UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, v. NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, and DEPARTMENT OF STATE, Defendants.	13-cv-9198 (KMW)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ***Page***

Statutes

Rules

Regulations

PRELIMINARY STATEMENT

Defendants the National Security Agency ("NSA"), Central Intelligence Agency ("CIA"), Department of Defense ("DoD"), Department of Justice ("DOJ"), and Department of State ("State") (collectively, "Defendants" or "the government"), by their attorney, Joon H. Kim, Acting United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in support of their second motion for partial summary judgment in this case arising under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

This case arises from sweeping FOIA requests by ACLU seeking records from seven agencies or agency components about sensitive national security and anti-terrorism activities arising under Executive Order 12,333. Defendants previously moved for partial summary judgment as to the sufficiency of their searches for records responsive to Plaintiffs' FOIA requests, and as to their withholdings of FOIA-exempt material from 150 responsive records. Plaintiffs disputed Defendants' contentions, and cross-moved. In a Memorandum Opinion and Order dated March 27, 2017, Dkt. No. 93, the Court granted Defendants' motion in part and denied the motion in part, with leave for Defendants to submit additional information regarding the issues as to which the Court did not rule in Defendants' favor. The Court denied Plaintiffs' cross-motion without prejudice.

The Court's partial denial of summary judgment to Defendants resulted from the Court's conclusion that some portions of Defendants' previous submissions did not meet their burden to establish that each Defendant conducted legally sufficient searches for responsive records and/or that certain exemptions applied to particular documents that Defendants withheld in full or in part. In so ruling, the Court authorized Defendants to provide supplemental submissions regarding the issues identified by the Court. Defendants other than FBI now do so, and FBI with

the Court's authorization will file its supplemental submission in support of this motion on or before July 7, 2017, by when it will have finished a supplemental search. Defendants move for partial summary judgment on all remaining issues as to the sufficiency of their searches and the applicability of the FOIA exemptions they previously asserted. The declarations supporting this second partial summary judgment motion address (or, in the case of FBI, will address) all of the Court's adverse rulings regarding Defendants' initial showings. Based on this additional information, along with the arguments herein and in Defendants' prior submissions, the Court should grant partial summary judgment to all Defendants as to all issues that were not conclusively resolved in connection with the parties' prior cross-motions for partial summary judgment.[1]

BACKGROUND

A. Executive Order 12,333

By way of brief restatement and as detailed in Defendant's prior motion papers, Executive Order ("E.O.") 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), as amended, governs and restricts the conduct of certain intelligence activities of the U.S. Government. *See* Declaration of Antoinette B. Shiner ("CIA Decl.," Dkt. No. 60) ¶ 6 n.2.[2] Plaintiffs' FOIA requests at issue here

[1] To assist the Court's review, this memorandum includes an addendum that identifies each issue as to which the Court's March 2017 Memorandum Opinion and Order denied summary judgment, and identifies the portions of the newly submitted agency declarations that address each such issue. Defendants' initial memorandum of law in support of their prior partial summary judgment motion includes an addendum that lists each document originally at issue; states which exemption or exemptions apply to each document; and refers to the relevant discussion set forth in one or more supporting agency declarations.

[2] For ease of reference, the declarations that accompany and support this memorandum, as well as Defendants' prior declarations, are all abbreviated using the name of the agency with which the declarant is affiliated – *e.g.*, [Agency] Decl. refers to declarations in support of Defendants' initial motion for partial summary judgment, Supp. [Agency] Decl. refers to declarations filed with Defendants' reply memorandum in support of that motion, and Second Supp. [Agency] Decl. refers to declarations submitted herewith.

pertain to aspects of E.O. 12,333 that concern electronic surveillance and U.S. persons. *Id.* ¶ 6; *see generally* Second Amended Complaint (Dkt. No. 44) (the "Second Amended Complaint"); Stipulation and Order Regarding Document Searches, May 9, 2014 (Dkt. No. 30) (the "Stipulation").

Executive Order 12,333 is lengthy and complex, and is not fully described in this memorandum. In brief, however, the Order constitutes formal Presidential recognition that "[a]ccurate and timely information about the capabilities, intentions and activities of foreign powers, organizations, or persons and their agents is essential to informed decisionmaking in the areas of national defense and foreign relations," and identifies the "[c]ollection of such information" as a "priority objective" that "will be pursued in a vigorous, innovative and responsible manner that is consistent with the Constitution and applicable law and respectful of the principles upon which the United States was founded." E.O. 12,333, § 2.1. Toward that end, the Order directs that "[t]he United States intelligence effort shall provide the President and the National Security Council with the necessary information on which to base decisions concerning the conduct and development of foreign, defense and economic policy, and the protection of United States national interests from foreign security threats." *Id.* § 1.1. The Order further requires that "[a]ll means, consistent with applicable United States law and this Order, and with full consideration of the rights of United States persons, shall be used to develop intelligence information for the President and the National Security Council. A balanced approach between technical collection efforts and other means should be maintained and encouraged." *Id.* § 1.1(b). The Order includes restrictions on the collection, retention, and dissemination of information pertaining to U.S. persons. *E.g., id.* §§ 2.3, 2.4.

