UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.*, *Plaintiffs,* v. CENTRAL INTELLIGENCE AGENCY, *Defendant*.	Civil Action No. 18-2784 (CJN)

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs have failed to rebut the CIA's showing that it conducted a reasonable search for records responsive to Plaintiffs' FOIA request and that it properly applied FOIA exemptions. In their Opposition, Plaintiffs primarily challenge the agency's assertions of the deliberative process and the attorney-client privilege prongs of Exemption 5 to protect draft documents and other predecisional deliberations. Contrary to the Plaintiffs' arguments, the CIA's original declaration and *Vaughn* index are sufficient to support its assertion of these privileges. But to avoid any doubt on this question, the CIA has submitted a supplemental declaration and *Vaughn* index, which provide additional information regarding each of the records withheld. For the reasons discussed below, this additional information, together with the information previously submitted, makes clear that the agency has properly applied FOIA exemptions to withhold information protected from public disclosure. Accordingly, the Court should enter summary judgment for the CIA.

ARGUMENT

I. Defendant Complied with Its Obligations to Search for Responsive Information

Defendant's Motion explained that the agency conducted a search that was reasonably calculated to uncover all responsive documents. Mot. at 5-7. Plaintiffs have not challenged the search and, therefore, Defendant is entitled to summary judgment on the adequacy of its search.

II. Defendant Properly Withheld Information Under Exemption 5

A. Plaintiffs Overstate the Degree of Detail Required to Justify Withholdings Under Exemption 5

As an initial matter, Plaintiffs overstate the degree of detail with which the agency must discuss each document subject to the deliberative process privilege. Plaintiffs draw from a handful of cases that found the government's showing insufficient in a particular case to assert the existence of inflexible general rules about how the government must demonstrate that the

privileges apply in every case. Opp'n at 10-32. Contrary to Plaintiffs' assertion, however, there is no strict rule regarding the format by which the government must justify its Exemption 5 withholdings, nor any requirement that the government always provide the types of details demanded by Plaintiffs. *See, e.g., Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 131 (D.D.C. 2016) (rejecting argument that agency must specify the individuals who "received, reviewed or authored" the withheld drafts and explain "what their respective positions are in the decisional hierarchy" because "[t]here is no categorical rule that an agency must provide such detail to assert the deliberative process privilege"). Rather, an agency's submissions must be "sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology, Inc. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979); *see also Judicial Watch, Inc. v. U.S. DOD*, 715 F.3d 937, 941 (D.C. Cir. 2013) ("Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears ''logical' or 'plausible.'"); *Competitive Enter. Inst.*, 161 F. Supp. 3d at 131 ("What is essential is that an agency provide information sufficient to allow a court to determine that the document is part of a deliberative process."). As Plaintiffs themselves acknowledge, "the deliberative process privilege is so dependent upon the individual document[.]" Opp'n at 12. Accordingly, the showing necessary to establish the applicability of the privilege will vary from case to case. As detailed further below, the declarations and *Vaughn* index submitted by the agency in this case provide more than enough information to justify the agency's withholdings.

B. The CIA Properly Withheld Draft Documents and Discussions About Drafts Under the Deliberative Process Privilege

1. Courts Routinely Affirm the CIA's Withholdings of Draft Documents Based on Similar Showings As Made Here

The inflexible general rules that Plaintiffs would have this Court apply are especially inapplicable here, where the vast majority of the withheld records are draft documents or

deliberations about those drafts.[1] Such materials are quintessentially deliberative and pre-decisional and, therefore, their exempt status is apparent. Indeed, "[d]raft documents, by their very nature, are typically predecisional and deliberative," *Blank Rome LLP v. Dep't of the Air Force*, No. 15-1200, 2016 U.S. Dist. LEXIS 128209, at *14 (D.D.C. Sept. 20, 2016), and the D.C. Circuit has held that drafts "reflect advisory opinions that are important to the deliberative process." *Krikorian v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993). In affirming the application of the deliberative process privilege to a draft letter, one court explained that the draft was "precisely the type of document that would come within this privilege." *Brown v. Dep't of State*, 317 F. Supp. 3d 370, 376-77 (D.D.C. 2018). And, "courts in this District have held, in many instances, that drafts are protected by the deliberative process privilege." *Competitive Enter. Inst.*, 161 F. Supp. 3d at 129-30 (citing cases). Accordingly, "[a]s a general rule, draft documents likely are to be protected under the deliberative process[.]" *Radiation Sterilizers, Inc. v. U.S. Dep't of Energy*, 1991 U.S. Dist. LEXIS 4669, *10 (D.D.C. April 9, 1991).[2]

Here, the agency has sufficiently demonstrated that the drafts it withheld are privileged, as drafts typically are. The agency's *Vaughn* index lists numerous draft documents, including "draft talking points to address Senate inquiries;" "draft responses to Senate inquiries addressed to Ms. Haspel as the nominee for CIA director;" a "draft document regarding Ms. Haspel's opening statement before the U.S. Senate Select Committee on Intelligence;" a "draft biographical

[1] Of the 112 documents withheld in full or in part under the deliberative process privilege, 90 are draft documents and/or discussions about draft documents. *See* Suppl. Index at entries 17-18, 20-31, 33, 35-37, 39-46, 48-52, 54-56, 58, 60-62, 67-74, 76-84, 86-87, 89-90, 92, 94-95, 97, 100-107, 109, 110-125, 127, 128.

