**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| AMERICAN CIVIL LIBERTIES UNION, *et al.*,<br><br>*Plaintiffs*,<br><br>v.<br><br>CENTRAL INTELLIGENCE AGENCY,<br><br>*Defendant*. | No. 18-cv-2784 (CJN) |

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES**
**IN OPPOSITION TO**
**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Through this Freedom of Information Act lawsuit, Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU") seek records concerning the CIA's unprecedented public-relations campaign supporting the controversial political nomination of Gina Haspel as the Director of the CIA.

As a senior CIA employee during the Bush administration, Ms. Haspel helped implement the agency's torture program. She oversaw the torture of detainees at a CIA black site, and later played a key role in destroying evidence of torture inflicted under her watch. Consequently, President Trump's nomination of Ms. Haspel to head the CIA in 2018 ignited public controversy. The CIA responded with a months-long effort to rehabilitate Ms. Haspel's public image and support her confirmation path. Part of the CIA's effort included selective, one-sided disclosures of previously secret information about Ms. Haspel's life and career.

Senators, including some who were privy to classified information about Ms. Haspel's background and past actions, repeatedly expressed concern that the CIA's incomplete disclosures were misleading. They called on the CIA to release information that would allow the public—and Congress—to meaningfully assess Ms. Haspel's record. The CIA refused. Senators also pointed out that Ms. Haspel herself had the authority to classify agency records of public interest that might cause her embarrassment, presenting a conflict of interest. The CIA provided no public information in response.

The ACLU submitted a FOIA request seeking information about the CIA's extraordinary campaign in support of Ms. Haspel's political confirmation. The CIA identified hundreds of records responsive to the ACLU's request. It has released a fraction of those records in heavily redacted form, but has withheld the vast majority in full. To justify its insistence on near-total secrecy, the CIA offers only vague explanations couched in boilerplate language. Most of these

explanations convey practically nothing about the records the CIA refuses to release, including, most significantly, why the records can be kept hidden from the public.

In its motion for summary judgment, the CIA claims to have met all its legal obligations. It is wrong: the law demands much more. Congress passed the Freedom of Information Act to preserve an informed citizenry. It intended to prevent government officials from wielding secrecy as a shield against public accountability. To comply with the Act, the CIA must either release the documents the ACLU seeks or—at minimum—provide the court and the public with clear legal justifications for its secrecy.

## BACKGROUND

### I. The CIA's public-relations campaign supporting Ms. Haspel

In 2002, Gina Haspel presided over a black site in Thailand where the CIA tortured prisoners. She oversaw the facility during the CIA's brutal torture of Abd al-Rahim al-Nashiri. That torture is described in the CIA's own documents. *See* Karen DeYoung, *Torture of Al-Qaeda Suspect Described in 2002 Cables Sent by CIA Director Gina Haspel*, Wash. Post, Aug. 10, 2018; Julian E. Barnes & Scott Shane, *Cables Detail C.I.A. Waterboarding at Secret Prison Run by Gina Haspel*, N.Y. Times, Aug. 10, 2018; Tim Golden et al., *A Prisoner in Gina Haspel's Black Site*, ProPublica, May 7, 2018; Rep. of the Senate Select Comm. on Intel., Comm. Study of the CIA's Detention & Interrogation Program ("Torture Report"), S. Rep. 113-288, at 67–73 (2014).

Ms. Haspel also participated directly in the destruction of video evidence showing victims being tortured at the black site she ran. *See* Jennifer Williams, *Gina Haspel, Trump's Controversial Pick for CIA Director, Has Just Been Confirmed*, Vox, May 17, 2018; Mem., Disciplinary Review Related to Destruction of Interrogation Tapes, C.I.A. (Dec. 20, 2011) (noting that Ms. Haspel had ordered the destruction of the video tapes).

In March 2018, President Trump announced his intent to nominate Ms. Haspel as Director of the CIA. *See* Greg Miller & Shane Harris, *Gina Haspel, Trump's Pick for CIA Director, Tied to Use of Brutal Interrogation Measures*, Wash. Post, Mar. 13, 2018. The CIA then embarked on an unprecedented public-relations campaign in support of her confirmation. This campaign involved, among other things, the selective disclosure of facts apparently calculated to burnish Ms. Haspel's reputation. *See* Adam Goldman & Matthew Rosenberg, *How the C.I.A. Is Waging an Influence Campaign to Get Its Next Director Confirmed*, N.Y. Times, Apr. 20, 2018. For instance, the CIA "prepared and declassified" a summary of Ms. Haspel's assignments dating back to 1985, but omitted any reference to her 2002 assignment at one of the agency's torture sites, even though that assignment had been widely reported and discussed.[1] It also released "an unusual two-page memo sprinkled with personal tidbits," such as that Ms. Haspel was a Kentucky Wildcats fan and owned a large poster of Johnny Cash. Deb Riechmann, *CIA Offers Peek into Life of Trump's Nominee to Lead Agency*, Associated Press, Mar. 22, 2018. The agency highlighted coverage of its disclosures on its official website and Twitter page.[2] A CIA spokesperson confirmed that "[i]f it appears C.I.A. is being more robust than normal in supporting this nomination, that's because we are." *Id.*

Even as the CIA promoted a meticulously curated version of Ms. Haspel's career and personal interests to Congress, the media, and the public, it largely ignored several U.S. senators'

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[1] *Gina C. Haspel, Central Intelligence Agency Career Timeline*, *available at* https://nsarchive.gwu.edu/sites/default/files/thumbnails/image/gina-c.-haspel-cia-career-timeline-1-may-2018.jpg (last visited Jan. 11, 2021).

[2] *See, e.g.*, ICYMI: CIA Introduces Gina Haspel to the American People, Press Release, C.I.A. (Mar. 23, 2018), https://www.cia.gov/news-information/press-releases-statements/2018-press-releases-statements/icymi-cia-introduces-gina-haspel-to-the-american-people.html; https://twitter.com/CIA/status/977256581439148032 ("She leads w compassion, integrity, discipline, & humor.").

repeated requests to provide the public with information about Ms. Haspel's record on CIA torture and its cover-up. *See* Letter from Senators Feinstein, Heinrich, and Wyden to CIA Director Pompeo (Apr. 13, 2018) ("We are writing for a fifth time to request that you declassify information related to the background of CIA Deputy Director Gina Haspel.").[3]

These senators were members of the Senate Select Committee on Intelligence, which conducted a landmark investigation of the CIA's torture program, culminating in a damning public summary of over 700 pages. They criticized the agency's portrait of Ms. Haspel's career, noting that the "superficial" facts made public by the agency stood in stark contrast to classified information that left the senators "disturbed." *Id.* They characterized the CIA's campaign as "a great disservice to the American people" that made it "impossible for the Senate to properly fulfill its constitutional obligation to 'advise and consent' on her nomination." *Id.* And they pointed out that the continued classification of Ms. Haspel's role in the torture program "appears to violate Executive Order 13526, prohibiting the classification of records to 'conceal violations of law, inefficiency, or administrative error' or 'prevent embarrassment to a person, organization, or agency.'" *Id.* Separately, one senior senator wrote that "the American people deserve to know the actual role the person nominated to be the director of the CIA played in what I consider to be one of the darkest chapters in American history." Letter from Senator Feinstein to CIA Director Pompeo & Deputy Director Haspel (Mar. 15, 2018).[4] Another senator stated, "I believe there is a cover-up of [Ms. Haspel's] background." Erin Kelley, *Sen. Wyden: CIA Engaging in 'Cover-Up' of Director Nominee Gina Haspel's Background*, WUSA9, Apr. 17, 2018.

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[3] *Available at* https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=EAA19329-AD87-4FC0-A107-A53CB93B40D1.

[4] *Available at* https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=F2358FDC-46C0-43F5-83D7-903B5DEA5B66.

On April 26, 2018, President Trump named Ms. Haspel the Acting Director of the CIA. The following week, without declassifying any of the information the senators had asked for, the CIA declassified an anecdote regarding a late-1980s encounter between Ms. Haspel and Mother Theresa. *See Wall St. J.: "From Mother Teresa to Counterterrorism: CIA Unveils More on Gina Haspel,"* White House News Clip, May 2, 2018.

Shortly thereafter, four senators asked the Director of National Intelligence to declassify all information related to Ms. Haspel's involvement in the CIA's torture program. The senators noted that Ms. Haspel, as Acting Director, was "in the conflicted position of serving as the classification authority over potentially derogatory information related to her own nomination." Letter from Senators Harris, Wyden, Heinrich and Feinstein to Daniel Coats (May 4, 2018).[5]

Neither the CIA nor the Director of National intelligence complied with the senators' request. The Senate confirmed Ms. Haspel as CIA director on May 17, 2018.

## II. The ACLU's FOIA request and the CIA's response

On May 4, 2018, the ACLU submitted a FOIA request for records related to ten categories of information:

> 1. All records regarding the selective declassification of information concerning Ms. Haspel, including the decision to declassify Ms. Haspel's encounter with Mother Teresa while keeping classified Ms. Haspel's actions in the Rendition, Detention, and Interrogation Program;
>
> 2. Any records regarding whether Ms. Haspel serves as the original classification authority over information concerning her own participation in abuse, torture, rendition, and detention, and any consideration of possible conflicts of interest in this position;
>
> 3. Communications between CIA personnel and journalists regarding Ms. Haspel's nomination, including Agency efforts to promote public perception of Ms. Haspel as "fair," "objective," and "committed to the rule

[5] *Available at* https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=DE4245F5-677D-4B5B-9F78-6750411B2C71.

