

headquarters, about serious problems, misconduct, security lapses, a breakdown in quality, and gross incompetence in the translation unit where plaintiff worked at the FBI's Washington Field Office. *Id.*, ¶¶ 15-22. In early March 2002, plaintiff reported her concerns to the FBI Office of Professional Responsibility ("OPR") and the U.S. Department of Justice ("DOJ") Office of Inspector General ("OIG"). *Id.*, ¶ 23. On March 22, 2002, plaintiff's employment was terminated without written reason, she was told by FBI management that she would never step foot again in the building and she was physically escorted out of the building by an FBI manager and FBI security chief. *Id.*, ¶ 24. Defendant FBI later sent plaintiff a letter stating that plaintiff's contract was "terminated completely for the Government's convenience." *Id.*, ¶ 25.

In early May 2002, plaintiff, through counsel, notified the Attorney General and FBI Director by letter that plaintiff alleged that as a direct result of the FBI's failure to address or correct the serious misconduct and security breaches reported by plaintiff, an arrest warrant was served by a foreign country at the residence of plaintiff's sister in that foreign country. *Id.*, ¶ 26. A copy of the arrest warrant was also provided to defendants. *Id.* In addition, Senator Grassley also wrote to the FBI Director about the arrest warrant and expressed concern that it was the result of retaliation against plaintiff for her whistleblowing. *Id.*, ¶ 27.

On June 8, 2002, the *Associated Press* published an article about plaintiff and quoted to "Government officials" who are quoted as providing information about plaintiff and her whistleblower allegations, her job performance, the FBI subjecting plaintiff to a security review, stating that the FBI had been unable to corroborate plaintiff's whistleblower allegations, and alleging that plaintiff was investigated for compromising national security. *Id.*, ¶¶ 28-31. *Also see*, Exhibit 1, attached hereto.

On June 18, 2002, *The Washington Post* also published an article quoting to “Government officials” who said “the FBI fired” plaintiff “because her ‘disruptiveness’ hurt her on-the-job performance,”” and that “FBI officials” stated that plaintiff “had been found to have breached security.” *Id.*, ¶ 32. *Also see*, Exhibit 4, attached hereto.

In Count I of the Complaint, plaintiff alleges that between March 2002 and the present defendants DOJ and FBI violated the Privacy Act by wrongfully disclosing, without plaintiff’s consent, information to third persons, *inter alia*, concerning plaintiff, the alleged security review of plaintiff, her job performance and other information from defendants’ personnel, security and investigative files about plaintiff. *Id.*, ¶¶ 34-40. Plaintiff also alleged in Count I other violations of the Privacy Act as a result of the defendants’ improper disclosures of information. *Id.*, ¶¶ 41-47.

Plaintiff alleges in Count II, that she engaged in activity protected by the First Amendment to the U.S. Constitution by reporting serious problems within the FBI translator program which has a direct and significant bearing on matters of widespread public concern, and that plaintiff was subjected to retaliation, including but not limited to termination of her contract, as a result of her First Amendment protected whistleblowing activity. *Id.*, ¶¶ 51-58.

In Count III, plaintiff alleges that defendants have violated her right to procedural due process and her due process liberty interest pursuant to the Fifth Amendment to the U.S. Constitution. *Id.*, ¶ 63. Plaintiff further alleges that as a result of the termination of her contract and other actions taken, including the defendants’ release of derogatory information and defamatory statements about plaintiff, that the defendants have interfered with plaintiff’s opportunity to obtain future employment in her chosen career, and that defendants’ action has imposed a stigma and disability on plaintiff that forecloses her freedom to take advantage of other employment opportunities. *Id.*, ¶¶ 63-66. Plaintiff

also alleges that defendants' action has resulted in her being formally and automatically excluded from all FBI work and broadly precludes her from pursuing a career as a government linguist or a government career in law enforcement and/or national security. *Id.*, ¶¶ 67-70. In addition, plaintiff alleges that defendants' conduct and adverse action have resulted in a change in plaintiff's status sufficient to implicate a liberty interest. *Id.*, ¶ 69. Plaintiff also alleges that defendants have violated their own rules, policies and procedures depriving her of due process with respect to her termination, and the FBI's continued illegal withholding of plaintiff's personal property (such as personal family photographs, personal calendars, and personal notes and papers). *Id.*, ¶¶ 71-72.

Months before Attorney General John Ashcroft asserted the military and state secrets privilege in this case, the defendants had disclosed much of the information they now assert is privileged. Moreover, even since the assertion of the privilege the defendants have acted in a manner that is inconsistent with the privilege.

For example, in June, 2002, the FBI provided official unclassified briefings to the Senate Judiciary Committee about plaintiff and her whistleblower allegations. *See*, Exhibits 5-7, attached hereto. In addition, the FBI has provided information to the DOJ Inspector General during the course of the OIG investigation into plaintiff's whistleblower allegations, which has been ongoing from March 2002 through the present, and the DOJ has stated to Congress that it "will cooperate fully with the Inspector General's investigation." *See*, Exhibit 10, attached hereto. The DOJ Inspector General has also provided information to Congress about plaintiff and her whistleblower allegations. In November, 2002, the FBI provided additional personal briefings about plaintiff and her allegations to Representative Frank Wolf. *See*, Exhibit 19, attached hereto.

Also, commencing in June, 2002, news media reports were published documenting official comment by “FBI officials” and “Government officials” about plaintiff and her whistleblower allegations, the plaintiff’s job performance, alleged security reviews of the plaintiff and another employee about whom plaintiff had reported misconduct. *See*, Exhibits 1, 4, 8, 9, 12-15. The news media coverage of plaintiff and her whistleblower allegations as well as “official” FBI and government comment thereon has continued from June 2002, through the present. *See*, Exhibits 1, 4, 8-9, 11-15. *Also see*, Exhibit 20, *Edmonds v. FBI*, Order, pp. 6-7 (Dec. 3, 2002) (“plaintiff’s allegations have received extensive media coverage, including numerous newspaper articles in the printed press ... and on TV.”). In addition, the news media coverage of the events and the government’s official reaction to plaintiff’s allegations has been both widespread and exceptional. *Id.* In October, 2002, the government, itself, issued a press release which generated articles published by the *Associated Press* and *The Washington Post*, and which continued to shed light on the plaintiff’s allegations and the government’s “official” comments in response thereto. *See*, Exhibits 11-13.

ARGUMENT

I. THE ATTORNEY GENERAL’S ASSERTION OF THE STATE SECRETS PRIVILEGE SHOULD NOT BE UPHELD.

A. Scope of the Privilege.

Defendants’ reliance on Attorney General John Ashcroft’s declaration is an attempt to assert the state secrets privilege over all information concerning this case, and to dismiss this case in its entirety, before the defendants have filed an Answer or complied with any discovery requests. However, the privilege is narrowly construed and properly invoked only where the government needs

to protect valid secrets which, if disclosed, would jeopardize the national security. *United States v. Reynolds*, 345 U.S. 1, 10-11, 73 S.Ct. 528 (1953). In this case, not only do defendants improperly assert the privilege, the defendants take the unique position that all information that is relevant to determining this lawsuit, or that is necessary for plaintiff to prove her claims, is a state secret and privileged. Defendants' sweeping invocation of the privilege is incompatible with and far exceeds the scope of the state secrets privilege as defined by the courts over the last 30 years.

In their zeal to dismiss plaintiff's case defendants overlook that "the Supreme Court has made clear" that the privilege "is not to be lightly invoked." *Ellsberg v. Mitchell* ("*Ellsberg I*"), 709 F.2d 51, 57 (D.C.Cir. 1983), quoting *United States v. Reynolds*, 345 U.S. at 7, 73 S.Ct. at 531. Also see, *Halkin v. Helms* ("*Halkin II*"), 690 F.2d 977, 990 (D.C. Cir. 1982). More significantly, the courts have placed limits on the scope and application of the state secrets privilege, and they have held that "the privilege *may not be used to shield any material not strictly necessary* to prevent injury to national security; and, *whenever possible, sensitive material must be disentangled from nonsensitive information to allow for the release of the latter.*" *Ellsberg I*, 709 F.2d at 57 (emphasis added), citing *Jabara v. Kelley*, 75 F.R.D. 475, 492 (E.D. Mich. 1977). *Accord.*, *In re United States*, 872 F.2d 472, 479 (D.C. Cir. 1989).

The Supreme Court has cautioned that when confronted with evaluating the government's claim of state secrets, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. at 9-10, 73 S.Ct. at 532-533. Also, as our Court of Appeals held in *Ellsberg I*, in order "to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue to critically examine instances of its invocation." *Ellsberg I*, 709 F.2d at 58. *Accord.*, *In re United*

States, 872 F.2d at 475 (“a court must not merely unthinkingly ratify the executive’s assertion of absolute privilege, lest it inappropriately abandon its important judicial role.”).

