UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OBAID ULLAH, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, *Plaintiffs*, v. CENTRAL INTELLIGENCE AGENCY, *Defendant*.	Civ. A. No. 18-2785 (JEB)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Introduction

This case arises under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiffs fail to establish the existence of a genuine dispute of material fact concerning the sufficiency of Defendant Central Intelligence Agency's ("CIA") response to Plaintiffs' FOIA request. First, Defendant conducted an adequate search for responsive records. Second, the information that CIA withheld is exempt from release under FOIA. Third, CIA produced all reasonably segregable information. Because CIA fully complied with its obligations under FOIA in responding to Plaintiffs' request for records, Defendant requests that the Court grant this Motion and enter summary judgment in its favor.

Factual and Procedural Background

On April 18, 2018, Plaintiffs Obaid Ullah, the American Civil Liberties Union, and the American Civil Liberties Union Foundation ("Plaintiffs") submitted a Freedom of Information Act ("FOIA") request "for records relating to the United States' disposal and the current whereabouts of the body of Mr. Gul Rahman, an Afghan citizen who the United States has acknowledged died while in the custody of [CIA] in November 2002." Def.'s Stmt. of Material Facts ("SMF") ¶ 1.

Specifically, Plaintiffs sought the release of records concerning:

1. The United States' (or its agents') disposition of Mr. Rahman's body after his death in CIA custody in November 2002;
2. Any and all documents referencing the location of Mr. Rahman's body; and
3. Procedures, protocols, or guidelines to be followed in the event of a CIA detainee's death while in United States' custody, including family notification, investigation, and disposition of the body.

Id. ¶ 2.

On November 29, 2018, Plaintiffs filed their Complaint. Compl., ECF No. 1. As of the filing of the Complaint, CIA had not made a final determination or released any records in response to Plaintiffs' FOIA request. Def.'s Answer ¶ 9, Feb. 27, 2019, ECF No. 13.

The CIA provided a final response to Plaintiffs' FOIA request on May 31, 2019. SMF ¶ 4. CIA produced nine documents in part and withheld twenty-nine documents in full. *Id.* Redactions and withholdings were made pursuant to FOIA Exemptions (b)(1), (b)(3), (b)(5), (b)(6), and (b)(7). *Id.*; *see also* Jt. Status Rpt., June 14, 2019 (ECF No. 15). Later, CIA determined that three of the documents withheld in full were not responsive. *Id.*

By email dated June 14, 2019, Plaintiffs advised that they intend to challenge both the search and the asserted withholdings. *Id.* ¶ 5; *see also* ECF No. 15 at 1. But Plaintiffs also identified a few categories of information that they did not intend to challenge: the redaction or withholding of classified code words and pseudonyms, classification and dissemination control markings, or the identities of CIA personnel who have not been officially identified with the CIA's former rendition, detention, and interrogation program (the "RDI Program"). SMF ¶ 5. Therefore, the parties agreed that the Agency's declaration did not need to address these particular withholdings. *Id.*

The Court entered a schedule for briefing the parties' dispute concerning the sufficiency of CIA's search and response, excepting the limiting categories of withholdings that are no longer in dispute. Defendant now moves for summary judgment because the record shows that there is no genuine dispute as to any material fact and Defendant is entitled to judgment as a matter of law.

Legal Standards

A. Fed. R. Civ. P. 56

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. ("Rule") 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). It is up to the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. A genuine issue is one that "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue" in dispute. *Id.*

B. Summary Judgment in the FOIA Context

"[T]he vast majority of FOIA cases can be resolved on summary judgment." *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); *see also Willis v. FBI*, Civ. A. No. 17-1959 (KBJ), 2019 WL 2138036 (D.D.C. May 16, 2019), at *4 (disputes arising from an agency's response to a FOIA request "typically and appropriately are decided on motions for summary judgment") (citation omitted); *Media Research Ctr. v. DOJ*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) (same).

At summary judgment in a FOIA case, the Court conducts a *de novo* review of the record. An agency bears the burden of proving that it has complied with its obligations under FOIA. 5 U.S.C. § 552(a)(4)(B); *Willis*, 2019 WL 2138036, at *4-5; *In Def. of Animals v. Nat'l Inst. of Health*, 543 F. Supp. 2d 83, 92-93 (D.D.C. 2008). The district court must analyze all underlying facts and inferences in the light most favorable to the requester. *Willis v. DOJ*, 581 F. Supp. 2d 57, 65 (D.D.C. 2008). If the Court determines that an agency has released all non-exempt

material, it has no further judicial function to perform under FOIA. *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982).

