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)

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

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PRELIMINARY STATEMENT

Defendants respectfully submit this reply memorandum of law in further support of their second motion for partial summary judgment (Dkt. No. 99) ("Gov't Mot."), and in opposition to ACLU's response and cross-motion (Dkt. No. 107) ("ACLU Opp.").[1]

The Government's moving papers fully addressed the few issues that the Court identified as inadequately supported in the Government's prior summary judgment motion, demonstrating the propriety of the Government's prior positions in virtually all respects, while determining that a small number of records could be released or were nonresponsive to ACLU's FOIA requests. ACLU's opposition abandons all of its challenges to the agencies' searches and its objections to Defendants' position regarding three specific records.

ACLU's remaining objections lack merit. Substantial portions of ACLU's opposition improperly and unpersuasively seek to relitigate issues that this Court already decided in the Government's favor — namely, holdings regarding the "working law" doctrine and the deliberative process privilege. ACLU did not seek reconsideration of the Court's prior decision, which is now the law of the case. And, at any rate, ACLU's contentions are misplaced. ACLU also challenges a variety of document-specific showings, as detailed below, but these challenges likewise lack merit. Defendants therefore are entitled to summary judgment.

ARGUMENT

I. Summary Judgment Should Be Granted as to Issues Not Contested by ACLU

ACLU does not oppose Defendants' motion for summary judgment on issues including the adequacy of the searches performed by all agencies from which the Court sought additional information, *see* ACLU Opp. at 1, or the Government's positions with respect to NSD 94-125,

[1] This memorandum uses terms previously defined in the Government's moving papers.

CIA 46, and CIA 36, *id.* at 5 nn.4-5. Nor does ACLU challenge the Government's invocation of Exemptions 1 and 3, other than to argue that the Government has not met its duty to release reasonably segregable, non-exempt information. Indeed, ACLU's failure to dispute that Exemptions 1 and 3 were properly asserted (but for the segregability issues discussed below) extends to all documents as to which ACLU questions the assertion of Exemption 5 as an independent basis for withholding. *See* Gov't Mot. at 16 & n.1. Summary judgment should thus be granted in favor of the Government with respect to these issues.

II. ACLU's Challenges to the Government's Assertions of Exemption 5 Are Without Merit

A. The Court Does Not Need to Decide ACLU's Exemption 5 Challenges

The Court need not even consider ACLU's Exemption 5 arguments if the Court upholds the Government's assertions of Exemptions 1 and 3, as it should. *See infra* Point III; *see generally N.Y. Times Co. v. DOJ*, 806 F.3d 682, 687 (2d Cir. 2015) ("Whether or not 'working law,' the documents are classified and thus protected under Exemption 1 . . . .").

Moreover, ACLU's Exemption 5 arguments consist in large part of attempts to relitigate legal questions that the Court already resolved in its previous summary judgment order: specifically, the standards for "working law" and the deliberative process privilege. But ACLU did not seek reconsideration of these rulings, and they are now the law of the case. *See Aramony v. United Way of Am.*, 254 F.3d 403, 410 (2d Cir. 2001) (court's decision on a legal issue should continue to govern in subsequent stages of same case, whether the prior decision "either expressly resolved an issue or necessarily resolved it by implication"). It is appropriate to revisit legal determinations made in an earlier stage of a case only when "cogent and compelling reasons militate otherwise" — *e.g.*, when there is "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice."

Makinen v. City of New York, 167 F. Supp. 3d 472, 482 (S.D.N.Y. 2016) (internal quotation marks and citations omitted).

ACLU neither acknowledges nor meets this standard, instead merely insisting that its position is "supported by and based on Supreme Court and circuit precedent" that was briefed earlier, ACLU Opp. at 9; *see also id.* at 17 (acknowledging that the Court found that ACLU had "'overstate[d]' the government's burden to justify the [deliberative process] privilege," but failing to identify any appropriate reason why the Court should reconsider its prior decision). These arguments cannot overcome the law of the case doctrine, and, in any event and as explained below, ACLU's contentions all lack merit.