In considering whether to dismiss a case on the basis of the state secrets privilege, our Court of Appeals has warned that, “[d]ismissal of a suit ... is indeed draconian” and ““is a drastic remedy that has *rarely been invoked.*”” *In re United States*, 872 F.2d at 477 (emphasis added), quoting *Fitzgerald v. Penthouse Int’l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985). Dismissal of the plaintiff’s complaint “merely on the basis of the unilateral assertion that privileged information lies at the core this case,” is not justified before the defendant has filed an answer or complied with discovery requests. *Id.*, 872 F.2d at 477-478. In that case, the D.C. Circuit agreed with the district court, “that broad application of the privilege to all of [plaintiff’s] information, before the relevancy of that information has even been determined, was inappropriate at this early stage of the proceedings.” *Id.*, 872 F.2d at 478 (denying government’s request for mandamus).

Where dismissal is sought as a remedy for invoking the state secrets privilege, the courts have uniformly required greater specificity on the part of the government to support the privilege and the courts have exercised a greater degree of judicial scrutiny of the government’s assertion of the privilege. See, *Ellsberg I*, 709 F.2d at 58-59; *Reynolds*, 345 U.S. at 11, 73 S.Ct. at 533; *Kinoy*, 67 F.R.D. at 8-9; *Jabara*, 75 F.R.D. at 484.

Like other evidentiary privileges, the state secrets privilege may “hinder the ascertainment of the truth, and may even torpedo it entirely,” so the exercise of the privilege ““should in every instance be limited to [its] narrowest purpose.”” *In re United States*, 872 F.2d at 478-479. *Accord.*, *Kinoy*, 67 F.R.D. 1, 14 (S.D.N.Y. 1975) , citing *United States v. Nixon*, 418 U.S. 683, 7090710, 94

S.Ct. 3090 (1974) (“Evidentiary privileges are to be construed narrowly, to permit the broadest possible discovery consistent with the purposes of the privilege.”).

B. The Attorney General Has Not Properly Invoked the Privilege Here.

In *Reynolds*, the Supreme Court established a three-part test to govern a claim of the state secrets privilege. “There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.” *Reynolds*, 345 U.S. at 7-8, 73 S.Ct. at 531-532. *Accord.*, *Ellsberg I*, 709 F.2d at 56-57. These requirements, including the “personal review of the material in question” by the head of the agency, “is not merely technical.” *Yang v. Reno*, 157 F.R.D. 625, 632 (M.D. Pa. 1994). “Rather, it is intended to ensure that the privilege is invoked by an informed executive official of sufficient authority and responsibility to warrant the court relying on his or her judgment.” *Id.*, citing *Kinoy v. Mitchell*, 67 F.R.D. 1, 9 (S.D.N.Y. 1975); *National Lawyers Guild v. Attorney General*, 96 F.R.d. 390, 396 (S.D.N.Y. 1982). The Supreme Court made clear in *Reynolds*, that it is the head of the department who must “have seen and considered the contents of the documents and himself formed the view” that the matter was privileged. *Reynolds*, 345 U.S. at 8 n. 20, 73 S.Ct. at 532 n. 20.

In order to “trigger review” of state secret claims “the person asserting the privilege must, at a minimum, make an *explicit representation* that he or she has personally seen and considered the material.” *Yang*, 157 F.R.D. at 632 (emphasis added), citing *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 405 (D.C.Cir. 1984); *Kinoy*, 67 F.R.D. at 9; *National Lawyers Guild*, 96 F.R.D. at 396.

In this case, the Attorney General has not “personally considered the material for which the privilege is sought, and made an explicit representation to that effect.” *Yang*, 157 F.R.D. at 634.

It is not sufficient to satisfy the requirement of personal consideration for the Attorney General to declare that he “understand[s]” a lawsuit has been filed and that he has “been informed generally of the nature of the plaintiff’s claims in this case.” *See*, Ashcroft Decl., ¶4. That is precisely the kind of vague and conclusory declaration that the courts have declined to find satisfies the *Reynolds* test. *See*, *Yang*, 157 F.R.D. at 634 (rejecting official’s declaration that he is “generally aware of the issues under litigation ... and am familiar with the types of issues and information that could arise...”).

In this case, the Attorney General does not explicitly state in his declaration that he has reviewed any documents other than a classified declaration prepared by a lower-ranking official, Bruce Gebhardt, the Deputy Director of the FBI. *See*, Ashcroft Decl., ¶ 1. This falls far short of the personal consideration and specificity requirements governing affidavits filed by heads of departments who assert the state secrets privilege. *See*, *Yang*, 157 F.R.D. at 634 (official “does not appear to have reviewed the specific content of the material”); *Kinoy*, 67 F.R.D. at 9 (rejecting Attorney General Richardson’s affidavit because he failed to explicitly state that he personally reviewed the material that was allegedly privileged). *Cf.*, *Northrop Corp.*, 751 F.2d at 400 (upholding privilege where Secretary of Defense stated he had personally “reviewed” documents as well as affidavits of staff members who had reviewed all of the “seven linear inches” of documents, and where the Secretary himself described with particularity all of the categories of records reviewed and “correlating” each of the alleged harms “to the document over which the privilege claim is claimed.”).

By contrast, Attorney General Ashcroft has not even stated that he has read the plaintiff’s Complaint, yet he declares in a single sentence that “further disclosure of the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this

case reasonably could be expected to cause serious damage to the national security interests of the United States.” *See*, Ashcroft Decl., ¶ 5. Before making such a broad and sweeping statement, and in order to satisfy the personal consideration and specificity requirements of the *Reynolds* test, the Attorney General must state, at the very least, that he has read the Complaint in this action.

Attorney General Ashcroft’s declaration also fails to state that he personally considered the fact that the FBI has provided “unclassified” briefings concerning the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this case, to members of Congress and congressional staff between June and November, 2002. *Cf.*, Exhibits 4-7, 19. The Attorney General’s declaration does not even state that he is aware that the FBI has provided such unclassified briefings to Congress. At a minimum, the Attorney General would be required to personally review and consider the information about the allegations underlying this case provided by the FBI to Congress in “unclassified” briefings, before reaching the most sweeping and broad conclusion that all information underlying this case is a state secret and privileged.

Nor does the Attorney General’s declaration state that he personally considered the plaintiff’s allegation that defendants FBI and DOJ have officially leaked information about the plaintiff and her allegations to the news media and others resulting in the public disclosure of information underlying plaintiff’s allegations. *See*, Complaint, ¶¶ 28-40. The Attorney General is required to personally consider the allegations that the FBI and DOJ are alleged to have officially leaked information about plaintiff and her allegations before concluding that all information underlying this case, including the nature of the plaintiff’s job duties, are privileged.

Likewise, the Attorney has not stated that he is aware, let alone that he personally considered, that the FBI and DOJ are cooperating with the DOJ Inspector General's investigation into plaintiff's whistleblower allegations. Certainly, the pendency of the IG investigation, the FBI's provision of information to the IG concerning plaintiff and her allegations, and the IG's yet to be concluded findings would be factors that the Attorney General should have personally considered before concluding that all information in this case is privileged.

Additionally, the pendency of plaintiff's Freedom of Information Act ("FOIA") requests seeking information from the FBI concerning her allegations would be another relevant factor warranting personal consideration by the Attorney General before asserting that all underlying information concerning plaintiff's allegations is privileged. *See, Northrop Corp.*, 751 F.2d at 404 (rejecting claim of state secrets privilege by the State Department where documents have not been reviewed by head of department). However, that is not even possible because the FBI has not even completed processing plaintiff's FOIA requests. *See, Ex. 20, Edmonds v. FBI*, Order (Dec. 3, 2002). Accordingly, it is "premature" for defendants "to assert or even insinuate a claim of the state secrets privilege over these documents." *Id.*

C. The Attorney General's Declaration Does Not Satisfy the Specificity Requirements and Must Be Rejected Because It Is So Conclusory and Overbroad As To Prevent Meaningful Review.

In addition to the personal consideration requirement, the Attorney General is also required to state in as much detail as possible, on the public record, why the specific information that is allegedly privileged would endanger national security if it is disclosed in the litigation. *See, Ellsberg I*, 709 F.2d at 63. *Also see, Linder v. Department of Defense*, 133 F.3d 17, 23 (D.C. Cir. 1998) (a "detailed public explanation" is required). As our Court of Appeals set forth this requirement:

the trial judge should *insist* (1) that the formal claim of privilege be made *on the public record* and (2) that the government either (a) *publicly explain in detail the kinds of injury to national security it seeks to avoid and the reason those harms would result from revelation of the requested information* or (b) indicate *why such an explanation would itself endanger national security*.

Ellsberg I, supra. (Emphasis added).

Notably, this public showing must be made by the government “before” the trial court conducts any “*in camera* examination of the requested materials.” *Id.*, 709 F.2d at 64. *Also see, Kinoy*, 67 F.R.D. at 9-10 (declining to review the *in camera* submissions because the public affidavit concerning the privilege was “insufficiently specific to be of any assistance in the Court’s proper function of deciding” whether any of the information at issue was privileged).^{1/}

In this case, the Attorney General’s declaration does not meet the minimum specificity requirements set forth in *Ellsberg I*. Therefore, the government’s claim of state secrets must be denied on the grounds that the privilege was improperly invoked, because there “is lack of particularity in the government’s identification of the material withheld and the reason for withholding it.” *Yang*, 157 F.R.D. at 634, *citing, Kinoy, supra*.