> of law," and to discredit accounts of Ms. Haspel's involvement in torture, destruction of evidence of torture, and other actions in the Rendition, Detention, and Interrogation program;
>
> 4. Communications between current CIA personnel and former CIA employees seeking statements of support or other legislative and/or media outreach for Ms. Haspel's nomination, including efforts to promote perception of Ms. Haspel as "fair," "objective," and "committed to the rule of law";
>
> 5. Records concerning CIA decisions to promote coverage deemed favorable of Ms. Haspel, including through the Agency's official Twitter account;
>
> 6. Records documenting the use of CIA resources, including expenditures of personnel time and money, to support Ms. Haspel's nomination;
>
> 7. Records showing actions undertaken by career, nonpolitical CIA employees in support of Ms. Haspel's nomination;
>
> 8. Records concerning coordination with nongovernmental actors to promote Ms. Haspel's nomination, including any records concerning CIA contacts with public relations firms and nongovernmental organizations;
>
> 9. All CIA guidance on the permissibility of using Agency resources, including expenditures of nonpolitical personnel time, to promote a nominee facing Senate confirmation;
>
> 10. Communications from CIA staff to the White House concerning efforts to promote Ms. Haspel's nomination[.]

Ex. A to Def.'s Mot. for Summ. J. 4–5, ECF No. 25-3. Three days later, the CIA granted the ACLU's request for expedited processing. Ex. B to Def.'s Mot. for Summ. J. 18, ECF No. 25-3. For the next six months, the agency made no further response. The ACLU sued to enforce its FOIA request on November 29, 2018. Compl. 1, ECF No. 1.

The CIA has since identified 634 records responsive to the ACLU's request. Decl. of Vanna Blaine ("Blaine Decl.") ¶ 14. It has produced one record in full and 160 records (25.4%) in significantly redacted form. *Id.* The agency has withheld the remaining 473 records (74.6%) in full. *Id.*

On November 23, 2020, the CIA moved for summary judgment. ECF No. 25. In support of its motion, it attached (1) a declaration prepared by Vanna Blaine, an Information Review Officer with the CIA's Litigation Information Review Office, ECF No. 25-2; and (2) a Vaughn index, ECF No. 25-4.

To reduce what the CIA indicated would be a lengthy processing time, the parties had previously agreed that the agency's Vaughn index would not contain an entry for every responsive record, but would instead describe a representative sample of the responsive records. Consequently, the Vaughn index contains a total of 129 entries. Entries 1–16 represent a sample of the documents the agency released in redacted form (10% of the 160 redacted documents). Blaine Decl. ¶ 14. The remaining entries represent a subset of the documents the CIA withheld in full. *Id.* To arrive at this subset, the agency searched the 473 documents withheld in full for certain keywords proposed by the ACLU.[6] *Id.* The agency's search yielded a subset of 225 documents. *Id.* Entries 17–129 of the Vaughn index represent 50% of this subset. *Id.*

To justify its withholdings, the CIA claims the following exemptions: Exemption 1, Exemption 3 (invoking the National Security Act), Exemption 3 (invoking the CIA Act), Exemption 5 (asserting the deliberative-process privilege), Exemption 5 (asserting the attorney-client privilege), and Exemption 6. Blaine Decl. ¶¶ 15, 25, 28, 30, 36.

**LEGAL STANDARD**

FOIA requires federal agencies to disclose their records upon request. *Campaign for Responsible Transplantation v. Food & Drug Admin.*, 180 F. Supp. 2d 29, 32 (D.D.C. 2001). Courts give FOIA's statutory exemptions a "narrow compass." *Milner v. Dep't of Navy*, 131 S.

[6] The keywords were: "torture," "enhanced interrogation," "rendition," "videos," "tapes," "videotapes," "detention," "investigation," and "chief of base." *See* Exhibit 1 to Declaration of Charles Hogle ("Hogle Decl.").

Ct. 1259, 1265 (2011). That is because "disclosure, not secrecy," is FOIA's "dominant objective." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Thus, "[a]t all times courts must bear in mind that FOIA mandates a 'strong presumption in favor of disclosure.'" *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (quoting *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)).

When an agency refuses to disclose records responsive to a FOIA request, it must prove that its refusal is justified by one of FOIA's enumerated exemptions. *See, e.g.*, *ACLU v. Dep't of Just.*, 655 F.3d 1, 5 (D.C. Cir. 2011). Courts review an agency's justifications de novo, resolving all doubts in favor of disclosure. *Goldberg v. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987).

At summary judgment, an agency may attempt to meet its burden of proof through a declaration or affidavit, but "conclusory affidavits that merely recite statutory standards, or are overly vague or sweeping," are not enough. *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009). In cases involving significant redactions, agencies often provide a Vaughn index "to enable the court and the opposing party to understand the withheld information" and "address the merits of the claimed exemptions." *Jud. Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 150 (D.C. Cir. 2006); *Campaign for Responsible Transplantation*, 180 F. Supp. at 32. To that end, a Vaughn index must "specifically identify the reasons why a particular exemption is relevant and correlate those claims with the particular part of a withheld document to which they apply." *Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 57 (D.D.C. 2014) (cleaned up). Done right, "a Vaughn index functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." *Campaign for Responsible Transplantation*, 180 F. Supp. at 32. (quotation marks omitted). A Vaughn index lacking detail

cannot serve that function; accordingly, "conclusory and generalized allegations of exemptions are unacceptable." *Morley v. C.I.A.*, 508 F.3d 1108, 1115 (D.C. Cir. 2007).

**ARGUMENT**

The Court should deny the CIA's motion for summary judgment. To prevail, the agency must prove that the information it withholds is covered by one of FOIA's enumerated, narrowly-construed exemptions. It must also prove that, where its withholdings sweep in information that is not covered by a FOIA exemption, the non-exempt information cannot be separated from the purportedly exempt information. The CIA has done neither. On the contrary, the Blaine Declaration and Vaughn index consist of boilerplate assertions that provide too little information to meaningfully assess the agency's claims.

The ACLU primarily challenges the CIA's withholdings under FOIA Exemption 5. The ACLU also challenges the CIA's claims under FOIA Exemptions 1 and 3, insofar as the agency uses those exemptions to justify withholding information pertaining to Ms. Haspel's classification authority and the conflict of interest presented by her power to classify records regarding her participation in the CIA's torture program. Finally, the ACLU challenges the CIA's failure to show that information for which it claims an exemption cannot be segregated from information for which it claims no exemption.

The ACLU does not seek release of the following categories of information, which the CIA has withheld under Exemptions 1, 3, and/or 6: identifying information regarding covert personnel; codewords; covert CIA locations; classification and dissemination control markings; and personally identifying information of individuals named in the responsive records, other than Ms. Haspel. Blaine Decl. ¶¶ 17–20, 22, 26, 28–29, 36–37. The ACLU challenges the sufficiency of the CIA's explanations for withholding this information only insofar as the CIA argues that the information cannot be segregated from responsive information that is non-exempt.

## I. The CIA has not carried its burden under Exemption 5.

According to the Vaughn index, the CIA invokes Exemption 5 for nearly all of the records it withholds in full.[7] Exemption 5 allows an agency to withhold inter- or intra-agency records that would normally be privileged in civil discovery. *Animal Welfare Inst. v. Nat'l Oceanic & Atmospheric Admin.*, 370 F. Supp. 3d 116, 126 (D.D.C. 2019). Thus, when an agency seeks to withhold records under Exemption 5, its first task is to establish "with 'reasonable certainty'" that the records are subject to a civil litigation privilege. *Id.* (quoting *Fed. Trade Comm'n v. TRW, Inc.*, 628 F.2d 207, 213 (D.C. Cir. 1980)). To do so, the agency must produce "competent evidence in support of each of the essential elements necessary to sustain a claim of privilege." *Id.* (quotation marks omitted). If the agency "fails to adduce sufficient facts to permit the district court to conclude with reasonable certainty that the privilege applies, its burden has not been met." *Id.*

Here, the CIA tethers its Exemption 5 claims to the deliberative-process privilege and the attorney-client privilege. Blaine Decl. ¶ 30. All of the Vaughn-index entries containing Exemption 5 claims (112 entries) assert the deliberative-process privilege; 30 of these also assert the attorney-client privilege. *See generally* ECF No. 25-4; Exhibit 2 to Hogle Decl.

As the ACLU explains below, the CIA does not provide the information necessary to determine whether the withheld documents are properly subject to the deliberative-process or attorney-client privileges. Without this information, it is impossible to assess the merits of the CIA's Exemption 5 claims, and the agency's claims of privilege therefore fail. *See Jud. Watch,*

[7] *See* Exhibit 2 to Hogle Decl. Based on the ACLU's review, only two of the Vaughn entries for documents withheld in full lack an Exemption 5 claim—Entries 34 & 129. Conversely, of the Vaughn entries for documents released in part, only one—Entry 2—contains an Exemption 5 claim.

449 F.3d at 150 (agency submissions must "enable the court and the opposing party to understand the withheld information in order to address the merits of the claimed exemptions").

But even if the CIA had provided enough information to assess the merits of its privilege assertions, the agency's Exemption 5 claims would still fall short. That is because Exemption 5 requires the agency to make an additional showing: it may withhold information under Exemption 5 only if it reasonably foresees, and specifically identifies, harm to an interest that Exemption 5 protects. 5 U.S.C. § 552(a)(8)(A)(i)(I); *Ctr. for Investigative Reporting v. Customs & Border Prot.*, 436 F. Supp. 3d 90, 106 (D.D.C. 2019). The CIA fails to meet this requirement as well.

