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*.	No. 13-cv-09198 (KMW) ECF Case

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' SECOND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

In this case, Plaintiffs seek basic information about the legal boundaries of the government's surveillance under Executive Order ("EO") 12333—the primary authority under which the National Security Agency ("NSA") gathers foreign intelligence. Plaintiffs filed their FOIA requests to learn how the government construes the broad authority conferred by EO 12333 and its regulations, and whether the government's surveillance appropriately accounts for the constitutional rights of American citizens and residents. This is precisely the kind of information that Congress intended to be made public under FOIA.

Following the parties' motions for partial summary judgment, the Court found that several agencies' searches were inadequate, and that Defendants failed to establish that FOIA exemptions properly applied to dozens of withheld documents, including legal memoranda, inspector general and compliance reports, and training materials. On the basis of supplemental declarations, Defendants have now moved for partial summary judgment as to the adequacy of their searches and the applicability of Exemptions 1, 3, and 5 to the outstanding documents. Although Plaintiffs no longer challenge the agencies' searches, they oppose Defendants' motion and cross-move for partial summary judgment as to 46 of the withheld documents.

As described below, Defendants' supplemental declarations fail to support their claimed exemptions; more, in some instances, the declarations actually provide further evidence that the withholdings are unlawful. Citing Exemption 5, Defendants continue to improperly withhold their "working law"—legal analysis that agencies accepted and relied upon in deciding whether to conduct surveillance programs or activities. Defendants have also failed to justify their invocations of the deliberative process and attorney-client privileges over numerous legal memoranda and training materials. Finally, with respect to Exemptions 1 and 3, Defendants have

failed to establish that they have released all segregable, non-exempt information from several inspector general and compliance reports.

For these reasons, Plaintiffs respectfully request that the Court hold that Exemptions 1, 3, and 5 do not properly apply to the documents at issue, and order the release of any non-exempt material. In the alternative, Plaintiffs ask that the Court review seven of the withheld records *in camera* to determine whether they are in fact protected by the exemptions the government cites.

BACKGROUND

I. Executive Order 12333

EO 12333—originally issued in 1981 by President Ronald Reagan and subsequently revised—is the primary authority under which the NSA gathers foreign intelligence. *See* 46 Fed. Reg. 59,941 (Dec. 4, 1981), *as amended by* EO 13284, 68 Fed. Reg. 4077 (Jan. 23, 2003), EO 13355, 69 Fed. Reg. 53,593 (Aug. 27, 2004), *and by* EO 13470, 73 Fed. Reg. 45,325 (July 30, 2008).[1] The order is used to justify undisclosed surveillance activities within the United States, as well as human and electronic surveillance conducted overseas. *See* EO 12333 § 2.4. Collection, retention, and dissemination of EO 12333 information is governed by directives and regulations promulgated by federal agencies and approved by the Attorney General. Although these regulations do not permit the intentional "targeting" of U.S. persons except in limited circumstances, they permit what is sometimes referred to as "bulk surveillance"—the indiscriminate collection of electronic communications or data. Bulk surveillance results in the collection of vast quantities of Americans' private information.[2]

[1] *See* EO 12333, as amended, *available at* https://www.dni.gov/files/NCSC/documents/Regulations/EO_12333.pdf.

[2] *See, e.g.*, Letter from ACLU to Privacy & Civil Liberties Oversight Board on Its Review of Executive Order 12333, at 3-7 (Jan. 13, 2016), https://www.aclu.org/letter/aclu-comments-privacy-and-civil-liberties-oversight-board-its-review-executive-order-12333.

On its face, EO 12333 authorizes the intelligence community to gather information necessary to protect U.S. interests from "foreign security threats." *See* EO 12333 § 1.1. Despite this stated purpose, the executive order is used to justify surveillance for a broad range of objectives, resulting in the collection, retention, and use of information from large numbers of U.S. persons who have no nexus whatsoever to foreign security threats.

II. Procedural History

Motivated by concerns about sweeping surveillance programs that operate with no statutory constraint and little oversight, Plaintiffs filed FOIA requests on May 13, 2013, with the Central Intelligence Agency ("CIA"), Defense Intelligence Agency ("DIA"), Federal Bureau of Investigation ("FBI"), NSA, the Justice Department's National Security Division ("NSD") and Office of Legal Counsel ("OLC"), and the Department of State ("State"). *See* Second Am. Compl. (ECF No. 44). The requests sought disclosure of the legal standards and limitations governing EO 12333 surveillance; rules and regulations issued under that authority; and records describing minimization procedures. *See* ECF No. 64-2.[3]

After exhausting administrative remedies, Plaintiffs filed their complaint on December 30, 2013 and an amended complaint on February 18, 2014. *See* ECF Nos. 1, 17. Plaintiffs subsequently agreed to modify the scope of their requests to expedite the release of information. *See* ECF No. 27. The Court approved a stipulation on May 9, 2014, requiring NSA, CIA, DIA, FBI, and State to search for five categories of records concerning electronic surveillance under EO 12333: certain regulations and policies, authorizations for surveillance, formal legal

[3] For ease of reference, "[Agency] Decl." refers to declarations in support of Defendants' first 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 in support of Defendants' second motion for partial summary judgment.

opinions, training materials, and reports relating to surveillance of U.S. persons. *See* Stipulation & Order ¶ 3 (ECF No. 30).