Additionally, the specificity requirement governing the Attorney General’s public declaration assists the court in ensuring that the privilege is not extended “to matters not clearly within its scope.” *See, Jabara*, 75 F.R.D. at 492-493 (“This privilege does not extend to relevant factual information pertaining to the ‘arrangement’ by which the FBI had requested and obtained information about the plaintiff from the unnamed federal agency, nor the ‘general’ manner such information was ultimately used by the FBI.”). *Also see, Ellsberg I*, 709 F.2d at 57 (“The privilege

^{1/}Accordingly, plaintiff opposes defendants’ request to submit the Ashcroft and Gebhardt declarations *ex parte* to the Court for an *in camera* review. Defendants’ failure to satisfy its required “public” precludes *in camera* review. *See, e.g., Ellsberg I, supra*.

may not be used to shield any material not strictly necessary to prevent injury to national security....”) The government bears the burden of demonstrating that the material is clearly within the privileged category. *See, Jabara*, 75 F.R.D. at 493 n. 47.

In a case such as this, where the plaintiff has raised serious allegations of agency misconduct and problems within the FBI translator program which have a direct and significant bearing on matters of widespread public concern, the court should be wary of the government’s urging to sweep all of plaintiff’s allegations into the category of state secrets. *See*, Complaint, ¶¶ 15-32, 51-58; Exhibits 1-10, 14, 16-19. *Also see*, Ex., 20, *Edmonds v. FBI*, No. 02-CV-1294 (ESH) (D.D.C), Order, pp. 5-8 (plaintiff’s allegations about problems in the FBI’s translator program have received widespread media and Congressional interest and call into question the integrity of the FBI which could affect public confidence in that agency.).

When the government attempts to dismiss a case at its earliest stage on the basis of the state secrets privilege (*i.e.*, before there has been an Answer or any discovery filed) our Court of Appeals has required the government to publicly explain by affidavit and otherwise “why item-by-item determination of the applicability of the privilege would be inadequate.” *In re United States*, 872 F.2d at 479. *Accord.*, *Kinoy*, 67 F.R.D. at 14 (“The Richardson affidavit which refers to *in camera* Exhibit B, standing alone, does not demonstrate with the required specificity why an appropriate protective order cannot accommodate the Government’s need to safeguard an intelligence investigation...”). This Court must also “examine whether each challenged document’s disclosure would threaten national security.” *See, Linder*, 133 F.3d at 23, *citing Ellsberg I, supra*.

Once again, the “totality” of Attorney General Ashcroft’s “remarks relevant to this issue are contained in” just one sentence of his declaration. *Cf., Yang*, 157 F.R.D. at 635, *with Ashcroft Decl.*,

¶ 5 (“...I have concluded that further disclosure of the information underlying this case, including the nature of the duties of plaintiff or other contract translators at issue in this case reasonably could be expected to cause serious damage to the national security interests of the United States.”). While the Attorney General states an overly broad conclusion, his declaration does not contain a single fact on which the Court or the public could evaluate that opinion. On its face, the Ashcroft declaration fails “to provide adequate information to allow” the Court “to make a legal determination” regarding the state secrets privilege. *Yang*, 157 F.R.D. at 635.

Attorney General Ashcroft has altogether failed to explain why an “item-by-item” approach cannot protect the government’s interests in this matter. *In re United States*, 872 F.2d at 479. *Accord.*, *Kinoy*, 67 F.R.D. at 14. Moreover, the Attorney General’s declaration reflects that no efforts have been made to “disentangle” the privileged material from non-privileged material, and the Attorney General has failed to justify or explain why it would be impossible to disclose any information in this case during discovery. *Ellsberg I*, 709 F.2d at 5; *Jabara v. Kelley*, 75 F.R.D. at 492; *In re United States*, 872 F.2d at 479. On these grounds, alone, the court must deny the motion to dismiss.

However, to make matters worse, in this case, the government has already released in an unclassified manner a substantial amount of information about plaintiff and her allegations to the Congress, the Inspector General and the news media months before the Attorney General invoked the state secrets privilege over all of the underlying information in this case. The defendants have also provided information about the plaintiff and her allegations to the DOJ Inspector General who is still conducting an investigation of those matters and presumably will publish a report documenting his findings. Not only does the Attorney General fail to mention in his declaration the

FBI's "unclassified" briefings to Congress about plaintiff and her underlying allegations, the official leaks to the press and the Inspector General's pending investigation, the Attorney General has not explained why all underlying information related to plaintiff's allegations must be considered a state secret and how the national security would be harmed if discovery goes forward in this case, particularly when the government has been making public comments and providing unclassified briefings to the Congress and the Inspector General about the same subject matters. *See, Ellsberg I*, 709 F.2d at 61 ("we note that the circumstances surrounding the case certainly did not make it obvious that serious harm to national security would be likely to result from disclosure of the material at issue."); *Jabara*, 75 F.R.D. at 493 (in view of the fact that the same information has been revealed in a final report of Congress "it would be a farce" to conclude that it "remains a state secret."). It is equally troubling that the Attorney General's declaration does not explain how information already officially leaked to the press by defendants would compromise national security.

Moreover, the defendants' repeated public and unclassified disclosures of information pertaining to plaintiff and her allegations to the press, the Congress and the Inspector General, raises genuine issues for discovery. In fact, plaintiff has already served written discovery requesting the defendants to explain what information about plaintiff and her allegations has been disclosed in the "unclassified" briefings to Congress, what information has been officially disclosed to the press and whether the Attorney General was aware of these official disclosures when he invoked the state secrets privilege. *See*, Exhibits 17 and 18. If defendants have, in fact, already released information to Congress, the press and the Inspector General, that would be a valid subject for plaintiff to explore in discovery. Such discovery would provide additional information about the proper scope of the

privilege, if any, to be asserted in this case, and provide plaintiff with an opportunity to obtain unprivileged information concerning her claims.

Under these circumstances, the lack of particularity in the Attorney General's declaration and his failure to explain all of the prior official disclosures by defendants of the underlying information is fatal to his assertion of the privilege. Moreover, the pendency of a Senate Judiciary Committee investigation, Inspector General investigation and plaintiff's pending FOIA suit are additional factors that warrant denial of the defendants' motion to dismiss.

II. DISMISSAL OF PLAINTIFF'S COMPLAINT IS NOT WARRANTED.

A. Defendants' Motion To Dismiss Does Not Meet the Legal Standards Required Pursuant to Fed. R. Civ. P. 12(b)(6).

Defendants have filed a motion to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P. They have not moved for summary judgment. Under the applicable standard, the Court cannot grant a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See, Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *Also see, Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S.Ct. 992, 998 (2002). Our Court of Appeals has repeatedly ratified this principle. *See, e.g., Caribbean Broadcasting System v. Cable & Wireless, PLC*, 148 F.3d 1080, 1084 (D.C. Cir. 1998) (*citing Conley v. Gibson*, reversing district court's denial of leave to amend complaint); *Atchinson v. District of Columbia*, 73 F.3d 418, 424 (D.C. Cir. 1996) (reinstating plaintiff's Section 1983 claims); *Taylor v. Beckas*, 424 F.2d 905, 907 (D.C. Cir. 1970). *Also see, Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111 (D.C. Cir. 2000); *Krieger v. Fadely*, 211 F.3d 134 (D.C. Cir. 2000). Accordingly, at this stage in the proceedings, the Court accepts as true

all of the Complaint's factual allegations. *See Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1102 (D.C.Cir.1985).

Notably, defendants do not contend that plaintiff's Complaint, on its face, fails to state a claim for relief. Defendants' failure to demonstrate the legal insufficiency of plaintiff's Complaint requires the denial of the motion to dismiss.

Defendants' argument that the state secrets privilege, if properly invoked by the Attorney General, will preclude any discovery and prevent plaintiff from proving any of her claims, is at best, premature, and, at worst, purely speculative. Even assuming, *arguendo*, that the Attorney General could identify with particularity some facts that are privileged, the courts are reluctant to dismiss otherwise legally sufficient claims on the basis of the state secrets privilege prior to discovery.

Dismissal for failure to state a claim for relief is "inappropriate" where the government's grounds for dismissal is the state secrets privilege. *Monarch Assurance, P.L.C. v. United States*, 244 F.3d 1356, 1361 (Fed. Cir. 2001). The court noted that the complaint stated a claim for relief under the standards of Rule 12. *Id.* Additionally, the court held that if the government's argument is that plaintiff "cannot meet its burden to show there are genuine factual issues for trial," dismissal is governed by the standards of Rule 56, which afford the plaintiff the right to discovery. *Id.*, citing Fed. R. Civ. P., Rules 56 (f) and 56 (e). *Accord.*, *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2nd Cir. 1991) ("Dismissal under Fed. R. Civ. P. 12(b)(6) seems inappropriate because the complaint will typically state a claim for relief under notice pleading rules."); *Clift v. U.S.*, 808 F. Supp. 101, 107 n. 16 (D. Conn. 1991) (following *Zuckerbraun*).

Here, the sole basis for the defendants' motion to dismiss is contained in one sentence in the agency head's declaration. *See*, Ashcroft Decl., ¶ 5. The Attorney General's vague conclusion that

all of the information underlying this case does not satisfy either his burden to assert the state secrets privilege or defendants' burden under Fed. R. Civ. P. 12(b)(6).