**A. The CIA fails to support its assertions of the deliberative-process privilege.**

The deliberative-process privilege exists to "enhance the quality of agency decisions by protecting open and frank discussion" among agency personnel. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9 (2001) (citations and quotation marks omitted). It applies to records that would "inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." *Heartland All. for Human Needs & Human Rights v. Dep't of Homeland Sec.*, 291 F. Supp. 3d 69, 78 (D.D.C. 2018) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

To withhold a record under the deliberative-process privilege, an agency must establish that the record is both predecisional and deliberative. *Mapother v. Dep't of Just.*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). A record "is predecisional if it was prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made." *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (quotation

marks omitted). A record "is deliberative if it reflects the give-and-take of the consultative process." *Id.*

An agency must provide an especially detailed and individualized description of each record it claims is predecisional and deliberative. This is because "the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process." *Elec. Frontier Found. v. Dep't of Just.*, 826 F. Supp. 2d 157, 167–68 (D.D.C. 2011) (cleaned up)); *see also Nat'l Sec. Couns. v. C.I.A.*, 960 F. Supp. 2d 101, 188 (D.D.C. 2013) (agency asserting deliberative-process privilege "must provide in its declaration and *Vaughn* index precisely tailored explanations for each withheld record at issue"); *Protect Democracy Project, Inc. v. Dep't of Health & Human Servs.*, 370 F. Supp. 3d 159, 169 (D.D.C. 2019) (same); *see also Hardy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 243 F. Supp. 3d 155, 168 (D.D.C. 2017) (agency must provide required information "for *each* contested document" (emphasis in original)); *Jud. Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 260 (D.D.C. 2004) (agency "must correlate facts in or about each withheld document with the elements of the privilege"); *Defs. of Wildlife v. Dep't of Agric.*, 311 F. Supp. 2d 44, 59 (D.D.C. 2004) (Vaughn entries must provide "individualized description" of withheld documents); *id.* (noting "the D.C. Circuit's emphasis on the individualized nature of the deliberative-process inquiry").

Therefore, an agency claiming that withheld documents are predecisional and deliberative must "[a]t the very least . . . provide the following information for each document at issue: (1) the nature of the specific deliberative process involved, (2) the function and significance of the document in that process, and (3) the nature of the decisionmaking authority vested in the document's author and recipient." *Protect Democracy*, 370 F. Supp. 3d at 169;

*accord Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 101; *Hunton & Williams LLP v. Env't Prot. Agency*, 346 F. Supp. 3d 61, 74 (D.D.C. 2018); *100Reporters LLC v. Dep't of Just.*, 248 F. Supp. 3d 115, 153 (D.D.C. 2017); *Ctr. for Biological Diversity v. Env't Prot. Agency*, 279 F. Supp. 3d 121, 147 (D.D.C. 2017). The CIA does not satisfy these fundamental requirements.

**1. The CIA has not correlated each withheld record to a specific deliberative process.**

The CIA must identify the deliberative process to which each of its withholdings pertains. *Coastal States*, 617 F.2d at 868; *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 101. It cannot meet this burden through generalities. On the contrary, using the information provided by the agency, "the court must be able to pinpoint an agency decision or policy to which the [withheld] document contributed, or was intended to contribute." *Heartland*, 291 F. Supp. 3d at 79 (quoting *Senate of the Commonwealth of Puerto Rico v. Dep't of Just.*, 823 F.2d 574, 585 (D.C. Cir. 1987)); *accord Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 101; *see also Trea Senior Citizens League v. Dep't of State*, 923 F. Supp. 2d 55, 68 (D.D.C. 2013) ("a broad and opaque description of the deliberative process" does not carry an agency's burden).

Neither the Blaine Declaration nor the Vaughn index "pinpoints" an agency decision or decisionmaking process for each withheld document. *Heartland*, 291 F. Supp. 3d at 79. The Blaine Declaration, for its part, offers only "broad and opaque" descriptions of deliberative processes. *Trea*, 923 F. Supp. 2d at 68. It asserts, in totality, that the withheld records "reflect the CIA's internal and confidential decisionmaking process during Ms. Haspel's nomination process for CIA director," Blaine Decl. ¶ 31; "reflect the status, considerations, and direction of the Agency's support of the nomination process at a given point in time, which was subject to change as new information or inquiries were acquired," *id.* ¶ 32; concern "the Agency's work conducted to garner and encourage Congressional and public support for Ms. Haspel's

nomination as CIA Director," *id.* ¶ 33; and "reflect the deliberative process that the Agency navigated to determine how best to support the CIA Director nomination," *id.* ¶ 33. At most, these assertions confirm that the withheld records involve the CIA's campaign in support of Ms. Haspel—the *starting point* of the ACLU's FOIA request. This is plainly insufficient. *See Protect Democracy*, 370 F. Supp. 3d at 169 (agency's explanations were inadequate when they revealed merely that "the deliberations at issue dealt with the subject of the FOIA request").

Moreover, the Blaine Declaration suggests that, in the CIA's view, any action the agency took to support Ms. Haspel's nomination before her confirmation was categorically predecisional and deliberative because the action reflected "the status, considerations, and direction of the Agency's support of the nomination process at a given point in time." Blaine Decl. ¶ 32. But agencies cannot claim the deliberative-process privilege over discrete, final decisions merely by nesting those decisions within larger, ongoing processes; if they could, Exemption 5 would swallow FOIA's presumption of disclosure. Courts in this district have repeatedly rejected agencies' use of "nebulous umbrella process[es]" to "effectively shield[] all agency action from review without accounting for any subsidiary agency decisions." *100Reporters*, 248 F. Supp. 3d at 153; *Judge Rotenberg Educ. Ctr., Inc. v. Food & Drug Admin.*, 376 F. Supp. 3d 47, 67 (D.D.C. 2019) ("[D]efendants' effort to define the deliberative process so broadly is rejected because the withheld records may in fact pertain to a litany of subsidiary decisions that defendants fail to acknowledge."); *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 102 (same). The agency's reference to decisions that reflect its support "at a given point in time" illustrate this key flaw. Blaine Decl. ¶ 32. The CIA appears to suggest that its earlier subsidiary decisions are shielded because they reflect the status of agency support at a particular point, and the agency could have later changed that status in a subsequent decision. But FOIA does not

consider decisions "predecisional" merely because they are subject to change. *Am. Immigr. Council v. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 220 (D.D.C. 2012) ("'More guidance soon,' . . . does not undercut the finality of the guidance already given. Although Charles Dickens published David Copperfield in monthly serialization, each installment fixed the chapters it published.").

The entries in the Vaughn index do nothing to remedy the Blaine Declaration's failures. Many entries contain nothing more than a bald assertion that they represent a "draft document," paired with boilerplate recitations of the elements of the deliberative-process privilege. For example, the entirety of Entry 112 reads:

> This is a draft document regarding Ms. Haspel as the CIA Deputy Director. Exemption (b)(5) was asserted to protect pre-decisional intra-agency deliberations. This document contains draft language. Disclosure of this document would reveal internal agency deliberations on a particular issue.

ECF No. 25-4 at 97.[8] This entry and others like it are utterly devoid of factual context and cannot justify the CIA's withholdings. *See Nat'l Sec. Couns.*, 960 F. Supp. 2d at 189 ("[W]hen an agency claims the deliberative-process privilege under Exemption 5, the factual context surrounding the withheld document is critical.").

Similar entries convey only that individuals commented on a document—they convey nothing about the topic of the document or the decision in which it was involved.[9] For instance, Entry 80 reads in pertinent part:

> This document consists of email exchanges between Agency personnel providing recommendations for a draft document on a particular issue with

[8] This exact language, or a version with minor variations, appears in at least fourteen Vaughn index entries—about 12% of the total withheld-in-full entries over which the CIA asserts the deliberative-process privilege. *See* Entries 25, 110, 112, 113, 114, 118, 119, 120, 121, 122, 123, 124, 125, 126.

[9] *See, e.g.*, Entries 17, 77, 78, 80.

> draft document [*sic*] attached. . . . Exemption (b)(5) was asserted to protect pre-decisional discussions related to the information contained within a draft document. This Disclosure [*sic*] of this document would reveal internal Agency deliberation on a particular issue.

ECF No. 25-4 at 68.

Still other entries indicate that someone at the CIA forwarded a draft "received from the White House" to someone else at the CIA.[10] These entries provide no information on whether the draft pertained to a CIA decision at all. For example, Entry 21 reads in pertinent part:

> This document consists of an email exchange between Agency personnel forwarding a draft document received from the White House for review and an attachment of the draft document. . . . Exemption (b)(5) was asserted to protect pre-decisional deliberations related to a request for review and comment concerning a draft document. Disclosure of this document would reveal deliberations between the Agency and the White House on a particular issue.

ECF No. 25-4 at 12–13.

A subset of entries in the Vaughn index suggest the existence of specific subsidiary decisions—including decisions apparently spurred by inquiries from Senators or the press—that may have been part of the agency's efforts to support Ms. Haspel's confirmation.[11] These entries, too, are inadequate. For example, Entry 20 reads,

> This document consists of an email exchange between Agency component personnel circulating draft responses to Senate inquiries addressed to Ms. Haspel as the nominee for CIA Director for review and attachments containing the draft language and additional information pertaining to the inquiry. . . . Exemption (b)(5) was asserted to protect pre-decisional discussions concerning a proposed response to Senate requests for information. This document contains draft language for a response. Disclosure of this document would reveal internal agency deliberations on particular issues.

[10] *See, e.g.*, Entries 21, 22, 23, 24.

[11] *See, e.g.*, Entries 20, 31.