NSD separately agreed to search for and process all documents responsive to Plaintiffs' original FOIA request. *Id.* ¶ 4. Plaintiffs submitted a revised FOIA request to NSD, which NSD then processed. Plaintiffs then filed their Second Amended Complaint, which incorporates the revised NSD request. *See* ECF No. 44.

In December 2015, the parties agreed to litigate a subset of responsive documents, and to apply the resulting ruling to the remaining responsive documents. *See* ECF No. 52. Defendants then moved for partial summary judgment on their searches and withholdings, and Plaintiffs cross-moved. *See* ECF Nos. 59 & 70.

On March 27, 2017, the Court issued a Memorandum Opinion and Order ("Opinion") granting Defendants' motion for partial summary judgment in part and denying it in part, and denying Plaintiffs' cross-motion without prejudice. *See* ECF No. 93. The Court concluded that the CIA, FBI, and NSD had not met their burden to establish that they conducted adequate searches for responsive records. In addition, the Court found that the CIA, NSA, and NSD had failed to show that FOIA Exemptions 1, 3, and 5 applied to certain withheld documents.

Specifically, with respect to Exemptions 1 and 3, the Court held that Defendants failed to address whether they had conducted a line-by-line segregability review of 13 inspector general and compliance reports: CIA 8, 10, 12, 30, and 77; NSA 22, 23, and 79; and NSD 7, 37, 42, 44, and 47. The Court also instructed Defendants to review these documents for improper withholding of unclassified material and to inform the Court of the results. *See* Op. at 36-37.[4]

[4] In addition, the Court required Defendants to inform the Court of the results of its re-review of NSD 94-125. Op. at 38. Following the first round of motion practice, Defendants provided

With respect to Exemption 5, the Court concluded that Defendants:

- Failed to establish that CIA 42, 43, 45, and 46 (training materials) were properly withheld under the deliberative process privilege, and that they did not contain working law, *see* Op. at 27;[5]
- Failed to establish that CIA 80-91 (legal memoranda) did not contain working law, *see* Op. at 26;
- Failed to establish that NSA 11 and 12 (approval packages containing legal memoranda) were properly withheld in their entirety under the attorney-client or deliberative process privileges, *see* Op. at 29-30;
- Failed to establish that NSA 7, 14-21, and 28 (legal memoranda) did not contain working law or had not been adopted, *see* Op. at 30; and
- Failed to establish that NSD 12, 13, 14, 23, 33, and 49 (approval packages containing legal memoranda) were properly withheld in their entirety under the attorney-client or deliberative process privileges, *see* Op. at 25.[6]

Defendants have now moved for partial summary judgment as to the adequacy of their searches and the applicability of Exemptions 1, 3, and 5 to the documents above. In conjunction with their motion, Defendants submitted additional declarations from the CIA, FBI, NSA, and NSD. Although Plaintiffs no longer challenge the adequacy of Defendants' searches, they oppose Defendants' motion and cross-move for partial summary judgment on the applicability of Exemptions 1, 3, and 5 to 46 of the remaining documents.

Plaintiffs with a less-redacted version of NSD 94-125. Plaintiffs do not challenge Defendants' remaining redactions of the document.

[5] The government has since released CIA 46 to Plaintiffs, who no longer challenge the withholding of this document.

The Court also held that the government failed to establish that CIA 36 (correspondence from the National Security Council to the CIA) was subject to the presidential communications privilege. *See* Op. at 28. Plaintiffs no longer challenge the applicability of the presidential communications privilege to CIA 36.

[6] As described in the Second Supplemental NSD Declaration, NSD 23, in its entirety, is a memorandum from a DOJ official to another DOJ official recommending a particular course of action. *See* Second Supp. NSD Decl. ¶ 23 (ECF No. 104). It is unclear whether all of the remaining documents from this set were formally designated as "approval packages," but NSD's description of the documents indicates that they all served that function. *See id.*

ARGUMENT

I. FOIA Imposes Strict Obligations on Agencies and Courts To Protect the Public's Right To Know.

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "[FOIA is] a means for citizens to know 'what their Government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) (citation omitted). To that end, the courts enforce a "strong presumption in favor of disclosure." *Associated Press v. DOD*, 554 F.3d 274, 283 (2d Cir. 2009). The statute requires disclosure of responsive records unless a specific exemption applies, and the exemptions are given "a narrow compass." *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011). Even where an exemption has been properly invoked over a particular document, "[a]ny reasonably segregable portion of a record shall be provided," and the government may withhold only those specific "portions which are exempt." 5 U.S.C. § 552(b).

FOIA directs courts to conduct a *de novo* review when reviewing an agency's decision to withhold information or records from a requester. Consistent with FOIA's presumption of public access to agency records, "all doubts [are] resolved in favor of disclosure." *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988); *see also Bloomberg, L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010).

FOIA is particularly hostile to government efforts—as in this case—to withhold documents that constitute the legal rules by which government agencies operate. As the Supreme Court has observed, FOIA "represents a strong congressional aversion to 'secret (agency) law,'

and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

On a motion for summary judgment, "[t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not agency records or have not been improperly withheld." *DOJ v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989). To satisfy this burden, an agency invoking a FOIA exemption must "provide a public affidavit explaining in as much detail as is possible the basis for its claim." *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976). Withholdings, including redactions, must be justified by affidavits or declarations "supplying facts . . . giving reasonably detailed explanations why any withheld documents fall within an exemption." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991).

II. Defendants Have Improperly Withheld Documents Under Exemption 5.

Exemption 5 protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption "incorporate[s] into the FOIA all the normal civil discovery privileges." *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991).

