

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION,  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION, and CENTER FOR  
CONSTITUTIONAL RIGHTS,  
Plaintiffs,  
v.

DEPARTMENT OF JUSTICE including its  
component OFFICE OF LEGAL COUNSEL,  
DEPARTMENT OF STATE, and  
DEPARTMENT OF DEFENSE,  
Defendants.

25 Civ. 10189 (PAE)

**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## PRELIMINARY STATEMENT

This Freedom of Information Act (“FOIA”) lawsuit now concerns a single document: a legal advice memorandum dated September 5, 2025 (the “Memorandum”) of the Office of Legal Counsel (“OLC”) of the Department of Justice. The Memorandum was solicited by and provided to legal advisers in the White House Counsel’s Office who advise the National Security Council (“NSC”) and its staff, and it memorializes legal advice given weeks earlier for use in counseling the President and other senior Executive Branch officials regarding the legal availability of potential military action, as part of a deliberative process in connection with the President’s decision whether to take such action.

The government has withheld the Memorandum in full. The Memorandum includes, and its legal analysis depends on, highly sensitive, currently and properly classified information, including information that would reveal intelligence operations, sources and methods. The government’s declarations logically and plausibly explain that this information is protected from release by FOIA’s exemption 1 and, where it would reveal intelligence sources and methods, exemption 3 under the National Security Act. The Memorandum is also protected by three distinct privileges incorporated by FOIA’s exemption 5: the presidential communications privilege, because it was created at the request of the President’s direct advisors for use in advising him concerning a presidential decision whether to take a military action; the attorney-client privilege, because the advice given was confidential legal advice; and the deliberative process privilege, because it is a predecisional document embodying internal government deliberations on the contemplated use of military force.

Together, the declarations the government submits from OLC and NSC logically and plausibly establish that the withheld information is protected from disclosure pursuant to

exemptions 1, 3, and 5. Accordingly, the Court should grant summary judgment to the government.

## **BACKGROUND**

### **I. Factual Background**

As explained by the Declaration of Ryan Watzel, Special Counsel in OLC who supervises OLC's responses to FOIA requests ("Watzel Decl."), the Memorandum is a legal advice memorandum dated September 5, 2025. Watzel Decl. ¶ 17. It was solicited by and provided to legal advisors in the White House Counsel's Office who advise the National Security Council and its staff and authored and signed by an OLC Deputy Assistant Attorney General. *Id.* The document memorializes deliberative advice given weeks earlier for use in advising the President and other senior Executive Branch officials regarding the legal availability of potential military action, as part of a deliberative process in connection with the President's decision whether to take such action in his constitutional role as Commander in Chief of the armed forces. *Id.* The document also memorializes legal advice concerning the manner in which the Executive Branch should implement the advice in the event the President ordered such action. *Id.* Prior to the Memorandum being finalized, the advice memorialized therein was provided to and discussed with senior attorneys from the White House Counsel's Office, the NSC, and three other Executive Branch agencies. *Id.* ¶ 18. In addition to memorializing advice that had been provided prior to the presidential decision authorizing military action, the Memorandum explains in detail the legal basis for that advice. *Id.* The Memorandum also describes and memorializes confidential client communications made to OLC for the purpose of seeking this advice, including an appended statement of facts. *Id.*

### **II. The FOIA Request**

In October 2025, plaintiffs sent identical FOIA requests to OLC, DOD, and the State Department. *See* Complaint ¶ 27 & Ex. A. The requests sought:

1. The OLC final opinion concerning the President’s authority to order lethal strikes against drug cartels;
2. President Trump’s July 2025 directive to the Department of Defense authorizing the use of military force against Latin American drug cartels deemed to be terrorist organizations; and,
3. Any unclassified summaries of the two above documents.

Complaint Ex. A, ECF No. 1-1, at 4-5. The government located the first two records and withheld both in full; on the third request, after discussions between the parties about scope and search methodology, the government ultimately provided one record. *See* ECF No. 37. Plaintiffs have determined only to challenge the withholding of the Memorandum, ECF Nos. 44, 45, and have dismissed the Department of State from this action, ECF No. 34.

## **ARGUMENT**

### **I. Standards of Review**

FOIA requires agencies to make certain records available to the public. But the statute also recognizes “that public disclosure is not always in the public interest,” *C.I.A. v. Sims*, 471 U.S. 159, 166–67 (1985), and mandates that records need not be disclosed if the documents “fall within” the statute’s “enumerated exemptions,” *Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7 (2001); *see* 5 U.S.C. § 552(b). To withhold records under a FOIA exemption, an agency must determine that disclosure would foreseeably harm an interest protected by the exemption, or is prohibited by law. 5 U.S.C. § 552(a)(8)(i); *see Seife v. FDA*, 43 F.4th 231, 234 (2d Cir. 2022).

FOIA disputes are generally resolved by summary judgment. *See, e.g., Grand Cent. P’ship v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if the movant shows “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.

56(a). An agency meets its burden through declarations providing “reasonably detailed explanations” for any asserted exemptions. *Carney*, 19 F.3d at 812 (footnote omitted).<sup>1</sup> The agency’s declaration is “accorded a presumption of good faith.” *Id.* (quotation marks omitted); *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009).<sup>2</sup>

An agency’s explanation for the application of exemptions is sufficient if it appears logical and plausible. *See ACLU v. DOD*, 901 F.3d 125, 133 (2d Cir. 2018) (as amended Aug. 22, 2018). In the area of national security, moreover, the government’s declarations are entitled to “substantial weight.” *ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012) (emphasis in original). This judicial deference extends both to executive determinations as to whether disclosure of particular facts would reveal protected information, *see Sims*, 471 U.S. at 179, and to their predictive judgments regarding the potential harms that could reasonably be expected to flow from public disclosure, *see, e.g., ACLU v. DOD*, 901 F.3d at 134.

