1228 (9th Cir. 1991)  
23 (citation omitted); see also Dobronski, 17 F.3d at 277-78 (applying Exemption 6 to sick  
24 leave records); Van Bourg, Allen, Weinberg & Roger v. N.L.R.B., 728 F.2d 1270, 1273 (9th

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25  
26 <sup>5</sup> The statute at issue in Lessner reflected a Congressional policy that the information  
27 not be disclosed unless the Secretary determined that disclosure would be in the public  
28 interest, whereas § 1083 reflects a Congressional policy that the names of instructors and  
students for FY 2009-2010 be disclosed unless the Secretary determines that such disclosure  
would not be in the national interest.

1 Cir. 1984) (applying Exemption 6 to names and addresses of employees eligible to vote for  
2 a union).

3 The information that plaintiffs seek is not medical or detailed personnel information  
4 regarding the students and instructors at WHINSEC. During the course of the briefing on  
5 this motion, defendants conceded that the information requested did not constitute “medical  
6 files” and now also appear to have conceded that the information cannot be considered  
7 “personnel files.” Thus, the court considers only whether the information qualifies as  
8 “similar files.” The Supreme Court has broadly defined “similar” files in this context as  
9 those containing “information which applies to a particular individual.” U.S. Dep’t of State v.  
10 Washington Post Co., 456 U.S. 595, 602 (1982); see also Bowen, 925 F.2d at 1228. Lists  
11 of names and addresses may meet that definition, so long as release of the information  
12 requested would be a clearly unwarranted invasion of personal privacy. Washington Post,  
13 456 U.S. at 602.

14 Here, plaintiffs do not seek actual “files,” but rather a listing of names of students  
15 and instructors, plus home countries, military units, and classes taken or taught at  
16 WHINSEC – the same information that DOD provided through FY 2004. They do not seek  
17 information regarding any individual’s date of birth, place of birth, home address, marital  
18 status, employment history (except for tenure at WHINSEC), medical history, or any other  
19 information of the type generally considered to be “private” or “intimate.” The only personal  
20 information that DOD seeks to withhold under Exemption 6 is the names and military units  
21 of the students and instructors.

22 An agency's burden in justifying the withholding of a record under FOIA Exemption 6  
23 “is an ‘onerous’ one.” Lawyers’ Comm. for Civil Rights of S.F. Bay Area v. U.S. Dep’t of  
24 Treasury, 2008 WL 4482855 at \*20 (N.D. Cal. Sept. 30, 2008) (quoting News-Press v. U.S.  
25 Dep’t of Homeland Sec., 489 F.3d 1173, 1198 (11th Cir. 2007)). “[U]nder Exemption 6, the  
26 presumption in favor of disclosure is as strong as can be found anywhere in the Act.”  
27 Washington Post Co. v. U.S. Dep’t of Health & Human Servs., 690 F.2d 252, 261 (D.C. Cir.  
28 1982), quoted in Yonemoto, 686 F.3d at 694.

1 The mere fact that information “applies to a particular individual” is not sufficient to  
2 support withholding information under Exemption 6. Rather, the information must be of  
3 such a nature that its disclosure “would constitute a clearly unwarranted invasion of  
4 personal privacy.” 5 U.S.C. § 552(b)(6). In conducting that analysis, the court must first  
5 determine whether disclosure would implicate a personal privacy interest that is “nontrivial”  
6 or that is “more than . . . de minimis,” which in turn requires an assessment of “both the  
7 nature of the privacy interest at stake, and the likelihood that disclosure would lead to its  
8 invasion.” Yonemoto, 686 F.3d at 693. In addition, the threat to personal privacy that may  
9 arise from the disclosure of the disputed records “must be nonspeculative.” Id. at 693-94.

10 The “personal privacy” contemplated by Exemption 6 “encompass[es] the  
11 individual’s control of information concerning his or her person,” although it is not limited to  
12 that type of information. Id. (quoting U.S. Dep’t of Justice v. Reporters Comm. for Freedom  
13 of Press, 489 U.S. 749, 763 (1989)). For example, in National Archives and Records  
14 Admin. v. Favish, 541 U.S. 157 (2004), the Supreme Court held that FOIA recognizes  
15 surviving family members’ right to personal privacy with respect to their close relative’s  
16 death-scene images. Id. at 170. If the agency cannot establish that disclosure would lead  
17 to an invasion of a non-trivial personal privacy interest protected by Exemption 6, it must  
18 disclose the record. Yonemoto, 686 F.3d at 694.