In its Opinion, the Court held that the government failed to justify its Exemption 5 withholdings with respect to CIA and NSA legal memoranda, NSA and NSD packages containing legal memoranda, and CIA training materials. *See* Op. at 25-30. For the reasons below, the government's supplemental declarations likewise fail to establish that Exemption 5 properly applies to these documents. Accordingly, Plaintiffs respectfully request that the Court hold that these documents may not be withheld under Exemption 5. In the alternative, the Court should review a representative sample of the documents *in camera*, including CIA 82 (an intra-

CIA legal memorandum); NSA 19 and NSA 21 (intra-NSA legal memoranda); NSD 33 (an approval package containing a legal memorandum), and CIA 45 (training material).

A. Defendants' "Working Law" Cannot Be Withheld Under Exemption 5.

Defendants assert the deliberative process privilege and the attorney-client privilege over numerous CIA, NSA, and NSD documents that appear to contain the agencies' working law. Even assuming that Defendants have properly invoked these privileges—and for the reasons discussed *infra* Section II.B, they have not—the working-law doctrine overcomes both, and the documents cannot be withheld pursuant to Exemption 5. *See, e.g.*, *Brennan Ctr. for Justice at NYU v. DOJ*, 697 F.3d 184, 194-96 (2d Cir. 2012).

Under the working-law doctrine, agencies cannot rely on Exemption 5 to withhold the opinions, rules, and interpretations that constitute their formal or informal law or policy. *See id.* at 195-96, 199-202. As Plaintiffs have explained, an agency's actual reliance on legal analysis as a basis for its policy or operational decisions transforms that analysis into working law. *See* Pls. First Br. 16-26 (ECF No. 70); Pls. First Reply 2-12 (ECF No. 82); *Sears*, 421 U.S. at 152-53; *see also, e.g.*, *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) (working law includes agency opinions about "what the law is" and "what is not the law and why it is not the law"); *Am. Immigration Council v. DHS*, 905 F. Supp. 2d 206, 218 (D.D.C. 2012) (the working-law doctrine ensures that an agency does not "develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final'" (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980)). Importantly, plaintiffs do not bear the burden to show that withheld materials are working law or were adopted by agencies; rather, as under FOIA generally, it is the agencies' burden to show that Exemption 5 properly applies. *See, e.g.*, *Brennan Ctr.*, 697 F.3d at 201-02.

In the Opinion, the Court stated that "Plaintiffs take an overly broad view of what constitutes working law, particularly with respect to legal memoranda." Op. at 19-20. Respectfully, however, Plaintiffs' arguments are supported by and based on Supreme Court and circuit precedent. Plaintiffs explained that, "if the relevant policy-maker reviewed [a legal memorandum] and, on the basis of the analysis in that document, elected to take actions that [the memorandum's author] opined would be lawful, the underlying memo would become working law, as it would reflect the agency's view of 'what the law is.'" Pls. First Reply 11 (quotation marks and citations omitted). In the scenario Plaintiffs presented, once the policy-maker elects to take action based on the memorandum's reasoning, the legal memorandum has "operative effect," Op. at 20, because it supplies the legal basis for agency action—and, thus, becomes the agency's working law. As the Supreme Court stated in *Sears*, "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted"—and these reasons "constitute the 'working law' of the agency." *Sears*, 421 U.S. at 152-53. The D.C. Circuit elaborated on the contours of the doctrine in *Coastal States*, holding that legal opinions that were "routinely used" and "relied on" as a basis for agency action were working law, notwithstanding the fact that the documents were not "absolutely binding" on agency decision-makers. *Coastal States*, 617 F.2d at 860, 869. Similarly, in *Brennan Center*, the Second Circuit drew on *Sears* and *Coastal States* to explain that when "an agency's memorandum or other document has become its '*effective* law and policy,' it will be subject to disclosure as the 'working law' of the agency." *Brennan Ctr.*, 697 F.3d at 199 (emphasis added) (citation omitted). As discussed below, Defendants have failed to meet their burden to establish that the withheld documents do not contain working law or were not adopted.[7]

[7] One way in which an agency may identify its effective law and policy is by internally adopting

1. Intra-CIA Legal Memoranda Contain Working Law.

The Court found that the CIA's description of CIA 80-91—legal memoranda from CIA attorneys in response to requests from agency offices—was insufficient to assess whether the memoranda contained working law. *See* Op. at 26. Yet the CIA has again failed to provide the information necessary for the Court to evaluate whether these documents in fact embody or include the agency's effective law and policy.

Once more, the government relies on an improperly narrow view of what qualifies as working law. It contends that CIA 80-91 do not constitute working law because: (i) they are not "controlling interpretations of policy"; (ii) they served as "one consideration, among others, weighed by Agency personnel in deciding whether to undertake a particular intelligence activity"; and (iii) they are not the "final legal position of the Agency regarding a given activity." Second Supp. CIA Decl. ¶ 12 (ECF No. 101). Yet the working-law doctrine is not limited to policy interpretations or legal analyses that have been formally designated as "controlling" or "final," *see, e.g.*, *Coastal States*, 617 F.2d at 859-60, 869, nor is it a defense for the agency to claim that personnel considered other factors, in addition to the legal advice they relied upon. *See* Pls. First Reply 11-12.