Here, the government’s declarations demonstrate that the government properly withheld the Memorandum pursuant to FOIA’s exemptions 1, 3, and 5. The government has logically and plausibly explained why the Memorandum is exempt from disclosure, especially in light of the substantial deference owed to the agency’s declarations on matters of national security. The government is therefore entitled to summary judgment.

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<sup>1</sup> FOIA cases are excepted from the Local Civil Rule 56.1 statement requirement. *See* Local Civil Rule 56.1(a).

<sup>2</sup> In the pre-motion conference, the Court asked the parties to provide the standard for in camera review in FOIA. The government generally agrees with the Court’s articulation of the standard set forth in *ACLU v. DOD*, 435 F. Supp. 3d 539, 560 (S.D.N.Y. 2020) (Engelmayer, J.). In brief, the statute authorizes in camera review, *see* 5 U.S.C. § 552(a)(4)(B), but it is to be used only where agency declarations lack sufficient detail. In camera review of classified national security information is disfavored. *See United States v. Reynolds*, 345 U.S. 1, 10 (1953).

## II. OLC Opinions in FOIA

The Court requested in the pre-motion conference that the parties provide background on the treatment of OLC opinions in FOIA. The government provides a brief overview here; however, we expect to engage with the case law in more depth when responding to plaintiffs' arguments.

As OLC's declarant explains, OLC exercises the Attorney General's delegated authority to provide the President and executive agencies with advice on a wide range of legal questions involving the operations of the Executive Branch. *See* 28 U.S.C. §§ 511-13; 28 C.F.R. § 0.25; Watzel Decl. ¶ 2. OLC advice may inform the decisionmaking of other Executive Branch officials, "but OLC does not make—and does not have authority to make—policy decisions on behalf of the agency requesting OLC's advice." Watzel Decl. ¶ 3. Both the President and other Executive Branch officials depend on OLC's advice remaining confidential: OLC is often asked to advise on and analyze difficult and unsettled issues of law, which can arise connection to complex and sensitive issues on potentially controversial matters. *Id.* ¶ 6. These concerns are especially compelling for legal advice: Executive Branch officials often need, and should be encouraged to seek, objective and candid legal advice. *Id.* ¶ 8. Unwanted disclosure of sensitive advice could breach the special duty of trust and confidence that OLC owes its clients, and "could lead future decisionmakers to seek less detailed oral advice or even to hesitate before seeking OLC's advice at all." *Id.*

To further the interests of transparency into the workings of the Executive Branch, OLC discretionarily makes many of its significant opinions available online to the public after a process of consultation with the requesting agency and any other relevant Executive Branch stakeholders. *Id.* ¶ 4. Other than opinions deemed appropriate for publication and documents discretionarily released (e.g., in response to FOIA requests) after similar consultations, OLC legal advice in all its forms is kept confidential, regardless of the recipient within the Executive Branch. *Id.*

In FOIA litigation, courts have recognized that OLC opinions generally begin life as privileged attorney-client, deliberative communications protected by exemption 5, which may also be subject to other exemptions in whole or in part. Thus, in general, controversies about OLC opinions in FOIA have centered on whether certain privileges that properly applied at the outset have been waived or otherwise rendered inapplicable by later government actions. *See, e.g., Electronic Frontier Found. v. DOJ*, 739 F.3d 1, 9 (D.C. Cir. 2014) (“*EFF*”) (OLC opinion privileged and not “working law” of recipient despite plaintiff’s arguments as to its “controlling” nature); *New York Times Co. v. DOJ*, 806 F.3d 682, 687 (2d Cir. 2015) (same, citing *EFF*); *Citizens for Responsibility and Ethics in Washington v. DOJ*, 922 F.3d 480, 486-87 (D.C. Cir. 2019) (rejecting claim for disclosure of all OLC opinions).

For example, in its most recent FOIA decision on an OLC opinion, the Second Circuit in 2019 determined that an OLC opinion about a once-secret surveillance program was properly withheld in full under FOIA’s exemption 5. *ACLU v. NSA*, 925 F.3d 576 (2d Cir. 2019). The court found that two separate privileges—the attorney-client privilege and the deliberative process privilege—properly protected the document, which consisted of confidential legal advice designed to inform a deliberation about potential government action. *Id.* at 589-92. Indeed, the plaintiff “d[id] not seriously challenge” the initial claim of attorney-client privilege. *Id.* at 590. Rather, the key disputes were whether those privileges had been waived or were otherwise unavailable. *Id.* at 592-98 (surveying and clarifying standards for working law, express adoption, and incorporation). Ultimately, the court determined those exceptions did not apply, so the opinion was properly withheld. *Id.* at 598-601.

Several years earlier, in a series of decisions, the Second Circuit considered whether the government could withhold in FOIA an OLC opinion regarding the potential use of drone strikes

abroad. *See New York Times Co. v. DOJ*, 756 F.3d 100, 113 (2d Cir.), *opinion amended on denial of reh'g*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014). The court held that the factual portions regarding operational details remained properly classified, but determined that a series of official government disclosures from various senior officials, combined with the leak of a government “white paper” that the government subsequently confirmed as genuine, served to waive assertions of exemptions 1 and 5 over the legal analysis. *Id.* at 113-20.

We expect plaintiffs will argue that some of the same exceptions apply to the Memorandum at issue here. Thus, we intend to address these decisions in more detail in our next brief when responding to plaintiffs’ arguments.