[2] Likewise, it is well-settled that "the drafting process is itself deliberative in nature." *Skull Valley Band of Goshute Indians v. Kempthorne*, 2007 U.S. Dist. LEXIS 21079, *46 (D.D.C. Mar. 26, 2007); *see also Competitive Enter. Inst.*, 161 F. Supp. 3d at 132 ("The deliberative process privilege protects not only the content of drafts, but also the drafting process itself."). Thus, documents reflecting deliberations about the contents of the withheld drafts are also privileged.

document regarding Ms. Haspel as nominee for CIA Director;" and "a draft letter written in response to a Senator's inquiry." *See* Suppl. Index at entries 26, 37, 45, 76, 81.

The Blaine Declaration provides further description of the documents, explaining that they "reflect the CIA's internal and confidential decision-making process during Ms. Haspel's nomination process for CIA Director." Blaine Decl. ¶ 31. The documents "do not convey final Agency viewpoints on a particular matter, but rather reflect different considerations, opinions, and approaches that preceded the Agency's final decision regarding the nomination process." *Id*. In addition:

> These documents 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. For example, the Agency continually received inquiries from the Senate regarding Ms. Haspel as the nominee for CIA Director, and as the inquiries were received they offered new perspectives that directly influenced the direction or scope of the Agency's support as it provided responses, handled subsequent press inquiries and public reaction, prompted new or different areas of focus, or raised new areas for consideration and additional guidance.

Id. ¶ 32.

Disclosing the drafts would "reveal the Agency's decision-making processes by showing precisely what information and considerations . . . were deliberated in the course of the Agency's work conducted to garner and encourage Congressional and public support for Ms. Haspel's nomination as CIA Director." *Id*. ¶ 33. The documents "reflect the deliberative process that the Agency navigated to determine how best to support the CIA Director nomination" and would reveal "which details were considered significant or what weight was accorded to certain pieces of information" and also "whether certain available information was, or was not, utilized or selected for inclusion in the final analysis[.]" *Id*. The agency provided still further detail in the Supplemental Blaine Declaration, which describes draft responses to Senate inquiries, draft written material in support of Ms. Haspel's nomination, and draft written responses regarding how to

address media inquiries concerning Ms. Haspel's nomination, and the roles those documents played in the agency's decisionmaking processes. Suppl. Blaine Decl. ¶¶ 3-8.

In fact, the agency has provided at least as much detail, if not more, as the *Vaughn* indexes and declarations found to be sufficient in other Exemption 5 cases involving the CIA. For example, in *National Security Counselors v. CIA*, 206 F. Supp. 3d 241 (D.D.C. 2016), the court ruled that the CIA had "met its burden of demonstrating that the agency properly invoked Exemption 5 in withholding" certain drafts because the agency "explained that each document is a 'pre-decisional draft,' which includes 'deliberative communications' that do not reflect a final agency decision or policy[.]" *Id*. at 279 (internal citation omitted); *see also* Ex. A (excerpts from *Vaughn* index showing entries 340, 341, 342, and 351, which were upheld as sufficient); Ex. B (excerpt from agency declaration containing paragraph cited by the court). The plaintiff challenged that specific ruling on appeal, *see National Security Counselors v. CIA*, No. 18-5047, Doc. No. 1772106, at 61 (D.C. Cir.) (arguing that "CIA's justifications for withholding alleged 'draft' reference or training documents is impermissibly conclusory"), and the D.C. Circuit affirmed, 969 F.3d 406, 412 (D.C. Cir. 2020).

Similarly, the court in *ACLU v. DOD*, 2017 U.S. Dist. LEXIS 159108 (S.D.N.Y. Sep. 27, 2017) sustained the CIA's Exemption 5 withholdings as applied to several draft documents and communications about drafts. *See id*. at *21-22, 33-34, 35, 38-40 (discussing documents 6, 18, 28, 43-46). The *Vaughn* index in that case was no more detailed that the index in this case. *See* Ex. C (excerpts from *Vaughn* index). Also instructive is *James Madison Project v. DOJ*, 208 F. Supp. 3d 265 (D.D.C. 2016), in which the court approved the CIA's withholding of various draft documents based on the following statement in the agency declaration:

> CIA invoked the deliberative process privilege to withhold *draft* versions of various memoranda, letters, charts and other documents *which contain comments, or*

> *tracked changes*, made in connection with inter and intra-agency *pre-decisional* discussions.

Id. at 290 (emphasis in opinion). The court emphasized that the declaration was "extremely clear that the records are drafts used in pre-decisional discussions" and "draft records have routinely been protected from FOIA using the deliberative process privilege." *Id*. at 290-91; *see also* Ex. D (excerpts from declaration); Ex. E (*Vaughn* index).

In addition, the CIA's *Vaughn* index and declaration are consistent with language the D.C. Circuit has deemed sufficient to support the CIA's assertion of the deliberative process privilege. *See, e.g.*, *Whitaker v. Department of State*, No. 14-5275, 2016 U.S. App. LEXIS 1086, at *4 (D.C. Cir. Jan. 21, 2016) (affirming privilege assertions on the basis of CIA declaration, which "characterize[ed] the documents as 'predecisional deliberations by [CIA] personnel regarding the nature of information retrieved, the scope of legal exemptions, the application of exemptions to particular material, or making recommendations related to final Agency determinations.'").