As an initial matter, the ability of a general counsel's office to set *policy* is irrelevant. To qualify as working law, it is "not necessary" for a document to "reflect the final *programmatic* decisions" of agency personnel; it is "enough" that it represents the agency's "final *legal* position" on the relevant issue. *Brennan Ctr.*, 697 F.3d at 201 (quotation marks and citation omitted). It is clear that an agency can rely on legal analysis to set the outer bounds of permissible agency action, while leaving decision-makers with some discretion to act within

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a particular legal interpretation. *See* Op. at 30; 5 U.S.C. § 552(a)(1)(D).

those parameters. When an agency accepts and relies on legal analysis that sets forth what the law does—or does *not*—permit, that analysis is working law. *See Tax Analysts*, 117 F.3d at 617.

The CIA also asserts that these legal memoranda served as "one consideration, among others" in the agency's policy decisions. Second Supp. CIA Decl. ¶ 12. This, too, is beside the point. It is undoubtedly the case that the vast majority of agency decisions are informed by multiple considerations, but that hardly means that an agency's legal analysis has no effect. To the contrary, this legal analysis often opens the door to particular agency conduct while foreclosing other courses of action. These interpretations—which endorse agency action or constrain it—thus affect the rights of the public, not least by permitting certain forms of surveillance. *See, e.g.*, *Brennan Ctr.*, 697 F.3d at 200 (Exemption 5 cannot be used to shield the law that an agency "is actually applying in its dealings with the public"). Agencies surely consider several factors in selecting among lawful alternatives, but this does not leave them without working law. If the CIA's claim defeated a working-law argument, the doctrine would never apply where an agency considered both the legality *and* the wisdom of a potential course of conduct—as agencies routinely do. Such an approach would essentially render the working-law doctrine a nullity, shielding the effective law of the executive branch from public view.

Finally, the CIA contends that these memoranda do not constitute the "final legal position of the Agency regarding a given activity." Second Supp. CIA Decl. ¶ 12. However, agency assertions that a legal opinion is "not a final decision" are not dispositive, because courts assess "the practical realities of the situation, rather than looking for a formal agency designation of 'final' or 'binding.'" *Coastal States*, 617 F.2d at 860 nn.7 & 8; *see id.* at 869 (considering what documents "in practice represent," regardless of the "formal powers" of counsel "to issue binding interpretations"); *Schlefer v. United States*, 702 F.2d 233, 238 (D.C. Cir. 1983).

Moreover, the CIA's assertion that the memoranda do not reflect the agency's final legal position is undermined by the CIA's own description of the documents as "fact-specific legal analysis and advice . . . weighed by Agency personnel in deciding whether to undertake a particular intelligence activity." Second Supp. CIA Decl. ¶ 12; *see also* Supp. CIA Decl. ¶ 3 (ECF No. 76). When the CIA General Counsel's office provides in-house legal advice "in response to a request for legal guidance on a particular issue," CIA Vaughn 38-44 (ECF No. 60-1), and when that advice is weighed by CIA personnel in deciding whether to undertake a particular activity, that advice is very likely the final legal position of the CIA regarding that particular activity.[8] Such advice surely does not qualify as a set of "merely informal suggestions" that may be easily disregarded. *Coastal States*, 617 F.2d at 860. Insofar as the CIA accepted and relied on these legal analyses as a basis for agency action, they constitute the effective law and policy of the agency and cannot be withheld under Exemption 5. *See id.* at 869; *Sears*, 421 U.S. at 152-53.

2. Intra-NSA Legal Memoranda Contain Working Law.

The Court found that it could not determine whether NSA 7, 14-21, and 28 contained working law or had been adopted, because the NSA relied on an unduly narrow view of these two doctrines. The agency stated only that the in-house legal memoranda were not used to "'*publically* justify NSA actions'" and were not "'*expressly* adopted as Agency policy,'" without explaining whether the documents were "informal[ly]" or internally adopted, or constituted the agency's effective law. Op. at 30 (quoting NSA Decl. ¶ 53 and citing *Brennan Center*, 697 F.3d at 195). Although the Court provided the NSA with an additional opportunity to justify its withholdings, the agency has once again failed to establish that its documents do not contain working law or have not been adopted.

[8] As the cases interpreting the working-law doctrine make plain, "final" legal advice does not mean advice that is irrevocable or set in stone. *See, e.g.*, *Coastal States*, 617 F.2d at 869.

The NSA's supplemental declaration is deficient in several respects. It merely states that these legal memoranda "reflect legal advice that constitutes one consideration, of many, for decision-makers; these memoranda do not reflect the Agency's final decision to engage in a particular course of action or to adopt a particular policy, either formally or informally." Second Supp. NSA Decl. ¶ 5 (ECF No. 103). The declaration also notes that the memoranda are not "definitive statements of NSA policy." *Id.* As Plaintiffs have explained in connection with the CIA's supplemental showing, the NSA's arguments about its attorneys' inability to make policy are unavailing. *See supra* Section II.A.1; Pls. First Reply 11-12. Similarly, the fact that the memoranda themselves do not reflect a final policy decision or course of conduct is irrelevant. Even if the legal advice is not working law at the moment it is provided, it *becomes* working law when an agency decision-maker accepts and relies upon it. *See Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 360 (2d Cir. 2005) (an agency may not adopt a final opinion while "shielding from public view the analysis that yielded that position").