Here, the CIA provides no detail on the Senate inquiries in question, other than that they relate in some way to Ms. Haspel's nomination.[12] The agency does not identify the quantity or timing of the Senate inquiries that (presumably) generated the withheld email exchange and attachments; does not identify how any of the Senate inquiries relate to Ms. Haspel's confirmation; and does not elaborate on the multiple issues over which the agency evidently deliberated, leaving the Court and the ACLU to guess at both the actual subject matter of the deliberations and whether, or when, they were resolved.[13] *See Trea*, 923 F. Supp. 2d at 68 (when agency claimed deliberative-process privilege over documents containing "employees' analyses of individual clauses of" a proposed agreement but did not "specify what sort of 'analyses' [were] contained in the documents," the court was "unable to discern whether these documents 'reflect the give and take of the deliberative process' or whether they [were] merely explanations or summaries of existing policy").

As these examples demonstrate, the CIA's Vaughn index contains only "nebulous" descriptions that fail to sufficiently identify a deliberative process. *100Reporters*, 248 F. Supp. 3d at 153. Indeed, courts in this district have repeatedly deemed agency explanations insufficient when they contained considerably more detail than the CIA offers here. For example, in *Bloche v. Department of Defense*, 279 F. Supp. 3d 68, 87 (D.D.C. 2017), the Defense Department explained that it had withheld in full a record consisting of

[12] While the CIA does not identify the Senate inquiries referenced in the Vaughn index, several Senate inquiries relevant to the ACLU's FOIA request are public. *See, e.g.*, Letter from Senators Feinstein, Heinrich, and Wyden to CIA Director Pompeo (Apr. 13, 2018), https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=EAA19329-AD87-4FC0-A107-A53CB93B40D1.

[13] Entry 20 is so generic that it could apply to senators' requests to discuss the confirmation process with Ms. Haspel over lunch, and agency "deliberations" on Ms. Haspel's preferred restaurant. There is no way to know—and that is precisely the problem.

> draft versions of a document prepared by the Air Force Surgeon General for then unnamed parties in which he analyzes various policy memoranda regarding medical support of detainee operations, to include both DoD and Air Force policies. The Surgeon General selected key facts to present from a larger body of facts, such that release would reveal the deliberative process. The withheld documents include handwritten notes as well as tracked changes and applicable discussions.

*Id.* The court held that this description did not "sufficiently describ[e] the propriety" of the agency's claimed exemption and ordered the agency to release the record. *Id.* None of the entries in the CIA's Vaughn index contains more factual context than this, and the majority of the CIA's entries contain far less.

In *Electronic Frontier Foundation*, 826 F. Supp. 2d at 168, the DOJ asserted the deliberative-process privilege over a group of email messages "wherein 'senior [DOJ] officials seek and receive advice, and discuss questions, developments, and potential ramifications with respect to the HLCG [United States–European Union High Level Contact Group] deliberations.'" *Id.* (quoting the record; first alteration by court). The DOJ explained that the emails

> consist of back and forth discussions, forwards, and spinoff discussions, in which [DOJ officials] exchange any thoughts, ideas, or guidance they deem appropriate regarding the U.S.[']s ... negotiation position on HLCG matters. These officials analyze and prepare for EU negotiating positions, and work amongst themselves to promote [DOJ] and U.S. foreign interests in these foreign negotiations.

*Id.* (quoting the record; alterations by court). The court held that this explanation was inadequate because it "fail[ed] to identify a specific deliberative process to which the withheld email messages contributed." *Id.* Once again, none of the entries in the CIA's Vaughn index contains more factual context than this, and the majority of the CIA's entries contain far less.

In *100Reporters*, 248 F. Supp. 3d at 152, the DOJ attempted to justify withholding records under Exemption 5 and the deliberative-process privilege by including the following language in its Vaughn index:

> As a party to the plea agreement and in exercising its duty to enforce the FCPA, the DOJ and the SEC were engaged in a deliberative process in evaluating whether the Monitor was fulfilling his mandate and whether Siemens was complying with the plea agreement. DOJ obtained the document prior to/in the course of making law enforcement and litigation decisions, and relied upon the information contained therein as part of its underlying deliberative process.

The court concluded that the DOJ had failed "to define with the necessary specificity" the deliberative process to which the withheld records pertained. *Id.* Yet again, none of the entries in the CIA's Vaughn index contains more factual context than this, and the majority of the CIA's entries contain far less. Other, comparable examples abound. *See, e.g.*, *New Orleans Workers' Ctr. for Racial Just. v. Immigr. & Customs Enf't*, 373 F. Supp. 3d 16, 51 (D.D.C. 2019); *Trea*, 923 F. Supp. 2d at 67–68; *Hunton & Williams LLP v. Env't Prot. Agency*, 248 F. Supp. 3d 220, 242–43 (D.D.C. 2017); *Pub. Emps. for Env't Resp. v. Env't Prot. Agency*, 213 F. Supp. 3d 1, 13 (D.D.C. 2016); *Jud. Watch*, 297 F. Supp. 2d at 264.

Finally, the CIA's brief in support of summary judgment underscores the deficiencies of the Blaine Declaration and Vaughn index. In the four pages of its brief devoted to the deliberative-process privilege, the agency fails to identify a specific agency decision or deliberation in which any withheld documents were involved. Br. 12–16. The brief asserts that the withheld documents include, "*inter alia*, draft documents including drafts prepared to respond to Senate inquiries, correspondence with the White House regarding such drafts, and documents reflecting deliberative discussions regarding responses to media inquiries." Br. 14–15. Yet it offers no further information on those decisions. Tellingly, the CIA's use of "*inter alia"* highlights that even its generalized explanations are incomplete—*i.e.*, that there are drafts

relating to topics *other than* Senate inquiries, correspondence with the White House regarding such drafts, and documents reflecting deliberative discussions regarding responses to media inquiries. The CIA's brief provides no indication of what or how many such topics were at issue.

Because the CIA has not specified the agency decision to which each of its withholdings contributed, it is not entitled to summary judgment on its withholdings under Exemption 5 and the deliberative-process privilege.

**2. The CIA has not explained the function or significance of each withheld record to a relevant decisionmaking process.**

To establish that a record is subject to the deliberative-process privilege, an agency must explain the record's "function and significance." *Protect Democracy*, 370 F. Supp. 3d at 169. Without knowing a document's function and significance in a decisionmaking process, it is impossible to assess whether the document played a part in the give and take of the pertinent agency deliberation. *See Trea*, 923 F. Supp. 2d at 68 ("This sort of factual context is critical in determining whether the deliberative process privilege applies[.]"). Satisfying this requirement requires an agency to describe how the decisionmaking process relevant to each withheld record works. *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1204 (D.C. Cir. 1991) (instructing agency "to explain such matters as how decisions like those in issue are reached; the role that staff discussion and memoranda play in such decisions; the manner in which such decisions are memorialized and explained; and whether such decisions are treated, in later agency decisionmaking, as precedents"); *accord New Orleans Workers' Ctr.*, 373 F. Supp. 3d at 52.

The CIA does not describe any of the withheld records' role in any decisionmaking process "in any amount of detail." *Nat'l Sec. Couns.*, 960 F. Supp. 2d at 190. For example, Entry 114 of the Vaughn index states, "This is a draft document regarding Ms. Haspel as the nominee for CIA Director. . . . Exemption (b)(5) was asserted to protect predecisional intra-agency

deliberations. This document contains track changes and draft language. Disclosure of this document would reveal internal agency deliberations on a particular issue." This entry and the many others like it provide no information on how the withheld draft fits into an agency decisionmaking process.

Moreover, three of the entries in the Vaughn index, including Entry 114, not only fail to explain the function and significance of the withheld documents, but are also undated, further obscuring their role in any particular agency decision.[14] Blaine Decl. ¶ 31. While the deliberative-process privilege may apply to undated documents, an agency must take care to explain the "chronology necessary to demonstrate that [the withheld] documents [are] predecisional," since a document must, of course, precede a decision to play any role in it. *McKinley v. F.D.I.C.*., 268 F. Supp. 3d 234, 244 (D.D.C. 2017) (quotation marks omitted), s*ee also Jud. Watch*, 449 F.3d at 151 (remanding with instructions for agency to provide "dates for documents that lack them or explanations where dates cannot be found"). The CIA has not done so.

The CIA's assertion that many of the withheld records are drafts does not satisfy the agency's burden to identify each record's role in a particular decisionmaking process.[15] While draft documents *may* be exempt from disclosure under FOIA, an agency's mere representation that a document is a draft—even a draft "replete with edits, strike throughs and other formatting changes, marginal suggestions and comments, and/or embedded questions regarding content"—is "insufficient to demonstrate the function and significance" of the document. *New Orleans*

[14] Entries 110, 112, 114.

[15] Specifically, the CIA asserts that many of the withheld records are either draft responses to inquiries from the press or Congress, or draft talking points. *See* Blaine Decl. ¶ 31; Br. 15.