B. Procedural History

1. Plaintiffs' FOIA Requests and the Parties' Narrowing of Issues in This Action

By letters dated May 13, 2013, Plaintiffs sent substantially identical FOIA requests (the "Initial Requests") to the CIA, NSA, FBI, NSD, OLC, State, and the Defense Intelligence Agency ("DIA"), an agency within DoD. Copies of these requests are annexed as exhibits to the initial declarations of each agency, and as exhibits to the Second Amended Complaint. In relevant part, each of the Initial Requests sought (a) any records construing or interpreting the scope of each agency's authority to act under E.O. 12,333, and any regulations thereunder; (b) any records describing the minimization procedures used by each agency with regard to both intelligence collection and intelligence interception conducted pursuant to Defendants' authority under E.O. 12,333 or any regulations issued thereunder; and (c) any records describing the standards that must be satisfied for the "collection," "acquisition," or "interception" of communications, as each agency defines these terms, pursuant to authority under E.O. 12,333 or any regulations issued thereunder.

Following correspondence with some of the defendant agencies, Plaintiffs filed this action on December 30, 2013, bringing FOIA claims against all five defendant agencies (CIA, DoD in connection with DIA's response, DOJ in connection with the responses of FBI, NSD, and OLC, State, and NSA). *See* Dkt. No. 1 (initial complaint). Plaintiffs amended their complaint on February 18, 2014 (Dkt. No. 17), and Defendants answered on March 3, 2014 (Dkt. No. 18). The parties subsequently submitted, and the Court approved, a Stipulation (Dkt. No. 30) that set forth agreed-upon procedures for the record searches that Defendants were to perform in response to Plaintiffs' requests. Specifically, OLC was to "continue to search for and process only those documents encompassed by the agreement it reached with Plaintiffs during

the administrative processing of the relevant request," Stipulation ¶ 2, NSD was to "search for and process all documents responsive to the original FOIA request submitted to it by Plaintiffs," *id.* ¶ 4, and NSA, CIA, DIA, FBI, and State were to "search for and process only" specified categories of documents, focusing generally on regulations, policies, governing legal opinions, procedures, and training materials. *Id.* ¶ 3.

After NSD informed Plaintiffs that their original request called for records that, by virtue of NSD's mandate and scope of activities, would not be in NSD's possession, *see* Declaration of John Bradford Wiegmann (Dkt. No. 65 ("NSD Decl.")) ¶¶ 3-5, Plaintiffs submitted a new, reworded FOIA request to NSD by letter dated July 29, 2014. *Id.* ¶ 6. ACLU's Second Amended Complaint, dated October 31, 2014, seeks disclosure of additional records responsive to this request.

The Stipulation further provided that CIA would search only specified offices (those of its Director, Deputy Director, and Executive Director) and "directorate level" records as to certain categories specified in the Stipulation; for another category of documents would search "only in the particular division of CIA's Office of General Counsel that is responsible for providing legal advice on complex or novel legal questions; and for another category of documents would search for materials created by the CIA's OGC Division or created or maintained at the CIA's directorate level. Stipulation ¶ 6. It also specified various date limitations for all agencies' searches, generally limiting documents considered responsive to those created or modified on or after September 11, 2001, and/or those that are "currently in use or effect." *Id.* ¶ 7.

2. Defendants' Searches and Release of Non-Exempt Records, and Prior Motion Practice

As is described in Defendants' prior motion papers and further detailed below and in the accompanying declarations, each Defendant agency completed its search and provided Plaintiffs with all non-exempt responsive documents or portions of documents that their searches identified, and most of the agencies that withheld any responsive records also provided Plaintiffs with an index of wholly or partially withheld records. Following discussions, Plaintiffs identified a subset of withholdings that they wished to challenge, which are listed in the addendum to Defendants' memorandum in support of their initial motion for partial summary judgment (Dkt. No. 59). Plaintiffs submitted a pre-motion letter describing the parties' agreement as to the issues to be addressed in cross-motions for partial summary judgment and their agreement concerning procedures to attempt to resolve any remaining disputes, if necessary, following the Court's ruling on these motions. *See* Dkt. No. 52. Defendants then moved for partial summary judgment as to the issues identified in the pre-motion letter, and Plaintiffs opposed and cross-moved. Dkt. Nos. 58, 69.

3. The Court's Memorandum Opinion and Order

The Court's 47-page Memorandum Opinion and Order ("Mem. Op.," Dkt. No. 93) ruled as to the sufficiency of the agency searches that ACLU contested, and ruled on Defendants' assertions of FOIA exemptions as to the 150 responsive records that ACLU challenged (Dkt. No. 52). As noted in footnote 1, this memorandum includes an addendum listing the Court's rulings that were adverse to Defendants, and referencing relevant portions of the supplemental submissions that are being submitted in support of this second motion for partial summary judgment. These issues are addressed herein and in Defendants' accompanying declarations.

a. Rulings Regarding Adequacy of Searches

First, the Court ruled on the adequacy of the only three searches that Plaintiffs challenged – those of FBI, NSD, and CIA. *See* Mem. Op. at 9.