As these examples show, courts have repeatedly deemed the CIA's *Vaughn* indexes and declarations – which were no more detailed than those submitted here – sufficient to justify Exemption 5 withholdings. Plaintiffs do not explain why the outcome should be any different in this case. Instead, Plaintiffs argue that "an agency's mere representation that a document is a draft" is insufficient. Opp'n at 21. But the CIA has done more than merely representing that certain documents are drafts. As shown above, the CIA has provided information about the drafts to demonstrate their pre-decisional and deliberative character. No more is required to show that the materials are privileged, as the numerous cases cited above establish.[3]

[3] Plaintiffs note that, in some of the cases cited in Defendants' motion in which courts upheld the application of Exemption 5 to draft documents, the court had conducted an *in camera* review of the documents. Opp'n at 22 n.16. But that does not undermine the points for which those cases were cited, such as that "[d]raft documents, by their very nature, are typically predecisional and deliberative[.]" Mot. at 15. Moreover, as shown above, courts routinely affirm the CIA's

Plaintiffs also speculate that the withheld drafts may have been "adopted formally or informally, as the agency position on an issue" or "used by the agency in its dealing with the public." Opp'n at 22. But the agency explained that the documents withheld under the deliberative process privilege "do not convey final Agency viewpoints on a particular matter," "do not reveal a final decision," and "reflect the CIA's *internal* and *confidential* decision-making process[.]" Blaine Decl. ¶¶ 31, 33 (emphasis added); *see also* Suppl. Blaine Decl. ¶¶ 4-7 (documents withheld under the deliberative process privilege "did not express a final decision").

2. The CIA Has Adequately Identified the Deliberative Process and the Withheld Documents' Role in the Decisionmaking Process

Plaintiffs claim that the agency did not "identify the deliberative process to which each of its withholdings pertains" or the documents' "role in any decisionmaking process." Opp'n at 13, 20. That is plainly incorrect. A draft is inherently pre-decisional and deliberative with respect to a decision regarding the contents of the final document, and disclosure would reveal details of government officials' preliminary thoughts and ideas regarding what information to include in the document. For example, a "draft letter" is "predecisional to the final letter" and "part of the deliberative process which led to the creation of the final letter." *Radiation Sterilizers*, 1991 U.S. Dist. LEXIS 4669, *17; *see also Brown*, 317 F. Supp. 3d at 377 ("This draft letter appears to have been developed as part of a pre-decisional and deliberative process leading up to the drafting and transmission of a final letter, and as such is precisely the type of document that would come within this privilege."); *Competitive Enter. Inst.*, 161 F. Supp. 3d at 130 ("The drafts plainly were predecisional—they preceded in time the final version of OSTP Letter. And they were deliberative—they reflect the opinions, reactions, and comments of OSTP employees to the OSTP

Exemption 5 withholdings on the basis of *Vaughn* indexes and declarations similar to here, without conducting *in camera* review. *See supra* at 5-6.

Letter."). Indeed, the D.C. Circuit has long held that an official's "editorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis"—qualify as deliberative material subject to the privilege. *Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1123 (D.C. Cir. 1989). In other words, the drafting process itself is deliberative and the drafts withheld by the CIA represent an intermediate step in the drafting process that contain non-final recommendations and proposals for the content of the final document.

Notably, Plaintiffs' own cited authority indicates that the agency has adequately identified the nature of the deliberative process here. In *Protect Democracy Project, Inc. v. HHS*, 370 F. Supp. 3d 159 (D.D.C. 2019), which Plaintiffs repeatedly cite, the court listed examples of *Vaughn* entries that adequately identified the nature of the deliberative information. Similar to here, those entries identified "recommendations (1) concerning 'how to respond to questions from the press, along with draft press release and talking points,' (2) concerning 'the agency's response to a letter from the Governor of Minnesota,'; and (3) reflecting 'a draft of an instruction to a government contractor.'" *Id*. at 170 (internal citations omitted).

Plaintiffs misstate the agency's position by asserting 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[.]" Opp'n at 14. That is not the agency's position. Although the agency appropriately described the relationship between the deliberative documents and the agency's efforts to support Ms. Haspel's nomination, the agency also identified subsidiary deliberations to which the documents relate. *See supra* at 3-4; *see also Sierra Club v. DOI*, 384 F. Supp. 2d 1, 20 (D.D.C. 2004) (agency identified "the over-arching 'policy'" to which the draft documents pertained, as well as "the specific 'decision'" which "was how best to respond to a related congressional inquiry"). Indeed, with regard to at least some of the entries in the *Vaughn*

index, Plaintiffs concede that the entries do reflect "the existence of specific subsidiary decisions," such as how to respond to a Senate inquiry. Opp'n at 16. Plaintiffs nevertheless complain that the entries do not reveal "detail on the Senate inquiries in question" such as their "quantity or timing." Opp'n at 17. But Plaintiffs cite no authority requiring the government to provide such details, and they do not explain why such information would be necessary to evaluate the privilege assertions.