Nearly all of the reported cases where the state secrets privilege was found to be valid, the issue of dismissal as a remedy has arisen on summary judgment after the plaintiff has been afforded discovery. *See, Monarch Assurance, supra.; Halkin II*, 690 F.2d at 982-987, 997 (summary judgment entered only after extensive discovery); *Ellsberg I*, 709 F.2d at 65 n. 55 (“it was incumbent on the District Court” to permit the plaintiff discovery and an opportunity to make out a *prima facie* case “before dismissing the relevant portions of the suit.”); *Kasza v. Browner*, 133 F.3d 1159 (granting summary judgment only after affording plaintiff discovery); *In re Under Seal*, 945 F.2d 1285, 1286-1287 (4th Cir. 1991) (granting summary judgment after discovery); *Clift, supra.* (summary judgment granted only after extensive discovery); *In re United States*, 872 F.2d at 477 (noting cases where dismissal occurred only after “the parties had fought ‘the bulk of their dispute on the battlefield of discovery’”) (citation omitted). That practice is consistent with the policy of narrowly construing evidentiary privileges and affording the plaintiff a fair opportunity to conduct discovery and prove her case without certain information should it be deemed privileged.

At this early stage of the proceedings, the courts, particularly in this Circuit, are extremely hesitant to dismiss a complaint solely on the grounds of privilege. In this case, there are multiple alternatives to dismissal in the event the defendants can assert the privilege over particular information. However, determination of those issues by the court is, at best, premature.

B. State Secrets Are Not At the Heart of Plaintiff's Case.

1. Plaintiff's Privacy Act claims do not implicate state secrets.

Defendants' motion to dismiss plaintiff's Privacy Act claims, solely on the basis of the state secrets privilege, is without merit. It is only by avoiding plaintiff's main allegation that the government, itself, improperly leaked information about plaintiff from Privacy Act systems of records, that defendants attempt to argue that plaintiff's Privacy Act claims should be dismissed.

Plaintiff has specifically alleged the elements of Privacy Act disclosure claims, within the parameters set forth by our Court of Appeals. *See, e.g. Bartel v. FAA*, 725 F.2d 1403, 1408 (D.C. Cir. 1984) (plaintiff must demonstrate: (1) a "willful release"; (2) of information which was "retrieved" from; (3) a "record"; (4) within a "system of records"). *Also see, Pilon v. U.S. Dept. of Justice*, 73 F.3d 1111 (D.C. Cir. 1996) (finding disclosure of confidential DOJ memorandum about an OPR investigation violated subsection (b) of the Privacy Act).

In Count I of the Complaint, plaintiff alleges that, on several occasions since March of 2002, defendants DOJ and FBI intentionally and willfully disclosed to third persons, without plaintiff's consent, the contents of records maintained by defendants in one or more Privacy Act systems of records pertaining to plaintiff. *See*, Complaint, ¶¶ 34-40. Plaintiff further alleges that information improperly disclosed by defendants DOJ and FBI included, but was not limited to, information that plaintiff was subject to a security review, information about plaintiff's job performance, and other information that is contained within defendants' personnel, security and investigative files about plaintiff. *See*, Complaint, ¶ 34.

Plaintiff also alleges other violations of the Privacy Act, all of which are based on the defendants' alleged improper disclosures of information about plaintiff. *See*, Complaint, ¶¶ 41-44.

Specifically, plaintiff alleges that: defendants disclosed information about her to third persons without first affording plaintiff the right to ensure that the information disclosed by defendants was “accurate, complete, timely, and relevant for agency purposes,” in violation of 5 U.S.C. § 552a(a)(6); defendants failed to establish rules of conduct and safeguards to protect records from improper disclosure in violation of 5 U.S.C. § 552a(e)(9) and (e)(10); and defendants failed to make and keep an “accounting” of each unauthorized disclosure to third parties of information about plaintiff in violation of 5 U.S.C. § 552a(c)(1). *See*, Complaint, ¶¶ 41-44.

In *Krieger v. Fadely*, 211 F.3d 134 (D.C. Cir. 2000), our Court of Appeals explained the application of Fed. R. Civ. P. 8 in Privacy Act cases. In that case, the plaintiff had merely alleged that “Defendant DOJ wrongfully disclosed to unauthorized persons records concerning Plaintiff subject to protection under the Privacy Act.” *Krieger*, 211 F.3d at 136. Though earlier paragraphs in the complaint alleged that a DOJ employee had secretly called the plaintiff’s new employer, to deride the plaintiff’s performance while at DOJ, the district court dismissed the plaintiff’s Privacy Act claims on the ground that the plaintiff failed to “identify any records or arguably confidential information that has been wrongfully disclosed.” *Id.*

In reversing the district court in *Krieger*, our Court of Appeals noted that, if the lawsuit went forward, the plaintiff would ultimately have to identify the records that were allegedly disclosed, but “that point surely was not as early as the pleading stage.” *Id.* Since Fed. R. Civ. P. Rule 8(a)(2) only requires a short, plain statement, the Court of Appeals specifically noted that complaints “need not plead law or match facts to every element of a legal theory.” *Id.*, quoting *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998).

In this case, Plaintiff sufficiently alleged each of the elements to put defendants DOJ and FBI on notice of the Privacy Act claims being asserted against them. Given the liberal pleading rules of Rule 8, and our Court of Appeals' pronouncement in *Krieger*, it is plain that all of the Privacy Act claims alleged in the Complaint were sufficiently plead.^{2/}

Significantly, defendants do not even move to dismiss on the grounds that plaintiff's allegations contained in Count I failed to state a claim under the Privacy Act. Accordingly, plaintiff's Complaint does, as a matter of law, state a claim for relief under the Privacy Act, and defendants' motion to dismiss should be denied on this ground alone.

Rather, defendants contend that litigation of plaintiff's Privacy Act claims must be dismissed because it would require disclosure of information that is purportedly protected by the state secrets privilege. However, defendants fail to state, except in the most generic way, how the application of the privilege would defeat plaintiff's Privacy Act claims. It is impossible, under these circumstances, for plaintiff to marshal any facts in opposition to defendants' most broad and vague contentions. Defendants' failure to cite to any specific facts, as opposed to asserting that everything is secret, is both unfair and fails to satisfy any legal or evidentiary standard on which defendants may attack the legal sufficiency of plaintiff's allegations.

More significantly, defendants completely ignore plaintiff's allegations that the government has already publicly disclosed the information that is at issue in Count I (*i.e.*, plaintiff's Privacy Act

^{2/}See also, *Tripp v. Department of Defense*, 219 F. Supp.2d 85, 89-91 (D.D.C. 2002) ("Plaintiff has alleged during a specific time period a specific defendant repeatedly released information about plaintiff to the press and public that is contained in a Privacy Act system of records, including but not limited to the contents of plaintiff's security forms and other personnel files.... These are factual allegations that support a claim of illegal disclosure pursuant to the Privacy Act...").

claims) to the press and public. Plaintiff has alleged two examples of such disclosures by government “officials who spoke only on condition of anonymity” to the *Associated Press* and *The Washington Post* about plaintiff and disclosed information, *inter alia*, plaintiff’s whistleblower allegations, the purported reasons for plaintiff’s termination for “performance issues”, the FBI’s “security review” of plaintiff, and that “FBI officials” had said that plaintiff allegedly “had been found to have breached security.” *See*, Complaint, ¶¶ 28-32.^{3/} Additionally, it is a matter of public record that the government has made official unclassified briefings to Congress on one or more occasions concerning plaintiff and her whistleblower allegations. *See*, Exhibits 4-7. Curiously, defendants fail to address in their memorandum in support of dismissal of Plaintiff’s Privacy Act claims their own official government leaks to the press and the defendants’ own official unclassified briefings to Congress about plaintiff and her whistleblowing, *cf.*, Def. Mem., pp. 14-16, let alone explain on the public record how its blanket assertion of the state secrets privilege or dismissal of plaintiff’s claims can be justified in light of such numerous official government disclosures.

As a matter of law, the official leaks of such information by the government cannot justify the withholding of that same information in this lawsuit on the grounds of national security. In the context of determining whether the government is entitled to withhold documents under FOIA exemptions 1 and 3, on the grounds that disclosure would harm national security, where the same information has already been released in “off-the-record” leaks by government officials to the press, it has been held that:

^{3/}Plaintiff believes that, while the newspaper articles she referred to in her Complaint served to notify defendants, and are proof, that the disclosures occurred in violation of the Privacy Act, plaintiff will seek evidence of these and other alleged disclosures through discovery (*e.g.*, in records that defendants likely used to answer media questions, and by deposing the defendants’ officials and spokespersons who allegedly made the additional disclosures).

The release of information to the press, *even if it occurs “off-the-record,”* constitutes a prior release of the relevant information. *State would not logically have discussed such information with the press unless it was sure that a “leak” would not breach national security.* Thus, *State's refusal to release these documents on the grounds that it could breach national security is undercut by its own prior actions.*

Lawyers Committee for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989), *reh'g den.*, 1990 U.S. Dist. LEXIS 6191 (S.D.N.Y. May 2, 1990).