As to FBI, the Court agreed with Plaintiffs' objection that FBI did not adequately document and detail how its search was conducted, and that FBI did not adequately explain the basis for its assertion that only five of its records systems were likely to contain responsive records. *See* Mem. Op. 10-12 ("FBI must, at the least, detail its search with greater specificity, and if FBI is unable to do so, it may be necessary to conduct, and properly document, additional searches"; "FBI should confirm that no other record system is likely to contain responsive documents, clarify the scope of the search conducted in the Office of the General Counsel, and address whether the Intelligence Branch is likely to produce responsive documents").

As to NSD, which relied on searches conducted or led by seven senior officials, the Court held to be insufficient NSD's representation that it is unlikely that "any additional significant records" would be uncovered elsewhere. Mem. Op. at 13 (citing *Oglesby v. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990), as requiring agency to "aver[] that *all files likely to contain responsive materials* (if such records exist) were searched"). Second, the Court was "not convinced that NSD's method of searching only present employees and then one historical database" was reasonably calculated to uncover all relevant documents. Mem Op. at 14.

Finally, as to CIA, the Court ruled that CIA provided insufficient information to permit evaluation of its search. Mem. Op. at 14. The Court held that CIA "must, at the least, provide a more complete explanation of the relevant databases that were searched." Mem. Op. at 15.

b. Rulings as to Specific Asserted Exemptions

The Court upheld the great majority of the Defendants' invocations of FOIA Exemptions 1 and 3, which protect, respectively, properly classified information and information

whose release is specifically exempted from disclosure by statute. *See generally* Mem. Op. 31-41. This memorandum does not detail the Court's rulings upholding Defendants' invocations of these exemptions as to numerous documents. These asserted exemptions were not upheld in only two respects, and the Court also instructed Defendants to report as to the status of ongoing review of one additional lengthy document (NSD 94-125). First, the Court held that Defendants failed to address whether they conducted a line-by-line segregability review of thirteen documents,[3] and instructed Defendants "to conduct such a segregability review if they have not done so, or inform the Court that this review has already occurred." Mem. Op. at 36. Second, and relatedly, the Court instructed Defendants to review these thirteen documents for possible improper withholding of unclassified portions and "inform the Court of the results." Mem. Op. at 37. Finally, as to NSD 94-125, which Defendants were continuing to review when they filed their prior motion, the Court directed that "Defendants shall inform the Court of the result" while noting that the Court "tends to agree with Plaintiffs that the withholdings may be inappropriate." Mem. Op. at 38; *see also* Mem. Op. at 41 (summarizing holdings under Exemptions 1 and 3 by document).

The Court also upheld all of Defendants' invocations of FOIA Exemption 7, Mem. Op. at 45, which are not further discussed in this memorandum.

The Memorandum Opinion and Order addressed at length Defendants' invocations of FOIA Exemption 5 based on a number of privileges. *See generally* Mem. Op. at 15-30. Again, this memorandum does not detail the favorable aspects of the Court's rulings, nor its detailed legal analysis – including that OLC adequately supported its invocation of privilege as to all OLC memoranda sought by Plaintiffs, *see* Mem. Op. at 23; that NSD adequately demonstrated

[3] CIA 8, 10, 12, 30, and 77; NSA 22, 23, and 79; and NSD 7, 37, 42, 44, and 47.

privilege as to six documents but not as to six others (NSD 12, 13, 14, 23, 33, and 49) about which the Court had upheld other exemptions, *see* Mem. Op. at 25; that CIA adequately established the privileged nature of numerous documents, but not with respect to CIA 36, 42, 43, 45, 46, and 80-91, *see* Mem. Op. at 29; and that, among NSA's classified responsive documents, NSA established privilege with respect to portions of NSA 12, but not with respect to other NSA documents. *See* Mem. Op. at 30.

C. Additional Declarations and Substantiation of Search Adequacy and Exemptions Asserted; Relief Requested

As noted, Defendants are filing four new declarations[4] in support of this motion. The FBI's declaration explains that FBI has been unable to adequately document its prior search efforts, and therefore is in the midst of conducting new searches using, among other things, search terms that ACLU has agreed are an appropriate means to search for responsive records. It intends to provide a declaration regarding the outcome of these searches by July 7, 2017, in further support of this partial summary judgment motion by Defendants. *See* Dkt. No. 98 (order approving the later submission of an FBI declaration in support of this motion). The other three declarations – from NSA, NSD, and CIA – provide additional information concerning the unresolved issues identified in the Memorandum Opinion and Order. Relevant portions of each of these declarations are described in this memorandum's Argument section in connection with its discussion of each unresolved issue, and, to avoid needless repetition, the declarations are not summarized in this Background section. Based on these showings (including FBI's forthcoming declaration) and the evidence previously submitted, Defendants request partial summary

[4] Respectively, declarations of Antoinette B. Shiner ("Second Supp. CIA Decl."); David M. Hardy ("Second Supp. FBI Decl."); David J. Sherman ("Second Supp. NSA Decl."); and Kevin Tiernan ("Second Supp. NSD Decl."). Each of these agencies earlier provided initial and supplemental declarations in support of Defendants' initial motion for partial summary judgment.

judgment on all issues as to which Defendants previously sought but did not obtain summary judgment.

