

**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)

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF GOVERNMENT'S
MOTION FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

The government’s opening papers demonstrated that the government has logically and plausibly asserted FOIA exemptions that together protect the entire OLC Memorandum from disclosure. Plaintiffs’ opposition brief largely repeats the arguments in their opening brief, and does not alter the calculus. Plaintiffs’ main new argument is that testimony before Congress of General Dan Caine, Chairman of the Joint Chiefs of Staff, demonstrates that the Memorandum has been expressly adopted; but General Caine’s remarks are neither legally relevant to the presidential communications privilege, nor factually supportive of plaintiffs’ other arguments. Plaintiffs also continue to argue—based on a mistaken understanding of the law—that the presidential communications privilege does not apply. But even on plaintiffs’ view of the law, a supplemental declaration filed with this brief explains that the Executive Branch maintains the Memorandum in four physical copies, of which DOD has only one, and access is strictly controlled. These facts make clear that the confidentiality of the Memorandum has, indeed, been maintained. Plaintiffs also contend that OLC’s declaration should be set aside for lack of personal knowledge, but this contention overlooks both the declaration’s own contents and the FOIA case law that permits declarations of government officials based on information provided in their official duties. Plaintiffs’ other new arguments are equally meritless. Accordingly, the Court should grant the government’s summary judgment motion and deny plaintiffs’ cross-motion.

ARGUMENT

I. General Caine’s Testimony Does Not Void the Government’s Exemption 5 Assertions

Plaintiffs’ opposition brief (“Pl. Opp.”), ECF No. 57, argues that April 30 testimony by the Chairman of the Joint Chiefs of Staff, General Dan Caine, demonstrates that the government has

adopted the Memorandum as working law, Pl. Opp. 9-10, 19, but this argument misapprehends the law and misreads the testimony.

First, as a matter of law, the Court need not consider the precise meaning of General Caine's testimony because the presidential communications privilege protects the Memorandum in full, and that privilege is not subject to the working law exception (including by express adoption). As the government's opposition brief explains, the presidential communications privilege applies to both predecisional and post-decisional materials; accordingly, the "working law" exception does not apply. *See* ECF No. 58 ("Govt. Opp.") 4-5 (citing authority).

But even if the Court did consider General Caine's testimony, it does not meet the standard that the Second Circuit has set to establish express adoption in the context of other exemption 5 privileges. The colloquy plaintiffs cite begins when Senator Kaine asks General Caine, "What legal justification could there possibly be that would allow the US military to strike boats in international waters and kill the occupants of those boats without a showing of evidence that there's narcotics on those boats?" ECF No. 58-1 ("Tr.") 78:13-18. General Caine responds by clarifying his role: "Well, sir, as you know, our job is to show the range of options, the associated risks, and then take those execution orders, transmit them down to the [combatant commands] on legally appropriate and legally backstopped actions." *Id.* 78:19-23. Senator Kaine then repeats his question, asking, over cross-talk, if there is a "legal justification . . . that would authorize . . . striking boats that do not have evidence that they are carrying narcotics?" *Id.* 78:24-79-5. General Caine responds:

I don't have a copy of the order issued to SOUTHCOM with me today. It is classified in its own right, which clearly articulates, based on a variety of criteria, what constitutes a valid military and legally valid target in that theater.

I just want to say, I know and trust that our commanders at Echelon are rigorously following that legal opinion and those legal boundaries upon which we have been issued those orders.

Id. 79:7-15. Senator Kaine then responds that he has “seen the legal opinion,” but cannot discuss it since it is classified, and makes similar remarks about the “targeting criteria” and “secret list of [designated terrorist organizations].” *Id.* 79:16-23.

Neither of the block-quoted paragraphs shows that the Memorandum is working law or has been adopted. The first paragraph does not mention the Memorandum; it refers only to “the order issued to SOUTHCOM.” It is not possible to understand the OLC Memorandum as an “order issued to SOUTHCOM.” As the government’s declarations have explained, and as is clear from its department and role, OLC is a component of the Department of Justice that provides legal advice; it lacks authority to make policy decisions on behalf of the agency requesting advice, let alone issue military orders. Watzel Decl. ¶ 3.