19 If, on the other hand, the agency does make the required threshold showing  
20 regarding a privacy interest, the public interest in disclosure becomes relevant, and the  
21 court must balance the privacy interest identified against the extent to which disclosure of  
22 the particular information sought “would she[d] light on the agency’s performance of its  
23 statutory duties, or otherwise inform citizens what their government is up to.” Id. (quoting  
24 Bibles v. Oregon Natural Desert Ass’n, 519 U.S. 355, 355-56 (1997) (per curiam)).

25 Plaintiffs contend that Exemption 6 does not justify keeping secret the names and  
26 military unit information of WHINSEC students and instructors. First, plaintiffs argue that  
27 defendants have not made a threshold showing that disclosure of the records would  
28 compromise a substantial, as opposed to a de minimis, privacy interest. Plaintiffs note that

1 courts have held that the government cannot prevail on withholding under Exemption 6  
2 where Congress has expressed a statutory policy of disclosure. See, e.g., Washington  
3 Post Co., 690 F.2d at 263-65; Dow Jones & Co. v. U.S. Dep't of Justice, 724 F.Supp. 985,  
4 991 (D.D.C. 1989). Here, plaintiffs assert, a statute passed by Congress – § 1083 of the  
5 National Defense Authorization Act of 2010 – requires disclosure of specified records  
6 (names of WHINSEC attendees and instructors for FY 2009-2010) with no exception for  
7 privacy. They argue that § 1083 expresses Congress' view that the disclosure of names of  
8 WHINSEC students and instructors is desirable and not an intrusion on personal privacy.

9 Plaintiffs also contend that disclosure of information about an individual's  
10 professional or business activities does not impinge on cognizable interests in personal  
11 privacy. Exemption 6 was developed to protect details of personal and family life, not  
12 information regarding professional activities. See Sims v. Central Intelligence Agency, 642  
13 F.2d 562, 573-75 (D.C. Cir. 1980); Cohen v. E.P.A., 575 F.Supp. 425, 429 (D.D.C. 1983).  
14 Plaintiffs contend that the requested information concerns professional activities engaged  
15 in by the foreign military students attending WHINSEC, and by their instructors. They  
16 assert that because disclosing the names, military units, and other information about the  
17 students and instructors provides no intimate details about their personal or family lives,  
18 DOD cannot show a cognizable interest in privacy, let alone that disclosing this information  
19 would constitute a "clearly unwarranted" invasion of privacy.

20 Plaintiffs argue further that the WHINSEC attendees have no reasonable  
21 expectation of privacy because they were never told that their attendance at a publicly  
22 funded U.S. military school would remain confidential, or that their names and assigned  
23 military units would not be made public. Moreover, plaintiffs assert, DOD routinely  
24 disclosed this information in response to FOIA requests up until FY 2004, including names  
25 and instructors going back to 1946, and has also disclosed names of some students and  
26 instructors on the WHINSEC website, and on its Facebook page, in "meet and greet"  
27 sessions with human rights groups, and in WHINSEC's monthly newsletter. In addition, the  
28 names of Costa Rican WHINSEC attendees are published in that country's official

1 newspaper, by law; and DOD has disclosed the names and units of Columbian military  
2 students trained at West Point from 1990 to 2008.

3 Plaintiffs contend that even if defendants could establish that the WHINSEC  
4 instructors and students have some minimal privacy interest in the fact that they are  
5 affiliated with WHINSEC, the public's interest in obtaining the requested information plainly  
6 outweighs any such privacy interest asserted by the government. In performing the  
7 balancing test, the court must "keep in mind that the invasion of privacy must be 'clearly'  
8 unwarranted," which weighs heavily in favor of disclosure. Church of Scientology, 611 F.2d  
9 at 746. In addition, the privacy interest must be "substantial" to override the presumption in  
10 favor of disclosure. National Ass'n of Homebuilders v. Norton, 309 F.3d 26, 37 (D.C. Cir.  
11 2002).