Where, as here, the government has already released such information to the press, it must be presumed that such information would not have been disclosed to the press unless the government was sure that the “leak” would not harm national security. *Id.*

Additionally, in considering whether the government waived the withholding of information on national security grounds pursuant to the FOIA statute, our court of appeals has “concluded that when information has been ‘officially acknowledged,’ its disclosure may be compelled even over an agency’s otherwise valid exemption claim.” *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990), *quoting Afshar v. Department of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983). In order for information to be “officially acknowledged” it must meet three criteria: (1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure. *Id.*

In this case, the information about plaintiff that was leaked by the defendants to the news media, and information about plaintiff that defendants have officially communicated to Congress, satisfy all three criteria. Obviously, criteria one and two are satisfied if the information about plaintiff and her allegations that government officials confirmed and released to the press and Congress is as specific and identical to the information that forms the basis of plaintiff’s Privacy Act

wrongful disclosure claims. Additionally, it is evident that government officials and spokespersons provided official briefings to the press and Congress about plaintiff and her whistleblower allegations. *See*, Exhibits 1, 4-7 and 19. Defendants' motion to dismiss plaintiff's Privacy Act claims should be denied given defendants' failure to address their own extensive disclosures to Congress and the press concerning the underlying matters that defendants now assert are privileged as state secrets. To the extent any of these issues are in dispute, plaintiff should be afforded discovery on what information about plaintiff and her whistleblower allegations the defendants have been released to the press and Congress, the manner and nature of such releases and the identities of each individual who made such releases. *See, e.g.*, Exhibits 17 and 18.

Indeed, the FBI has "officially acknowledged" its disclosure of certain facts alleged by plaintiff during one or more unclassified official briefings by FBI officials to the U.S. Senate Judiciary Committee. These official and unclassified public disclosures by the FBI are documented in two letters from Sen. Patrick Leahy, Chairman of the Senate Judicial Committee, and Sen. Charles E. Grassley, Ranking Member of the Senate Judiciary Subcommittee on Crime and Drugs. *See*, Exhibit 5, letter dated June 19, 2002, and Exhibit 7, letter dated August 13, 2002. Both of these letters have been made public, and they have been published on official U.S. Senate web sites. Notably, Senators Leahy and Grassley state in their August 13, 2002 letter to the Attorney General that plaintiff "has made a number of serious allegations, some of *which the FBI verified were not unfounded during an unclassified briefing* for Judiciary Committee staff on June 17." Ex. 5, p. 1 (emphasis added).

According to Senators Leahy and Grassley, the FBI has already publicly "confirmed" in an "unclassified briefing" the following information:

- “the FBI has confirmed” plaintiff’s allegation “that the FBI assigned a contract linguist ‘monitor’ to Guantanamo Bay, Cuba, contrary to clear FBI policy that only more qualified ‘linguists’ be assigned to Guantanamo Bay...” *See*, Exhibit 5, p. 1.
- “the FBI has confirmed” plaintiff’s allegation “that another contract linguist in the FBI unit to which Ms. Edmonds was assigned failed to translate at least two communications reflecting a foreign official’s handling of intelligence matters. *Id.*
- the “FBI has confirmed that the contract linguist” who is a subject of plaintiff’s allegations “had ‘unreported contacts’ with that foreign official.” *Id.*
- the “FBI has verified” that a “contract monitor indeed failed to translate certain material properly, but has attributed the failure to a lack of training as opposed to a malicious act.” Ex. 7, p. 1.

In addition, the FBI officially commented to the Senate Judiciary Committee about some of plaintiff’s other allegations by providing details about the FBI’s investigation of plaintiff’s allegations and by explaining its position in response to some of plaintiff’s allegations. *See*, Ex. 5, pp. 1-2 (numbered paragraphs 3 and 4); Ex. 7, p. 1 (“Even after verifying some of these allegations, the FBI downplayed the importance of this matter and seemed to imply that it had ceased looking into the complaints as a security matter until after the Inspector General finished their investigation.”).

The Attorney General’s *post hoc* blanket assertion of the state secrets privilege over plaintiff’s Privacy Act claims does not address the plaintiff’s allegations that defendants DOJ and FBI had previously leaked information about plaintiff to the public and press, and neither the Attorney General nor the defendants explain how the prior government release of such information should be protected as privileged in light of such prior disclosures.

In light of these circumstances, including the breadth and scope of public disclosures made by defendants about plaintiff and her whistleblower allegations, defendants’ claim that such matters

are protected by the state secrets privilege is dubious. As previously discussed, defendants' blanket assertion that the duties of plaintiff and her co-workers as well as the plaintiff's underlying allegations are, in their entirety, consumed by the state secrets privilege is not supported by either the record or the Attorney General's conclusory and over-generalized declaration. Likewise, it is highly questionable whether each and every document relevant to plaintiff's Privacy Act allegations "are infused with sensitive classified information." *See*, Def. Mem., p. 15. Considering the amount of information that the government has voluntarily disclosed to the public, through official communications with the Congress and the press, it is extremely unlikely that all documents are privileged or classified.^{4/}

To make matters worse, the defendants assert that plaintiff could not even ask basic questions of FBI or DOJ officials and employees, at least some of whom have already communicated with the press and Congress about plaintiff and her allegations, without risking disclosure of state secrets. Without any justification, defendants make the startling assertion that plaintiff would be prohibited in discovery, on the basis of the state secrets privilege, from inquiring at all about the identity of any individuals employed by the defendants, where they work, their personal background, etc. Such a blanket contention, without specific factual support or explanation on the public record, especially in light of the government's numerous public disclosures on these issues, is simply without merit.

It is disingenuous, on the one hand, for the government to officially leak information to the national news media, and to provide official unclassified briefings to Congress, about plaintiff and the "underlying allegations," and, on the other hand, in response to plaintiff's Privacy Act and

^{4/}As demonstrated above, defendants' claim that all documents would contain state secrets must fail because the Attorney General did not state in his declaration that he personally reviewed any documents. *See, Ellsberg I, supra.; Northrop Corp., supra.*

constitutional claims, assert that such information is classified or privileged as state secrets. Defendants have simply not satisfied their burden to demonstrate on the public record how, in the context of prior news briefings and official unclassified briefings to Congress on the very subjects at issue in this lawsuit, this case cannot proceed by permitting defendants to object to specific information that it claims is classified.^{5/}

Finally, defendants' claim that plaintiff's Privacy Act claims must be dismissed because the government will be unable to release any documents due to the Attorney General's assertion of the state secrets privilege is equally without merit. First, if the government has already disclosed to others information about plaintiff from records that are contained within a Privacy Act system of records, then this argument is a red-herring, because the records would no longer be privileged. Second, the FBI has been ordered to expedite its processing and release of records in response to plaintiff's requests to produce records pursuant to the FOIA and Privacy Act. *See*, Exhibit 20, *Edmonds v. FBI*, Order, pp. 5-8. For the government to simply assert in this case that such records "cannot be disclosed" is presumptuous and ignores the pendency of plaintiff's FOIA lawsuit. Third, the Attorney General has not stated he personally reviewed any of the documents that would supposedly be privileged, so any claim of privilege over documents would be specious. Fourth, plaintiff must be afforded an opportunity to discover facts to support her claims, and the Attorney General has failed to explain in his declaration why such information could not be disclosed.

^{5/}Defendants' assertion that "information surrounding plaintiff's employment and her allegations cannot be disclosed," *see*, Def. Mem., p. 16, may be sanctionable under Rule 11, given that the government has already made several documented and official disclosures of such information to the press, to Congress and the Inspector General. *See*, Exhibits 1, 4-7, 19.

2. State secrets do not prevent litigation of plaintiff's First Amendment claims.

As a public employee, plaintiff's speech must be afforded "considerable First Amendment protection." *O'Donnell v. Barry*, 148 F.3d 1126, 1133 (D.C. Cir. 1998). This Circuit employs a "four-factor test" to determine whether a public employee has been retaliated against in violation of the First Amendment. *Id.*, citing *Hall v. Ford*, 856 F.2d 255, 258 (D.C. Cir. 1988). The first factor is whether plaintiff's speech pertained to a matter of public concern. *Id.*, citing *Tao v. Freeh*, 27 F.3d 6335, 638-39 (D.C. Cir. 1994). The second factor is whether the government has an interest that outweighs the employee's interest in being able to, as a citizen, comment upon matters of public concern, and the interest of potential audiences being in hearing what the employee has to say. *Id.*, 148 F.3d at 1133, citing *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731 (1968); and *United States v. National Treasury Employees Union*, 515 U.S. 4554, 468, 115 S.Ct. 1003 (1995). The third factor simply requires that plaintiff show, by either direct or circumstantial evidence, that her speech was a motivating factor in her discharge. *Mt. Healthy City School Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Fourth, if plaintiff meets the first three factors of the test, the defendant must show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected speech. *Id.* It is purely speculative on defendants' part to assert that any effort by plaintiff to demonstrate or rebut the four-factor test would risk disclosure of privileged information. *See, O'Donnell*, 148 F.3d at 1139 (noting the need for the district court to permit development of a factual record in order to evaluate these factors).