ARGUMENT

I. Legal Standards for Summary Judgment in FOIA Actions

As set forth in greater detail in Defendants' prior motion papers and as the Memorandum Opinion and Order recognizes, the Freedom of Information Act, 5 U.S.C. § 552, represents a balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 1497, at 6 (1966)); *Associated Press v. U.S. Department of Justice*, 549 F.3d 62, 64 (2d Cir. 2008). Under FOIA, records need not be disclosed if "the documents fall within [the] enumerated exemptions." *U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001) (citations omitted).

Summary judgment is warranted if a 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). In a FOIA case, "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden" on summary judgment. *Carney v. Department of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (footnote omitted). The agency's declarations in support of its determinations are "accorded a presumption of good faith." *Id*. (quotation marks omitted).[5]

[5] Consistent with the Court's ruling earlier in this litigation, *see* Dkt. No. 53, Defendants are not filing a Local Rule 56.1 statement in support of this motion. Such statements generally are not required in FOIA cases in this Circuit. *See, e.g., New York Times Co. v. U.S. Department of Justice*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012).

For the reasons explained below, the government is entitled to summary judgment as to the searches and record withholdings at issue here, subject to successful completion of FBI's ongoing supplemental search and its forthcoming showing of how that search was conducted. The accompanying declarations establish that CIA, NSA, and NSD all carried out more-than-adequate searches, and demonstrate the applicability of the exemptions that the Court previously concluded were not adequately supported by earlier declarations.

II. The Agencies Conducted Reasonable Searches

An agency can show that it has conducted an adequate search for records responsive to a FOIA request by demonstrating, through declarations, that it has conducted a search reasonably calculated to uncover all relevant documents. *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). "The adequacy of a search is not measured by its results, but rather by its method." *New York Times Co. v. U.S. Department of Justice*, 756 F.3d 100, 124 (2d Cir. 2014), *amended on denial of reh'g*, 758 F.3d 436 (2d Cir. 2014); *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (adequacy of search turns on "whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant" (internal quotation marks omitted)). The agency is not required to search every record system, only those systems in which it believes responsive records are likely to be located. *See Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 497 (S.D.N.Y. 2010). Nor is any particular search method mandatory; rather, courts consider "search terms and the type of search performed," "the nature of the records system or database searched," and "whether the search was logically organized," with "adequacy – not perfection – [as] the standard." *Schwartz v. Department of Defense*, No. 15-cv-7077 (ARR), 2017 WL 78482, *6 (E.D.N.Y. Jan. 6, 2017) (internal quotations and citations omitted).

Here, the supplemental declarations being provided by the CIA and the NSD, along with prior relevant submissions, establish that their searches were reasonably calculated to discover the requested records and, therefore, legally sufficient. The FBI is engaged in a supplemental search, which will be addressed in a later FBI declaration to document the sufficiency of its search. *See* Dkt. No. 98.

A. Central Intelligence Agency

The Central Intelligence Agency's search for responsive records was described in the initial and supplemental declarations of Antoinette Shiner of CIA (Dkt. Nos. 60, 76 (respectively the "CIA Decl." and the "Supp. CIA Decl.")). CIA is supplementing this showing with an additional declaration of Ms. Shiner (the "Second Supp. CIA Decl."). After performing searches pursuant to the parties' Stipulation, CIA produced to Plaintiffs two documents in full and 46 documents in part, and CIA withheld 82 responsive documents in full pursuant to FOIA exemptions 1, 3, 5, 6, and 7(e). *See* CIA Decl. ¶ 8.

The Second Supplemental CIA Declaration provides extensive additional information regarding CIA's searches in light of issues identified by the Memorandum Opinion and Order, demonstrating that CIA met its obligation to conduct a search reasonably calculated to uncover all relevant documents. *See, e.g.*, *Weisberg*, 705 F.2d at 1351. The declaration explains that CIA's Information Management Services component, in consultation with CIA's Office of General Counsel, designed search strategies for responsive records as called for by applicable law and the terms of the Stipulation (Dkt. No. 30). *See* Second Supp. CIA Decl. ¶ 3. CIA's latest declaration further describes CIA's search efforts, to the extent consistent with limitations on the CIA's ability to disclose information about its sensitive databases and record systems. The declaration explains that the CIA offices searched have record systems and holdings that are well-known to the pertinent CIA office staff, and that "personnel knowledgeable about the

subject matter" of the requests were identified and located responsive records or guided search personnel to other resources. *Id.* ¶ 4. Rather than conduct a narrow and potentially underinclusive search, CIA performed database and repository searches using broad terms such as "12333" and "Executive Order 12,333" so as to capture an overinclusive set of records, which CIA then reviewed for responsiveness to Plaintiffs' requests as narrowed by the Stipulation. *Id.* ¶ 5. Further, CIA's latest supplemental declaration details how it determined appropriate places to search for each of the five categories of records identified in the Stipulation, how it conducted the search for each such category of records, why each search is likely to have yielded all records responsive to each requested category of records, and why additional search methods would not have been likely to yield additional documents. *Id.* ¶¶ 6-11. This detailed explanation more than establishes that CIA has satisfied its search obligations.