### **III. The Government Properly Withheld the Memorandum in Full Under Exemptions 1, 3 and 5**

The government’s declarations logically and plausibly establish that the Memorandum is protected from disclosure in full by FOIA’s exemptions 1, 3, and 5.<sup>3</sup>

#### **A. The Government Properly Withheld Classified Information Pursuant to Exemption 1**

The government withheld classified information pursuant to exemption 1 concerning (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources. *See* Declaration of Earl Matthews (“Matthews Decl.”) ¶¶ 6-14. The government’s declaration logically

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<sup>3</sup> Because the parties are filing simultaneous opening briefs, the government has not yet seen plaintiffs’ final arguments and factual basis. The government intends to respond to plaintiffs’ arguments primarily in its opposition brief. However, as presented below in the government’s discussion of legal standards applicable to the presidential communications privilege, *infra* Section III.C.1.b, we rebut an argument in plaintiffs’ pre-motion letter (ECF No. 36) which advances an inapplicable standard that, if accepted, could affect the government’s burden on summary judgment.

and plausibly establishes that the material withheld under exemption 1 is currently and properly classified. *Id.* Disclosure could reasonably be expected to cause harm—including in some instances exceptionally grave harm—to national security, thereby causing foreseeable harm to an interest protected by exemption 1. *Id.*

Exemption 1 protects records that are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and [] in fact [are] properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). Pursuant to Executive Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009) (“E.O. 13526”), information is properly classified if (1) an original classifying authority classified the information; (2) the information is “owned by, produced by or for, or is under the control of the United States Government;” (3) the information pertains to one or more of eight protected categories of information listed in section 1.4 of E.O. 13526; and (4) an original classification authority “determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security” and be “able to identify or describe the damage.” E.O. 13526 § 1.1(a)(1)-(4); *see also* Matthews Decl. ¶¶ 4.a-d.

The declaration of Earl G. Matthews, General Counsel for the United States Department of War, an original classification authority, establishes that each of these criteria is met with respect to the information withheld under exemption 1. The information withheld under exemption 1 has been classified at the Secret or Top Secret level, and is in some cases subject to additional access controls, some of which are classified. Matthews Decl. ¶ 6. It is under the control of the United States government. *Id.* ¶ 5. Disclosure of the information withheld under exemption 1 would reveal information subject to the first four bases for classification pursuant to E.O. 13526 §§ 1.4(a)-(d). Matthews Decl. ¶¶ 6-14.

**First**, portions of the Memorandum, which are classified at both the Secret and Top Secret levels, describe current and ongoing military plans and operations pertaining to the scope, duration, and targeting decisions for current and ongoing operations as well as the potential method of delivery, locations, and types of military equipment to be used in those operations. Matthews Decl. ¶ 7. Disclosure of this information could reasonably be expected to cause serious or exceptionally grave damage to the national security because this information includes specific operational capabilities of United States military forces and targeting capabilities. *Id.* If disclosed, adversaries could use this information to assess specific U.S. military capabilities, which could allow them to develop countermeasures or modify their behavior to render U.S. military operations less effective. *Id.*

**Second**, portions of the Memorandum marked as Secret or Top Secret describe internal foreign government activities and information pertaining to the potential targets of the U.S. government operations, which is exempt under E.O. 13526 § 1.4(b). Matthews Decl. ¶ 8. Disclosure of this information could reasonably be expected to cause serious or exceptionally grave damage to national security because this information relates to very recent activities of foreign governments. *Id.* The information includes detailed assessments of foreign government activity and frank assessments of regimes that remain in power. *Id.* Release of this information reasonably could be expected to cause serious or exceptionally grave damage to the national security by harming the U.S. relationship with foreign states as a result of disclosing candid U.S. assessments of their governments' actions and capabilities. *Id.*

**Third**, portions of the Memorandum marked as Secret or Top Secret draw information from intelligence sources and include information derived from and pertaining to covert operations undertaken by the United States government, which is exempt from disclosure under E.O. 13526

§ 1.4(c). Matthews Decl. ¶ 9. Disclosure of this information would cause serious or exceptionally grave harm to national security for two reasons.

Disclosure would allow hostile entities to discover current intelligence activities and methods used by the United States, including undisclosed covert action. *Id.* ¶ 10. With the aid of this detailed information, hostile entities could severely disrupt the U.S. government's intelligence gathering capabilities—for example, by avoiding actions or behaviors that may be vulnerable to U.S. government capabilities. *Id.* In addition, disclosure would reveal intelligence sources, whether individuals or foreign governments. *Id.*

Additionally, disclosure would reveal intelligence sources, whether individuals or foreign governments. *Id.* ¶ 11. In general terms, where a source is an individual, the United States promises to protect the identities of its sources and their relationship with the United States because an individual who is revealed to be a source could become the victim of harassment, imprisonment, or death. *Id.* If an intelligence asset provides valuable information to the United States, every detail of that information, from the substance to the timing of its collection, is information that, if exposed, could connect the source to that information, thus endangering the source. *Id.* The loss of such a source and the critical intelligence that the source provides reasonably could be expected to cause serious or exceptionally grave harm to U.S. national security. *Id.*

Where a source is a foreign government or other foreign entity, disclosure that the source provided information about a specific topic, and the specific information provided, without authorization from the foreign government or entity would constitute a serious breach of trust that would almost certainly impair a relationship important to U.S. national security. *Id.* ¶ 12. The attendant reputational harm to the United States of disclosing classified information from a foreign government or entity without its authorization would also risk the loss of potential assistance from

other foreign governments that require confidentiality to convey sensitive information, which is critical to confronting threats to our national security. *Id.* Damage to these important relationships reasonably could be expected to cause serious or exceptionally grave harm to U.S. national security. *Id.*

**Fourth**, information regarding foreign relations or foreign activities of the United States, including confidential sources, are exempt from disclosure under E.O. 13526 § 1.4(d). Matthews Decl. ¶ 14. The Memorandum references the United States’ coordination with foreign countries on the execution of operations and the activities of foreign nations in response to the targets of those operations. *Id.* Release of this information reasonably could be expected to cause serious or exceptionally grave harm to national security because, as explained above, foreign governments expect that information they provide voluntarily in confidence will be kept confidential. *Id.*

The Matthews Declaration logically and plausibly establishes that the information withheld under exemption 1 is properly classified, *ACLU*, 901 F.3d at 133, and is entitled to “substantial weight,” *Wilner*, 592 F.3d at 73, 76. The Court should therefore sustain the government’s exemption 1 withholdings. *See, e.g., ACLU v. NSA*, 925 F.3d at 600-01 (intelligence program documents concerning intelligence sources and methods properly classified and withheld under exemption 1); *Osen LLC v. U.S. Cent. Command*, 969 F.3d 102, 115-16 (2d Cir. 2020) (deferring to executive judgment about whether disclosure of certain images would expose vulnerabilities of military and upholding exemption 1 claim).

