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)

PLAINTIFFS' RESPONSE TO DEFENDANT'S SECOND SUPPLEMENTAL DECLARATION AND VAUGHN INDEX

On July 8, 2021, the Court "note[d] that Defendant may wish to supplement its [31-1] Vaughn Index and/or [25-2], [29-1] Declarations in light of *Reporters Comm. for Freedom of the Press v. FBI*," 3 F.4th 350 (D.C. Cir. 2021), and permitted Plaintiffs to respond to any supplemental submissions. Min. Order of July 8, 2021. On August 24, the CIA supplemented both the index and the declarations it had previously offered. *See* ECF No. 40.[1] In addition, the CIA released portions of six records it had previously asserted should be withheld in full. *See* Second Suppl. Decl. of Vanna Blaine ¶ 5, ECF No. 40-1 ("2nd Suppl. Blaine Decl.").[2] Plaintiffs submit this response to make clear their position on the CIA's supplemental submissions, which, like its previous submissions, do not justify its withholdings.

[1] Unfortunately, the CIA has chosen to continue filing its supplemental submissions in a non-text-searchable PDF format despite the requirements of Local Rule 5.4(a).

[2] Five of the documents that the CIA partially released, Entries 21, 22, 35, 86, and 129, continue to contain insufficiently justified redactions. Plaintiffs no longer challenge the withholding of the sixth document, Entry 34.

1. The CIA's supplemental submissions ignore the guidance the D.C. Circuit provided in *Reporters Committee* and do not justify its invocation of the deliberative process privilege. Although the CIA has now had the opportunity to further buttress its submissions in light of the D.C. Circuit's most recent guidance, its third try fails to cure the previous failures to meet the standards Congress established. Instead, the second supplemental submissions continue to suffer from two key flaws that the D.C. Circuit condemned in *Reporters Committee*: they rely on very broad categorical justifications rather than evaluating the harm posed by each disclosure, and their predictions of harm consist entirely of conclusory, boilerplate generalities and speculation.

As an initial matter, rather than try to justify the purported harm posed by disclosure of any individual document, the CIA again retreats to generalities. The D.C. Circuit has instructed that an agency cannot rely on "a perfunctory, sweeping, and undifferentiated declaration that release of every single record withheld would have an 'inhibiting effect' by 'chilling full and frank discussions.'" *Reporters Committee*, 3 F.4th at 372 (quoting insufficient FBI declaration) (cleaned up). Instead, the "agency must specifically and thoughtfully determine whether it 'reasonably foresees that disclosure' of each particular record 'would harm an interest protected by [the] exemption.'" *Id.* (quoting 5 U.S.C. § 552(a)(8)(A)(i)(I)). Rather than abide by this requirement, the CIA maintains that the records here "cannot be viewed in isolation," and that every single one is "part and parcel of the agency's overall deliberative and consultative process for supporting Presidential nominations and confirmations." Second Suppl. Blaine Decl. ¶ 6. And although the agency sorts the documents into four broad groups (draft responses to Senate inquiries; agency correspondence with the White House; draft written material to support Ms. Haspel's nomination; and responses to media inquiries), its analysis of each is identical.

According to the CIA, release of any document or category of documents reflecting deliberations, no matter how individually innocuous, would inevitably chill "frank communications and the free exchange of ideas." *Id.* ¶¶ 6–10. The CIA thus does not comply with the D.C. Circuit's instruction that "what is needed is a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward." *Reporters Committee*, 3 F.4th at 370. This failure to offer any focused and concrete explanation to justify its withholdings strongly suggests the CIA has not actually evaluated "each particular record" to determine whether "disclosing *that particular document*" would harm an interest protected by the exemption. *Id.* at 372.

Second, the CIA's submissions, like the submissions faulted by the D.C. Circuit in *Reporters Committee*, hardly "differ in any material way from the routine assertions of deliberative process privilege that pre-dated the FOIA Improvement Act." *Id.* at 371. The Second Supplemental Blaine Declaration is little more than a "series of boilerplate and generic assertions that release of any deliberative material would necessarily chill internal discussions." *Reporters Committee*, 3 F.4th at 370. *Compare, e.g.*, 2nd Suppl. Blaine Decl. ¶ 8 ("anticipated disclosure of the opinions and recommendations" in nomination process would "discourage" CIA employees "from providing particularly useful knowledge, perspectives, and opinions"); *id.* ¶ 9 (if "opinions and recommendations would be disclosed publicly" this would "chill the free flow of open discussions during a very high profile nominations process"), *with Reporters Committee*, 3 F.4th at 370 ("If agency personnel know that their preliminary impressions, opinions, evaluations, or comments would be released to the general public, they would be less candid and more

circumspect in expressing their thoughts, which would impede the fulsome discussion of issues necessary to reach a well-reasoned decision." (quoting agency declarant)).