B. National Security Division (NSD)

NSD's search for responsive records was described in the initial and supplemental NSD Declarations (Dkt. Nos. 65, 80). In light of the Court's rulings that questioned NSD's reliance on senior personnel to design and carry out NSD's search, the Second Supplemental NSD Declaration, by Kevin Tiernan, more extensively details NSD's organization, history, and record-keeping, and explains in detail both the reasons that the seven officials tasked with this search were selected, and why those officials were able to conduct and direct a thorough search that was likely to identify all responsive records. This declaration also explains why no other search method would be likely to uncover additional responsive records.

Paragraphs 10-23 of the Second Supplemental NSD Declaration discuss NSD's search in detail, and are not fully set forth in this memorandum. Briefly, NSD's search was conducted by seven senior and knowledgeable attorneys with longstanding institutional knowledge and appropriate topical expertise and responsibility. Second Supp. NSD Decl. ¶¶ 9-11. These

individuals were assigned this task because their knowledge, experience, and roles "cover[ed] all of NSD's involvement with EO 12333 intelligence issues, and all of NSD's records that would be reasonably likely to contain records responsive to plaintiffs' requests." *Id.* ¶ 10. Meanwhile, other methods would not be effective, because NSD's records "are not kept in a system that can readily be searched electronically using search terms," nor are they "widely dispersed within the agency"; accordingly, NSD "used the best available means to uncover all NSD records responsive to plaintiffs' requests, and no additional search methods are likely to reveal responsive NSD records." *Id.*

Paragraphs 11-19 of the Second Supplemental NSD Declaration describe the searchers' backgrounds, responsibilities, and knowledge of relevant NSD records, and the search assignments for and activities undertaken by each of these seven senior officials. Further, six of the seven senior officials tasked with the search reviewed the "amalgamated" results of their searches and "met for several hours," using "their collective experience and institutional knowledge to review the potentially responsive documents and to confirm that the searches were comprehensive and produced a complete set of responsive records." *Id.* ¶ 18. NSD also took additional measures to ensure the completeness of its search, further tasking a very senior Special Counsel within NSD's Office of Law and Policy to also search his hard copy and electronic records. *Id.* ¶ 19. And, as a further precaution, NSD conducted a search term-based search of historical files, notwithstanding its primary reliance on searches by expert officials whose responsibility and first-hand knowledge of 12333 matters reached back at least 20 years. *Id.* ¶ 21.

As the Second Supplemental NSD Declaration also explains, additional search methods would be unlikely to yield additional responsive records. *See* Second Supp. NSD Decl. ¶ 20

("There is no other reasonably achievable search method that would be likely to uncover additional responsive records"); *id.* ¶ 21 ("Together, these searches captured all the systems and types of files that were likely to contain responsive records possessed by each attorney," and "it is unlikely that any other NSD personnel would have responsive records that at least one of the seven attorneys who conducted searches did not also have, beyond the historical records that were searched separately"). These explanations are entitled to a "presumption of good faith," *Carney*, 19 F.3d at 812, and are entirely consistent with, and supported by, the NSD's detailed showing of the thoroughness of the search that was conducted, coupled with its explanation of why there were no other reasonably achievable additional methods that were likely to yield responsive records. Thus, NSD has met its legal obligation to perform a search "reasonably calculated to discover the requested documents." *Grand Cent. P'ship, Inc.*, 166 F.3d at 489.

C. **FBI**

As noted, the FBI is unable to document its prior search in the degree of detail required by the Memorandum Opinion and Order. *See* Second Supp. FBI Decl. ¶ 4. The FBI therefore is undertaking an expedited new search to ensure that it performs and documents a search that meets its legal obligations. *Id.* Toward this end, FBI and Plaintiffs, through Defendants' counsel, reached agreement on electronic search terms that FBI would employ in a supplemental search. *Id.* Those search terms and the FBI's tasking of searches using those terms are described in paragraph 6 of the Second Supplemental FBI Declaration. These search terms, adopted with input from and the agreement of Plaintiffs, are reasonably calculated to locate all responsive records if FBI indeed possesses any such records, and thus meet FBI's legal obligations. The results of FBI's ongoing supplemental search and any other pertinent developments will be described in an additional declaration that FBI will file on or before July 7, 2017, in further support of this motion. *See* Dkt. No. 98 (scheduling order).

Thus, the Court should grant partial summary judgment to Defendants on all unresolved questions concerning the adequacy of their respective searches.