*Workers' Ctr.*, 373 F. Supp. 3d at 52 (cleaned up); *Heartland*, 291 F. Supp. 3d at 80 ("The fact that the documents are drafts and contain edits does not, alone, qualify them for protection under the deliberative process privilege . . . ."); *see also Arthur Andersen & Co. v. I.R.S.*, 679 F.2d 254, 257 (D.C. Cir. 1982) (stating that agency's "argument that any document identified as a 'draft' is per se exempt" from disclosure was "foreclosed" by Circuit precedent); *Protect Democracy*, 370 F. Supp. 3d at 171 ("Knowing that the redactions include back and forth discussions providing recommendations on various topics or show the creation and review of drafts is helpful, but is not enough to permit the Court to determine whether each redaction at issue is consistent with FOIA."); *Trea*, 923 F. Supp. 2d at 69 (agency's "conclusory" assertion that "draft talking points" were predecisional and deliberative was insufficient); *Defs. of Wildlife*, 311 F. Supp. 2d at 58 ("[D]esignation of a document as a 'draft' does not automatically trigger proper withholding under Exemption 5[.]"); *Jud. Watch*, 297 F. Supp. 2d at 261 ("[D]rafts are not presumptively privileged[.]").[16]

Moreover, to establish that a draft is subject to the deliberative-process privilege, an agency "must indicate whether the draft was (1) adopted formally or informally, as the agency position on an issue; or (2) used by the agency in its dealings with the public." *Citizens for Resp. & Ethics in Wash. v. Nat'l Archives & Records Admin.*, 583 F. Supp. 2d 146, 164–65 (D.D.C. 2008) (quotation marks omitted); *accord Bloche*, 279 F. Supp. 3d at 87; *Jud. Watch*,

[16] The CIA's brief underscores this point: it cites multiple cases in which a court ratified an agency's decision to withhold a draft document only after *in camera* review—*i.e.*, not based on the agency's mere designation of the document as a draft. Br. 15. (citing *Jud. Watch, Inc. v. Dep't of State*, 349 F. Supp. 3d 1, 6 (D.D.C. 2018); *Hunton & Williams LLP v. Env't Prot. Agency*, 346 F. Supp. 3d at 78; *Blank Rome LLP v. Dep't of Air Force*, No. 15-CV-1200-RCL, 2016 WL 5108016, at *5 (D.D.C. Sept. 20, 2016)). Notably, the purpose of requiring an agency to submit sufficient factual detail in its supporting declaration and Vaughn index is to avoid the burden of *in camera* review on the reviewing court, particularly where, as here, the withheld documents are voluminous. *Id.*

297 F. Supp. 2d at 261. Here, the CIA "has done neither," and therefore, it "has not met its burden." *Bloche*, 279 F. Supp. 3d at 87.

Because the CIA has not explained the function and significance of its withholdings in its decisionmaking processes, it is not entitled to summary judgment on its withholdings under Exemption 5 and the deliberative-process privilege.

**3. The CIA has not explained the decisionmaking authority of personnel involved in creating and reviewing the withheld records.**

Finally, an agency asserting the deliberative-process privilege must explain the decisionmaking authority of the people involved in authoring and commenting on any withheld records. This information is crucial to identifying the point at which a deliberation ceases to be a deliberation and becomes a decision. As the D.C. Circuit has explained, "A document from a junior to a senior is likely to reflect his or her own subjective opinions and will clearly have no binding effect on the recipient," whereas "one moving from senior to junior is far more likely to manifest decisionmaking authority and to be the denouement of the decisionmaking rather than part of its give-and-take." *Access Reports v. Dep't of Just.*, 926 F.2d 1192, 1195 (D.C. Cir. 1991). Accordingly, "[e]xplaining decisionmaking authority is an essential ingredient to justifying withholdings under the deliberative process exemption." *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 102.

Neither the CIA's brief, the Blaine Declaration, nor the Vaughn index contains any indication of the decisionmaking authority of the personnel associated with the withheld records. For example, the Vaughn index frequently refers to exchanges between "agency personnel" without explaining what authority those personnel wield, either in relation to each other or to the deliberative process(es) at issue. *See, e.g.*, Entries 26–33. In other words, "in almost every instance," the CIA has "wholly omitted information about the positions and responsibilities of

the authors and recipients . . . of the records." *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 103 (quotation marks omitted). This alone makes the Blaine Declaration and Vaughn index inadequate to support the CIA's motion for summary judgment. *See Ctr. for Biological Diversity*, 279 F. Supp. 3d at 149 ("The Vaughn indices provide little to no information as to the identities, positions, and job duties of any of the authors or recipients of the withheld documents; consequently, this Court simply cannot properly determine whether the deliberative process privilege applies." (quotation marks omitted)); *Conservation Force*, 66 F. Supp. 3d at 61 (denying summary judgment when defendant agencies "provided little if any information regarding the role of the document's author with respect to the agency's decisionmaking process, or that of the recipient of the document, or how, if at all, the document impacted the agency's deliberations.").

A subset of Vaughn entries describe communications between CIA employees and "senior" CIA employees.[17] These entries are likewise inadequate. Merely noting that one or more employees involved with a document are "senior," as the CIA does here, provides no insight into any employee's authority to conclude the decisionmaking process at issue. A court in this district explained as much in *National Security Counselors*, 960 F. Supp. 2d at 190. There, the CIA noted that documents for which it claimed the deliberative-process privilege contained "a recommendation from [an] analyst to his/her supervisor," as well as "a recommendation from the analysts to senior reviewers[.]" (quotation marks omitted). The court found this explanation insufficient because the CIA did not "not describe the decisionmaking authority of the 'supervisor' or 'senior reviewers,'" leaving it unclear whether the reviewing personnel "had the authority to approve" the decisions at issue. *Id.*

[17] *See* Entries 18, 19, 45, 46, 64, 66, 67, 68, 69, 70, 71, 74, 127.

* * *

In sum, the CIA has failed to justify its assertions of the deliberative-process privilege because the Blaine Declaration and Vaughn index do not adequately address (1) the deliberative process to which each withheld record pertains, (2) each record's function and significance in any such process, and (3) the decisionmaking authority of particular documents' authors and recipients. As a result, the ACLU has no "meaningful opportunity to argue for the release of the withheld documents," *Campaign for Responsible Transplantation*, 180 F. Supp. 2d at 32 (quotation marks omitted), and the CIA is not entitled to summary judgment on this issue.

**B. The CIA fails to support its assertions of the attorney-client privilege.**

The CIA asserts the attorney-client privilege in at least 30 entries of the Vaughn index, all of which represent documents withheld in full.[18] Blaine Decl. ¶ 35. The purpose of the attorney-client privilege is to ensure "that a client's confidences to his or her attorney will be protected, and therefore encourage clients to be as open and honest as possible with attorneys." *Coastal States*, 617 F.2d at 862. "Like all privileges . . . the attorney-client privilege is narrowly construed and is limited to those situations in which its purposes will be served." *Id.* It "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Id.* (quotation marks omitted).

In the FOIA context, an agency asserting the attorney-client privilege over withheld records must, at minimum, satisfy four requirements. First, the agency must establish that it asserts the privilege as a "client," and that the communication over which it asserts the privilege was made to "a member of the bar or his subordinate" who was "acting in his or her capacity as a

[18] *See* Entries 36, 37, 40, 44, 49, 64, 66, 67, 72, 73, 74, 80, 85, 87, 88, 93, 94, 95, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 127.

lawyer." *Cause of Action Inst. v. Dep't of Just.*, 330 F. Supp. 3d 336, 347 (D.D.C. 2018). The "'client' may be the agency and the attorney may be an agency lawyer." *Tax Analysts v. I.R.S.*, 117 F.3d 607, 618 (D.C. Cir. 1997).

Second, the agency "must establish that securing legal advice was a primary purpose" of the communication. *Cause of Action Inst.*, 330 F. Supp. 3d at 347 (quotation marks omitted). An agency lawyer's mere involvement with a record does not make the record privileged. *Animal Welfare Inst.*, 370 F. Supp. 3d at 130 ("It is well-established . . . that not every communication between an attorney and a client—government or otherwise—is made for the purpose of securing legal advice or services.").

Third, the agency must establish that the information in the withheld communication was confidential when it was conveyed and has remained confidential since. *Coastal States*, 617 F.2d at 863. This "fundamental prerequisite to the assertion of the privilege" requires an agency to establish that any purportedly confidential information it imparted to a government attorney "circulated no further than among those members of the organization who [were] authorized to speak or act for the organization in relation to the subject matter of the communication." *Id.* (quotation marks omitted). Additionally, the agency must establish that any confidential information disclosed to its attorneys concerned the agency itself; information concerning a party outside the agency is not subject to the privilege, even if the agency transmits the information to its own attorneys. *Schlefer v. United States*, 702 F.2d 233, 245 (D.C. Cir. 1983); *accord Tax Analysts*, 117 F.3d at 619; *Cause of Action Inst.*, 330 F. Supp. 3d at 349.

Fourth, when an agency asserts the privilege over a communication originating with an attorney, it must establish that disclosure of the communication would reveal an underlying client confidence. *Tax Analysts*, 117 F.3d at 618 (citing *In re Sealed Case*, 737 F.2d 94, 98–99

(D.C. Cir. 1984)); *see also Coastal States*, 617 F.2d at 863 ("The purpose of the privilege is limited to protection of confidential facts."); *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) ("[T]he attorney-client privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts[.]"). As the D.C. Circuit has explained, "To allow the contrary rule would permit agencies to insulate facts from FOIA disclosure by simply routing them through lawyers in the agency and invoking the attorney-client privilege." *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980). Thus, an agency asserting the attorney-client privilege over an attorney's legal advice or legal assessment must produce "sufficient facts" to "demonstrate with reasonable certainty" that the advice or assessment "rested in significant and inseparable part on the client's confidential disclosure." *In re Sealed Case*, 737 F.2d at 99 (cleaned up).

The CIA gestures to these requirements in invoking the attorney client privilege, but it fails to substantiate them. In particular, while it claims that each record for which it asserts the attorney-client privilege consists of a legal assessment or legal advice, it offers nowhere near "sufficient facts" to establish that the assessment or advice contained in each record rests "in significant and inseparable part on the client's confidential disclosure," or that the confidential disclosures made to CIA attorneys, if any, have remained confidential. *Id.*; *see also Am. Immigr. Council*, 905 F. Supp. 2d at 223 ("Because [the agency] has not shown that the [withheld documents] rest on its own confidential communications in the role of a client asking for legal advice, attorney-client privilege does not apply here."). In total, the CIA's justifications for invoking the attorney-client privilege are cursory.