B. The Court Correctly Formulated and Applied the Working Law Standard

As the Court previously explained, the working law exception to Exemption 5 "'calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be.'" Mem. Op. at 19-20 (quoting *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184, 196 (2d Cir. 2012)). However, "[r]eports or recommendations that have 'no operative effect' do not need to be disclosed even where the agency action agrees with the conclusion of the report or recommendation." *Id.* at 20; *see also Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184-86 (1975). The Court's legal analysis largely accorded with Defendants', but the Court did conclude that, in one respect, the Government made a factually insufficient showing to overcome ACLU's arguments as to whether the documents were used to publicly justify or articulate Government policies. *See* Mem. Op. at 30 (quoting NSA Decl. ¶ 53 and citing *Brennan Ctr.*, 697 F.3d at 195).[2]

[2] The same portion of the Court's ruling also addressed the separate adoption doctrine, on which ACLU does not rely.

In support of this motion, Defendants have presented additional information that fully addresses the Court's expressed concern. Specifically, CIA 80-91 — like the other CIA legal memoranda that the Court found not to be working law — are not "controlling interpretations of policy"; they served as "one consideration, among others, weighed by Agency personnel in deciding whether to undertake a particular intelligence activity"; and they do not represent the "final legal position of the Agency regarding a given activity." Second Supp. CIA Decl. ¶ 12. Similarly, the NSA has now explained that the memoranda at issue consist of "legal advice that constitutes one consideration, of many, for decisionmakers"; they "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*"; and "[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 Supp. NSA Decl. ¶ 5 (emphasis added).

The Court's prior ruling specifically and correctly rejected — as "overly broad" — ACLU's suggestion 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.'" Mem. Op. at 19 (quoting Pl. Reply at 11). ACLU's continuing working-law argument is premised on its disagreement with this ruling, and on ACLU's stubborn insistence that legal advice becomes working law when a decisionmaker takes action that is consistent with predecisional advice that he or she received. But the Second Circuit squarely rejected that argument in another ACLU case, the result of which ACLU seems unwilling to accept. *See N.Y. Times*, 806 F.3d at 687 (OLC memoranda providing legal advice *not* "working law" even if client agency elects to take action that OLC opined would be

lawful); *accord Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 10 (D.C. Cir. 2014). Indeed, the Second Circuit denied ACLU's petition for rehearing on this very point. *See* Dkt. Nos. 141, 146, Case No. 14-4432 (2d Cir.).[3] ACLU's working law argument is therefore foreclosed by Second Circuit precedent. Moreover, adopting ACLU's position would entirely swallow up the deliberative process and attorney-client privileges, as agencies could never consider and act in accordance with legal advice without risking the release of such advice as "working law." *See N.H. Right to Life v. HUD*, 778 F.3d 43, 55 (1st Cir.), *cert. denied*, 136 S. Ct. 383 (2015) ("It is a good thing that Government officials on appropriate occasion confirm with legal counsel that what the officials wish to do is legal. To hold that the Government must turn over its communications with counsel whenever it acts in this manner could well reduce the likelihood that advice will be sought. Nothing in the FOIA compels such a result.").

Not only does *N.Y. Times* dispose of ACLU's contention here, but even the cases ACLU cites suggest that the working-law exception applies only to the small minority of legal opinions that authoritatively and definitively set out the agency's binding interpretation of the relevant law, for general reference by agency employees in performing their day-to-day activities. *See, e.g.*, *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980) (Department of Energy "regional counsel opinions" that "were routinely used by agency staff as guidance in conducting their audits, and were retained and referred to as precedent"); *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983) ("summary indexes" that summarized precedent-setting chief counsel opinions interpreting relevant statutes, where those indexes summarized "authoritative Agency decisions in the cases to which they are addressed and . . .

[3] Although captioned *N.Y. Times Co. v. DOJ*, the appeal involved consolidated FOIA actions brought by *The New York Times* and ACLU. *See* 806 F.3d at 682.

also guide[d] subsequent Agency rulings"). In contrast, both the Second and D.C. Circuits have held that memoranda providing confidential legal advice to decisionmakers regarding the legality of contemplated agency actions are not working law, and remain privileged and protected by Exemption 5. *See N.Y. Times*, 806 F.3d at 687; *Brennan Ctr.*, 697 F.3d at 202; *Elec. Frontier Found.*, 739 F.3d at 10. The legal opinions here are far more analogous to legal advice memoranda than to the precedential and widely distributed legal manuals that courts have deemed non-exempt working law. Each provided a legal assessment for a relevant decision-maker of whether a contemplated intelligence activity would be lawful. These memoranda are not working law and are protected by Exemption 5.[4]