The NSA also contends that none of the memoranda "reflect binding statements of NSA's legal position," despite the fact that they were written by "senior NSA intelligence law attorney[s]" in the agency's Office of General Counsel. Second Supp. NSA Decl. ¶¶ 5, 16; NSA Vaughn at 1, 3-5 (ECF No. 64-14). As a general matter, legal analysis from a General Counsel's office to an agency component is often a "binding statement" of the agency's legal position at that point in time. *See, e.g.*, *Schlefer*, 702 F.2d at 238 (rejecting as "superficial" the government's argument that an agency's chief counsel is "wholly without authority to make substantive decisions binding upon the agency").[9] Moreover, an agency's insistence that advice is not

[9] Likewise, the NSA's assertion that the memoranda do not reflect "final determinations with any operative effect" warrants skepticism, *see* Second Supp. NSA Decl. ¶ 5, given the role of a General Counsel's office, *see, e.g.*, *Schlefer*, 702 F.2d at 238.

"binding" is not dispositive, particularly if the advice "was regularly and consistently followed by the non-legal staff." *Coastal States*, 617 F.2d at 859-60. For example, in *Coastal States*, the D.C. Circuit held that legal opinions from the Department of Energy's regional counsel were working law, even though agency staff would decline to follow the advice in certain instances, and would sometimes even refer the matter to a higher authority within the agency. *See id.* at 860. The court observed that "DOE's contention that these documents are not 'final opinions,' absolutely binding on the auditors, misses the point," because the opinions were routinely used and relied on by agency staff. *Id.* at 869. Similarly, here, the Court must look beyond the NSA's bare assertions and assess whether the memoranda were accepted and relied upon as a basis for agency action. *See id.* at 859-60, 869. Because the NSA has failed to meet its burden to establish that the documents were not used in this way, they may not be withheld under Exemption 5.

3. NSD and NSA "Approval Packages" Contain Working Law.

In its Opinion, the Court held that the government failed to satisfy its burden that Exemption 5 applies to the entirety of NSD 12, 13, 14, 23, 33, and 49, and NSA 11 and 12. *See* Op. at 25, 29-30. These documents include legal memoranda that were part of "approval packages" for NSA surveillance, or that were otherwise integral to the authorization of surveillance programs or activities. *See* Second Supp. NSD Decl. ¶¶ 23-24; Pls. First Br. 21-23. Not only has NSD failed to justify its invocation of Exemption 5 privileges, *see infra* Section II.B., but its supplemental declaration serves as further evidence that these documents contain working law or were adopted.[10]

[10] NSD is continuing to justify the applicability of the attorney-client and deliberative process privileges to NSA Documents 11 and 12. *See* Second Supp. NSA Decl. ¶ 4.

Plaintiffs recognize that the Court did not direct NSD or NSA to address the working law or adoption doctrines with respect to this subset of documents. However, given that the Court is assessing the applicability of Exemption 5, and given that NSD's declaration strongly suggests

As Plaintiffs have explained, these approval packages are the product of a formal decision-making structure designed to provide legal justifications for specific policy decisions. *See* Pls. First Reply 10-11. The process ensures that a given policy decision is supported by—and directly tied to—an articulated legal basis. Thus, the telltale sign for working law purposes is whether the package was, in fact, approved. An agency decision-maker who disagreed with the legal justification set forth in an approval package would not *approve* the package, because the legal analysis is not merely an "informal suggestion[]" "which could be freely disregarded." *Coastal States*, 617 F.2d at 860, 869. The decision-maker might insist on revisions to the legal rationale, or reject the proposed activity altogether. Conversely, agency approval of the proposed program or action represents an acceptance of the legal reasoning contained in the approval package—and, thus, that legal analysis is working law. *See La Raza*, 411 F.3d at 360. Indeed, the very point of an approval package—as the Vaughn indices and declarations show—is to tie a particular policy decision to the agency's legal justification for it.

NSD's supplemental description of NSD 12, 13, 14, 23, 33, and 49, and NSA 11 and 12, is further evidence that these documents contain working law or were adopted. Each includes legal analysis "recommending . . . a particular course of action," and all but NSD 23 contain additional documents "*reflecting the governmental action decisions* [*sic*] *that occurred after consideration of those recommendations.*" Second Supp. NSD Decl. ¶ 23 (emphasis added). Insofar as the NSA accepted or relied on the underlying legal reasoning as a basis for its action, the legal memoranda within these documents constitute working law and cannot be withheld under Exemption 5.

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that the documents contain working law or were adopted, Plaintiffs discuss in brief why these documents constitute effective law and policy.

4. CIA Training Materials Contain Working Law.

The Court also found that the government failed to establish that CIA 42, 43, and 45—talking points for agency trainings—did not contain working law. *See* Op. at 27. The Second Supplemental CIA Declaration does not cure this defect; if anything, it indicates that the documents do in fact contain working law. For instance, the agency describes CIA 45 as a "rough outline containing several hypothetical scenarios specific to CIA operations created by OGC attorneys to use as presentation aids [*sic*] in order to promote oral discussion of potential legal issues among Agency personnel receiving training on the legal requirements of Executive Order 12333." Second Supp. CIA Decl. ¶ 16. As the Court recognized, "An opinion about the applicability of existing policy to a certain state of facts, like examples in a manual, constitute[s] working law . . . ." Op. at 27 (internal quotation marks and citation omitted).

Similarly, the agency characterizes CIA 42 and 43 as "rough outline[s] of classified talking points drafted by CIA attorneys to use as a reference tool when advising Agency clients or when conducting in-person briefings of Agency employees on specific topics related to Executive Order 12333." Second Supp. CIA Decl. ¶¶ 14-15. Although the CIA states that these documents appear to be "working draft[s]," *id.*, that fact is not dispositive of the working-law inquiry. *See, e.g.*, *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257-58 (D.C. Cir. 1982). Indeed, the agency's prior characterization of the documents further suggests that they do contain working law, as they "provided guidance on E.O. 12333 intended to inform subsequent agency decision-making regarding the use of specific authorities." CIA Decl. ¶ 24 (ECF No. 60).