In rejecting this kind of boilerplate chilled-discussion justification, the D.C. Circuit emphasized that Congress specifically amended FOIA to ensure that agencies could no longer "rely on mere speculative or abstract fears, or fear of embarrassment to withhold information." *Reporters Committee*, 3 F.4th at 369 (cleaned up). Yet unexplained speculation about abstract fears and embarrassment is all the agency offers here. The CIA proclaims that it must respond "in the most accurate and forthcoming manner" to questions from "the Senate or the public" and additionally "proactively inform[] the Senate and the American public about the nominee to garner Senate and public support." 2nd Suppl. Blaine Decl. ¶ 7. Yet it maintains that every single document reflecting its efforts to be as accurate and transparent as possible must be hidden from the public, because the agency's personnel (whose names the agency almost universally withholds and the ACLU does not seek) would be "discourage[d]" from sharing "knowledge, perspectives, and opinions" if such opinions or recommendations were made public. *Id.* ¶ 8. Why is this so? The agency does not attempt to explain, merely asserting that any disclosure of CIA personnel's "knowledge, perspectives, and opinions" about the agency's public statements would inevitably prevent all personnel from holding "open and candid discussions." *Id.* Left similarly unexplained are the assertions that disclosure of "opinions and recommendations" in response to White House inquiries would inevitably "chill the free flow of open discussions," *id.* ¶ 9, that "deliberations about what could be publicly released without compromising national security" would inevitably cause CIA personnel to "be disinclined to participate in frank communications," *id.* ¶ 10, and that CIA public affairs personnel would not

"engag[e] in the necessary open discussions" if the public had insight into their deliberations about how to support Ms. Haspel's nomination, *id.* ¶ 11.[3]

The lack of any reasoning or explanation beyond a boilerplate description of chill is particularly glaring with respect to another purported justification: that CIA personnel would fear sharing "pertinent information related to and about the nominee, Agency policy, and Agency positions," which is "necessary for accurate and compete responses to the SSCI questions." 2nd Suppl. Blaine Decl. ¶ 8. As the D.C. Circuit recently reiterated, sharing factual information to ensure accuracy does not even typically qualify as a deliberative action: "For starters, '[u]nder the deliberative process privilege, factual information generally must be disclosed[.]'" *Reporters Committee*, 3 F.4th at 365 (quoting *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992)). And specifically when it comes to factual corrections to draft documents, comments about whether "statements in the draft were incorrect, incomplete, or divulged sensitive information" generally do "not cross the line into deliberative material." *Id.* at 367. But even if the sharing of factual information to ensure accuracy *did* cross the line into deliberative material here, the CIA has not even attempted to explain why its personnel, particularly those whose identities remain secret, would fear to share factual knowledge "about the nominee, Agency policy, and Agency positions" if they knew that the same knowledge might someday be shared with the public.

In addition to its umbrella claim that personnel will be inevitably chilled by disclosure of any deliberative material whatsoever, the CIA offers one additional, conclusory justification with

[3] Defendants' declaration states that disclosure of some deliberations "would also reveal classified intelligence activities," 2nd Suppl. Blaine Decl. ¶¶ 8–10, but that is relevant only as to whether discrete information contained in the deliberations might be withheld under Exemptions 1 and 3, not to the separate application of the deliberative process privilege at issue here.

respect to a single category of documents: that releasing deliberative material pertaining to creation of written documents "about Ms. Haspel's background and agency career to encourage Senate and public support for her nomination" somehow "could mislead or confuse the public by disclosing rationales that were not the basis for the Agency's final decision." 2nd Suppl. Blaine Decl. ¶ 10. Defendants do not assert that the deliberations *actually* disclose a misleading rationale (and it is not clear that such a misleading rationale could even be discerned in the withheld material), but merely suggest that they "could" confuse or mislead the public. This is plainly insufficient: "In the context of withholdings made under the deliberative process privilege, the foreseeability requirement means that agencies must concretely explain how disclosure 'would'—not 'could'—adversely impair internal deliberations." *Reporters Committee*, 3 F.4th at 369–70; *see also id.* at 371 (rejecting boilerplate claim that disclosure "would potentially confuse the public about the reasons for the [Office of the Inspector General]'s actions in this matter").