12 Plaintiffs argue that the public interest requirement is satisfied here because they  
13 have shown that the records will further "the strong public interest in knowing 'what the  
14 government is up to,'" id., specifically, the interest of the general public, and those involved  
15 in news organizations and other media, human rights organizations, academia, government  
16 (including Congress), and assorted other non-profits. Plaintiffs assert that the monitoring of  
17 who passes through WHINSEC is essential to determining whether DOD and the State  
18 Department are performing their statutory duties to vet WHINSEC participants for past  
19 human rights abuses before they are approved to attend or teach at WHINSEC.

20 Plaintiffs contend that set against these public interests, which plaintiffs contend are  
21 "weighty," is an unsubstantial, unsubstantiated, and legally untenable claim of personal  
22 privacy. Plaintiffs argue that because DOD cannot meet its burden of proof to establish the  
23 existence of an exemption, and because these speculative unsupported interests do not  
24 "clearly outweigh" the public's interest in access to the information, DOD's Exemption 6  
25 claim cannot be sustained.

26 In response, defendants argue that the privacy interests of WHINSEC students and  
27 instructors in their names and military units are more than de minimis, and clearly outweigh  
28 the public interest in disclosure. Defendants cite two district court cases holding that

1 military personnel have a significant privacy interest in their names and other identifying  
2 information, due to potential security risks from releasing such information. See  
3 Schoenman v. F.B.I., 575 F.Supp. 2d 136, 160 (D.D.C. 2008); Hiken v. Dep't of Defense,  
4 521 F.Supp. 2d 1047, 1065 (N.D. Cal. 2007). In both cases, the privacy interests at issue  
5 were asserted on behalf of U.S. military personnel only.

6 In Schoenman, the court considered whether certain Air Force members had a  
7 legitimate privacy interest in their names and addresses, which information had been  
8 redacted from documents provided to the plaintiffs pursuant to a FOIA request. The court  
9 noted that the disclosure of names and addresses does not pose an inherent threat to the  
10 privacy of those listed, but that the circumstances of each case must be considered.  
11 Schoenman, 575 F.Supp. at 160. Because of a DOD policy change following the events of  
12 September 11, 2001, under which DOD does not routinely release the names and other  
13 personal details of military and civilian personnel, for security reasons, the court found that  
14 the privacy interest claimed by the Air Force was not de minimis. Id. at 161.

15 In Hiken, the court considered whether DOD should be required to disclose the  
16 names of military personnel involved in an incident during the Iraq War, in which shots were  
17 fired at a vehicle carrying an Italian journalist. The court found that the privacy interests at  
18 stake were significant because disclosure of the names might create a risk of harm or  
19 retaliation. Id. at 1064-65.

20 In this case, defendants argue, the WHINSEC students and instructors have more  
21 than a de minimis privacy interest in their names and military units because disclosure of  
22 that information risks exposing them to "violence and harassment." Defendants claim that  
23 withholding documents that contain the names and military units of WHINSEC students and  
24 instructors protects those personnel from terrorist, foreign intelligence, and criminal threats  
25 that may arise due to the nature of their work.

26 Defendants' primary support for these assertions is the declaration provided by Mr.  
27 Rials, the WHINSEC Public Affairs Specialist. Mr. Rials states that FOIA requests for  
28 names have been propounded on SOA and WHINSEC since 1993, and that until 2005, the

1 names of international students were released to the public. However, he claims that  
2 WHINSEC has never released the names of U.S. personnel pursuant to a FOIA request,  
3 and that in 2005, the Army's General Counsel determined that international personnel  
4 should have the same rights to privacy as U.S. personnel, in light of concerns for the safety  
5 of persons who may be actively involved in law enforcement missions, particularly anti-drug  
6 activities. Thus, according to Mr. Rials, since 2005, names have been redacted from  
7 documents released concerning all WHINSEC students.

8 Mr. Rials asserts that there are a number of risks associated with releasing the  
9 names of WHINSEC students, instructors, and guest instructors. He contends that  
10 Defense Intelligence Agency assessments indicate that public disclosure of WHINSEC's  
11 records may increase the threat to Latin American military and law enforcement personnel  
12 from the intelligence and security apparatuses of countries hostile to U.S. interests and to  
13 U.S. partner nations in the Western Hemisphere; from terrorist organizations operating in  
14 the Western Hemisphere; and from drug trafficking organizations operating in the Western  
15 Hemisphere. DOD recognizes these significant risks, and asserts that for this reason it  
16 currently proscribes the release of names and other personally identifying information of  
17 personnel assigned within a particular unit.