B. Defendants Have Failed To Justify the Privileges They Assert.

In the Opinion, the Court provided the government with a second opportunity to justify its assertions of the deliberative process and attorney-client privileges over 12 CIA, NSA, and NSD documents, which include legal memoranda and training materials. *See* Op. at 25, 27, 29-

30. For the reasons set forth below, the government's supplemental declarations lack the detail required to demonstrate that the documents may be withheld under Exemption 5.

1. Defendants Have Failed To Justify the Deliberative Process Privilege.

To properly invoke the deliberative process privilege, the government must establish that the documents are both predecisional and deliberative, and that they contain no factual, non-deliberative material. *See* Pls. First Br. 26-30; *Schlefer*, 702 F.2d at 237; *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999). Specifically, Defendants must explain: (1) the roles of the author and recipient of each document; (2) the function and significance of the document in a decision-making process; (3) the subject-matter of the document and the nature of the deliberative opinion; and (4) the number of employees among whom the document was circulated. *See Senate of P.R. v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987) (finding cursory description of "each document's issue date, its author and intended recipient, and the briefest of references to its subject matter" inadequate to sustain withholding under Exemption 5); *Nat'l Day Laborer Org. Network v. U.S. Immig. & Customs Enf't Agency*, 811 F. Supp. 2d 713, 743 (S.D.N.Y. 2011) (requiring agencies to describe documents' "function and significance in the agency's decision-making process" to sustain the privilege); *Arthur Andersen & Co.*, 679 F.2d at 258 (requiring that an agency describe "the positions in the chain of command of the parties to the documents"); *Auto. Club of N.Y. v. Port Auth. of N.Y. & N.J.*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) (applying *La Raza* and observing that a log of documents withheld on the basis of the deliberative process privilege should include the number of employees among whom the document was circulated).

For two reasons, Plaintiffs respectfully disagree with the Court's observation that Plaintiffs "overstate[d]" the government's burden to justify the privilege. Op. at 16-17. First, the Court seemed to suggest that under *Tigue v. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002), the

government need not identify any relevant decision to which the withheld documents relate. *See* Op. at 17. But this is not so. *Tigue* explained that an agency need not show that a decision was *in fact* ultimately made; however, an agency "must be able to demonstrate that, *ex ante*, the document for which executive privilege is claimed *related to a specific decision facing the agency*." 312 F.3d at 80 (emphasis added); *see also* Op. at 17, 27 (acknowledging *Tigue*'s holding). Here, the government has not made that *ex ante* showing, as discussed below. Second, the Court stated that *Automobile Club*'s privilege log requirements—specifically, the requirement that a log include the number of recipients of a document—is based on discovery in civil cases, and that this rule does not necessarily apply to invocations of privilege in FOIA cases. *See* Op. at 17. Critically, however, Exemption 5 was designed to incorporate common law litigation privileges. *See, e.g.*, *Sears*, 421 U.S. at 149. For this reason, the standards the government must meet to satisfy the deliberative process privilege in FOIA cases are just as exacting as in the non-FOIA context, especially given FOIA's "strong presumption in favor of disclosure." *Associated Press*, 554 F.3d at 283; *see Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 519 (S.D.N.Y. 2010) (analogizing the requirements that must be met in a Vaughn index to the requirements for a privilege log in civil litigation).

Most importantly, even if the government need not specify the number of employees among whom a document was circulated, the fact remains that the government has failed to specify the roles of the author and recipient of each document; the function and significance of each document in a decision-making process; and the subject-matter of each document and the nature of the deliberative opinion.

a. Defendants Have Failed To Justify the Privilege for NSD and NSA Approval Packages.

The Court found that the government failed to establish that NSD 12, 13, 14, 23, 33, and 49, and NSA 11 and 12—approval packages that include legal memoranda—were properly withheld in their entirety under the deliberative process privilege. *See* Op. at 25, 29-30. For a second time, Defendants have failed to justify the privilege. The only new information the government has provided about these documents is the number of pages of legal memoranda in each, and the fact that the recipients of the documents were Department of Justice officials (as opposed to "Government attorneys"). *Compare* Second Supp. NSD Decl. ¶¶ 23-24, *with* NSD Decl. ¶¶ 15-18 (ECF No. 65). Notably, the government's public declarations do not specify the institutional role of the recipients, the nature of the government decisions at issue at the time of the document's creation, the decision-making process, or the role the specific documents played in that process.[11] For the same reasons that NSD previously failed to support its invocation of the privilege over these documents, *see* Pls. First Reply 14-18, NSD's additional declaration fails to explain "what portions of these documents do, and do not, contain . . . deliberative and pre-decisional analysis" protected by the privilege, Op. at 25.

b. Defendants Have Failed To Justify the Privilege for CIA Training Materials.