III. The Withheld Documents and Information Are Exempt from Disclosure Under FOIA

A. The Government Has Properly Justified Its Assertions of Exemption 5

The standards governing FOIA Exemption 5, which generally protects records that are subject to privileges, are detailed in Defendants' prior filings, and not set forth at length in this memorandum. With the exception of one document (CIA 46) that CIA has now released, the Court should uphold Defendants' Exemption 5 assertions as to which summary judgment was not previously granted, in light of information set forth in the accompanying, more-detailed declarations and Defendants' prior declarations. Given the limited issues that remain, this memorandum identifies each document or group of documents as to which the Court has held an additional showing was required, describes the additional information that Defendants are now providing, and explains why that showing establishes that Exemption 5 applies.

1. NSD 12, 13, 14, 23, 33 and 49; NSA 11 and 12

The Memorandum Opinion and Order directed Defendants to clarify what portions of NSD 12, 13, 14, 23, 33 and 49 and NSA 11 and 12 are privileged, given uncertainty resulting from the statement in NSA's initial declaration that only the "vast majority" of these memoranda are privileged and deliberative. *See* Mem. Op. 25, 29. The Memorandum Opinion and Order upheld the withholding in full of these documents pursuant to Exemptions 1 and 3, *see* Mem. Op. 36,[6] and, in light of those exemptions' clear applicability to all of each document, Defendants did

[6] Defendants asserted Exemptions 1 and 3 as to each of these documents. *See* summary addendum annexed to Defts' Mem., Dkt. No. 59. Plaintiffs objected that Defendants insufficiently demonstrated the absence of segregable non-exempt portions of these documents. The Court "credit[ed] Defendants' declarations that affirm that disclosure of these documents would tend to cause harm to the national security and would reveal intelligence sources and

not previously detail which portions of these documents are also privileged, and therefore subject to Exemption 5. Paragraphs 22-24 of the Second Supplemental NSD Declaration now provide that previously-missing degree of detail, explaining that most of these multi-page records include "sub-documents" consisting of legal memoranda generally presenting recommendations and legal analysis to agency decision-makers, but also some discrete pages reflecting governmental actions or decisions that occurred after consideration of the privileged analysis and advice set forth in the memoranda. *See* Second Supp. NSD Decl. ¶ 23. The declaration identifies the specific portions of each document that are (or are not) subject to privileges that the declaration specifies and explains, while also explaining that NSD 23 is privileged in full. *See id*. ¶ 24. This more precise assertion of Exemption 5 should be upheld.

2. CIA 36, 42, 43, 45, 46, and 80-91

The Second Supplemental CIA Declaration provides the additional information directed by the Court as to CIA 36, 42, 43, 45, 46, and 80-91.

First, as to CIA 80-91 (which also were properly withheld under Exemptions 1 and 3, *see supra* n. 6 and Mem. Op. at 36), the CIA explains that reference to CIA 80-91 was inadvertently and mistakenly omitted from the CIA's explanation of how many other documents (CIA 13-21, 23-25, 37-41, 44, 47-76, and others) were privileged and did not constitute "working law." *See* Second Supp. CIA Decl. ¶ 12 (citing Supp. CIA Decl. ¶ 3). The Court properly held that these documents were privileged and did not constitute "working law." Mem. Op. 26. Similarly, CIA 80-91 "constitute classified memoranda providing legal advice in response to confidential

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methods," Mem. Op. 36, while not directing further justification of Defendants' segregability determinations as to these documents while calling for such justification with respect to other documents – thus upholding Defendants' assertion that Exemptions 1 and 3 protect the documents in full. Mem. Op. 36.

requests from client-offices about the legal implications associated with certain proposed courses of action." Second Supp. CIA Decl. ¶ 12. They are not "controlling interpretations of policy . . . nor do they constitute the final legal position of the Agency regarding a given activity." *Id.* Thus, the documents are privileged and protected by Exemption 5.

Second, as to CIA 42, 43, 45, and 46, the CIA in the exercise of its discretion has released CIA 46, *see* Second Supp. CIA Decl. ¶ 13 & n.3, and the other three documents are privileged for reasons further detailed in CIA's most recent declaration. *See id.* ¶¶ 14-16. CIA 42 is a rough outline of classified talking points for reference by CIA attorneys when advising Agency clients, and appears to be a working draft of a planned presentation that may never have been given. *Id.* ¶ 14. CIA 42 thus constitutes both a deliberative process and an attorney-client privileged document reflecting contemplated attorney-client communications; it is also classified in full, and therefore protected by Exemptions 1 and 3, as the Court has recognized. *Id.*; *see* Mem. Op. 39. CIA 43 is an exact duplicate of the first three pages of CIA 42. *Id.* ¶ 15. Finally, CIA 45 is a rough outline prepared by CIA Office of General Counsel attorneys to use as presentation aids, again reflecting CIA legal advice on specific topics. *Id.* ¶ 16. Like CIA 42 and 43, the document also is classified in full. *Id.* Courts have upheld the assertion of Exemption 5 as to similar CIA documents. *See ACLU v. Department of Justice*, 844 F.3d 126, 133 (2d Cir. 2016) (holding that deliberative process privilege protected the entirety of two CIA documents consisting of informal outlines of legal analysis; documents were "predecisional with respect to the formulation of a policy or clear legal position," even though they were prepared after the actions in question), *reversing in relevant part ACLU v. Department of Justice*, 12 Civ. 794 (CM), 2015 WL 4470192, at *42, *45 (S.D.N.Y. July 16, 2015).