C. The Court Correctly Formulated and Applied the Deliberative Process Privilege

In its first opinion, the Court explained that, in order to invoke the deliberative process privilege, an agency must "state the 'function and significance'" of the document at issue "'in the agency's decision-making process.'" Mem. Op. at 17 (quoting *Nat'l Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency*, 811 F. Supp. 2d 713, 743 (S.D.N.Y. 2011)) (brackets omitted). ACLU argues, incorrectly, that the Court should have required *Vaughn* indices that provide the specific information required in discovery responses pursuant to Local Civil Rule 26.2 in order to justify this privilege with respect to certain NSA and NSD documents. ACLU Opp. at 17-18. The relevant declaration leaves no doubt that the

[4] ACLU's argument that the NSA and NSD legal memoranda are not protected by the attorney-client privilege, ACLU Opp. at 21, was already rejected by the Court, *see* Mem. Op. at 30 (Court is "satisfied that these documents are protected by the attorney-client privilege"). Its remaining argument is essentially the one it made for the working-law doctrine — *i.e.*, that these memoranda could have lost their privileged status if, "for example, they were distributed broadly as official guidance." ACLU Opp. at 21. But this argument is foreclosed by the agency's declaration: they are classified advisory memoranda that were not binding or definitive policy statements or final determinations with operative effect. *See* Second Supp. NSA Decl. ¶ 5.

NSA and NSD documents played an important part in the decision-making process. The privileged portions of these documents are each memoranda from an official of DOJ or another executive-branch agency to a DOJ official "recommending that s/he take a particular course of action." Second Supp. NSD Decl. ¶ 23. These are precisely the types of documents that this privilege was designed to protect. *See* Mem. Op. at 16 ("An inter- or intra-agency document may be withheld pursuant to the deliberative process privilege if it is: (1) predecisional, *i.e.*, prepared in order to assist an agency decisionmaker in arriving at his decision, and (2) deliberative, *i.e.*, actually . . . related to the process by which policies are formulated." (citation and internal quotation marks omitted)).

ACLU complains that it would like to know more about "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." ACLU Opp. at 18. But, as the Court noted previously, there is simply no authority to apply the requirements of Local Rule 26.2 to a *Vaughn* index. Mem. Opp. at 17. Moreover, given the classified nature of the documents — the Court has upheld the agencies' assertion of Exemptions 1 and 3 with respect to them, *see id.* at 31-41, Gov. Mot. at 16 n.1 — there is relatively little that can be said on these topics in an unclassified declaration, especially about the "subject-matter of [each] document and the nature of the deliberative opinion." The declaration does, however, make clear that the recipient of each of these memoranda is a DOJ official and that their authors hail from DOJ and other executive agencies. And the declaration notes that in addition to the privileged recommendation memoranda, nearly all of the document packages also contain classified but "non-privileged, non-deliberative documents reflecting the governmental action decisions that occurred after consideration of those recommendations," Second Supp. NSD Decl.

¶ 23, thus providing information regarding the "function and significance" of the documents "in [the] decision-making process." This information is sufficient to justify the privilege.

Each of the remaining CIA documents (CIA 42, 43, and 45) is classified and protected by Exemptions 1 and 3, so there is no need to adjudicate whether they are also privileged. *See* Points I, III. As the Court previously suggested, CIA 42 and 43 further are not responsive to ACLU's request, because they are merely versions of a draft training presentation that do not appear to have been finalized or presented to anyone. *See* Second Supp. CIA Decl. ¶¶ 13-16 (documents are informal working drafts reflecting attorney deliberative process); Mem. Opp. at 27 ("if these documents are as informal as CIA suggests, they would not be responsive to the FOIA request"). Even if the Court were to address whether privilege also applies, all of these documents remain privileged for reasons stated in CIA's declarations. Second Supp. CIA Decl. ¶¶ 14-16; *cf. ACLU v. DOJ*, 844 F.3d 126, 133 (2d Cir. 2016) (as to draft article and "suggested talking points," "Government officials do not lose the protection of Exemption 5 by considering informally how to present a legal analysis").