The Blaine Declaration devotes a single paragraph to the attorney-client privilege. It states that the CIA has asserted the privilege over communications in which

> Agency employees requested legal advice related to responses to Senate inquiries and certain proposed courses of action. These confidential communications consist of factual information supplied by the clients in connection with their requests for legal advice, discussions between attorneys that reflect those facts, and legal analysis and advice provided to the clients. The confidentiality of these communications was maintained.

Blaine Decl. ¶ 35. The declaration does not carry the agency's burden because it fails to "present the underlying facts demonstrating the existence of the privilege." *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (quotation marks omitted). Instead, it simply paraphrases the privilege's elements. That is not enough. *Larson*, 565 F.3d at 864 ("conclusory affidavits that merely recite statutory standards" do not carry an agency's burden); *see also Jud. Watch, Inc. v. Dep't of Homeland Sec.*, 841 F. Supp. 2d 142, 154 (D.D.C. 2012) (Vaughn index insufficient when it "simply parrot[ed] selected elements of the attorney-client privilege" without elaboration). Even if blanket assertions like these could, in theory, support an agency's invocation of the attorney-client privilege, the assertions in the Blaine Declaration would not. The declaration refers to "confidential communications," but that conclusory assertion "hardly demonstrates that confidential information gained from the client underpin[s]" the documents at issue. *In re Sealed Case*, 737 F.2d at 100. The relevant question is whether the withheld communications contain confidential information concerning the CIA. The Blaine Declaration leaves that question unanswered.

The Vaughn index does not fill the gaps in the declaration. To start, at least eight of the Vaughn entries containing attorney-client claims make no reference to communications with an attorney or attorney's agent—much less communications containing confidential information concerning the CIA.[19] For example, Entry 80 reads, in pertinent part, "This document consists of

[19] *See* Entries 37, 80, 93, 94, 95, 98, 99, 101.

email exchanges between Agency personnel providing recommendations for a draft document on a particular issue with draft document attached. . . . [T]he attorney client privilege was also asserted to protect these discussions, which consist of a legal assessment." ECF No. 25-4 at 67–68. The assertion of the privilege in these entries is misplaced: the CIA does not identify, and the ACLU is unaware of, any case holding that the attorney-client privilege applies to a "legal assessment" contained in "discussions" limited entirely to non-lawyers.[20] *See Pub. Emps. for Env't Resp.*, 213 F. Supp. 3d at 19 ("To the extent EPA seeks summary judgment related to communications that do not appear to include an attorney, the motion will be denied."); *id.* at 20 ("It goes without saying that the attorney-client privilege only covers 'confidential communications between *an attorney* and his client.'" (quoting *Mead*, 566 F.2d at 260)).

The remaining entries do mention attorneys, but they do not establish that the legal assessments or advice over which the CIA asserts the privilege are based on, and inseparable from, confidential information that the CIA provided for the primary purpose of seeking legal advice. For instance, sixteen of the remaining entries consist of communications between CIA

[20] The attorney-client privilege may attach to "reports of third parties made at the request of the . . . client where the purpose of the report [is] to put in usable form information obtained from the client," provided the report is made "in confidence for the purpose of obtaining legal advice from the [client's] lawyer." *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resol. Trust Corp.*, 5 F.3d 1508, 1514 (D.C. Cir. 1993) (cleaned up); *accord F.T.C. v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); *see also In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014) ("[C]ommunications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege." (citing *F.T.C.*, 628 F.2d at 212)). Nothing in the Vaughn entries at issue suggests that the withheld legal assessments meet these conditions.

attorneys.[21] Approximately half of them refer to exchanges in which CIA attorneys emailed each other about draft responses to inquiries from the Senate.[22] One of them, Entry 100, reads,

> This document consists of an email exchange between CIA attorneys providing recommendations for a draft responses [*sic*] to Senate inquiries addressed to Ms. Haspel as the nominee for CIA Director. . . . [T]he attorney client privilege was also asserted to protect these written exchanges, which consist of a legal assessment.

The other half refer to exchanges in which CIA attorneys emailed each other about unspecified draft documents that take legal positions on unspecified issues. In many of these, the Vaughn index does not even clarify whether the CIA—*i.e.* the client—was the source of any underlying information.[23] One of them, Entry 104, reads,

> This document consists of email exchanges between CIA attorneys providing recommendations and comments for a draft document regarding a specific issue with the draft document attached. . . . the attorney client privilege was also asserted to protect these discussions, which consist of a legal assessment provided by a CIA attorney.

None of the entries referencing attorney-to-attorney communications contain enough information to assess whether the essential elements of the attorney-client privilege are satisfied. There is no way to tell, for instance, whether the "legal assessment" referenced in Entry 100 is based on, or inseparable from, confidential information concerning the CIA; given the scant facts provided, the assessment could consist of a purely legal analysis of a position taken by the Senate, or of a "government attorney's advice on political, strategic, or policy issues," to which the attorney-client privilege does not apply. *Cause of Action Inst.*, 330 F. Supp. 3d at 347 (citation omitted).

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[21] *See* Entries 40, 44, 49, 64, 67, 73, 74, 85, 87, 97, 100, 103, 104–107.

[22] *See* Entries 40, 44, 49, 73, 97, 100, 103.

[23] *See* Entries 64, 67, 74, 85, 87, 104–107. Another entry, Entry 64, refers to an email exchange between CIA attorneys taking a legal position on a response to a media inquiry.

The five remaining Vaughn entries asserting the attorney-client privilege reference communications between CIA attorneys and other agency personnel.[24] For example, Entry 72 reads,

> This document consists of various email exchanges between Agency personnel and between CIA attorneys concerning draft responses to Senate inquiries addressed to Ms. Haspel as the nominee for CIA Director. . . . [T]he attorney client privilege was also asserted to protect these written exchanges, which consist of a legal assessment.

It is impossible to say whether any of the communications between agency personnel and agency attorneys referenced in these entries contain confidential information concerning the CIA, because the entries "say nothing about the source of the information on which" the withheld assessments or advice are based. *Mead*, 566 F.2d at 254 n.27; *see also id.* at 254 (agency failed to justify assertion of privilege when "[i]t simply state[d] the subject, source, and recipient of the legal opinion rendered"). Entry 72, for example, could well encompass a "legal assessment" in which a CIA attorney makes no reference to confidential CIA information and instead analyzes whether the Senate can generally require CIA personnel to respond in writing to repeated inquiries. Such an assessment would not be subject to the attorney-client privilege. *See id.* at 253 ("The privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship . . . . It must also be demonstrated that the information is confidential."); *Cuban v. S.E.C.*, 744 F. Supp. 2d 60, 78 (D.D.C. 2010) ("[T]he attorney-client privilege does not give the agency the ability to withhold a document merely because it is a communication between the agency and its lawyers. The agency must show that the information provided to its lawyers was intended to be confidential and was not disclosed to a third party." (quotation marks and citations omitted)).

[24] *See* Entries 36, 66, 72, 88, 102.

In sum, neither the Blaine Declaration nor the Vaughn index contains facts establishing that the records for which the CIA asserts the attorney-client privilege contain information that was, and remains, confidential, and that was communicated to CIA attorneys for the primary purpose of seeking legal advice. Without those facts, it is impossible to "state with reasonable certainty that the privilege applies," and the agency's "burden is not met." *F.T.C.*, 628 F.2d at 213.

### C. The CIA asserts the deliberative-process and attorney-client privileges over the same withholdings but fails to specifically describe which portions of its withholdings are subject to which privilege.

The Vaughn entries in which the CIA asserts the deliberative-process privilege "in conjunction with" the attorney-client privilege, Blaine Decl. ¶ 35, are inadequate for an independent reason: the CIA fails to provide "any particularity as to which privilege applies to which portions of [each] document." *Bloche v. Dep't of Def.*, 414 F. Supp. 3d 6, 47 (D.D.C. 2019). The deliberative process and attorney-client privileges may sometimes shield the same information, but they will not always do so, because the privileges are conceptually distinct:

> [T]he attorney-client privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts, while the deliberative process privilege directly protects advice and opinions and does not permit the nondisclosure of underlying facts unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decisionmaking process

*Mead*, 566 F.2d at 254 n.28. In other words, the deliberative process privilege will often protect opinions but not underlying facts, and the attorney-client privilege is just the reverse. Consequently, "uncertainty about which privilege applies to a particular withholding has real stakes." *Bloche*, 414 F. Supp. 3d at 49. An agency seeking to withhold a document by invoking both privileges must therefore provide "specific detail as to which parts of which documents

[were] withheld under which privilege." *Id.* This helps ensure that the withheld information is properly subject to at least one of the privileges. Here, the CIA has offered no such detail—rather, the agency has asserted both privileges in blanket, conclusory fashion, without regard for their different theoretical underpinnings and scope of coverage. As in *Bloche*, the CIA's "mixture of deliberative process and attorney-client privilege language makes it confusing, if not impossible, to discern which privilege has been applied with respect to which withholdings." *Id.* Thus, the Court should hold that the Vaughn entries in which the CIA invokes both the deliberative-process and attorney-client privileges do not carry the agency's burden.

**D. The CIA fails to satisfy the independent foreseeable-harm requirement that applies to all records withheld under Exemption 5.**

Even if the CIA had established that the deliberative-process and attorney-client privileges applied to the records in question, it would not be entitled to summary judgment, as it has not sufficiently explained how the records' disclosure could foreseeably harm an interest protected by Exemption 5.