The Court's Opinion also concluded that the government failed to establish that CIA 42, 43, and 45—talking points for agency trainings—were properly withheld under the deliberative process privilege. *See* Op at 27. As with the approval packages discussed above, the

[11] Although the government may seek to rely on information provided in the Classified NSA Declaration, *see* NSD Decl. ¶ 15 (stating that the classified declaration discusses these documents), FOIA strongly disfavors reliance upon *in camera*, *ex parte* submissions and permits such reliance only after the government has submitted as detailed a public explanation of its withholdings as possible. *See John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 110 (2d Cir. 1988); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006).

government's showing is again inadequate to justify the privilege. The only relevant new information the government has provided about these documents is that they were drafted by CIA attorneys. *Compare* Second Supp. CIA Decl. ¶¶ 13-16, *with* CIA Decl. ¶ 24. However, the CIA has still failed to specify the institutional role of the recipients, or any agency decision to which the talking points relate. With respect to CIA 42 and 43, the government asserts that the documents would reveal "the attorney's deliberative process in preparing the presentation." Second Supp. CIA Decl. ¶ 14-15; Gov. Second Br. 18 (ECF No. 100). But an attorney's thought-process in crafting a presentation is not the kind of internal agency decision-making process that is protected by the deliberative process privilege. Otherwise, the privilege could apply to any and all attorney work product, even if it did not "bear on the formulation or exercise of policy-oriented judgment." *Tigue*, 312 F.3d at 80.

Although the government contends that the Second Circuit upheld the assertion of Exemption 5 "as to similar CIA documents" in *ACLU v. DOJ*, 844 F.3d 126, 133 (2d Cir. 2016), *see* Gov. Second Br. 18, the documents at issue in that case were plainly distinguishable. There, the court upheld the privilege as to two documents related to the targeted killing program, which the government described as "rough outlines prepared by CIA attorneys concerning legal issues relating to the [Anwar al-]Aulaqi strike, created for use in ongoing intra- and inter-agency deliberations on that subject." Reply for Defs.–Appellees–Cross-Appellants at 24, *ACLU v. DOJ*, No. 15-3122 (2d Cir. Aug. 5, 2016), ECF No. 1834417. In other words, the Second Circuit concluded that these documents were "predecisional with respect to the formulation of a policy or a clear legal position" concerning the targeted killing of American citizens. *ACLU*, 844 F.3d at 133. Here, in contrast, the CIA identifies no relevant decision or deliberative process: it seeks to assert the privilege over (i) talking points for a planned presentation to agency employees on

"topics related to Executive Order 12333," and (ii) a rough outline of possible scenarios designed to serve as a presentation aide for training on the legal requirements of EO 12333. Second Supp. CIA Decl. ¶¶ 14-16. These materials do not reflect preliminary deliberations, but are statements of what the law is and how it applies to agency activities. The CIA has again failed to establish that these documents are both deliberative and pre-decisional.

2. Defendants Have Failed To Justify the Attorney-Client Privilege.

In the Opinion, the Court found that the government did not establish that NSD 12, 13, 14, 23, 33, and 49, and NSA 11 and 12, were properly withheld in their entirety under the attorney-client privilege. *See* Op. at 25, 29-30. Yet NSD's supplemental declaration fails to demonstrate that the legal memoranda within these documents are indeed privileged. To properly invoke the privilege, the government must show that the document was "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *In re Cty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007). However, NSD has failed to provide sufficient information about the recipients of copies of the withheld documents, and whether the documents were kept confidential. *See* Second Supp. NSD Decl. ¶¶ 23-24. Without this information, the Court cannot assess whether the documents were in fact confidential communications between client and counsel, or whether, for example, they were distributed broadly as official guidance, thus defeating the privilege. *See, e.g.*, *Coastal States*, 617 F.2d at 863; *Amnesty Int'l USA*, 728 F. Supp. 2d at 519. In sum, NSD's additional declaration fails to explain "what portions of these documents do, and do not, contain legal advice" protected by the privilege. Op. at 25.[12]

[12] For the first time, the CIA belatedly asserts that the attorney-client privilege applies to CIA 42 and 43, and that the agency can withhold CIA 30, 42, and 43 as non-responsive to Plaintiffs' FOIA request. *See* Second Supp. CIA Decl. ¶¶ 14-15, 21; Gov. Second Br. 18, 21-22. The Court should reject these assertions as untimely. *See, e.g.*, *Maydak v. DOJ*, 218 F.3d 760, 764 (D.C.

III. Defendants Have Improperly Withheld Information Under Exemptions 1 and 3.

A. Defendants Must Release Segregable, Non-Exempt Information.

The legal standards governing the applicability of Exemptions 1 and 3 are set forth in Plaintiffs' prior motion and are not described at length here. *See* Pls. First Br. 32-35. In brief, under FOIA, Defendants are required to segregate and disclose non-exempt portions of individual records—*i.e.*, any portion of a record that is not "inextricably intertwined" with properly exempt material. *ACLU v. FBI*, No. 11-cv-7562, 2015 WL 1566775, at *2 (S.D.N.Y. Mar. 31, 2015); 5 U.S.C. § 552(b). To satisfy their burden of establishing that they have released all reasonably segregable material, Defendants must "provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts." *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977); *see also Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007) (explaining that courts must make "specific findings of segregability").

The Court's Opinion held that Defendants did not adequately address whether they had conducted a line-by-line segregability review of 13 inspector general and compliance reports: CIA 8, 10, 12, 30, and 77; NSA 22, 23, and 79; and NSD 7, 37, 42, 44, and 47. The Court also instructed Defendants to review these documents for improper withholding of "Unclassified/For Official Use Only" material and to inform the Court of the results. *See* Op. at 36-37. As discussed below, Defendants have failed to establish that they have segregated and released non-exempt portions of these reports. Accordingly, Plaintiffs respectfully request that the Court hold that these documents may not be withheld under Exemptions 1 and 3. In the alternative, the

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Cir. 2000) ("We have plainly and repeatedly told the government that, as a general rule, it must assert all exemptions at the same time, in the original district court proceedings."). In any event, the CIA has failed to establish the elements of the privilege with respect to CIA 42 and 43. *See* Pls. First Br. 30-32; *Coastal States*, 617 F.2d at 863; *Amnesty Int'l USA*, 728 F. Supp. 2d at 519.