III. ACLU's Challenges to the Agencies' Segregability Determinations Are Without Merit

The Government has met its duty to identify and release all reasonably segregable and non-exempt portions of the many responsive documents that are protected by Exemptions 1 and/or 3. The Court previously instructed the Government to address whether thirteen specified CIA, NSA, and NSD documents contained additional segregable non-exempt portions that could be released. *See* Mem. Op. at 36 ("Defendants are instructed to conduct such a segregability review if they have not done so, or inform the Court that this review has already occurred").

The relevant agencies already had performed such a segregability review, and re-performed such a review to confirm their previous determinations that no additional non-exempt

segregable portions could be released. Specifically, CIA "re-reviewed the five [CIA] documents at issue," *see* Second Supp. CIA Decl. ¶ 18, and confirmed that the agency "conducted a page-by-page and line-by-line review and released all reasonably segregable non-exempt responsive information" from CIA 8, 12, and 77, all of which were classified documents submitted to Congressional committees. *Id.* ¶ 19. Similarly, CIA "conducted a page-by-page, line-by-line re-review" of CIA 10, and "confirm[ed] that all reasonably segregable non-exempt information has been released to Plaintiffs and there is no unclassified information improperly withheld under Exemption 1." *Id.* ¶ 20. In addition, CIA has now determined that CIA 30 — an "internal memorandum" rather than an Inspector General report — is not responsive to ACLU's request. *See id.* ¶ 21. ACLU identifies no basis for its suggestion that this is an impermissible new assertion of an exemption, which it self-evidently is not. Meanwhile, CIA's determination does not deprive ACLU of responsive information. As CIA has explained, the memorandum concerns a separate document, CIA 10, which CIA acknowledges is responsive to ACLU's request, and has addressed in this litigation. *Id.*

The NSA likewise affirms that all segregability requirements were met as to the NSA and NSD documents at issue. *See* Second Supp. NSA Decl. ¶¶ 17-22 (describing prior segregability reviews); *id.* ¶¶ 23-24 ("NSA again analyzed these materials for segregability"; "there are no reasonably segregable portions of those documents . . . withheld in full"; noting that FOIA does not require release of isolated words that "standing in a vacuum would be meaningless," especially where providing "sufficient context . . . to make the non-exempt material meaningful" would reveal the circumstances warranting classification).

ACLU's response to this detailed explanation is conclusory and insufficient. ACLU baldly calls the Government's position "implausible," but it advances no reason to doubt the

agencies' express findings to the contrary, based on two separate and meticulous reviews. The only other argument ACLU makes — that the release of parts of NSA 79 shows that other documents must also have releasable portions, ACLU Opp. at 23 — is illogical. Rather, the handling of NSA 79 *confirms* that, where appropriate, the agencies did segregate and release non-exempt document portions. Second Supp. NSA Decl. ¶ 22.

Nor does the existence of some passages marked Unclassified (U) or For Official Use Only (U/FOUO) require additional releases. *See* Mem. Op. at 37; ACLU Opp. at 22, 24 (as to NSD 42 and 47, and NSA 22 and 23). The only U/FOUO marking on a relevant CIA document was a mismarking, and that portion is properly classified and subject to Exemption 1. *See* Second Supp. CIA Decl. ¶ 20. And the NSA explains that although the four NSA and NSD documents in question do contain some U and/or U/FOUO information, the unclassified but "FOUO" text is properly subject to FOIA Exemption 3, which applies to information protected from release by statute. *See* Third Supp. NSA Decl. ¶ 4 (identifying governing statutes and explaining their applicability). Further, as the latest NSA declaration details, the limited portions of NSA Documents 22 and 23 that are marked (U) remain non-segregable from the classified documents in which the passages appear because the passages reflect meaningless, non-substantive organizational document features such as headings; constitute improperly marked material that should have been marked (U/FOUO), or even, in some instances, marked as classified; or reveal, in context, information concerning these reports that is properly protected by statute and accordingly exempt from disclosure. *Id.* ¶¶ 5-7; *see, e.g.*, *N.Y. Times Co. v. NSA*, 205 F. Supp. 3d 374, 381 (S.D.N.Y. 2016).

CONCLUSION

The Court should grant Defendants' motion and deny ACLU's cross-motion.

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Respectfully submitted,

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