3. The CIA Is Not Required to Disclose Information About the Authors and Recipients of the Withheld Documents

Plaintiffs also contend that "an agency asserting the deliberative-process privilege must explain the decisionmaking authority of the people involved in authoring and commenting on any withheld records." Opp'n at 23. Specifically, Plaintiffs insist that the CIA identify "the positions and responsibilities of the authors and recipients" of the withheld records. *Id*. at 23-24. Plaintiffs cite no cases requiring the CIA to disclose such information, nor could they. The Central Intelligence Agency Act of 1949 provides that the CIA shall be exempted from any law requiring "the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the [CIA]." 50 U.S.C. § 3507. Therefore, to the extent the FOIA could be interpreted to require the CIA to disclose in a *Vaughn* index sensitive information such as the identities, titles, and responsibilities of CIA personnel, the CIA Act would create an exemption. *See Whitaker v. CIA*, 64 F. Supp. 3d 55, 62 (D.D.C. 2014) (CIA Act protects information including "the names of [CIA] employees, personal identifiers, official titles, file numbers, and internal organizational data").

Apart from the protections of the CIA Act, courts have specifically rejected the argument that an agency must always provide information about recipients and authors in order to justify a deliberative process privilege assertion. *See Competitive Enter. Inst.*, 161 F. Supp. 3d at 131 (rejecting argument that agency must specify the individuals who "received, reviewed or authored"

the withheld drafts and explain "what their respective positions are in the decisional hierarchy" because "[t]here is no categorical rule that an agency must provide such detail to assert the deliberative process privilege"); *Odland v. FERC*, 34 F. Supp. 3d 3, 17 (D.D.C. 2014) (upholding assertion of privilege, noting that "the actual names of the agency staff who wrote and received these emails is not critical to a determination regarding whether the deliberative process privilege applies," and deeming "baseless" the argument that, among other things, "names or titles for each author and recipient of each document" needed to be provided).

Such information is not necessary to determine whether a draft document is or is not privileged. For example, in *National Security Counselors*, the court upheld the CIA's deliberative process privilege assertions over drafts while noting that the CIA did not identify the "agency personnel involved in the drafting and editing process." 206 F. Supp. 3d at 279. The court explained that "the chilling risk associated with disclosure of predecisional drafts 'arises from disclosure that the [agency] as an institution made changes in a draft at some point—not from disclosure that particular [agency] employees at particular stages in the editorial process made such changes.'" *Id*. Also, "[d]rafts typically 'reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.'" *Radiation Sterilizers*, 1991 U.S. Dist. LEXIS 4669, at *10. Therefore, even if the drafts withheld by the CIA were authored by an official with final decisionmaking authority, the drafts would still be privileged because they would represent only a tentative view of the agency's position.

C. The CIA Properly Withheld Other Documents Under the Deliberative Process Privilege

In addition to draft documents, the CIA also withheld other documents under the

deliberative process privilege.[4] As with the drafts, the CIA has provided more than sufficient description to justify the withholding of those documents under Exemption 5.

The D.C. Circuit's decision in *Whitaker* is instructive. There, the CIA withheld under the deliberative process privilege various documents related to the processing of the plaintiff's earlier FOIA request. The D.C. Circuit found that the record "including the CIA's affidavit and the *Vaughn* index—supports the CIA's application of the privilege." 2016 U.S. App. LEXIS 1086, at *4. The withheld documents "pre-dated the CIA's ultimate disposition of appellant's requests and reflect the 'give-and-take' at the core of the deliberative process privilege." *Id*. As support, the court quoted from the agency's declaration, which "characteriz[ed] the documents as 'predecisional deliberations by [CIA] personnel regarding the nature of information retrieved, the scope of legal exemptions, the application of exemptions to particular material, or making recommendations related to final Agency determinations.'" *Id*. "That," the court said, "is enough to resolve the matter." *Id*.[5]

Here, the CIA has provided at least as much detail as was held sufficient by the D.C. Circuit in *Whitaker*. For example, the agency's *Vaughn* index identifies email exchanges about "Senate inquiries addressed to Ms. Haspel as the nominee for CIA Director" in which agency personnel offer "assessments concerning how to respond to the Senate inquiries." Suppl. Index at entries 32, 38. That is sufficient to show the privileged nature of the communications under *Whitaker* and various other decisions as well. *See, e.g., Sierra Club*, 384 F. Supp. 2d at 19-20 (documents were "privileged under Exemption 5 because they constitute recommendations from staff as to how

[4] *See* Suppl. Index at entries 2, 19, 32, 38, 47, 53, 57, 59, 63-66, 75, 85, 88, 91, 93, 96, 98, 99, 108, 126.

[5] Excerpts from the CIA's *Vaughn* index and declaration from *Whitaker* are attached as Exhibits F and G.

agency officials might handle congressional inquiries"). And, contrary to Plaintiffs' argument (Opp'n at 13), the CIA has sufficiently identified the specific decision to which the documents relate. *Compare* Suppl. Index at 32 ("This document contains assessments concerning how to respond to the Senate inquiries."), *with Sierra Club*, 384 F. Supp. 2d at 20 ("[T]he specific 'decision' was how best to respond to a related congressional inquiry.").

Similarly, the *Vaughn* index identifies numerous documents relating to whether and how to respond to inquiries from the news media. *See, e.g.*, Suppl. Index at entries 2, 19, 53, 57, 59, 63, 64. In their Motion, Defendants cited several opinions in which courts have held that such deliberations are privileged, *see* Mot. at 15, and Plaintiffs' opposition addresses none of them. Other documents withheld by the agency under Exemption 5 relate to deliberations about classification issues, such as the proper "classification of specific information," "possible release" of a document, and "recommendations for document classification[.]" Suppl. Index at entries 65, 75, 91, 93, 96, 98, 99, 108. Still other documents involve deliberations about "how to respond to an internal request for information regarding Ms. Haspel in support of her nomination for CIA Director," "whether to document the basis for a particular decision," and "whether to include particular information in a publication." *Id*. at entries 47, 88, 126. Accordingly, the agency has sufficiently established that the information withheld is subject to the deliberative process privilege.