18 Mr. Rials notes that in some countries, such as Mexico and Colombia, security  
19 personnel and their families have been attacked after being identified in the media. As an  
20 example, he cites to March 2010 testimony by General Victor E. Renuart, Jr., former  
21 Commander of the U.S. Northern Command. General Renuart testified before the House  
22 Armed Services Committee that in a recent raid conducted by the Mexican military on  
23 Mexican drug cartel head Arturo Beltran Leyva, one of the military personnel was killed,  
24 and after his identity was made public, his mother, wife, and children were killed.

25 Mr. Rials claims that DOD recently consulted with WHINSEC's participating nations  
26 regarding its disclosure policy, and that the majority of participating nations either oppose  
27 public disclosure of personally identifying information of students and instructors, or wish to  
28 reserve the right to make decisions on such disclosures regarding their personnel. He

1 asserts that the majority of participating nations also indicate that public disclosure of the  
2 names and other personally identifying information concerning their personnel may have  
3 adverse effects on future participation in training programs at WHINSEC.

4 Defendants also contend that releasing the names and other information might  
5 subject WHINSEC instructors and students to harassment, because of the “stigma”  
6 attached to the former entity – the School of the Americas – and the public perception that  
7 SOA was training Latin American military personnel to better engage in human rights  
8 abuses.

9 As for WHINSEC’s disclosure of the identities of some students and instructors – for  
10 example, on its web site and its Facebook page, and in its newsletter – defendants  
11 concede that individuals are sometimes identified on these sites, but claim that it is always  
12 with the consent of the individuals involved; and that a newspaper that offers limited  
13 identification of individuals also does so only with the individuals’ consent.

14 In addition to Mr. Rials’ declaration, defendants cite 32 C.F.R. § 518.13(f)(2), which  
15 provides that U.S. Army components “shall ordinarily withhold lists of names (including  
16 active duty military, civilian employees, contractors, members of the National Guard and  
17 Reserves, and military dependents) and other personally identifying information” including  
18 e-mail addresses and home addresses. Defendants also cite a memorandum issued by  
19 the Secretary of Defense, dated November 9, 2001, in which the Secretary stated that in  
20 light of the attacks of September 11, 2001, all DOD components shall ordinarily withhold  
21 lists of names and other personally identifying details of personnel currently or recently  
22 assigned to a particular component, unit, organization or office within the DOD.

23 Based on this stated policy, defendants claim it would be reasonable for WHINSEC  
24 instructors and students to expect that their names and units would remain private.  
25 Defendants assert that the 2001 memorandum is sufficient to establish a “presumption of  
26 non-disclosure,” and that the court should give deference to DOD’s determination that  
27 individuals associated with DOD are entitled to have their names kept secret.

28 As for balancing the public and private interests, defendants contend that even if

1 plaintiffs have identified significant public interests, they have not shown how obtaining the  
2 names and military units of WHINSEC instructors and students is likely to advance those  
3 interests. The only relevant public interest in disclosure is the extent to which disclosure  
4 would serve the core purpose of FOIA, which is “contribut[ing] significantly to public  
5 understanding of the operations or activities of the government.” U.S. Dep’t of Defense v.  
6 Fed. Labor Relations Auth., 510 U.S. 487, 495 (1994) (quotation and citation omitted). The  
7 requested information must “shed[ ] light on an agency’s performance of its statutory  
8 duties.” Reporters Comm., 489 U.S. at 773. “[I]nformation about private citizens . . . that  
9 reveals little or nothing about an agency’s own conduct” does not serve a relevant public  
10 interest under FOIA. Id. The requesting party’s intended use for the information is  
11 irrelevant to the analysis. See id. at 771.

12 Here, defendants assert, while plaintiffs contend that disclosure of the names and  
13 military units of the WHINSEC instructors and students will allow the public to determine  
14 whether the Secretary of State is properly carrying out his/her duty to withhold U.S.  
15 assistance, including training assistance, to foreign police or military units where there is  
16 credible evidence of human rights abuses by those units, plaintiffs have failed to show how  
17 such disclosures will be “likely to advance” those public interests.