As our Court of Appeals has held, the “logical structure of a retaliation case, whether based upon Title VII or the First Amendment,” is the same. *Morris v. Washington Metropolitan Area Transit Authority*, 702 F.2d 1037, 1049 (D.C. Cir. 1983).^{6/}

First, defendants do not contest that plaintiff has spoken on matters of public concern with respect to her allegations of significant problems in the FBI’s language division and translations unit. “A communication that provides information that might help the public to ‘make informed decisions about the operation of their government merits the highest degree of first amendment protection.” *O’Donnell*, 148 F.3d at 1234. For example, “when a police officer speaks out on an issue that he is uniquely qualified to address, we must be cautious of accepting the claim that the public interest demands that he be silent.” *Id.* This circuit has held that federal employee “whistleblowing” is core-protected speech under the U.S. Constitution. *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995) (en banc). The Supreme Court has held that the First Amendment protects the speech of public employees who report on matters of public concern, either publicly, or privately and directly to their supervisors. *Givhan v. Western Lind Consolidated School District*, 439 U.S. 410 (1979).

Based on the pre-discovery public record concerning plaintiff’s allegations that has thus far been created, the defendants would be hard-pressed to even argue that plaintiff did not speak on matters of public concern. Unquestionably, the plaintiff reported to her superiors and management at the FBI, and later to the FBI Office of Professional Responsibility, the DOJ OIG, and the U.S.

^{6/}To establish a *prima facie* case of retaliation, it must be shown: (1) plaintiff engaged in activity that is protected about which the employer was aware; (2) plaintiff received adverse treatment from the employer either contemporaneous with or after the protected activity; and (3) there is evidence of a causal connection between the two (*i.e.*, retaliatory motive played a part in the adverse treatment). *Rogers v. McCall*, 488 F. Supp. 689, 697-698 (D.D.C. 1980); *Wilson v. Taylor*, 1985 WL 5941, at *11 (D.D.C. 1985).

Senate Judiciary Committee, allegations of misconduct and serious problems at the FBI concerning serious breaches in the FBI security program *and* a break-down in the quality of translations.. *See, e.g.,* Complaint, ¶¶ 15-23, 27. Indeed, the government, itself, commented publicly to the news media about plaintiff’s allegations concerning problems in the FBI’s “translator program that has played an important role interpreting interviews and intercepts of Osama bin Laden’s network since Sept. 11.” Complaint, ¶ 29. *Also see, Id.,* ¶¶ 28-32. In addition, the plaintiff’s allegations are the subject of ongoing investigations by the U.S. Senate Judiciary Committee and the DOJ IG. *See, Exhibits* 4-7, 10, 16, 19. Moreover, the plaintiff’s allegations have already been held to be the subject of widespread news media attention. *See, Exhibit 20, Edmonds, supra.,* Order, pp. 5-8.

Second, defendants have yet to even identify that the second prong of the test (*i.e.,* a balancing of the governmental interests, if any, versus the public interest in plaintiff’s speech) is even an issue in this case.^{7/} In other cases, factors that have been considered by courts to determine whether the protected speech unduly interfered with the efficiency of public service include whether the statements are directed to persons with whom the speaker would normally be in contact in the course of her daily work, whether they had an adverse effect on discipline or harmony amongst coworkers, whether the communication would interfere with loyalty and confidence; and whether

^{7/}Defendants’ failure to identify any supporting arguments on this issue is not surprising. *See, Fed. R. Civ. P. 11.* Specifically, the speech at issue in this case does not concern speech to the public. The speech at issue is communications, oral and in writing, by plaintiff to her supervision and designated offices within the FBI and DOJ for making such disclosures. It would be incredulous for defendants to argue that protected speech directed to FBI management and internal offices designated to receive reports of misconduct could be legitimate grounds for taking disciplinary action.

the speech would impede the employee's daily duties or interfere with the regular operation of the office.^{8/}

Even if the defendants had articulated any factors that would constitute a government interest requiring such a balance, the defendants would still be required to explain on the public record how the litigation of such specific factors, if any, would endanger national security. *See, e.g., Ellsberg I, supra*. Defendants' failure to even articulate any specific factors, or to assert any government interest under the First Amendment analysis, requires this court to deny defendants' motion to dismiss on the basis of the state secrets privilege. It would be highly inappropriate to dismiss plaintiff's First Amendment retaliation claims on the basis of defendants' purely hypothetical posturing and speculation. To properly assert the state secrets privilege defendants are required to provide a specific basis grounded in fact, particularly where, as here, the defendants contend that the effect of the privilege would be dismissal of all of plaintiff's claims.

In the First Amendment context courts have, after balancing the competing interests, held that an employee cannot be disciplined for engaging in protected speech. For example, in *Brockell v. Norton*, 732 F.2d 664 (8th Cir. 1984), the Court held that terminating a police department employee for reporting cheating on police certification examinations violated his First Amendment rights. The *Brockell* Court noted that "[w]e cannot simply decide in the abstract, however, that a chain-of-command policy designed to protect this interest [developing efficiency] will always take precedence over the interest of public employee in open communication." *Id.*, at 667 (emphasis added). The Court went on to state:

^{8/}*See, Czurlanis v. Albanese*, 721 F.2d 98, 106 (3rd Cir. 1983)(citing Justice Brennan's dissenting opinion in *Connick v. Meyers* referring to some facts which may appropriately be considered under *Pickering*).

The facts before us approach more closely the plight of a whistle-blower who wishes to report the misconduct of her or his immediate supervisor... '[A]n *employee's first amendment interest is entitled to more weight where he is acting as a whistle-blower exposing government corruption...*' In a similar case, involving a plaintiff's breach of the chain of command in a county probation office, we stated:

[The defendant's] additional reason for requesting [the plaintiff's] resignation, that she had violated an office rule by delivering her April 11 letter regarding probation office business to [Assistant County Attorney] Bray without review of the letter by [Chief Probation Officer] Wickes, cannot be sustained. The enforcement of such a rule against an employee seeking to criticize the very superior empowered to review office correspondence would impermissibly chill first amendment rights.

Brockell, 732 F.2d at 668 (citations omitted)(emphasis added).

Notably, in this case, the defendants have neither cited to any reason as a potential factor under the second *O'Donnell* factor in this case, nor have they explained how such factors (if asserted by defendants) would even implicate state secrets. Defendants' failure to even cite in the abstract a single reason as a factor to be considered in the balancing test required by the second prong of the test requires that defendants' motion be denied.

Before seeking dismissal for plaintiff's failure to meet the second factor of the *O'Donnell* test, the defendants must at least articulate a factual basis on which it relies for a balancing of interests in this case. Not all First Amendment cases require a balancing of competing interests, because the balancing test only applies where the government asserts a legitimate and credible competing governmental interest. In this case, the defendants have failed, altogether, to even articulate such a competing interest.^{2/} Rather, defendants seek dismissal of plaintiff's First

^{2/}Indeed, the FBI Director arguably struck the balance in favor of the right to expose wrongdoing, when he informed all employees in November of 2001, that the FBI considers the "freedom to expose *any impropriety* with the Bureau, without suffering reprisal, is fundamental to (continued...)

Amendment claims on the basis of defendants' purely abstract discussion of the second *O'Donnell* factor. Once this action proceeds through discovery it may be possible for the parties to stipulate to this factor, or it may be that no identifiable government interest is available to the defendants, or finally, it may be that after discovery the parties can still litigate this, as yet undefined, issue without risking disclosure of state secrets.

Notably, in regards to the second factor, the Attorney General has failed to elaborate or offer an explanation to support its blanket assertion that "the details" of plaintiff's allegations, "how the government responded" to her allegations, and "the different positions of the parties and witnesses thereto," implicate state secrets or risk serious damage to the national security interests of the United States. *See*, Def. Mem., p. 10. Nowhere in Attorney General Ashcroft's very general and conclusory declaration does he even mention or refer to plaintiff's allegations, let alone the details of those allegations, or how the government responded to them, as information that is allegedly privileged. *See*, Ashcroft Decl., ¶ 5. Nor has the Attorney General addressed in his declaration the various factors, cited above, that other courts have looked at in striking a balance under the second *O'Donnell* factor. *Id.* Indeed, on the face of the Attorney General's declaration, the Attorney General has not even asserted the state secrets privilege over any specific matters that might fall within the second *O'Donnell* factor. *Id.*

²(...continued)

[the FBI's] ability to maintain high standards of organizational performance and conduct and to expeditiously root out inefficiency and malfeasance." Exhibit 21, Memorandum to All Employees, p. 1 (emphasis added). The FBI Director has stated that this "critical freedom cannot be impaired by fear of reprisal or intimidation." *Id.*

Defendants appear to be under the misconception that the merits or validity of plaintiff's underlying whistleblower allegations are somehow at issue in order to litigate plaintiff's First Amendment retaliation claims. They are not. Plaintiff's whistleblower allegations, or protected speech, need only be based on a good faith belief that a violation occurred, or on "reasonably perceived violations" of the applicable laws or regulations.^{10/} The substance of plaintiff's underlying whistleblower allegations are not at issue, rather it is the right of plaintiff to raise the allegations that is protected and litigated. *See, Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969) (Held in Title VII retaliation case: "The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action."); *Rogers*, 488 F. Supp. at 697 (to establish a claim of retaliation plaintiff "need not prove that underlying claim for discrimination was true."); *Wilson v. Taylor, supra*. (All that is required for plaintiff to prove retaliation claim is that she had a "reasonable belief" that the defendant had engaged in unlawful conduct). *Accord.*, *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) ("it is not necessary to prove that the underlying discrimination in fact violated Title VII in order to prevail in an action charging unlawful retaliation."); *Kubicko v. Ogden Logistics Services*, 181 F.3d 544, 554 (4th Cir. 1999) (retaliation claim "does not turn on substance" of plaintiff's underlying charges of discrimination). Notably, the FBI Director's policy statement on whistleblower protection for FBI employees adopts the "reasonable belief" test. *See*, Exhibit 21, p. 1. Under this line of precedent, plaintiff need not demonstrate that "certain security breaches occurred," only that she reported those concerns and was retaliated against for making those reports. *Cf.*, Def. Mem., p. 8, 10. Accordingly, the proper inquiry

^{10/}*See, Gifford v. Atchison, Topeka & Santa Fe Ry. Co.*, 685 F.2d 1149, 1156-57 (9th Cir. 1982); *Peyne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1137-40 (5th Cir. 1981); *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980).

and focus is on whether the plaintiff raised such allegations, and whether the defendants terminated plaintiff's employment for making protected disclosures.