D. The CIA Properly Withheld Materials Protected by the Attorney-Client Privilege

Plaintiffs also attempt, but fail, to rebut Defendant's assertions of the attorney-client privilege. Plaintiffs concede that Defendant's *Vaughn* index explains that the records for which the attorney-client privilege was asserted contain a "legal assessment" or "legal advice," but they nevertheless assert that Defendant has not shown "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." Opp'n at 27.

The attorney-client "privilege has consistently included communications of the attorney to the client[.]" *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 254 n.25 (D.C. Cir. 1977). The D.C. Circuit has held "that the privilege cloaks a communication from attorney to client based, in part at least, upon a confidential communication [to the lawyer] from [the client]." *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (internal quotation marks omitted); *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) (the privilege applies to attorney communications that are "based on or related to confidences from the client"); Edward J. Imwinkelried, The New Wigmore: Evidentiary Privileges § 6.6.4 & n.113 (2012) (citing D.C. Circuit cases as adopting "[t]he intermediate view" "that the privilege attaches to any communication by the professional that, in a broad sense, is 'based upon a privileged communication from the client'").[6]

The CIA has reasonably established that the withheld records include, *inter alia*, attorney communications that are based upon confidential communications from the client agency. The Blaine Declaration explains that the agency withheld "confidential communications between Agency officials or Agency personnel and attorneys within the CIA's Office of General Counsel." Blaine Decl. ¶ 35. Specifically, "Agency employees requested legal advice related to responses to

[6] Plaintiffs appear to acknowledge this legal standard, *see* Opp'n at 27 (citing *In re Sealed Case*, 737 F.2d at 99), but they elsewhere suggest that a different standard applies. *See* Opp'n at 32 (arguing that the attorney-client privilege protects only "underlying facts" but not attorney opinions). However, so long as a communication from a lawyer to a client was "'based, in part at least, upon a confidential communication [to the lawyer] from [the client]," it is privileged, including the lawyer's opinions. *See In re Sealed Case*, 737 F.2d at 99 (holding that a communication meeting this standard is privileged even though "advice prompted by the client's disclosures may be further and inseparably informed by other knowledge and encounters.").

Senate inquiries and certain proposed courses of action" and the "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." *Id.*; *see also* Suppl. Blaine Decl. ¶ 9 (the attorney-client communications, including the legal guidance and underlying CIA information, are confidential). The *Vaughn* index provides further description of the records, explaining, for instance, that a particular communication concerns "draft responses to Senate inquiries," "contains recommendations and assessments of proposed draft responses," and consists of a "legal assessment provided by a CIA attorney," Suppl. Index at entry 36; that another communication "provid[es] a legal position on an issue concerning how to respond to a media inquiry," *id*. at entry 64, and that another "discuss[es] whether to document the basis for a particular decision," includes "recommendations and assessments," and "consists of a legal assessment provided by a CIA attorney," *id*. at entry 88. Thus, the legal advice contained in these documents is exactly the sort of communication "for the purpose of obtaining or providing legal advice" protected by the attorney-client privilege. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014).

Plaintiffs attack the agency's justification as "cursory." Opp'n at 27. But Plaintiffs do not explain what additional relevant information the agency could provide without disclosing the privileged contents of the communications. *See Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) ("An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information[.]"). Nor do Plaintiffs identify any reason to question the accuracy of Defendant's declarations describing the confidential nature

of the communications.[7]

Moreover, the agency justification here is consistent with the justifications provided in other cases in which courts approved the application of the attorney-client privilege. For instance, in *ACLU*, the same Plaintiff as here made the same arguments in an attempt to challenge the sufficiency of the CIA's attorney-client privilege assertions in that case. *See* 2017 U.S. Dist. LEXIS 159108, at *10 ("The ACLU relies on decisions from the D.C. Circuit to argue that the attorney-client privilege applies only to the extent necessary 'to protect the secrecy of the underlying facts.'"). But the court found that the CIA had properly applied the privilege to certain withholdings, including documents described in the *Vaughn* index as "email exchanges between CIA attorneys and CIA Office of Public Affairs personnel providing legal advice on draft talking points related to the interrogation program," and a document described as "email exchanges between CIA attorneys and legal staff containing comments on OPA's draft press briefing." *Id*. at *38-39. The court's *in camera* review further confirmed that the withheld material was indeed privileged. *Id*. at *39; *see also Protect Democracy Project, Inc. v. U.S. HHS*, 370 F. Supp. 3d 159, 174 (D.D.C. 2019) (agency adequately justified attorney-client privilege assertion where it "attested that the redacted communications were 'confidential' and that they were either for the purpose 'of obtaining legal advice' or to disseminate and discuss that advice with other agency officials" "[a]nd it has explained that the advice at issue related to 'any legal ramifications related to . . . discontinuing [the] advertisements for healthcare.gov.'"); *In re Sealed Case*, 737 F.2d at

[7] Notably, the requirement that an attorney's communication of legal advice "rest on confidential information obtained from the client," "does not require that the 'confidential information' obtained from the client is, for example, trade secret or other 'secret' information." *Minebea Co. v. Papst*, 229 F.R.D. 1, 2-3 (D.D.C. 2005). "Rather it requires that the communication from attorney to client rest on a previous communication made by the client 'in confidence' that would be directly or indirectly revealed were the communication from attorney to client made public." *Id*.