### **B. The Government Properly Withheld Information Concerning Intelligence Methods Pursuant to Exemption 3 and the National Security Act**

Under exemption 3, matters “specifically exempted from disclosure by [a] statute” that “leave[s] no discretion on the issue” or “refers to particular types of matters to be withheld” need not be disclosed. 5 U.S.C. § 552(b)(3). Exemption 3 “differs from other FOIA exemptions in that

its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Wilner*, 592 F.3d at 72 (quotation marks omitted); *accord Sims*, 471 U.S. at 167.

Here, the government properly asserted exemption 3 with respect to the same intelligence-related information withheld under exemption 1 to protect information that would reveal intelligence sources and methods protected under the National Security Act, 50 U.S.C. § 3024(h)(1), as amended. That statute protects intelligence sources and methods from unauthorized disclosure. 50 U.S.C. § 3024(h)(1) (formerly codified at 50 U.S.C. § 3024(i)(1) and 50 U.S.C. § 403-1(i)(1)).<sup>4</sup> The National Security Act is an exempting statute within the meaning of exemption 3. *See, e.g., ACLU v. DOJ*, 681 F.3d at 73 (citing cases).

As this Court has previously explained, the Second Circuit reads the Act's phrase "intelligence sources and methods" consistent with its "plain meaning" to encompass information that "falls 'within the [agencies'] mandate to conduct foreign intelligence.'" *Bonner v. FBI*, 686 F. Supp. 3d 255, 267 (S.D.N.Y. 2023) (Engelmayer, J.) (quoting *ACLU v. DOJ*, 681 F.3d at 73). That definition is "broad," and "requires a court to view, with some solicitude, agencies' reasoned explanations as to why information falls within the statute." *Id.*

As described above, and in the Matthews Declaration, disclosure of certain information withheld under both exemptions 1 and 3 would reveal information relating to intelligence sources and methods. Matthews Decl. ¶¶ 9-13, 15-18. That information is therefore exempt from

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<sup>4</sup> Specifically, the Act provides that the Director of National Intelligence ("DNI") "shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(h)(1). Courts have recognized that members of the Intelligence Community may exercise this authority pursuant to delegation and guidance from the DNI. *See DiBacco v. U.S. Army*, 795 F.3d 178, 197-99 (D.C. Cir. 2015).

disclosure under exemption 3 and the National Security Act. *See ACLU v. DOJ*, 681 F.3d at 73. Unlike classified information withheld under exemption 1, the government need not show that disclosure would be harmful in order to protect intelligence sources and methods from disclosure under exemption 3. *See Elec. Privacy Info Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012); *Fitzgibbon v. CIA*, 911 F.2d 755, 764 (D.C. Cir. 1990).<sup>5</sup> Nevertheless, disclosure of the information subject to exemption 3 would harm national security for the same reasons discussed above with regard to exemption 1. *See Matthews Decl.* ¶¶ 10-13.

### **C. The Government Properly Withheld Privileged Information Pursuant to Exemption 5**

The government has also properly asserted exemption 5 over the Memorandum because it is protected by three distinct civil privileges.<sup>6</sup>

Exemption 5 protects from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency.” 5 U.S.C. § 552(b)(5). This exemption is “universally read... to mean that agency documents that would be privileged in ordinary civil discovery are also protected from disclosure under FOIA.” *N.Y. Times Co. v. DOJ*, 939 F.3d 479, 488 (2d Cir. 2019). Thus, if a document (or portion of a document) could not be obtained under ordinary discovery rules in litigation against an agency, it is exempt from FOIA release as well. *See Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002).

As explained in OLC’s declaration, the Memorandum is protected by the deliberative

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<sup>5</sup> FOIA’s “foreseeable harm” standard, *see* 5 U.S.C. § 552(a)(8)(i)(I), is inapplicable to exemption 3, *see id.* § 552(a)(8)(B) (“Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).”); *accord id.* § 552(a)(8)(A)(i) (an agency shall withhold information only if either (I) the foreseeable harm standard is met, or if (II) “disclosure is prohibited by law”).

<sup>6</sup> As OLC’s declarant explains, in the context of the Executive Branch, the presidential communications, attorney-client, and deliberative process privileges are all aspects of executive privilege, but for ease of use we will refer to them separately as distinct privileges. *Watzel Decl.* ¶ 10 n.1.

process privilege, the presidential communications privilege, and the attorney-client privilege. Watzel Decl. ¶¶ 20-25. And its disclosure would foreseeably harm several interests protected by exemption 5. *Id.* ¶¶ 26-29.

### **1. The Government Properly Withheld the Memorandum Under the Presidential Communications Privilege**

First, the government has logically and plausibly explained that the Memorandum is properly withheld in full under exemption 5's incorporation of the presidential communications privilege.

#### **a. The Government Has Shown the Presidential Communications Privilege Applies**

Exemption 5 encompasses the presidential communications privilege. *See Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113 (D.C. Cir. 2004); *ACLU v. DOD*, 435 F. Supp. 3d 539, 559 (S.D.N.Y. 2020) (Engelmayer, J.). The Supreme Court has recognized a “presumptive privilege for Presidential communications” that is “fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974) (“*Nixon I*”). The presidential communications privilege protects “communications ‘in performance of a President’s responsibilities,’ . . . ‘of his office,’ . . . and made ‘in the process of shaping policies and making decisions.’” *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977) (“*Nixon II*”) (quoting *Nixon I*, 418 U.S. at 708, 711, 713). It is justified in part because “[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.” *Nixon I*, 418 U.S. at 708.