An agency may withhold records under a discretionary exemption, including Exemption 5, only when it "reasonably foresees that disclosure would harm an interest protected by [the] exemption." *Machado Amadis v. Dep't of State*, 971 F.3d 364, 370 (D.C. Cir. 2020) (quoting 5 U.S.C. § 552(a)(8)(A)(i)(I)) (alteration in source). This is true of all records that may otherwise satisfy the requirements of the exemption—including records over which the agency has successfully asserted the deliberative-process or attorney-client privilege. *See id.* (agency must show that Exemption 5 applies to withheld record *and* that foreseeable-harm requirement is satisfied); *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 106 ("[T]he foreseeable-harm requirement impose[s] an independent and meaningful burden on agencies." (quotation marks omitted; alteration in source)).

Congress imposed the foreseeable-harm requirement in the FOIA Improvement Act, Public L. No. 114-185, 130 Stat. 538 (June 30, 2016). *See* 5 U.S.C. § 552(a)(8)(A)(i)(I). The Senate Committee on the Judiciary explained that the Act was intended to curb "a growing and troubling trend towards relying on . . . discretionary exemptions to withhold large swaths of Government information, even though no harm would result from disclosure." S. Rep. No. 114-4, at 3 (2015).[25] Consistent with that intent, courts in this district have recognized that "the text and purpose of the [FOIA Improvement] Act both support a heightened standard for an agency's withholdings under Exemption 5." *Jud. Watch, Inc., v. Dep't of Comm.*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019); *accord Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 106 (D.D.C. 2019).

An agency cannot meet this heightened standard through "general explanations" or "boiler plate language." *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 106. On the contrary, Congress sought to ensure that the foreseeable-harm inquiry would be both particularized and substantial, specifying that

> the content of a particular record should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its age, content, and character, would harm an interest protected by the applicable exemption.

S. Rep. 114-4, at 8. *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 106 (an agency may withhold records under Exemption 5 only if it can identify "specific harms to the relevant protected interests that it can reasonably foresee would actually ensue from disclosure of the

[25] *Available at* https://www.congress.gov/114/crpt/srpt4/CRPT-114srpt4.pdf. Although the Senate's draft of the FOIA Improvement Act was the version ultimately enacted, the House of Representatives passed its own, closely related bill. *See* H.R. 653, 114th Cong. (2016). In its Report on that bill, the House Committee on Oversight and Government Reform stated that "Exemption five has been singled out as a particularly problematic exemption. Some have taken to calling it the 'withhold it because you want to' exemption." H.R. Rep. No. 114-391, at 10 (2015), *available at* https://www.congress.gov/114/crpt/hrpt391/CRPT-114hrpt391.pdf.

withheld materials and connect[] the harms in [a] meaningful way to the information withheld" (alterations in source)).

The CIA does not discuss, much less satisfy, the independent foreseeable-harm requirement imposed by the FOIA Improvement Act.

**1. The CIA has not satisfied the foreseeable-harm requirement with respect to the deliberative-process privilege**

To satisfy the foreseeable-harm requirement, an agency asserting the deliberative-process privilege must provide "context or insight into the specific decision-making processes or deliberations at issue, and how they in particular would be harmed by disclosure." *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 107. The CIA fails to do so. The Blaine Declaration recites generic statements about what might result from disclosing the documents withheld under the deliberative-process privilege. Blaine Decl. ¶ 33–34. These boil down to two assertions of harm, applied across the board to each of the agency's deliberative-process withholdings. First, the agency asserts that disclosure would "chill[] the free flow of discussion in agency decisionmaking," Blaine Decl. ¶ 33, which "would tend to degrade the quality of Agency decisions," Blaine Decl. ¶ 34. Second, it asserts that disclosure "could mislead or confuse the public by disclosing rationales that were not the basis for the Agency's final decisions." Blaine Decl. ¶ 34. The Vaughn index adds nothing of substance; the vast majority of the deliberative-process entries in the index are accompanied by the same rote, conclusory statement (with slight variations): "Disclosure of this document would reveal internal agency deliberations on a particular issue." *See, e.g.*, Entries 24–27.

These assertions do not carry the CIA's burden because they consist of boilerplate language that does not meaningfully connect any particular asserted harm to any particular withheld record. Courts in this district have concluded that descriptions of harm equivalent or

comparable to those offered by the CIA here do not justify an agency's decision to withhold records under Exemption 5. For instance, in *Ctr. for Investigative Reporting*, 436 F. Supp. 3d at 107, the U.S. Customs and Border Protection agency (CBP) included the following statement with every one of the Exemption 5 entries in its Vaughn index:

> Releasing these documents could result in confusion regarding reasons and rationales that may not ultimately be the grounds for any actions CBP may take regarding the contracting, procurement, and construction process. Moreover, release could chill open and frank discussions among CBP employees.

*Id.* (emphasis added). The court held that these assertions—which precisely parallel the CIA's—were just the sort of "general explanations and boiler plate language that do not satisfy the foreseeable-harm requirement." *Id.* at 106 (quotation marks and citations omitted).

Similarly, in *Judicial Watch*, 375 F. Supp. 3d at 101, an agency attempted to satisfy the foreseeable-harm requirement by explaining that the release of records withheld under the deliberative-process privilege "'could have a chilling effect on discussions within the agency' . . . and that failure 'to have these frank deliberations could cause confusion if incorrect or misrepresented climate information remained in the public sphere.'" *Id.* at 100 (quoting from the record). The court held that these assertions failed to satisfy the foreseeable-harm requirement, noting that "[i]f the mere possibility that disclosure discourages a frank and open dialogue was enough for the exemption to apply, then Exemption 5 would apply whenever the deliberative process privilege was invoked regardless of whether disclosure of the information would harm an interest protected by the exemption." *Id.* at 101. Here, the CIA's assertions of foreseeable harm fit the same mold: boilerplate statements that parrot the definition of the deliberative-process privilege but lack anything approaching specific information.

Notably, in its report on the FOIA Improvement Act, the Senate took pains to emphasize that agencies should not withhold information responsive to a FOIA request "merely because

public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." S. Rep. 114-4, at 8 (quoting President Barack Obama, *Mem. for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (Jan. 21, 2009)). The Senate also made it clear that "[n]ondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve." *Id*. Here, the CIA has asserted the deliberative-process privilege over records that almost certainly concern the agency's attempts to downplay Ms. Haspel's role in torture and destruction of evidence, all for the purpose of improving her confirmation prospects. The agency's failure to provide any alternative explanation of foreseeable harm, or even to acknowledge the existence of the foreseeable-harm requirement, is striking in light of its incentive to avoid "embarrassment" and "protect the personal interests of Government officials[.]" *Id.*

**2. The CIA has not satisfied the foreseeable-harm requirement with respect to the attorney-client privilege.**

The CIA fails to explain how disclosing the information over which it asserts the attorney-client privilege could harm an interest protected by the privilege. Indeed, the CIA appears to misunderstand what the privilege protects. According to the Blaine Declaration, if the "confidential information" in the CIA's purported attorney-client communications "were to be disclosed, it would subject the legal guidance [provided by CIA attorneys] to scrutiny and reveal preliminary legal risk analysis and strategy. This," the declaration says, "is precisely the type of information that the attorney-client privilege is designed to protect." Blaine Decl. ¶ 35.

The CIA is mistaken. The purpose of the attorney-client privilege is not to shield government lawyers' "legal risk analysis and strategy" from the public, but to "assure that a client's confidences to his or her attorney will be protected, and therefore encourage clients to be

as open and honest as possible with attorneys." *Coastal States*, 617 F.2d at 862. That is, it is "the secrecy of the underlying facts" that matters. *Mead*, 566 F.2d at 254 n.28. The CIA does not assert that disclosure of the withheld records would frustrate this purpose—*i.e.*, that disclosure would reveal legitimate CIA secrets to the public, and thereby discourage CIA personnel from discussing the CIA's interests openly and honestly with CIA attorneys. *See Cause of Action Inst.*, 330 F. Supp. 3d at 355 (agency carried its burden under Exemption 5 and the attorney-client privilege when it "explained the manner in which disclosure would stifle 'full and frank' communication between DOJ and its client agencies"). But even if it did, the assertion would be unsupported. As discussed *supra*, the CIA has produced no evidence that any of the information contained in the withheld records is based on—let alone "inseparable" from—confidential information imparted to the CIA's attorneys. *In re Sealed Case*, 737 F.2d at 99. Thus, nothing in the record establishes that disclosing the legal assessments over which the CIA claims the attorney-client privilege would harm the interests protected by the privilege.

## II. The CIA cannot withhold all information concerning Ms. Haspel's classification authority or conflicts of interest under Exemption 1 or 3.

The ACLU's FOIA request seeks "[a]ny records regarding whether Ms. Haspel serves as the original classification authority over information concerning her own participation in abuse, torture, rendition, and detention, and any consideration of possible conflicts of interest in this position[.]" Blaine Decl. ¶ 5, Item 2. The Blaine Declaration and Vaughn index are so vague that it is impossible to know whether, or in which documents, the agency has withheld such records under Exemption 1, Exemption 3 (National Security Act), or both. If it has, those withholdings are improper.[26]

[26] As noted above, the ACLU does not otherwise challenge the CIA's withholdings under Exemptions 1 or 3, except insofar as the CIA argues that those withholdings are not segregable

**Exemption 1.** Exemption 1 permits an agency to withhold "matters that are specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy," provided that the matters "are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Here, the CIA invokes Exemption 1 in concert with Executive Order 13526, which, among other things, permits information to be classified "only if . . . the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security," and "the original classification authority is able to identify or describe the damage." E.O. 13526 §§ 1.1(a)(4), 1.4. Additionally, Executive Order 13526 provides that when an agency receives a FOIA request, it may "classif[y] or re-classif[y]" information responsive to the request "only if such classification . . . is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order." E.O. 13526 § 1.7(d). An agency may not classify information to "prevent embarrassment to a person, organization, or agency." E.O. 13526 § 1.7(a)(2).