101 (attorney-client privileged protected conversations between attorney and client where the attorney "rendered legal advice based, at least in part, on Company confidential information previously disclosed to him"; internal citations omitted).[8]

Even were the Court to disagree with the agency regarding any of its attorney-client privilege assertions, the material still would be protected under the deliberative process privilege. The documents at issue here involve, *inter alia*, legal advice and assessments and, as the D.C. Circuit has explained, "[t]here can be no doubt that such legal advice, given in the form of intra-agency memoranda prior to any agency decision on the issues involved, fits exactly within the deliberative process rationale for Exemption 5." *Brinton*, 636 F.2d at 604; *see also Brown*, 317 F. Supp. 3d at 378 (where "documents contained communications of legal advice sent from government attorneys to their clients," they were "clearly privileged" under the deliberative process privilege); *Hardy v. Bureau of Alcohol*, 243 F. Supp. 3d 155, 169 (D.D.C. 2017) (documents containing "opinions on legal or policy matters" "are clearly 'deliberative' in nature and non-disclosure is permissible under Exemption 5").

Lastly, although Plaintiffs contend that Defendant "fails to specifically describe which portions of its withholdings are subject to which privilege," Opp'n at 32, the Blaine Declaration states that "the Agency asserted the attorney-client privilege, in conjunction with the deliberative process privilege, to protect confidential communications between Agency officials or Agency personnel and attorneys within the CIA's Office of General Counsel." Blaine Decl. ¶ 35. Thus,

[8] Plaintiffs state that "at least eight of the Vaughn entries containing attorney-client claims make no reference to communications with an attorney or attorney's agent[.]" Opp'n at 28 (citing entries 37, 80, 9395, 98, 99, 101. Those entries stated that the documents contained "legal advice" or a "legal assessment," and Defendant has now clarified, in the Supplemental Index, that the documents do contain communications with attorneys, except for entry 37, for which the attorney-client privilege assertion has been withdrawn.

the agency asserted both privileges over the same communications, which is unsurprising given that both privileges readily apply to "documents containing legal opinions and advice[.]" *Mead Data*, 566 F.2d 254 at n.28. For such documents, "there is no doubt a great deal of overlap between the attorney-client privilege component of exemption five and its deliberative process privilege component." *Id*.

III. The CIA Has Adequately Demonstrated Foreseeable Harm

Plaintiffs fail to rebut Defendant's articulations of harm that would flow from disclosure of the material withheld under Exemption 5. Opp'n at 33-38. The pertinent statutory provision requires only that the agency "reasonably foresee[] that disclosure would harm an interest protected by [a FOIA] exemption." 5 U.S.C. § 552(a)(8)(A)(i). As discussed below, there can be no serious dispute that (1) CIA has identified interests protected by Exemption 5 and (2) CIA reasonably foresees harm to those interests if the withheld material were disclosed. Nothing more is required by Section 552(a)(8)(A)(i).

With regard to the agency's withholdings pursuant to the deliberative process privilege, the Blaine Declaration states that Ms. Blaine is "familiar with all of the documents withheld in full and in part pursuant to the deliberative process privilege," and that "[d]isclosure of any of these documents would inhibit the frank communications and free exchange of ideas that the privilege is designed to protect." Blaine Decl. ¶ 34. "If the withheld information were released, CIA employees may hesitate to offer their candid opinions to superiors or coworkers, and such self-censorship would tend to degrade the quality of Agency decisions." *Id*. More specifically:

> If the information documented in the withheld records[] were disclosed it would reveal the Agency's decision-making process throughout the course of the nomination by revealing which details were considered significant or what weight was accorded to certain pieces of information. It would also reveal that whether certain available information was, or was not, utilized or selected for inclusion in the final analysis, which ultimately would open the Agency's deliberative process

> to public scrutiny on decisions that were not final thereby chilling the free flow of discussion in agency decision-making. All of these details would reveal the deliberations underlying the final conclusions of Agency personnel.

Id. ¶ 33.

The Blaine Declaration also explains that "revealing this information could mislead or confuse the public by disclosing rationales that were not the basis for the Agency's final decisions." *Id*. ¶ 34.

Thus, the CIA plainly has identified "an interest protected by [Exemption 5.]" 5 U.S.C. § 552(a)(8)(A)(i). It is settled that an objective of the deliberative process privilege "is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *Dep't of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8-9 (2001); *see also Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (the "deliberative process privilege . . . serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism"). Another purpose of the privilege is "to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Coastal States*, 617 F.2d at 866. The Blaine Declaration identifies both of those interests.

Moreover, the CIA "reasonably foresees that disclosure would harm" those interests. 5 U.S.C. § 552(a)(8)(A)(i). The Blaine Declaration explains that, "[d]isclosure of any of these documents would inhibit the frank communications and free exchange of ideas that the privilege is designed to protect." Blaine Decl. ¶ 34 (emphasis added); *see also id*. ¶ 33 (disclosure "would open the Agency's deliberative process to public scrutiny on decisions that were not final thereby chilling the free flow of discussion in agency decision-making"). Ms. Blaine's determination that

disclosure would harm the agency's deliberative process is plainly reasonable. *Klamath Water Users,* 532 U.S. at 8-9 ("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news.").