The privilege protects communications directly with the President. But it also covers communications involving immediate presidential advisors and their staffs, in order to ensure that such advisers investigate issues and provide appropriate advice to the President. *In re Sealed Case*,

121 F.3d 729, 752 (D.C. Cir. 1997). This includes “both [ ] communications which these advisers solicited and received from others as well as those they authored themselves.” *Id.*

Once a document is shown to fall within the bounds of the presidential communications privilege, the protection is broad. The presidential communications privilege “‘applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.’” *Judicial Watch*, 365 F.3d at 1113 (quoting *In re Sealed Case*, 121 F.3d at 745); *see also In re Sealed Case*, 121 F.3d at 745 (“Even though the presidential privilege is based on the need to preserve the President’s access to candid advice, none of the cases suggest that it encompasses only the deliberative or advice portions of documents.”). And the privilege extends to both presidential communications and to records memorializing or reflecting such communications. *See Protect Democracy Project, Inc. v. NSA*, 10 F.4th 879, 887 (D.C. Cir. 2021) (document written to memorialize conversation with president).<sup>7</sup>

The government has logically and plausibly explained that the Memorandum meets the requirements of exemption 5 and the presidential communications privilege. First, the Memorandum is a communication internal to the Executive Branch, and therefore meets the statutory “inter-agency and intra-agency” threshold for exemption 5. *See* 5 U.S.C. § 552(b)(5). Second, the elements of the privilege are met. The Memorandum was solicited by legal advisors in the White House Counsel’s Office, including the chief legal counselors to the National Security Advisor, an immediate adviser to the President. Watzel Decl. ¶ 21. Communications with those legal advisors in the Memorandum, as well as an advice document solicited by those advisors, fall within “communications . . . solicited and received by those members of an immediate White

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<sup>7</sup> In the FOIA context, the presidential communications privilege need not be invoked by the President himself, but may be asserted by the agency withholding the records in question. *See, e.g., Loving v. DOD*, 496 F. Supp. 2d 101, 108 (D.D.C. 2007), *aff’d*, 550 F.3d 32 (D.C. Cir. 2008).

House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *In re Sealed Case*, 121 F.3d at 750. And finally, to the extent relevant, *but see infra* Section III.C.1.b, access to the Memorandum has been strictly controlled. Watzel Decl. ¶¶ 24, 28.

In addition, the government reasonably expects that release would foreseeably harm interests protected by the presidential communications privilege: the integrity of the decisionmaking processes of the President and his senior advisers. *See* 5 U.S.C. § 552(a)(8)(i). OLC provides legal advice in connection with presidential decisionmaking on a variety of topics, which include some of the most difficult and important issues the President faces—indeed, Presidents and their advisers often request OLC advice precisely because a legal issue is difficult and important. Watzel Decl. ¶ 27. By protecting in their entirety communications solicited and received by the President or his advisers during the course of this decisionmaking, the presidential communications privilege ensures that the President has access to honest and informed advice, and provides the President with the confidentiality necessary to consider all potential options, including novel or controversial ones. *Id.* Compelled disclosure of OLC's advice to the President or his advisers would breach that confidentiality, impede the President's decisionmaking processes, and impair his ability in the future to rely on the availability of candid, confidential legal advice when carrying out the responsibilities of office. *Id.* In sum, disclosure of the Memorandum would inhibit precisely the free flow of information and candid exploration of issues between the President and his advisors that lies at the heart of the privilege. *See Nixon II*, 433 U.S. at 449.

**b. Plaintiffs' Pre-Motion Letter Proposes an Inapplicable Legal Standard**

Plaintiffs' pre-motion letter suggests that the presidential communications privilege is inapplicable here because, they claim, the Memorandum was reviewed by a person who falls

outside the “limited circle of close presidential advisors and their staff” whose communications may trigger the privilege. ECF No. 36 at 2 (citing *ACLU v. DOJ*, 15 Civ. 1954 (CM), 2016 WL 889739, at \*4 (S.D.N.Y. Mar. 4, 2016)). This is legally mistaken: it confuses the question of *which communications* are eligible for protection in the first place with the separate question of when, if ever, the privilege may be rendered inapplicable by distribution. And in any event, cases such as *ACLU v. DOJ* state an untenable waiver principle unmoored from the purposes, and thus the proper scope, of the presidential communications privilege.<sup>8</sup>

The question of whose communications may be eligible for the presidential communications privilege was most extensively analyzed in *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). As the D.C. Circuit recognized, because the privilege “is rooted in the need for confidentiality to ensure that presidential decisionmaking is of the highest caliber, informed by honest advice and full knowledge,” *id.* at 750, some communications not made directly to the president must be protected. After all, the advice given to the president cannot be drawn from “thin air,” *id.*, but is rather arrived at through advance discussion. The privilege therefore extends to “communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.” *Id.* Indeed, a document may be properly protected even if the president never sees it. *Id.* at 752. Even so, only the work of a “limited circle of close presidential advisors

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<sup>8</sup> The government addresses this argument in its opening brief because it goes to the applicable legal standards. However, we expect to respond to plaintiffs’ more detailed arguments and factual presentation in later briefing. We note that plaintiffs’ presentation of the facts in their pre-motion letter appears inaccurate.

and their staff” is eligible for the privilege. *ACLU v. DOJ*, 2016 WL 889739, at \*4 (citing *In re Sealed Case*); *Jud. Watch, Inc. v. DOJ*, 365 F.3d at 1115-16.