More significantly, the FBI and DOJ have repeatedly publicly commented on and officially disclosed to the press and the Congress information about the details of plaintiff's allegations and how the government responded to her allegations. In addition, the U.S. Senate Judiciary Committee has publicly disseminated information about the details of plaintiff's allegations and how the government responded to her allegations that it has obtained, in part from the FBI as the result of unclassified briefings, through the Senate Judiciary Committee's ongoing investigation of plaintiff's allegations. The FBI is also cooperating with the DOJ OIG's investigation into plaintiff's whistleblower allegations. *See*, Exhibit 10. Although the DOJ OIG investigation is still ongoing, it is likely that at the conclusion of the OIG investigation additional information will be publicly available about the details of plaintiff's allegations and how the government responded to her allegations.

As for the third and fourth *O'Donnell* factors, once again, the defendants are speculating that the plaintiff would be unable to address whether plaintiff's allegations (or protected speech) prompted the alleged retaliation, or whether the defendants would have taken the same action in the absence of the protected speech, without disclosure of state secrets.¹¹¹ Indeed, the government has

¹¹¹In *Tao v. Freeh*, the U.S. Court of Appeals for the D.C. Circuit held that "employer action taken against an employee in response to her exercise of free speech need not be ... significant ... to raise a constitutional claim." *Tao*, 27 F.3d at 639. Quoting from a Supreme Court decision, the court recognized that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee ... when intended to punish her for exercising her free speech rights" was prohibited as a matter of law. *Id.*, quoting *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 76 n. 8 (1990).

already publicly disclosed the purported, albeit conflicting, reasons for plaintiff's discharge, in disclosures to the news media and to the U.S. Senate Judiciary Committee. *See*, Exhibits 1, 4-7.

Moreover, *O'Donnell* factors three and four are "questions of fact ordinarily for the jury" to resolve. *Id.*, 148 F.3d at 1133. Accordingly, it would be inappropriate for the court to dismiss plaintiff's First Amendment claims for failing to meet these factors, because the complaint states a claim for relief on plaintiff's First Amendment retaliation claim, pursuant to Rule 12(b)(6), and discovery will be necessary before a factual record on these factors can be created.

Notably, plaintiff's burden of demonstrating the third factor (*i.e.*, that her discharge or alleged retaliation was motivated, at least in part, by the defendants' retaliatory animus towards her whistleblowing) may be established by either direct or circumstantial evidence. *See, Mt. Healthy, supra*. At this stage it is certainly premature to reach any definitive conclusion that plaintiff cannot prove this element without risk of disclosure of state secrets. Indeed, the type of circumstantial evidence on which the courts have often relied in retaliatory discharge cases to satisfy this element include the timing of events, or the lack of negative comments about job performance prior to the protected speech. *See, e.g., Wilson v. Taylor, supra, citing Burrus v. Untited Telephone Co.*, 683 F.2d 339, 343 (10th Cir. 1982). This type of circumstantial evidence is not the kind of information that would likely reveal state secrets. In the absence of any factual record or discovery, defendants have also failed to demonstrate that even direct evidence of defendants' improper motive, such as proof of a hostile attitude towards plaintiff's protected activities, would implicate state secrets.

Finally, the fourth *O'Donnell* factor, is not part of the plaintiff's *prima facie* case of retaliation, but rather states the defendants' burden to demonstrate a legitimate non-retaliatory reason for the discharge or other adverse action alleged by plaintiff. It is highly speculative, at this early

stage, that this issue is incapable of litigation, and defendants have not demonstrated that they are entitled to judgment as a matter of law when the facts related to this issue have yet to be developed. Once again, defendants have not satisfied their burden to justify dismissal concerning the fourth factor, in part, because the defendants have already publicly disclosed to the news media and to Congress reasons for plaintiff's discharge. Even though defendants' public and unclassified comments about plaintiff's job performance and discharge may be conflicting, that would be circumstantial evidence under the *Mt. Healthy* standard that defendants engaged in retaliation, and does not support that defendants are entitled to dismissal based on the state secrets privilege.

3. Plaintiff's Fifth Amendment claims can be litigated without revealing state secrets.

Defendants also move to dismiss plaintiff's Fifth Amendment claims, not because plaintiff has failed to state a claim for relief, but on the basis of the state secrets privilege. *See*, Def. Mem., pp. 13-14. Plaintiff's Fifth Amendment claims are based on several grounds, none of which would require this Court to dismiss on the basis of the state secrets privilege.

In *Kartseva v. Department of State*, the D.C. Circuit has held that an employee's allegation that she was discharged from her position as a government translator after the Department of State ruled that the employee was ineligible to work on the contract with the agency because of a "security concern" was sufficient to state a claim for violation of the plaintiff's liberty interest as a due process "stigma" claim. *Kartseva*, 37 F.3d 1524, 1527-1530 (D.C.Cir. 1995). Under *Kartseva*, there are two means by which plaintiff can demonstrate that the government's action "has worked a change in" the employee's "status under law." *Id.* First, plaintiff can state a due process claim if she alleges the defendants' action "automatically" excludes her from a "definite range of employment

opportunities” either within the FBI, or with other employers. *Id.*, 37 F.3d at 1527-1529, *citing Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972). Second, under a separate line of cases, if plaintiff alleges that the defendants’ action “broadly preclud[es] her from continuing in her chosen career,” then she also states a due process liberty interest claim. *Id.*, 37 F.3d 1527, 1529-1530, *citing Cafeteria Workers v. McElroy*, 367 U.S. 886, 895-96 (1961) (“right to follow a chosen trade or profession” is protected); *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (revocation of security clearance possibly implicates Fifth Amendment liberty interest where action “has seriously affected, if not destroyed, [plaintiff’s] ability to obtain employment” in chosen field); *Doe v. Department of Justice*, 753 F.2d 1092, 111-12 (D.C. Cir. 1985) (liberty interest threatened where DOJ spreads charges of lawyer’s incompetence and untrustworthiness to public and private lawyers in her specialty).

Plaintiff has alleged that defendants’ actions (1) “automatically” exclude her “from all FBI work”; and (2) have broadly precluded her from pursuing her chosen career. *See*, Complaint, ¶¶ 67-70. Accordingly, plaintiff states a claim under both *Kartseva* factors.

Notably, defendants’ motion to dismiss does not address *Kartseva*. The issue of whether the FBI’s termination “automatically” excludes her from other work, or broadly precludes her from her chosen field, would not result in revelation of any secrets, but rather would examine the defendants’ employment policies and procedures; an examination of what information the defendants have disclosed, or would be required to disclose, to other employers about plaintiff and her termination; the impact of the FBI’s termination of plaintiff’s contract on other employers; whether the plaintiff’s disqualification from FBI employment is “formal and automatic”; whether plaintiff is precluded from other FBI employment; and the infringement on plaintiff’s ability to pursue her chosen career.

Kartseva, supra. None of these factors are of the type that would require litigation over the plaintiff's underlying whistleblower allegations and would not implicate state secrets.

Additionally, plaintiff has also alleged a Fifth Amendment liberty interest claim based on a reputation-plus theory, as a result of defendants' alleged release of derogatory and defamatory statements to others about plaintiff in addition to terminating her employment. *See*, Complaint, ¶ 64. *See, O'Donnell v. Barry*, 148 F.3d at 1140 (distinguishing "reputation-plus" claims from "stigma or disability" claims). Once again, defendants' state secrets argument must fail, for if the defendants made defamatory statements about plaintiff, as she has alleged, the defendants would simply not be able to claim that alleged defamatory information disclosed to third persons is privileged. A privilege arises only where there has not been a disclosure of the alleged privileged matter to a third person. If defendants have made defamatory statements to third parties about plaintiff, they waived whatever privilege they may have had concerning those statements. In any event, it is too premature to further evaluate defendants' claim of privilege with respect to these matters because at this stage the plaintiff's allegations must be taken as true and discovery will afford the parties the ability to further define these issues.^{12/}

Finally, in this circuit, the federal courts may review the agency's process in reaching certain determinations to see if the agency violated its own regulations. *See, Fried v. Hinson*, 78 F.3d 688, 690-691 (D.C. Cir. 1996), *citing Service v. Dulles*, 354 U.S. 363, 373-81, 77 S.Ct. 1152, 1157-62 (1957). Plaintiff has also alleged that defendants' violations of their own rules, policies and

^{12/}While defendants would not be prejudiced or prevented from raising valid claims of privilege in response to particular matters, defendants should not be permitted to claim that information they have already disclosed to third persons is somehow privileged. Plaintiff is entitled to discover from defendants what information they have already disclosed to others about plaintiff.

procedures in taking adverse action against plaintiff deprived plaintiff of her due process rights. *See*, Complaint, ¶¶ 71-72. Whether, and to what extent, defendants violated their own procedures, rules or policies in taking action against plaintiff would not disclose state secrets. Moreover, it is premature to assess what impact, if any, a particular claim of privilege would have upon this aspect of plaintiff's Fifth Amendment claims.