As an initial matter, the information at issue—attempts to obscure or downplay a political appointee's participation in torture, destruction of evidence, and attendant conflicts of interest—is of profound public importance and could be embarrassing to Ms. Haspel or other senior CIA officials. Therefore, to ensure that the agency has complied with sections 1.7(d) and 1.7(a)(2) of Executive Order 13526, any decision to classify information on Ms. Haspel's classification authority or conflict of interest should be subject to particularly close scrutiny. *See* Letter from Senators Harris, Wyden, Heinrich and Feinstein to Daniel Coats (May 4, 2018) (observing that Ms. Haspel's appointment as acting director placed her "in the conflicted position of serving as

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from other, non-exempt information.

the classification authority over potentially derogatory information related to her own nomination").

The CIA identifies five categories of information withheld under Exemption 1. Blaine Decl. ¶ 17. It defines one of these categories, "intelligence methods and activities," very broadly. *See* Blaine Decl. ¶ 21 ("Intelligence methods are the techniques and means by which an intelligence agency accomplishes its mission, to include how we train officers to accomplish the mission, and the classified internal regulations, approvals, and authorities that govern our conduct."). It is impossible to tell from this vague description whether or not the CIA has invoked Exemption 1 over the information in dispute: information concerning Ms. Haspel's classification authority over her own participation in the CIA's torture program, as well as information concerning internal agency discussions on the conflict of interest raised by Ms. Haspel's classification authority.

If the CIA has indeed withheld information on Ms. Haspel's classification authority and conflict of interest under Exemption 1, it has not sufficiently justified its withholdings. First, the classification authority of agency directors is public knowledge; plainly, Ms. Haspel's classification authority as Acting Director and then Director of the CIA is not itself classified. *See* E.O. 13526 § 1.3(a)(2) ("agency heads and officials designated by the President" exercise original classification authority). Second, the CIA has not identified or described any "damage to the national security," E.O. 13526 § 1.1(4), that might result from the disclosure of information concerning Ms. Haspel's classification authority or conflict of interest. While the Blaine Declaration states that disclosure of the "intelligence sources and methods" for which it claims Exemption 1 "would allow [foreign adversaries] to use countermeasures to undermine U.S. intelligence capabilities and render collection efforts ineffective," Blaine Decl. ¶ 21, it does not

plausibly link those consequences to the information at issue here. Thus, the agency has not carried its burden of establishing that the information at issue "logically fall[s] within the exemption." *Larson*, 565 F.3d at 864.

**Exemption 3.** Exemption 3 permits an agency to withhold responsive records if the agency shows that the records are "specifically exempted from disclosure by [a] statute" other than FOIA. 5 U.S.C. § 552(b)(3). Here, in relevant part, the CIA invokes Exemption 3 in concert with Section 102A of the National Security Act. Blaine Decl. ¶ 25. The pertinent provision of the National Security Act states that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1).

The Blaine Declaration's description of "intelligence sources and methods" is so vague that it is impossible to tell whether the agency has invoked Exemption 3 over information concerning Ms. Haspel's classification authority and conflict of interest. *See* Blaine Decl. ¶ 26 ("[T]here are some aspects of the manner in which the Agency protects its intelligence is [*sic*] itself an intelligence method that is unclassified—but nevertheless if disclosed would reveal sensitive intelligence sources and methods."). Here, too, if the CIA has withheld information on Ms. Haspel's classification authority and conflict of interest under Exemption 3, it has not sufficiently justified those withholdings. The agency does not cite, and the ACLU has not identified, any case supporting the proposition that information concerning a CIA official's public classification authority, and information on whether that authority raises a conflict of interest, constitutes an intelligence source or method within the meaning of the National Security Act. As a result, the CIA has not justified its Exemption 1 and 3 withholdings with regard to Ms. Haspel's classification authority and related conflict of interest in the context of Ms. Haspel's confirmation as CIA Director.

**III. The CIA fails to establish that it performed a proper segregability analysis.**

An agency cannot justify a broad withholding—including wholesale refusal to disclose a responsive document—"simply by showing that it contains some exempt material." *Mead*, 566 F.2d at 260. Rather, "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Id.* To ensure compliance with this requirement, an agency that withholds large swaths of information "should describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Id.* at 261; *see also Bloche*, 414 F. Supp. 3d at 51 (segregability requirement applies to documents released in part); *McKinley v. F.D.I.C.*, 756 F. Supp. 2d 105, 116 (D.D.C. 2010) (same). Doing so enables "both litigants and judges . . . to test the validity of the agency's claim that the non-exempt material is not segregable." *Mead*, 566 F.2d at 261. "A 'blanket declaration' that documents do not contain segregable material is insufficient." *McGehee v. Dep't of Just.*, 800 F. Supp. 2d 220, 238 (D.D.C. 2011) (citation omitted). As the D.C. Circuit has explained, "unless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts." *Mead*, 566 F.2d at 261.

While "[a]gencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007), that presumption is overcome when an agency's justifications for its withholdings "falls far short of the specificity required to justify non-segregation," *Hardy*, 243 F. Supp. 3d at 178. *See also Wilderness Soc. v. Dep't of Interior*, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) ("[F]or *each* [Vaugh index] entry the defendant is required to specify in detail which portions of the document are disclosable and which are allegedly exempt." (quotation marks omitted); *McGehee*, 800 F. Supp. 2d at 238 (absence of specific explanations in Vaughn

index defeats presumption of compliance by "render[ing] it impossible to evaluate" the agency's conclusion that withheld documents contain no segregable information).

Here, the presumption is overcome. The CIA's Vaughn index contains no references to segregability, and while the Blaine Declaration does refer to segregability, it does not explain in sufficient factual detail why all the information the agency withheld is not segregable and can be withheld. *See* Blaine Decl. ¶¶ 34, 39. Indeed, at its most specific, the Blaine Declaration's discussion of segregability is off base. To justify the agency's refusal to release redacted versions of hundreds of responsive records, the Blaine Declaration states that "much of the withheld information is subject to multiple, overlapping categories." Blaine Decl. ¶ 39. It goes on to say,

> For example, the information withheld pursuant to the deliberative process privilege of Exemption 5, also contains discrete pieces of classified information covered by Exemption 1 as well as the names of employees, and intelligence sources and methods that are protected by the Exemption 3 statutes—the CIA Act and the National Security Act.

But the fact that some responsive information is allegedly subject to withholding on multiple grounds says nothing about whether all withheld information is non-segregable. *See Bloche*, 414 F. Supp. 3d at 53 (when agency claims multiple FOIA exemptions but provides no way for the court or opposing party to identify which portions of which records are withheld under each exemption, the agency has not met its burden of establishing non-segregability).

Compounding the problem, the declaration's single "example" does not apply to all of the entries in the Vaughn index. Most egregiously, the Blaine Declaration sheds no light on Entry 129, which reads, in its entirety, "This document consists of a letter written in response to a Senator's inquiry with the attachment of an internal document. Exemptions (b)(3) (CIA Act) and (b)(6) were invoked to protect identifying information of CIA personnel (names, organization, functions, and official titles)." Entry 129 represents a 113-page record. The CIA's decision to

withhold all 113 pages of this record—rather than simply redact the identifying information of its personnel—is both conspicuous and completely unexplained.

Moreover, the Blaine Declaration's reference to overlapping exemptions does not describe the majority of entries in which the CIA has claimed Exemption 5. At least sixty-eight of the Vaughn entries for withheld-in-full records containing an Exemption 5 claim do *not* contain an Exemption 1 claim. At least forty of these do not contain claims for *either* classified information under Exemption 1 *or* intelligences sources or methods under Exemption 3.[27] And at least fourteen contain claims *only* under Exemption 5, with no overlap whatsoever.

The CIA's vague segregability assertions are especially problematic in light of its extensive invocations of the deliberative-process privilege. The question of segregability "is especially critical for the deliberative process privilege," *Bloche*, 414 F. Supp. 3d at 30, because the privilege "does not . . . protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations," *In re Sealed Case*, 121 F.3d at 737, or "the selection or organization of facts is part of an agency's deliberative process," *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011). The Blaine Declaration makes no serious attempt to address whether the records withheld under Exemption 5 and the deliberative-process privilege contain non-exempt factual information. It merely asserts that "to the extent there is any factual material" in the CIA's hundreds of pages of deliberative-process withholdings, "it is part and parcel of the deliberations and cannot be segregated," Blaine Decl. ¶ 34. The declaration further states that "[t]he selection of facts in these documents

[27] In other words, at least 40 entries—over a third of the entries for documents withheld in full—contain no claims relating to classified information or information that would reveal intelligence sources or methods, according to the CIA.

would reveal the nature of the preliminary recommendations and opinions preceding the final determinations." Blaine Decl. ¶ 34. These broad, categorical assertions of non-segregability are inadequate. *Gatore v. Dep't of Homeland Sec.*, 177 F. Supp. 3d 46, 52 (D.D.C. 2016) (declaration that discusses segregability in "categorical fashion" is insufficient because it prevents de novo review).

The general overbreadth of the agency's claimed exemptions, combined with its failure to specifically address the segregability of information in its withholdings (including the hundreds of pages of responsive records withheld in full), strongly suggests that the agency has not complied with its obligation to segregate and release non-exempt material. Accordingly, the Court should find that the agency has not satisfied FOIA's segregation requirement, and should instead require the agency to supplement the record with thorough and specific explanations of why the documents withheld in full cannot be released, at least in redacted form.

## CONCLUSION

The Court should deny the CIA's motion for summary judgment and order the agency to release its withheld documents or, at minimum, supplement the record with a revised declaration and Vaughn index that contain enough detail and specificity to enable meaningful review.

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Respectfully submitted,

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