Some district courts have mistakenly applied the “immediate White House adviser’s staff” concept to the separate question of whether a document initially protected by the presidential communications privilege can lose that protection by distribution within the Executive Branch for “non-advisory purposes.” See, e.g., *ACLU v. DOJ*, 2016 WL 889739 at \*4. Those courts’ conclusions are erroneous, but in any event, the concerns that underlie those conclusions are not present here.

The main case courts cite for the waiver principle—and the one that Judge McMahon discussed in *ACLU v. DOJ*—is *Center for Effective Gov’t v. Dep’t of State*, 7 F. Supp. 3d 16 (D.D.C. 2013) (“*CEG*”). Its facts are clearly distinguishable from this case, and a careful reading shows that subsequent courts have overread its supposed waiver holding. The FOIA request in *CEG* sought a single record, an unclassified presidential directive to agencies instructing them on the administration’s policy objectives and priorities for global development. *Id.* at 19-20. The directive was distributed throughout the government—initially to more than thirty senior members of the Executive Branch, and was later “widely distributed” to less senior officials. *Id.* at 20 & n.4. Moreover, the President himself publicly spoke about the directive shortly after its issuance, and the government published a “fact sheet” with content that (the court determined) closely mirrored the substance of the directive. *Id.* at 19-20, 26. Under all these circumstances, the court readily concluded that the presidential communications privilege did not apply.

Most fundamentally, the directive was decisional, had the force of law, and apparently guided a wide array of Executive Branch activity. *Id.* at 28-30. It thus squarely raised the concern that a privilege claim would amount to an endorsement of “secret law,” undermining a core

purpose of FOIA. *Id.* at 28-30. Additionally, the purpose of the privilege is to protect the integrity of presidential decisionmaking by ensuring confidentiality, such that confidentiality is the “touchstone” of the privilege. *Id.* at 24. But the court found there was “no evidence” that the directive was confidential: it was unclassified, did not concern national security or military matters, and was widely distributed within Executive Branch. *Id.* at 25-26. The President himself gave public remarks on its content. *Id.* For all these reasons, the court held that the presidential communications privilege and exemption 5 were not properly asserted (in other words, not even waived). *Id.* at 30.

This review serves to highlight all the distinctions from this case. In contrast to the presidential directive in *CEG*, the Memorandum at issue here is classified and has been closely held; it is predecisional and deliberative, rather than post-decisional; it represents merely one document that fed into a decisionmaking process, rather than the final result of that process; it contains legal advice intended for close presidential advisors, rather than directives for wide distribution to agencies; it identifies legally permissible options that the President could take, rather than make policy decisions that carry the force of law; it has not been publicly discussed by the President; and it is not the subject of public summary by government publication.

In short, every indication is that the Memorandum is a confidential, predecisional document without independent legal effect. The Memorandum is absolutely nothing like the presidential directive in *CEG*, and does not raise the concerns the *CEG* court identified. It is not even clear that the *distribution* of the presidential directive—as opposed to all the other facts on which the *CEG* court relied to determine it was not confidential, and thus not privileged—was dispositive in that case. But there is no indication of widespread distribution of the classified

Memorandum at issue here; to the contrary, access has been “strictly controlled.” Watzel Decl. ¶ 24.

Other cases decided after *CEG* and which claim to adopt its principles are factually distinguishable from this case. In *ACLU v. DOJ*, the court determined that in camera review was necessary to determine whether the contents of a classified document otherwise covered by the presidential communications privilege were mirrored in a separate officially disclosed “fact sheet.” *ACLU v. DOJ*, 2016 WL 889739, at \*5. The court’s extensive discussion of *CEG* was largely dictum—the key fact, as evident in the paragraphs directing in camera review, was that the government had disclosed *publicly* a document with potentially similar content, not that the protected document had been distributed within the government. *Id.* Here, the government is not aware of any applicable official disclosure of the Memorandum’s contents (though we will review any facts plaintiffs put forward in their motion papers). Likewise, in *Brennan Ctr. v. Dep’t of State*, No. 17 Civ. 7520 (PGG), 2019 WL 10984173, at \*6-7 (S.D.N.Y. Mar. 29, 2019), the court determined that in camera review was necessary evaluate whether a document that was on its face protected by the presidential communications privilege closely mirrored information that had been disseminated not only within the Executive Branch, but to foreign governments. Following review, the court determined that most documents properly retained the privilege, but portions of one document were not privileged because the content of those pages, which was unclassified, had been “disclosed in other publicly available documents.” *Id.* at \*11. Once again, that is not this case. And in *Knight First Amend. Inst. at Columbia Univ. v. CDC*, 560 F. Supp. 3d 810, 829-30 (S.D.N.Y. 2021), the court rejected an assertion of presidential communications privilege in purported reliance on *CEG*, holding that a set of documents about media strategy for Covid-19 were too remote from the purposes of the privilege for protection. That case did not involve the

president's own decisions or a core presidential power. *Id.* Although the court also noted that the strategy document was sent to several CDC communications staff with no role advising the president, *id.* at 830, there is no reason to think that that fact alone would have led the court to deem the privilege inapplicable.<sup>9</sup>

In sum, there is no case with facts comparable to this one which has held—as plaintiffs apparently suggest—that the presidential communication privilege is abrogated if a senior official not part of the original process of advising the president or his senior staff reviews a document otherwise protected by the presidential communications privilege.