2. The agency's new disclosures cast considerable doubt on its conclusory claims to have conducted multiple "page-by-page, line-by-line" reviews for segregable information. The Second Supplemental Blaine Declaration states: "I have again conducted a page-by-page, line-by-line review and have determined that there is no reasonably segregable non-exempt and meaningful information left to disclose." 2nd Suppl. Blaine Decl. ¶ 14. The difficulty with accepting this claim is that the agency has previously professed to have conducted two separate "document-by-document and "line-by-line" reviews, and to have likewise determined twice previously that "no segregable, non-exempt portions of documents could be released without potentially compromising classified or privileged information or other information protected under the FOIA." Declaration of Vanna Blaine ¶ 39, ECF No. 25-2; *see also* Supplemental

Declaration of Vanna Blaine ¶ 11, ECF No. 29-1 ("I have again conducted a page-by-page, line-by-line review of the documents at issue in this case and have determined that there is no reasonably segregable non-exempt and meaningful information left to disclose."). Yet the CIA now essentially concedes that its two previous "page-by-page, line-by-line" reviews missed all of the more than 70 pages making up the "transcript of the unclassified confirmation hearing that occurred on May 9, 2018," 2nd Suppl. Blaine Decl. ¶ 5, which has been available for years as a public record. *See Nomination of Gina Haspel To Be The Director Of The Central Intelligence Agency: Hearing Before the S. Select Comm. on Intel.,* 115th Cong., S. Hrg. 115-302 (2018), https://www.govinfo.gov/app/details/CHRG-115shrg30119. The two previous reviews also failed to turn up any of the 13 pages making up Ms. Haspel's completed "SSCI Questionnaire for Completion by Presidential Nominees," 2nd Suppl. Blaine Decl. ¶ 5, which has likewise long been a public record. *See* https://www.intelligence.senate.gov/sites/default/files/documents/q-ghaspel-050918.pdf (completed questionnaire). It is hard to understand how two previous attempts at a "page-by-page, line-by-line review" resulted in a determination that both of these public documents must be withheld in full, or why the CIA similarly withheld the 13-page "SSCI unclassified questions for the record" and assorted additional pages that the agency finally disclosed to Plaintiffs on August 24. 2nd Suppl. Blaine Decl. ¶ 5.

Additional questions are raised by Entry 129, which the CIA previously withheld in full. Following the Court's July 8 *in camera* review order, the CIA produced the cover letter portion of Entry 129 to Plaintiffs on August 24. *See* 2nd Suppl. Blaine Decl. ¶ 5. While the agency had provided only a bare-bones description of the document, the newly-released cover letter explains that the document addresses a senator's request for "additional unclassified materials regarding DCIA-Nominee Gina Haspel's headquarters assignments" and consists of "ten pages of Ms.

Haspel's performance reviews covering her entire tenure in the CIA's Counterterrorism Center," which are "in an unclassified format." Yet the CIA continues to withhold the ten pages in full, even as the Second Supplemental *Vaughn* Index states only that "Exemptions (b)(3) (CIA Act) and (b)(6) were invoked to protect identifying information of CIA personnel (names, organization, functions, and official titles.)." ECF No. 40-2 at 112. It is not clear from the agency's submissions why ten unclassified pages concerning Ms. Haspel's performance in the CIA Counterterrorism Center must be fully redacted to protect undisclosed "names, organizations, functions, and official titles," particularly as the CIA has already disclosed Ms. Haspel's titles at the CIA's Counterterrorism Center. *See Response to Committee Additional Pre-Hearing Questions* 1, https://www.intelligence.senate.gov/sites/default/files/documents/aphq-ghaspel-050918.pdf (explaining that Ms. Haspel "served in CTC in the following positions: 2001 - 2003: Deputy Group Chief, CTC; and 2003 - 2004: Senior-level Supervisor, CTC").

* * *

The CIA has now had multiple opportunities to segregate non-exempt information and to provide the accounting for its determinations that D.C. Circuit law requires. *See Army Times Pub. Co. v. Dep't of Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993) ("[T]he agency bears the burden of showing that no such segregable information exist."); *see also* Pls.' Mem. of P. & A. in Opp'n to Defs.' Mot. for Summ. J. 42–45, ECF No. 27. Yet the agency once again provides no detail as to its segregability determination, and does not attempt to explain how or why it previously failed to segregate the materials disclosed last month—which amount to more than *100 pages* that were neither protected nor inextricably intertwined with exempt material. Instead, the CIA continues to offer only the same conclusory assurance that it has released all non-segregable information, even as the record shows that the identical assurances it previously

offered were baseless. The CIA's barebones submissions cannot carry its burden, and its motion for summary judgment should be denied.

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Respectfully submitted,

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