III. EVEN IF DEFENDANTS COULD PROPERLY INVOKE THE STATE SECRETS PRIVILEGE, THERE ARE ALTERNATIVES TO DISMISSAL AVAILABLE.

Defendants have not demonstrated that this case is like those, where the very subject matter being litigated is a state secret, and there are no alternatives to dismissal. As shown above, in this circuit, dismissal is a rare and drastic remedy resulting from the state secrets privilege and the courts are required to consider alternatives to dismissal.

This case does not fall within the scope of *Totten v. United States*, 95 U.S. 105 (1975). By failing to show that any specific facts are privileged in this case defendants have failed to satisfy the even higher standard, under *Totten*, which permits the dismissal of a claim where the government shows that the very subject matter of the action was itself a secret. More significantly, the *Totten* exception requiring dismissal has been rarely invoked, and it is a drastic remedy that should be avoided. *Fitzgerald*, 776 F.2d at 1242 (citations omitted).

Even assuming, for sake of argument, there was a valid privilege asserted in this case, which there has not been such a valid claim made, there is no categorical rule on dismissal. As Circuit Judge Ervin noted in *Fitzgerald v. Penthouse Int'l., Ltd.*, that not every case alleging, for example, libel for having engaged in espionage, would implicate state secrets. *Fitzgerald*, 776 F.2d at 1243. Indeed, even where state secrets are involved the court should "fashion appropriate procedures" and

take other precautions short of dismissal. *Id.*, 776 F.2d at 1244. It is only “when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal warranted.” *Id.*

The D.C. Circuit has recognized that even where the state secrets privilege is successfully invoked, it does not automatically result in dismissal. *Halkin II*, 690 F.2d at 998. It is still presumed that the claim might still be established. *Id.* (citations omitted). Assuming defendants could assert a valid state secrets privilege, the court must still consider whether plaintiff can make out a *prima facie* case without the benefit of the privileged information, and if the plaintiff fails to do so, only those relevant portions of the suit adversely affected by the privilege would be dismissed. *Ellsberg I*, 709 F.2d at 64 n. 55. The uniform rule applied in this circuit is that successful invocation of the privilege simply removes from the case the material in question. *Id.*, 709 F.2d at 65. That is precisely why courts have uniformly weighed the impact of the state secrets privilege during summary judgment proceedings. Unquestionably, granting a dismissal based on the state secrets privilege at the Rule 12(b) stage is completely inconsistent with this circuit’s precedent.

Any “categorical rule” requiring dismissal of plaintiff’s entire claim when the state secrets privilege is validly invoked would be “unfair.” *DTM Research, LLC*, 245 F.2d at 354, *citing Fitzgerald*, 776 f.2d at 1238 n. 3. Rather, the district court should use “creativity and care” to devise “procedures that would protect the privilege and yet allow the merits of the controversy to be decided in some form.” *Id.*

While it is premature to predict what information may be privileged and what impact such a specific and valid claim of privilege would have on this case, there are several alternatives to dismissal which the courts have considered. *See, e.g., In re United States*, 872 F.2d 472, 478-479

(D.C. Cir. 1989). First, the court may consider the relevancy of all of the information as well as the privileged matter on an “item-by-item basis as the parties’ theories develop and the litigation evolves.” *Id.* Second, the district court may rely on its own experience in handling highly sensitive government information to accommodate the government’s security concerns so evidentiary control of the litigation could proceed without jeopardizing national security. *Id.* Third, the information could remain within the government’s custody pending any judicial review and the government could present challenged documents over which the government asserts the privilege to the court for *in camera* review. *Id.* Fourth, the case will be tried to the bench, which will reduce the threat of unauthorized disclosure of confidential material. *Id.* Fifth, because much of the information has been requested by plaintiff pursuant to the Freedom of Information Act, it would be prudent to evaluate what information plaintiff is able to obtain under FOIA. *Id.*^{13/}

In addition, this case presents additional special factors warranting against outright dismissal of plaintiff’s claims, if the Attorney General can assert a valid claim of privilege. First, as stated above, there are ongoing Congressional and DOJ Inspector General investigations into the very subject matter of plaintiff’s allegations. Second, the defendants have already disclosed in an unclassified manner a substantial amount of information to Congress and the Inspector General. After answering complaint, and discovery, and after IG investigation and Congressional inquiries

^{13/}In this case, plaintiff’s FOIA lawsuit seeking records that would be relevant to her allegations has been expedited. Judge Huvelle has already entered an order requiring the FBI to expedite the processing of plaintiff’s FOIA requests. *See*, Exhibit —, Order (Dec. 3, 2002). In addition, Judge has entered a briefing schedule for summary judgment in that case, which requires the parties to complete briefing on summary judgment on any exemptions claimed by the FBI by February 28, 2003.

are concluded, either defendants may not be able to assert the privilege, or plaintiff may be able to prove her case without having to require the disclosure of any privileged information.

Accordingly, in addition to the numerous procedural deficiencies caused by the premature nature of defendants' motion, there are alternatives available to dismissal, even if the privilege were validly asserted in this case. For these reasons, defendants' motion to dismiss must be denied.

IV. DEFENDANTS' MOTION DEMONSTRATES WHY PLAINTIFF SHOULD BE AFFORDED DISCOVERY.

As already demonstrated there is significant doubt about whether the defendants have properly asserted the state secrets privilege. Even if the defendants have properly asserted the privilege, there are unquestionably numerous questions about the scope and impact of privileged information and its effect on the litigation of plaintiff's claims. In such circumstances, it is appropriate for the Court to permit discovery into such matters. As noted above, the courts have almost uniformly in such circumstances permitted the plaintiff to conduct discovery before considering the issue of the impact of the privilege on the case, or deciding the case on its merits.

Plaintiff served discovery requests on November 15, 2002 that are is reasonably calculated to lead to the discovery of information that will properly define the scope of the privilege. *See*, Exhibit 17, Plaintiff's First Request for Admissions (Nov. 15, 2002); Exhibit 18, Plaintiff's First Request for Production of Documents (Nov. 15, 2002). Plaintiff's proposed requests for admissions request the defendants to admit or deny whether the defendants have disclosed information about plaintiff and her allegations, her security clearance, her termination, etc. to Congress and to the news media. *See*, Exhibit 18, pp. 6-18. In addition, plaintiff's proposed discovery asks whether the Attorney General was aware that substantive information about plaintiff and her allegations had

already been released by the FBI and/or DOJ to Congress and/or the news media when the Attorney General signed his declaration in this case asserting the state secrets privilege. *Id.*, pp. 18-19.^{14/}

If defendants have, in fact, released information to the news media, Congress or others it would impact on this Court's determination of defendants' broad claim of privilege in this case. Requiring the defendants to state under oath whether or not they have engaged in such conduct is relevant to the issues raised by the defendants. Moreover, if the Attorney General was not aware at the time of his declaration that the defendants have been disclosing "the information underlying this case" outside the DOJ without restriction on its dissemination, the Attorney General's claim of privilege dated October 18, 2002 would be invalid.

In this case, the Court should defer any determination on the validity of the privilege, including in camera review, until after the defendants answer the Complaint and this case proceeds to discovery. Defendants will be able to raise on an "item-by-item" basis any claim of privilege. This method will afford the parties and the Court an opportunity to assess the validity of the privilege and any impact it may have if specific information is determined to fall within the scope of the privilege. This approach is consistent with the requirement that defendants provide specificity and a public explanation to support any claim of the state secrets privilege.

^{14/}Plaintiff's proposed document requests asks the defendants to produce all documents relied upon by defendants in answering the requests for admissions, and all documents that related to the subject matter of the requests for admissions. *See*, Exhibit 18, p. 6.

Conclusion

For the foregoing reasons, defendants' motion to dismiss should be denied.

ORAL ARGUMENT REQUESTED

Respectfully submitted,

_____/s/_____
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December 6, 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing opposition was served via the Court's Electronic Filing system, and by first class mail, postage prepaid, on this 20th day of December, 2002,

upon:

Vesper Mei
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044

By: _____/s/_____
David K. Colapinto

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
SIBEL EDMONDS,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 1:02CV01448 (JR)
)	
UNITED STATES DEPARTMENT OF)	
JUSTICE, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

ORDER

UPON CONSIDERATION of Defendants' Motion to Dismiss, dated October 18, 2002, Plaintiff's Opposition thereto, and all papers and arguments submitted by the parties, it be and hereby is

ORDERED that Defendants' Motion to Dismiss is DENIED.

IT IS SO ORDERED.

DATE

HON. JAMES ROBERTSON
United States District Judge

Copies to:

[See next page.]

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