Nor would such a holding make sense. “Since executive privilege exists to aid the governmental decisionmaking process, a waiver should not be lightly inferred.” *In re Sealed Case*, 121 F.3d at 741. And there are proper reasons why government officials not originally involved in the provision of advice to the President or his immediate advisors may need to review a document created to formulate and provide that advice. Considering OLC work in particular, it may be useful for an official not involved in the original decision—future OLC attorneys preparing to advise future Presidents, for instance—to review privileged materials in order to consider a new, related decision. Or a supervisor may request to review materials that a subordinate official prepared: for example, the Attorney General might ask to review OLC's prior work, even if the Attorney General was not personally involved in the original advice. So, too, may the Executive Branch need to

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<sup>9</sup> This Court's decision in *ACLU v. DOD* also recites that “the transmittal of a document to persons who are unlikely to be in a position to give advice to the President waives the privilege.” 435 F. Supp. 3d at 559 (Engelmayer, J.) (quoting *ACLU v. DOJ*, 2016 WL 889739, at \*4). However, that statement was dictum: ultimately the Court did not reach the question of whether the presidential communications privilege applied to any contested document. *See id.* at 560-61 (determining that certain documents were properly withheld under exemption 1, without reaching exemption 5), *id.* at 569-71 (holding that other documents were properly withheld under the deliberative process privilege, and not reaching presidential communications privilege).

share privileged materials with members of Congress, and courts have held that that does not constitute a waiver of privilege under FOIA either. *See Murphy v. Dep't of Army*, 613 F.2d 1151, 1155-57 (D.C. Cir. 1979).<sup>10</sup>

Creating a formalistic rule that any “non-advisory” circulation of a protected record breaks the privilege would demand that the President and direct advisors operate as a tight cabal, restricting access to information for fear of disclosure by waiver. That will damage, not strengthen, presidential decisionmaking, undercutting the very purpose the privilege protects. While the presidential communications privilege is intended to have narrow application, it must also be workable to be effective. In sum, the line plaintiffs appear to propose defies the privilege’s functions and is not the law.

## **2. The Government Properly Withheld Information Under the Attorney-Client Privilege**

OLC has logically and plausibly explained why the Memorandum is protected by the attorney-client privilege.

“The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services.” *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). The privilege applies to “communications,” and thus may properly protect documents in full if they consist of communications between attorney and client to seek or provide legal advice, including the facts that clients provide in confidence to inform counsel’s analysis. *See, e.g., Climate Investigations Ctr. v. United States Dep’t of Energy*, No. 16-CV-00124 (APM), 2020 WL 7419672, at \*1 (D.D.C. Nov. 27, 2020).

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<sup>10</sup> By statute, the Attorney General may be called on to give legal opinions within the Executive Branch. 28 U.S.C. §§ 511-13. Regulations largely delegate this authority to OLC, *see* 28 C.F.R. § 0.25, *see also* 28 U.S.C. § 510 (delegation authority), but the Attorney General remains the head of the Department of Justice, and “all functions” of Department officials except three narrow exceptions are vested by statute in the Attorney General. *See* 28 U.S.C. § 509.

The purpose of the attorney-client privilege “is to encourage attorneys and their clients to communicate fully and frankly and thereby to promote broader public interests in the observance of law and administration of justice.” *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (citation and internal quotation marks omitted). Indeed, “the traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law . . . be encouraged to seek out and receive fully informed legal advice.” *Id.* at 419 (quoting *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005)).

Here, the government has logically and plausibly explained that the Memorandum is properly withheld pursuant to exemption 5’s incorporation of the attorney-client privilege. The Memorandum is a communication authored and signed by an attorney (an OLC Deputy Assistant Attorney General) that both records and explains advice provided to legal advisors in the White House Counsel’s Office and other senior Executive Branch attorneys for their use in advising the President and his aides. Watzel Decl. ¶ 24. Those attorneys solicited the legal advice. *Id.* ¶ 17. Having been asked to provide confidential legal advice, OLC stood in a special relationship of trust with the President and his advisers. *Id.* ¶ 24. The factual material contained in the Memorandum, much of which is highly classified, was provided to OLC by NSC staff or other entities within the Executive Branch for purposes of developing this advice. *Id.* ¶¶ 24, 28. The legal advice contained in the Memorandum was provided in confidence and has remained confidential—indeed, access to the Memorandum has been strictly controlled. *Id.* ¶ 24. Just as disclosure of client confidences conveyed in the course of seeking legal advice would seriously disrupt the relationship of trust critical to formulating that advice, so too would disclosure of the legal advice itself undermine that trust. *Id.*

The government has also shown, for similar reasons, that it reasonably foresees harm to interests protected by the attorney-client privilege if the Memorandum were released. Disclosure of OLC's confidential legal advice would reveal core client confidences, including highly classified facts provided in confidence for the purpose of seeking OLC's advice, in addition to the details of the advice itself. Watzel Decl. ¶ 28. If the confidentiality of legal advice on a particular question and the sharing of sensitive facts in the process cannot be assured, the foreseeable harm to the attorney-client relationship would be significant. *Id.* The proper functioning of the Executive Branch depends on clients being willing to seek and rely on OLC's legal advice on hard or controversial questions without being inhibited by concerns about the risk of public disclosure. *Id.* Likewise, protecting the confidentiality of OLC's legal advice is essential to ensuring that all potential legal arguments are properly considered and addressed. *Id.*

Thus, the Memorandum is fully protected by the attorney-client privilege. This is consistent with the Second Circuit's decision in *ACLU v. NSA*, which held that a similar OLC legal memorandum was protected by the attorney-client privilege, after determining that certain potential exceptions to or waivers of exemption 5 were inapplicable. 925 F.3d at 589-91, 600.

### **3. The Government Properly Withheld the Memorandum Under the Deliberative Process Privilege**

OLC has logically and plausibly explained why the Memorandum is protected by the deliberative process privilege.