Court should review a representative sample of the reports *in camera*, including NSA 23 and NSD 44, to assess Defendants' failure to release segregable, non-exempt material.

B. Defendants Have Failed To Establish That They Have Released Segregable, Non-Exempt Information from Inspector General and Compliance Reports.

Although Defendants assert that there are no additional segregable portions of the inspector general and compliance reports, *see* Second Supp. NSA Decl. ¶ 23; Second Supp. CIA Decl. ¶¶ 19-21, there are several reasons to doubt the adequacy of the agencies' segregability analyses.[13]

First, given the length and description of the documents withheld in full, it is implausible that they contain no segregable material whatsoever. For example, NSA 23 is an 84-page Office of Inspector General report on NSA activities, and NSD 42 is a 21-page compliance incidents report on an NSA program. Pls. First Br. 39; NSA Vaughn at 5; NSA Decl. ¶ 58; NSD Vaughn at 7 (ECF No. 65-1). Yet the agencies continue to withhold these documents in their entirety. Although certain information in these reports may be exempt from disclosure, the withholding of these reports in full strongly suggests that the government has applied an unduly narrow interpretation of the segregability requirement.

Second, the NSA's release of significant portions of its Intelligence Oversight Board reports shows that segregation of this kind of document is feasible. *See* NSA 79 (an Intelligence Oversight Board report released in part) (ECF No. 71-11). Though the government previously sought to distinguish NSA 79 on the grounds that "the withheld [in full] NSA, CIA, and NSD reports pertain to nonpublic, classified programs or operations," Gov. First Opp. 36 (ECF No.

[13] Although the Second Supplemental NSA Declaration states that the agency re-reviewed NSA and NSD documents for segregability, it fails to confirm whether, in the course of this re-review, the NSA determined that there are any additional segregable portions of NSA 79, which was withheld in part. *See* Second Supp. NSA Decl. ¶¶ 23, 25.

75), NSA 79 apparently "pertains to" classified programs or operations as well. *See* NSA 79 at I.A.2, I.A.3 (redacting information pursuant to Exemptions 1 and 3). The question is not whether the reports withheld in full "pertain to" classified material, but, instead, whether the government has met its burden to segregate material that is non-exempt—including material that would not reveal intelligence sources and methods, and that would not harm national security if disclosed.

Finally, in response to the Court's order, the Second Supplemental NSA Declaration explains that NSD 42 and 47, as well as NSA 22 and 23, contain "Unclassified" and/or "Unclassified/For Official Use Only" information—yet it maintains that all four documents were properly withheld in full under Exemption 1 and 3. Second Supp. NSA Decl. ¶ 24. However, it is implausible that U and U/FOUO information is inextricably intertwined with exempt information, given that the U and U/FOUO material *has already been segregated* from information that is designated as classified.[14]

IV. The Court Should Review a Selection of the Documents *In Camera*.

For the reasons explained above and in Plaintiffs' prior briefing, Plaintiffs respectfully request that the Court hold that Defendants have failed to justify the exemptions they assert over the remaining 46 documents at issue, and order the release of any non-exempt material. In the alternative, Plaintiffs request that the Court conduct an *in camera* review of a representative

[14] The government also errs in contending that, "information that, viewed in isolation, could be considered unclassified, is nonetheless classified in the context of this case because it can reasonably be expected to reveal (directly or by implication) classified national security information." Second Supp. NSA Decl. ¶ 18 (internal quotation marks omitted). This is simply an effort to block the disclosure of information that the government itself has deemed *unclassified*, not in isolation but in the context of the actual document. Indeed, the original classification process already considers what might be revealed "directly or by implication." *See* EO 13526, 75 Fed. Reg. 707 (Dec. 29, 2009). Nothing in the executive order governing classification permits the government to relabel unclassified information "classified in the context" of a particular case.

sample of the documents to determine whether the government has justified the exemptions it claims. *See* Pls. First Br. 6-9, 48-49. This sample should include the following:

Approval Package Containing a Legal Memorandum: NSD 33;
Legal Memoranda: CIA 82, NSA 19, and NSA 21;
Inspector General and Compliance Reports: NSA 23 and NSD 44; and
Training Material: CIA 45.

As the Second Circuit has recognized, *in camera* review allows a district court to make a case-specific determination about the legality of government withholdings. *See Associated Press v. DOJ*, 549 F.3d 62, 67 (2d Cir. 2008); 5 U.S.C. § 552(a)(4)(B). Here, Defendants' supplemental declarations raise significant questions about the applicability of Exemptions 1, 3, and 5. At this juncture, *in camera* review is the only way the Court can assess what these documents actually contain and what role they played in the agencies' decision-making processes. Indeed, courts have found such review particularly appropriate where (1) "the government seeks to exempt entire documents but provides only vague or sweeping claims as to why those documents should be withheld," *Associated Press*, 549 F.3d at 67; and (2) the number of documents at issue is manageably small, *see N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 315 (S.D.N.Y. 2012); *see also Quiñon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). Both of these conditions are present here.

CONCLUSION

For these reasons, Plaintiffs' second motion for partial summary judgment should be granted.

Respectfully submitted,

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