In a supplemental declaration filed with this brief, DOD’s General Counsel, who has personally reviewed the Memorandum, *see* Matthews Decl. ¶ 3, confirms this intuitive point: “The Memorandum, which was authored by the Department of Justice, does not contain military orders. Military orders are embodied in separate documents.” Supplemental Declaration of Earl G. Matthews (“Suppl. Matthews Decl.”) ¶ 8.

The second quoted paragraph of General Caine’s testimony likewise does not show express adoption. General Caine says that he “know[s] and trust[s] that our commanders at [e]chelon¹ are rigorously following that legal opinion and those legal boundaries upon which we have been issued those orders.” Tr. 79:12-15.

To start, the remark is ambiguous. While General Caine mentions “that legal opinion,” he does not specifically mention the Memorandum, OLC, or the Department of Justice. And the

¹ Based on discussion with DOD, we understand that in military jargon, an “echelon” is a level within the command structure, and the term “at echelon” means “at the appropriate level of the command structure.”

phrase “legal opinion” is mentioned alongside “legal boundaries” relevant to military orders; it is not clear, in context, whether it refers to a specific document or encompasses all relevant legal constraints.

Following the Supreme Court, when courts find express adoption, the adoption is express—not ambiguous. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975) (exemption 5 cannot apply “if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion”). For example, in *National Council of La Raza v. DOJ*, the Attorney General and a senior advisor referred specifically to an OLC memorandum to justify a changed legal position—and to assure state and local government officials that they could lawfully enforce federal immigration law, as DOJ wished. 411 F.3d at 357–60 (2d Cir. 2005). And in *Brennan Center v DOJ*, USAID expressly referred to an OLC opinion in both an agency publication and in Congressional testimony, each time to justify a legal position. 697 F.3d 184, 188 (2d Cir. 2012). The testimony here—that commanders in the field are acting consistently with all legal advice that has been provided—is neither express about what “that legal opinion” is, nor about whether it has been adopted.

Even if General Caine’s statement is interpreted as referring to the Memorandum, however, a government agency’s confirmation that its officials have acted consistent with legal advice is insufficient to show express adoption for three separate reasons. First, as the government’s opposition brief explains, acting in a manner consistent with legal advice is not itself express adoption. Govt. Opp. 20. The purpose of the attorney-client privilege is to encourage public officials to seek legal advice—a purpose that would be fatally undermined if simply following that advice (and acknowledging they had done so) operated as a waiver. Second, the context of the

remark—an off-the-cuff response to questions from a senator, rather than an official publication or news conference in which the Executive Branch announces its position—further undercuts any claim of express adoption. As the government’s opposition brief notes, courts recognize that responding to a question from a member of Congress is different from affirmatively raising a document to justify or explain the position of the Executive Branch. Govt. Opp. 14 (citing examples). This distinction helps ensure that Executive Branch officials are not deterred from answering questions before Congress. Third, as with the testimony of Charles Young III, General Caine’s remark is general, and does not show that “the reasoning in the” Memorandum was “adopted by the [President]” as his own reasoning, even if he “agrees with the conclusion” of the Memorandum. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *see also ACLU v. NSA*, 925 F.3d 576, 599 (2d Cir. 2019) (no express adoption of OLC memorandum even though Attorney General indicated he “agreed with” OLC’s “legal analysis” before certifying a program).

In sum, General Caine’s testimony does not show that the Memorandum is working law or has been expressly adopted.

II. Plaintiffs’ Arguments About the Distribution of the Memorandum Are Legally Irrelevant and Factually Incorrect

Plaintiffs’ argument that the purported distribution of the Memorandum has abrogated the presidential communications privilege misses the legal mark and is factually mistaken.

As the government’s opening brief explains in detail, the legal premise of plaintiffs’ argument is incorrect: the presidential communications privilege is not waived when a document within its protection is shared with or reviewed by other Executive Branch officials who were not involved in the process of advising the president. Govt. Br. 16-22. As we have noted, plaintiffs’ contrary understanding would be unworkable and would undercut the purposes of the privilege.