18 Defendants argue further that there are substantial oversight policies in place with  
19 regard to WHINSEC. The Department of State vets all foreign nationals prior to issuing any  
20 visa; and since FY 2005, DOD has provided to Congress (in classified format, and in  
21 accordance with the National Defense Authorization Act for FY 2008) the names and other  
22 data for all WHINSEC instructors and students, so Congress may monitor DOD’s  
23 compliance with the law. In addition, the WHINSEC Board of Visitors provides external  
24 oversight of WHINSEC’s performance. Defendants suggest that given these oversight  
25 measures, plaintiffs’ arguments regarding the asserted public interest are to no avail, and  
26 that the court should find that Exemption 6 applies.

27 The court finds that defendants have not established that the WHINSEC students  
28 and instructors have a substantial privacy interest in their names and military units – in

1 particular the international students and instructors. Given that there is no evidence that  
2 any student or instructor at WHINSEC was promised that his/her participation in the  
3 program would be kept confidential; the fact that prior to 2004, the DOD routinely provided  
4 this same type of information in response to FOIA requests, without objection; the fact that  
5 § 1083 of the National Defense Authorization Act of 2010 provided for disclosure of the  
6 names of WHINSEC students and instructors in FY 2009 and 2010; and the fact that the  
7 identities of faculty and students at WHINSEC is not routinely kept secret or confidential by  
8 WHINSEC, the court finds that DOD has not met its burden of showing that the names and  
9 military units of WHINSEC students and instructors are protected by a substantial privacy  
10 interest.

11 At most, defendants have made a showing that some international students or  
12 instructors might consider their names and military units to be private information, and  
13 might object to the disclosure of that information. However, “[t]he legislative history is clear  
14 that Exemption 6 was directed at threats to privacy interests more palpable than mere  
15 possibilities.” Rose, 425 U.S. at 380 n.19; see also Carter v. U.S. Dep’t of Commerce, 830  
16 F.2d 388, 391 (D.C. Cir. 1987). As the Court indicated in Rose, the fact that a threat to  
17 privacy is conceivable on some generalized, conjectural level is not sufficient to justify  
18 evoking Exemption 6. DOD’s position appears to be that the court should simply defer to  
19 the Secretary’s determination that the information should be withheld. This position is  
20 clearly at odds with the entire premise of FOIA, which mandates a strong policy in favor of  
21 disclosure.

22 DOD also appears to be suggesting that the court should also defer to Mr. Rials’  
23 assessment of the WHINSEC individuals’ privacy rights, and the risks that they might face if  
24 their names were released. The court finds, however, that Mr. Rials’ assessment is largely  
25 speculative, as he cites to no examples of anyone who was harmed because his name was  
26 released pursuant to a FOIA request prior to 2005, when DOD was still releasing the  
27 names.

28 The 2002 memorandum regarding disclosure of information about members of the

1 military does not, on its face, apply to foreign individuals attending or working at WHINSEC,  
2 or to civilian contractors. Moreover, the memorandum does not establish a “policy” of  
3 nondisclosure, but rather merely states a policy that after the events of September 11,  
4 2001, nondisclosure will be given more serious weight in the analysis. Finally, even after it  
5 issued this memo, the DOD still continued to disclose the names of WHINSEC graduates  
6 and instructors for the next four years. It was only beginning with FY 2005 that DOD began  
7 refusing to disclose the information.

8 As for 32 C.F.R. § 518.13(f)(2), this regulation plainly applies only to the release of  
9 information regarding U.S. Army personnel or civilians connected in some way to U.S.  
10 Army personnel, not information about military or civilian personnel of a foreign country.  
11 It is also insufficient for purposes of this analysis for defendants to claim that the Army’s  
12 General Counsel “recognized” in 2005 that international personnel should have the same  
13 privacy rights as U.S. personnel. There is no evidence that this reflects official DOD policy,  
14 and in particular, to the extent that it is intended to expand the scope of 32 C.F.R.  
15 § 518.13, it is ineffective. Moreover, any such “policy” is arguably contradicted by the  
16 Army General Counsel’s disclosures of the names of foreign military students at West Point  
17 during the same time period that WHINSEC has been withholding names.