In enacting exemption 5, “[o]ne privilege that Congress specifically had in mind was the ‘deliberative process’ . . . privilege.” *Hopkins v. U.S. Dep’t of Hous. & Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991). “[T]he deliberative process privilege shields from disclosure ‘documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *U.S. Fish & Wildlife Serv. v. Sierra*

*Club*, 141 S. Ct. 777, 785 (2021) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). An agency record must satisfy two criteria to qualify for the deliberative process privilege: it “must be both ‘predecisional’ and ‘deliberative.’” *Grand Cent. P’ship*, 166 F.3d at 482. Documents or information are “‘predecisional’ if they were generated before the agency’s final decision on the matter, and they are ‘deliberative’ if they were prepared to help the agency formulate its position.” *Sierra Club*, 141 S. Ct. at 786. So long as the document “was prepared to assist [agency] decisionmaking on a specific issue,” it is predecisional. *Tigue*, 312 F.3d at 80. In determining whether a document is deliberative, courts inquire as to whether it “formed an important, if not essential, link in [the agency’s] consultative process.” *Grand Cent. P’ship*, 166 F.3d at 483. Factual material may be properly withheld if it is “inextricably intertwined with policy making recommendations,” such that disclosure “would compromise the confidentiality of deliberative information.” *NRDC v. EPA*, 954 F.3d 150, 157 (2d Cir. 2020) (quotation marks and alterations omitted).

Here, the Memorandum satisfies both prongs of the test. First, it is predecisional. The advice contained in the Memorandum was prepared for the consideration of the President’s advisers to aid the President in deciding whether to authorize one or more military actions. Watzel Decl. ¶ 23.

Although the Memorandum was finalized after some of this advice was provided, it memorializes advice that had been conveyed previously. *Id.* ¶¶ 18, 23. The privilege protects deliberative information, so the question is whether the specific information—here, OLC’s legal advice—is predecisional, even if the document in which it is contained was finalized after some decisions were made. *See, e.g., CREW v. U.S. Dep’t of Justice*, 658 F. Supp. 2d 217, 232-35 (D.D.C. 2009); *North Dartmouth Properties, Inc. v. U.S. Dep’t of Housing and Urban Devel.*, 984

F. Supp. 65, 68 (D. Mass. 1997) (holding that portions of an email written after agency decision was made that recounted predecisional deliberations and an employee's recommendations were still subject to deliberative process privilege); *see also Mead Data Cent. Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 257 (D.C. Cir. 1977) ("It would exalt form over substance to exempt documents in which staff recommend certain action or offer their opinions on given issues but require disclosure of documents which only 'report' what those recommendations and opinions are."). In other words, it is not a "communication[] made after the decision and designed to explain it," which would fall outside the privilege, *Sears*, 421 U.S. at 152; rather, it is a document finalized after the President's determination to undertake certain military actions, but which recounts OLC's predecisional legal advice in a formal record.

Second, the Memorandum is deliberative. It consists of advice to legal advisors in the White House Counsel's Office for use in deliberations over whether to recommend that the President authorize military action and what advice to provide the President in connection with that decision. Watzel Decl. ¶ 23. It reflects ingredients in a decision, not results.

Indeed, the Memorandum is necessarily predecisional and deliberative, because OLC lacks any decisionmaking authority over military operations—those are authorities vested in the President as commander in chief, and the military itself. As the Second Circuit has noted, "OLC does not purport, and in fact lacks authority, to make policy decisions. OLC's legal advice and analysis informs the decisionmaking of Executive Branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted." *ACLU v. NSA*, 925 F.3d at 592 (quotation marks omitted). The D.C. Circuit has made the same observation. *See EFF*, 739 F.3d at 9 ("OLC is not authorized to make decisions about the FBI's investigative policy, so the OLC Opinion cannot be an authoritative statement of the agency's policy."). And courts recognize that

a decision may be the “final” work of one agency, but if the final product is merely a recommendation to another agency with decisionmaking authority, the document may still properly be deliberative. *Bureau of Nat. Affs., Inc. v. DOJ*, 742 F.2d 1484, 1497 (D.C. Cir. 1984).

OLC has also explained why it reasonably foresees harm to government deliberations from release of the Memorandum. Compelled disclosure of the Memorandum would undermine government decisionmakers’ ability to seek and receive confidential advice from OLC, compromising the deliberative processes of the Executive Branch. Watzel Decl. ¶¶ 25, 29. OLC’s legal advice can be a key input into Executive Branch deliberations. *Id.* ¶ 29. These deliberations benefit from the careful, detailed, written advice that OLC provides, and decisionmakers benefit from the ability to consider all options, including those that they may choose not to take. *Id.* OLC has repeat clients throughout the Executive Branch, and whether is able to OLC maintain the confidentiality of prior advice will impact the willingness of these and other clients to request written advice from OLC in the future. *Id.* Decisionmakers fearing forced disclosure of the legal issues that were considered during their deliberations may be less likely to seek advice from OLC on challenging or sensitive matters, causing harm to future Executive Branch decisionmaking and ultimately to the public itself. *Id.*

#### **IV. There Is No Reasonably Segregable, Non-Exempt Information**

FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). 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).

As explained, OLC’s declarant has personally reviewed the document at issue, and confirms that there is no reasonably segregable non-exempt information. Watzel Decl. ¶ 30. First,

the presidential communications privilege protects the Memorandum in its entirety. *Id.* Second, the factual material recounted in the document was provided to OLC in confidence for the purpose of seeking legal advice; it is therefore protected by the attorney-client privilege, and intertwined with the legal analysis. *Id.* Moreover, even if the facts were not covered by any exemption 5 privilege, many of them are separately protected by exemptions 1 and 3. Matthews Decl. ¶¶ 21-22. Accordingly, the government's withholdings in the Memorandum are proper and should be upheld.

### CONCLUSION

For the foregoing reasons, and the reasons set forth in the government's declarations, the government's motion for summary judgment should be granted.

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New York, New York

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CERTIFICATE OF COMPLIANCE

I, Peter Aronoff, counsel of record for defendants, certify that this brief was prepared using Microsoft Word, and that this processing program has been applied to include all text other than what Local Rule 7.1(c) allows to be excluded in preparing the following word count. I further certify that this brief contains 8722 words.

By: /s/ Peter Aronoff  
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