On plaintiffs' view, even if a government official had a legitimate reason to review advice after it had been given—for example, when facing a new situation that shared some features with a previous one—doing so would put privileges at risk. Govt. Br. 22. And plaintiffs have identified no case actually holding that circulation of a document waives the presidential communications privilege; rather, the main authority on which both plaintiffs and other courts have relied—*Center for Effective Gov't v. Dep't of State*, 7 F. Supp. 3d 16 (D.D.C. 2013) (“*CEG*”)—shows only that communications that were never genuinely confidential do not fall within the presidential communications privilege in the first place, not that circulation to a limited number of government officials waives the privilege. Govt. Br. 18-19.

In any event, plaintiffs' argument is factually mistaken. As DOD's supplemental declaration explains, in addition to handling and access measures associated with classified information, access to the Memorandum is further limited and strictly controlled. Suppl. Matthews Decl. ¶ 5. Specifically, Mr. Matthews states that only four physical copies are maintained across the entire Executive Branch, and that because of the sensitivity of the information it contains, the Memorandum is maintained in hard copy rather than stored on a classified network or distributed by secure email. *Id.* DOD has a single hard copy, which has been held in a secure safe in the Office of the General Counsel. *Id.* ¶ 6. Access to this copy must be specifically cleared with the the General Counsel or his immediate staff and is provided only to appropriately cleared individuals with a need to know. *Id.* DOD has not distributed any other copies of the Memorandum. *Id.* Finally, only limited senior Department and military leadership officials, or their legal counsel, have reviewed the Memorandum. *Id.* ¶ 7. It has not otherwise been distributed or made available for review. *Id.*

These additional facts make clear that DOD and the Executive Branch generally have kept access to a minimum, and have not distributed the Memorandum broadly. These facts are absolutely nothing like the facts that led the *CEG* court to conclude that the document at issue was not being maintained in confidence, and that the presidential communications privilege did not apply.

III. Plaintiffs' Other Arguments Are Without Merit

Plaintiffs argue that OLC's declaration should be excluded because it relies on hearsay, but this overlooks the declaration's contents and decisional law.

The declaration itself shows personal knowledge. The OLC declarant is a career member of the Senior Executive Service whose duties include supervising OLC's responses to FOIA matters. Watzel Decl. ¶ 1. This experience provides him personal knowledge of the relevant facts about OLC's role in Executive Branch functioning and the FOIA request. *Id.* ¶¶ 2-15. The declarant further attests that he has personally reviewed the Memorandum, *see id.* ¶ 16, which provides personal knowledge for most of the relevant facts about exemptions, *see id.* ¶¶ 17-33.

It is true that the declarant's description of a meeting that predated the Memorandum is “[b]ased on information provided to [him] by Executive Branch officials familiar with the Memorandum and its use.” *Id.* ¶ 18. But as plaintiffs acknowledge, Pl. Opp. 14-15, courts accept declarations in FOIA cases that incorporate facts the declarant was provided in the course of official duties. *See, e.g., Barnard v. DHS*, 598 F. Supp. 2d 1, 19 (D.D.C. 2009) (rejecting claim that declarations should be excluded on hearsay grounds, and noting that “FOIA declarants may include statements in their declarations based on information they have obtained in the course of their official duties”).

Plaintiffs argue the instant case is different because they claim to have identified “contrary evidence” about the “creation, purpose, use, and dissemination” of the Memorandum. Pl. Opp. 15.

But there is no such evidence. The OLC declaration explains that the Memorandum memorializes legal advice “provided to and discussed with senior attorneys from the White House Counsel’s Office, the NSC, and three other Executive Branch agencies at a meeting convened several weeks prior to the Memorandum being finalized.” Watzel Decl. ¶ 18. The advice was “provided 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.* ¶ 17, and the Memorandum also provides legal advice “concerning the manner in which the Executive Branch should implement the advice in the event the President ordered such action,” *id.*

Plaintiffs’ efforts to identify “evidence” that is “contrary” to this straightforward description fall flat. First, plaintiffs wonder what specific presidential decision was at issue. Pl. Opp. 16. But there is no doubt on this score: OLC explains that the Memorandum “memorializes deliberative advice provided 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.* ¶ 17; *see also id.* ¶ 23 (explaining that the Memorandum’s advice is predecisional “because it was prepared for the consideration of the President’s advisers to aid the President in deciding whether to authorize one or more military actions”).