18 Nor has DOD established that disclosure will cause a “clearly unwarranted” invasion  
19 of personal privacy. Establishing a clearly unwarranted invasion of privacy requires an  
20 individualized, or at least a uniform, showing. Defendants have not shown that students or  
21 instructors uniformly had an expectation of privacy, particularly given that the information  
22 was disclosed prior to FY 2004, and that § 1083 of the National Defense Authorization Act  
23 required disclosure for FY 2009 and 2010. The fact that defendants cite “safety reasons,”  
24 but fail to provide any example that is relevant to WHINSEC, leads the court to conclude  
25 that DOD has no examples. The court finds that defendants’ showing is not sufficient to  
26 apply a blanket exemption.

27 Moreover, defendants argue “safety” only in a generalized sense – not “invasion of  
28 privacy” or “embarrassment” that would result from the disclosure of the names and military

1 units. Defendants have made no showing that the military status of the attendees is a  
2 secret in their home countries. In addition, the assertion that withholding is proper based  
3 on a “clearly unwarranted invasion of privacy” is supported here solely by allegations of risk  
4 of violence. Mr. Riels refers to an individual whose family was attacked after he was  
5 identified in the Mexican media as a police officer. While that circumstance may provide a  
6 justification for shielding the identity of any law enforcement personnel anywhere, it does  
7 not provide a sufficient basis for overriding the presumption of disclosure in FOIA.

8 Mr. Riels also refers to “international military personnel,” but makes no distinction  
9 between U.S. and foreign military personnel. Mr. Riels states in his supplemental  
10 declaration that the identities of students are disclosed, but only with their agreement.  
11 Either the information implicates a substantial privacy interest, or it does not. But to say  
12 that some students and instructors allow their names and faces to appear publicly, while  
13 others do not, suggests that the information is not truly “private.”

14 With regard to the public interest, plaintiffs have shown that there has been  
15 extensive media coverage, editorials, and scholarly works that have flowed from the prior  
16 public disclosure of the names, military units, and other information about SOC and  
17 WHINSEC personnel. This use of the information is indicative of the public interest in  
18 disclosure and in knowing what the government is up to. When balanced against the  
19 relatively weak showing of privacy, the interest of U.S. citizens is at least as strong.

## 20 CONCLUSION

21 In accordance with the foregoing, the court finds that plaintiffs’ motion must be  
22 GRANTED to the extent that plaintiffs seek a ruling that DOD improperly withheld the  
23 requested information, and that defendants’ motion must be DENIED to the extent that  
24 DOD seeks a ruling that the withholding of the information was proper under Exemptions 3  
25 and 6.

26 In particular, the court finds that DOD is not entitled to withhold the requested  
27 information pursuant to FOIA Exemption 3, because the “national interest” criteria for  
28 withholding under § 1083 of the National Defense Authorization Act of 2010 is insufficiently

1 particular to qualify § 1083 as a withholding statute under that exemption.

2 The court finds further that DOD has not made a sufficient showing that it may  
3 withhold the requested information under FOIA Exemption 6, as it has not established that  
4 the privacy interests advanced are substantial, and has not shown through admissible  
5 evidence that the release of this information would constitute a clearly unwarranted  
6 invasion of personal privacy, in light of the strong public interest in access to this  
7 information as shown on the record before the court.

8 As for the arguments raised at the hearing regarding the sufficiency of the search  
9 and/or the sufficiency of the production of records, the court did not understand the cross-  
10 motions to be seeking relief as to either of those issues. If the court is mistaken, the parties  
11 shall so advise the court in a joint written statement, to be submitted no later than May 20,  
12 2013.

13 Finally, the court finds that plaintiffs' request for an order enjoining defendants from  
14 withholding names and unit information of WHINSEC students and instructors for years  
15 after the time period specified in the FOIA request is not properly before the court.

16 If this order fully adjudicates the issues presented by plaintiffs' FOIA request, the  
17 parties shall submit a proposed form of judgment. If it does not, the parties shall submit a  
18 status statement setting forth the remaining issues and a proposal for their resolution. This  
19 response is due no later than May 20, 2013.

20

21 **IT IS SO ORDERED.**

22 Dated: April 22, 2013

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PHYLLIS J. HAMILTON  
United States District Judge

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