Although Plaintiffs claim that these statements are "boilerplate," Opp'n at 35, recent D.C. Circuit precedent makes clear that statements of the type CIA provided here suffice. In *Machado Amadis v. United States Department of State*, 971 F.3d 364 (D.C. Cir. 2020), the D.C. Circuit ruled that an agency had satisfied the foreseeable harm requirement based on agency representations similar to those in the Blaine Declaration. The agency affidavit in *Machado Amadis* "adequately explained that full disclosure of the [records at issue] would discourage line attorneys from 'candidly discuss[ing] their ideas, strategies, and recommendations,' thus impairing 'the forthright internal discussions necessary for efficient and proper adjudication of administrative appeals.'" 971 F.3d at 371. The court held that "[s]uch chilling of candid advice is exactly what the privilege seeks to prevent." *Id*. The court further explained that an agency will satisfy the "governing legal requirement," if it explains that it has "specifically focused on 'the information at issue' in the [records] under review, and . . . concluded that disclosure of that information 'would' chill future internal discussions." *Id*. As discussed above, the Blaine declaration specifically focuses on the information at issue, *see* Blaine Declaration ¶ 34 (stating that Ms. Blaine is "familiar with all of the documents withheld in full and in part pursuant to the deliberative process privilege," and describing the harm from the "[d]isclosure of any of these documents"), and concludes that disclosure "would" chill future internal discussions, *id*. ¶¶ 33-34.

Since *Machado Amadis* was decided, district courts have relied on that ruling to find that agencies have satisfied the foreseeable harm requirement based on similar declarations to what the

CIA offers here. For example, in *National Immigration Project of the National Lawyers Guild v. Immigration and Customs Enforcement*, No. 17-2448, 2020 U.S. Dist. LEXIS 178774, at *14-15 (D.D.C. Sep. 29, 2020), Judge Mehta found sufficient the following statement in an agency declaration: "The release of this non-final internal information . . . would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel," which, in turn, "would result in a chilling effect on intra- and inter-agency communications." Although, as here, the plaintiffs dismissed the statement "as mere boilerplate language," Judge Mehta noted that the agency "declarations are at least as detailed as those in *Machado Amadis*[.]" *Id*. at *15; *see also Judicial Watch, Inc. v. U.S. DOJ*, No. 17-0832, 2020 U.S. Dist. LEXIS 171731, at *13-15 (D.D.C. Sep. 18, 2020) (finding similar agency affidavit to here satisfied the *Amadis* standard and noting that the affidavit was "arguably *more particularized* than the OIP affidavit in *Machado Amadis*").

Despite *Machado Amadis* being the only D.C. Circuit decision to address the foreseeable harm requirement, Plaintiffs barely mention it. Instead, they rely primarily on two district court decisions, both of which predate *Machado Amadis*. Opp'n at 33-38. Even assuming those decisions are still good law, neither suggests that CIA failed to meet the foreseeable harm requirement. The court in *Center for Investigative Reporting v. U.S. Customs & Border Protection*, 436 F. Supp. 3d 90, 107 (D.D.C. 2019) required the agency to provide "context or insight into the specific decision-making processes or deliberations at issue, and how they in particular would be harmed by disclosure." The CIA provided that context here when it explained that release of the withheld information "would reveal the Agency's decision-making process throughout the course of the nomination by revealing which details were considered significant or what weight was accorded to certain pieces of information" and "would also reveal that whether

certain available information was, or was not, utilized or selected for inclusion in the final analysis, which ultimately would open the Agency's deliberative process to public scrutiny on decisions that were not final thereby chilling the free flow of discussion in agency decision-making." Blaine Decl. ¶ 33.

Similarly, the court in *Judicial Watch, Inc. v. Department of Commerce*, 375 F. Supp. 3d 93, 101 (D.D.C. 2019) noted that the "mere possibility that disclosure discourages a frank and open dialogue," was insufficient to show that the agency reasonably foresees harm. "In other words, the [FOIA Improvement Act] requires more than speculation," which the Court found was "all that [the agency had] provided through its declarations and *Vaughn* indexes." *Id*. at 101. *Machado Amadis* makes clear, however, that an agency satisfies the applicable standard where it concludes, as the CIA did here, "that disclosure of that information 'would' chill future internal discussions." *Machado Amadis*, 971 F.3d at 371.

As for the agency's withholdings pursuant to the attorney-client privilege, the Blaine Declaration states if the confidential attorney-client communications were disclosed, "it would subject the legal guidance to scrutiny and reveal preliminary legal risk analysis and strategy." Blaine Decl. ¶ 35. In response, Plaintiffs contend that it is only the "secrecy of the underlying facts" that matters, not the legal advice provided by counsel. Opp'n at 38. That is incorrect. "While its purpose is to protect a client's disclosures to an attorney, the federal courts extend the privilege also to an attorney's written communications to a client, to ensure against inadvertent disclosure, either directly or by implication, of information which the client has previously confided to the attorney's trust." *Coastal States*, 617 F.2d at 862. Indeed, the Supreme Court long ago held that a purpose of the privilege is "to protect . . . the giving of professional advice to those who can act on it[.]" *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). The reason is

apparent – if the client knows that sensitive information "could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be more reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Thus, the encouragement of "full and frank communications between attorneys and their clients," which "promote[s] broader public interests in the observance of law and administration," would be undermined. *Upjohn*, 449 U.S. at 389; *see also In re Cty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (noting that "public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest" and noting that, "if anything, the traditional rationale for the [attorney-client] privilege applies with special force in the government context").