Next, plaintiffs argue that “the declaration does nothing to dispel the possibility . . . that the relevant policy decision was not to engage in any *particular* strike, including the first of them, but whether to engage in the boat strikes *campaign* writ large.” Pl. Opp. 17. But as the OLC

declaration explains, the legal advice 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 (emphasis added). The fact that the Memorandum was prepared in connection with the consideration of “one or more” potential strikes does nothing to undermine the conclusion that it is deliberative. Moreover, the government’s opposition brief acknowledges, Govt. Opp. 6, that the President’s decision authorizing the use of military force came before the Memorandum was finalized, and we further acknowledge that the first strike (on September 2²) preceded by several days the date the Memorandum was finalized (September 5, *see* Watzel Decl. ¶ 17). But none of this shows an inconsistency, and neither does it undermine the claim of deliberative process privilege. *See* Govt. Opp. 6.³

Finally, plaintiffs seem to seek to cast doubt on the predecisional nature of the legal advice by suggesting (by citation to a Washington Post article, Pl. Opp. 17 & n.10) that a separate July 2025 classified document signed by the President authorizes military action. This claim relies on speculation. Although the government has acknowledged that a record responsive to the second item in plaintiffs’ FOIA request exists, *see, e.g.*, Joint Status Report (Feb. 26, 2026), ECF No. 32, the government has never represented anything about the contents or nature of that document, and

² A recently issued joint report of the Inspectors General of the Departments of Defense and State to Congress on Operation Southern Spear provides more information about the timeline, including the first strike date of September 2, 2025. *See* Lead IG Report to the U.S. Congress, https://media.defense.gov/2026/May/21/2003935694/-1/-1/1/OSS_Q2_MAR2026_FINAL_508.PDF, at 2.

³ Plaintiffs also argue that public reporting states that the OLC memorandum was being drafted “far earlier” than the interagency meeting described in the OLC declaration. Pl. Opp. 17 (citing Washington Post article). It is not clear why plaintiffs believe this would undermine rather than emphasize the predecisional nature of the advice memorialized therein. But even so, on its face, plaintiffs’ citation does not show this: the OLC declaration states that the interagency meeting occurred “several weeks prior” to September 5, when the Memorandum was finalized, Watzel Decl. ¶ 18; that is fully consistent with the “late summer” timeframe plaintiffs allege, Pl. Opp. 17.

does not concede that the description plaintiffs provided in their FOIA request accurately describes it.⁴ And ambiguous, anonymously sourced news reporting, does not generate the sort of “contrary evidence” that can be weighed against the government’s declarations.

In sum, OLC’s declaration meets the relevant standard, and there are no contrary indications in the record that would require another declaration. However, if the Court nonetheless determines it is necessary, the government is prepared to provide a supplemental declaration to satisfy any concerns.⁵

⁴ The second item in plaintiffs’ FOIA request seeks “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.” ECF No. 1-1 at 4.

⁵ Citing *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994), plaintiffs suggest that “targeted discovery” is appropriate if the Court does not rule in plaintiffs’ favor on this record. Pl. Br. 15. This is mistaken. *Carney* itself affirmed the district court’s denial of an application for discovery and subsequent grant of summary judgment. *See id.* at 811-12. And *Carney* sets a high bar for discovery in FOIA: to be permitted, “the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency’s affidavits or declarations, or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate.” *Id.* at 812 (quotation marks and citations omitted). Plaintiffs have shown neither here. Subsequent Second Circuit decisions make clear that mere “conjectural” notions about purportedly contradictory facts do not justify discovery. *Wood v. FBI*, 432 F.3d 78, 85 (2d Cir. 2005). Nor do plaintiffs cite a FOIA case actually permitting discovery—let alone in the realm of national security. As a practical matter, the obviously sensitive nature of the document at issue and the process by which it was created would create significant obstacles to discovery. Thus, as noted above the line, if the Court requires additional facts, we respectfully submit that it should direct the government to provide one or more supplemental declarations, not order discovery.

CONCLUSION

Plaintiffs' motion for summary judgment should be denied, and the government's cross-motion for summary judgment should be granted.

Dated: May 29, 2026
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Respectfully submitted,

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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 3240 words.

By: /s/ Peter Aronoff
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