Finally, as to the applicability of the presidential communications privilege as to CIA 36, CIA attests that the document is a "one-page memorandum signed by the President of the United States and sent through the National Security Council to the Director of Central Intelligence." Second Supp. CIA Decl. ¶ 17. The document "consists of direct, confidential communications from the President to the CIA Director on a sensitive topic, disclosure of which would inhibit the President's ability to engage in effective communications and decisionmaking." *Id.* This document also is fully classified, and is properly withheld in full pursuant to Exemptions 1 and 3. *Id.*

3. NSA 7, 14-21, and 28

The Court upheld the assertion of attorney-client privilege as to NSA 7, 14-21, and 28, but held that the agency did not sufficiently justify why these documents do not constitute the agency's working law or communications that have been adopted as final agency policy, so as to make Exemption 5 inapplicable. *See* Mem. Op. at 30. While Defendants do not concede that their prior showing was deficient, NSA is submitting an additional declaration of David J. Sherman (the "Second Supp. NSA Decl.") that addresses all concerns identified by the Court, and that conclusively establishes that the "working law" doctrine does not apply.

The NSA's second supplemental declaration provides facts demonstrating that neither the adoption nor the working law exceptions to Exemption 5 apply to any of these documents. *See* Second Supp. NSA Decl. ¶¶ 5-16. The declaration explains in detail the nature and function of each of these documents, all of which were memoranda providing advice to governmental decision-makers, none of which had "operative effect," none of which was disseminated or adopted as final agency policy, and all of which constituted predecisional, legal or other advice rendered to a decision-maker in the course of that official's formulation of government policy.

See id.; *Brennan Center for Justice v. Department of Justice*, 697 F.3d 184, 197-98 (2d Cir. 2012); Mem. Op. at 30; *see also generally* Defts' Reply Mem. (Dkt. No. 75) at 6-7 (citing additional cases). As the NSA has specifically averred, "[n]one of these memoranda, which are patently advisory in nature, reflect binding statements of NSA's legal position, definitive statements of NSA policy, or final determinations with any operative effect." Second NSA Supp. Decl. ¶ 5. Indeed, the descriptions and functions of these documents are materially the same as those of the OLC memoranda as to which the Court already has ruled for Defendants on this issue. *See* Mem. Op. at 20-23 (upholding assertion of Exemption 5 as to OLC memoranda); *see also New York Times v. U.S. Department of Justice*, 806 F.3d 682, 687 (2d Cir. 2015) (same, rejecting argument that "working law" precluded application of Exemption 5).

The Memorandum Opinion and Order also directed a further submission regarding NSA 11 and 12, only the "vast majority" of which NSA stated were privileged. Paragraphs 22-24 of the Second Supplemental NSD Declaration clarify which portions of these documents are privileged, as is discussed in Point III.A.1, *supra*, along with five NSD documents that presented the same issue.

B. Defendants Have Satisfied the Requirements of Exemptions 1 and 3, Including as to Segregability

The Court upheld nearly all of Defendants' assertions of Exemptions 1 and 3, but directed further submissions concerning two evidentiary questions. First, the Court directed Defendants to either conduct a line-by-line segregability review or to inform the Court that such a review has taken place for CIA 8, 10, 12, 30, 77; NSA 22, 23, 79; and NSD 7, 37, 42, 44, 47. *See* Mem. Op. at 36. Second, the Court directed Defendants to address whether certain portions of 13 documents as to which they invoked Exemption 1 consisted of unclassified ("U/FOUO") material that was not actually protected by Exemption 1. *See* Mem. Op. at 37 (discussing, *e.g.*,

CIA 10 at 8 but holding that pages 14, 23-24 and 32-43 of CIA 10 were properly withheld as classified).

Defendants have conducted the segregability review called for by the Court, and have reaffirmed that there are no reasonably segregable portions of these documents that can be released without revealing or threatening to reveal classified and FOIA-exempt information. The Second Supplemental CIA Declaration explains that "CIA conducted a page-by-page and line-by-line review and released all reasonably segregable non-exempt responsive information to Plaintiffs." Second Supp. CIA Decl. ¶¶ 19-20. Similarly, NSA attests that it has performed the segregability review called for by the Court as to specified NSA and NSD documents. *See* Second Supp. NSA Decl. ¶¶ 17-23. That review confirmed that no additional portions of these documents were reasonably segregable and non-exempt. *Id.*[7]

Defendants also have reviewed the records at issue to ensure that they are not improperly withholding "U/FOUO" or other unclassified information, and they have explained that no such information that can be disclosed exists in these documents. Specifically, CIA determined that all material withheld under Exemption 1 is currently and properly classified. *See* Second Supp. CIA Decl. ¶¶ 19-20. NSA did the same as to the NSA and NSD documents about which the Court inquired. *See* Second Supp. NSA Decl. ¶¶ 24-25.