IV. The CIA Did Not Withhold Information Because it Related to Ms. Haspel's Original Classification Authority or Potential Conflicts of Interest

Plaintiffs argue that, "[i]f 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." Opp'n at 40; *see also id*. at 41 (arguing the same regarding Exemption 3). The Supplemental Blaine Declaration states that the CIA did not withhold any information on the ground that it related to Ms. Haspel's original classification or any potential conflicts of interest as a result of such authority. Suppl. Blaine Decl. ¶ 10. Where the agency withheld information responsive to Plaintiffs' request for records on these subjects, it did so because the records were otherwise exempt. *Id*.

V. Defendant Properly Produced All Segregable Records

An agency is "entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material." *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013) (quotation

marks omitted). Plaintiffs fail to rebut that presumption in this case. Although Plaintiffs rely on *Mead Data*, 566 F.2d at 261 (*see* Opp'n at 42), "more recent decisions form the D.C. Circuit have indicated that the standard first articulated in *Mead Data* has been relaxed." *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 207 (D.D.C. 2013) (discussing *Loving v. DOD*, 550 F.3d 32, 41 (D.C. Cir. 2008), and *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002)). Specifically, the D.C. Circuit has held that a *Vaughn* index that adequately describes the information withheld and the applicable exemptions, in conjunction with a declaration that the agency "released all segregable material," is sufficient for the court's segregability determination. *Loving*, 550 F.3d at 41; *accord Johnson*, 310 F.3d at 776. Here, the agency's declarant completed a document-by-document and line-by-line segregability review and determined that all reasonably segregable non-exempt information has been released. Blaine Decl. ¶ 39; Suppl. Blaine Decl. ¶ 11. Further, the agency has provided a detailed *Vaughn* index and two declarations explaining its withholdings.

Plaintiffs' arguments on segregability do not withstand scrutiny. Their contention that the *Vaughn* index itself must discuss segregability, Opp'n at 42-43, is belied by D.C. Circuit decisions finding that agencies had demonstrated compliance with segregability requirements through statements in a declaration. *See, e.g.*, *Johnson*, 310 F.3d at 776; *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 578 (D.C. Cir. 1996). And Plaintiffs' speculation that there may be segregable facts in the withheld records, Opp'n at 44, is contrary to the Blaine Declaration, which explains that "to the extent there is any factual material" in the documents over which the deliberative process privilege was asserted, "it is part and parcel of the deliberations and cannot be segregated." Blaine Decl. ¶ 34. Plaintiffs' argument also ignores that many of the documents over which the agency asserted the deliberative process privilege are drafts, and settled law protects the entirety of the drafts from disclosure. *See Charles v. Office of the Armed Forces Med.*

Exam'r, 979 F. Supp. 2d 35, 42 (D.D.C. 2013) (discussing *Russell v. Department of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982) and observing that, following *Russell*, "judges in this circuit have found that similar draft documents do not contain reasonably segregable material, and thus are properly withheld in their entirety."). "[E]ven though preliminary drafts may indeed contain 'factual' information, the ultimate decision to include or exclude facts and information in the final product reflects the deliberations of agency decisionmakers, which would be improperly exposed upon comparison of the preliminary and final versions." *Id.*; *see also Competitive Enter. Inst.*, 161 F. Supp. 3d at 132 ("Any effort to segregate the 'factual' portions of the drafts, as distinct from their 'deliberative' portions, would run the risk of revealing 'editorial judgments[.]'").[9]

Lastly, although Plaintiffs claim the CIA's statements regarding segregability lack "factual detail" and are "broad," Opp'n at 43, 45, courts routinely find segregability obligations satisfied based on similar statements to those presented here. *See, e.g.*, *ACLU v. CIA*, 109 F. Supp. 3d 220, 244 (D.D.C. 2015) (agency demonstrated compliance with segregability requirement based on similar statements as here); *Rosenberg v. DOD*, 442 F. Supp. 3d 240, 265-66 (D.D.C. 2020) (same); *Heartland All. for Human Needs & Human Rights v. U.S. Immigration & Customs Enf't*, 406 F. Supp. 3d 90, 128-29 (D.D.C. 2019) (same); *Am. Immigration Lawyers Ass'n v. U.S. Dep't of Homeland Sec.*, No. 16-cv-2470, 2020 U.S. Dist. LEXIS 159948, at *22-23 (D.D.C. Sep. 2, 2020) (same); *Touarsi v. DOJ*, 78 F. Supp. 3d 332, 350 (D.D.C. 2015) (same); *Dillon v. DOJ*, 102 F. Supp. 3d 272, 298 (D.D.C. 2015) (same); *Blackwell v. FBI*, 680 F. Supp. 2d 79, 96 (D.D.C. 2010) (same); *Adionser v. DOJ*, 811 F. Supp. 2d 284, 295 (D.D.C. 2011) (same).

[9] Plaintiffs suspect that entry 129 may contain segregable information because the initial *Vaughn* index listed it as a 113-page record. Opp'n at 43-44. But the Supplemental Blaine Declaration explains that the page count for that document was incorrect. Suppl. Blaine Decl. ¶ 2 n.1. The Supplemental *Vaughn* Index shows that it is actually an 11-page document.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court grant summary judgment in favor of Defendant.

Respectfully submitted,

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