CIA also re-reviewed CIA 30, which is a CIA internal transmittal memorandum, and determined that the document "was inadvertently included in the production and is not a formal report relating to electronic surveillance under Executive Order 12333," which was the relevant

[7] NSA had previously released non-exempt portions of NSA 79. *See* Second Supp. NSA Decl. ¶ 22 (citing Supp. NSA Decl. ¶ 13).

category sought under the Stipulation. Second Supp. CIA Decl. ¶ 21. Thus, the document "should not have been treated as responsive to the request." *See id.*

Finally, the Court noted that further agency review was ongoing as to NSD 94-125, which the Court stated was quite possibly not exempt. See Mem. Op. 38. On September 26, 2016, upon the completion of their review, Defendants released NSD 94-125 with limited redactions. *See* Second Supp. NSA Decl. ¶¶ 26-27. ACLU does not appear to challenge Defendants' limited assertion of exemptions as to this document.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for partial summary judgment as to all issues that were not resolved in their favor in the Court's Memorandum Opinion and Order dated March 27, 2017.

Dated: New York, New York
June 14, 2017

Respectfully submitted,

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ADDENDUM – TOPICS REQUIRING FURTHER EVIDENTIARY SUPPORT PER MEMORANDUM OPINION AND ORDER, WITH REFERENCE TO RELEVANT EVIDENCE FROM SUPPLEMENTAL DECLARATIONS

Agency searches:

FBI

- Mem. Op. 10-12: FBI must better detail its search or conduct and document additional searches. Supplemental search is underway; results will be detailed in forthcoming FBI declaration. *See* Dkt. No. 98 (scheduling order); Second Supp. FBI Declaration.

NSD

- Mem. Op. 13-14: NSD failed adequately to describe and justify its search terms or methods. For additional explanation of search methodology, *see* Second Supp. NSD Declaration ¶¶ 9-21.

CIA

- Mem. Op. 14-15: More detailed search explanation required. For additional explanation of search methodology, including search terms or methods used, *see* Second Supp. CIA Declaration ¶¶ 3-11.

Exemption 5

Documents NSD 12, 13, 14, 23, 33 and 49

- Mem. Op. 25: summary judgment denied as to invocation of Exemption 5 as to NSD 12, 13, 14, 23, 33 and 49, pending explanation of what portions of these documents are privileged, given statement that only the "vast majority" of these memoranda are privileged and deliberative. *See* Second Supp. NSD Decl. ¶¶ 22-24.

CIA documents 36, 42, 43, 45, 46, and 80-91

- Mem. Op. 26: Explanation needed of the basis of withholding CIA 80-91. *See* Second Supp. CIA Decl. ¶ 12.

- Mem. Op. 27: Additional discussion needed of deliberative process privilege as to CIA 42, 43, 45, 46. *See* Second Supp. CIA Decl. ¶¶ 13-16 & n.3 (defending privilege as to CIA 42, 43, and 45, while noting CIA's authorization of discretionary release of CIA 46).

- Mem. Op. 28: Insufficient justification of application of presidential communications privilege to CIA 36. *See* Second Supp. CIA Decl. ¶ 17.

NSA

- Mem. Op. 29-30: Summary judgment denied as to invocation of Exemption 5 as to NSA 11 and 12, pending explanation of what portions of these documents are privileged, given statement that only the "vast majority" of these memoranda are privileged and deliberative. *See* Second Supp. NSD Decl. ¶¶ 22-24.

- Mem. Op. 30: For NSA 7, 14-21, and 28, the Court upheld the assertion of the attorney-client privilege, but found that the agency insufficiently justified why working law or adoption doctrine does not preclude protection under Exemption 5. *See* Second Supp. NSA Decl. ¶¶ 5-16.

Exemptions 1 and 3

Inspector General and Compliance Reports

- Mem. Op. 36: Agencies must conduct line-by-line segregability reviews (or inform the Court that such a review has taken place) for CIA 8, 10, 12, 30, 77; NSA 22, 23, 79; NSD 7, 37, 42, 44, 47. *See* Second Supp. CIA Decl. ¶¶ 19-20; Second Supp. NSA Decl. ¶¶ 17-23 (discussing lack of reasonably segregable non-exempt portions of NSD documents as well as NSA documents).

- Mem. Op. 37: Defendants must review 13 documents for improper Exemption 1 marking of unclassified (U/FOUO) material, *e.g.*, CIA 10 at 8 (but, within CIA 10, pages 14, 23-24, and 32-43 were properly withheld). *See* Second Supp. CIA Decl. ¶¶ 18-20; Second Supp. NSA Decl. ¶¶ 24-25.

NSD 94-125

- Mem. Op. 38: Defendants to advise Court of outcome of ongoing review of NSA 94-125. The document has been released in redacted form. *See* Second Supp. NSA Decl. ¶¶ 26-27.