Argument

I. CIA Conducted an Adequate Search.

To obtain summary judgment in a case challenging an Agency's response to a FOIA request, the Agency must show that it conducted "a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *see also Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984); *Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) (the Court's assessment of the adequacy of the agency's search is guided by principles of reasonableness). To conduct a "reasonable" search is a process that requires "both systemic and case-specific exercises of discretion and administrative judgment and expertise." *Schrecker v. DOJ*, 349 F.3d 657, 662 (D.C. Cir. 2003). This is "hardly an area in which the courts should attempt to micro manage the executive branch." *Id.* Moreover, "[t]here is no requirement that an agency search every record system." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

A government agency may obtain summary judgment in a FOIA case by relying on "relatively detailed" declaration. *McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Perry*, 684 F.2d at 127 (declaration need not "set forth with meticulous documentation the details of an epic search for the requested records"; it must only "explain in reasonable detail the scope and method of the search conducted by the agency"); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (court may grant summary judgment to the agency based on information provided in "a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched").

Agency declarations attesting to a reasonable search "are afforded a presumption of good faith[,]" and "can be rebutted only with evidence that the agency's search was not made in good faith." *Defs. of Wildlife v. DOI*, 314 F. Supp. 2d 1, 8 (quotation marks and citation omitted); *see also SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (requestor cannot rebut adequacy of a search with purely speculative claims about the existence and discoverability of other documents).

"[T]he only issue that arises when evaluating the adequacy of a FOIA search is whether the agency used appropriate methods to carry out the search, regardless of the *results* of that search." *Willis*, 2019 WL 2138036, at *6 (quotation marks and citation omitted) (emphasis in the original); *see also Weisberg*, 745 F.2d at 1485; *SafeCard Services, Inc.*, 926 F.2d at 1201 (search is not inadequate merely because it failed to "uncover[] every document extant"); *Boyd v. DOJ*, 475 F.3d 381, 390-91 (D.C. Cir. 2007) ("[T]he [mere] fact that a particular document was not found does not demonstrate the inadequacy of a search."); *Oglesby*, 920 F.2d at 68 (rejecting an argument that a search was inadequate because it did not uncover "documents that [plaintiff] claims must exist").

In this case, CIA provides in support of its Motion a declaration from CIA's Information Review Officer, Antoinette Shiner. Shiner Decl. ¶ 1, Aug. 28, 2019 (Ex. 1 hereto). In her declaration, Shiner describes the approach CIA took in preparing and carrying out its search for responsive records. SMF ¶¶ 6-11. First, CIA reasonably determined that its Rendition, Detention, and Interrogation Network ("RDINet") was the main location that would contain records responsive to Plaintiffs' request, because Plaintiffs' request dealt with aspects of the former RDI program. *Id.* ¶ 6.

Moreover, although RDINet is a comprehensive collection of materials related to the former detention and interrogation program, CIA did not limit its search to that record system. *Id.* ¶ 7. CIA's search professionals also conducted searches in the Office of the Inspector General ("OIG"); the Office of the General Counsel ("OGC"); the Office of the Director (to include the files of the Director, Deputy Director, and Chief Operating Officer); the Office of Congressional Affairs ("OCA"), and the Office of Medical Services ("OMS"). *Id.*

A team of search professionals and subject matter experts with access to the highly classified RDINet, and search teams for each of the other offices, conducted searches to find documents responsive to the three categories of information sought in the Plaintiffs' request. *Id.* ¶ 8. Shiner's declaration also describes the specific search terms that the search teams applied. For the first two parts of the request, the teams search for documents containing any references "Rahman" combined with other terms, such as "body," "death," and "corpse," and other variations on those terms, that the Agency thought were likely to uncover any responsive records. *Id.* ¶ 9. For the third part of the request, the search terms performed searches for documents containing the terms "death" and "detainee" with words like "policy," "protocol," or "guidelines." *Id.* ¶ 10. The search teams also consulted persons knowledgeable about the topic. *Id.*

"[T]he touchstone when evaluating the adequacy of an agency's search for records in response to a FOIA request is reasonableness, and in particular, whether the agency made 'a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'" *Muckrock, LLC v. CIA*, 300 F. Supp. 3d 108, 125 (D.D.C. 2018) (quoting *Oglesby*, 920 F.2d at 68). Here, CIA has satisfied its burden of proving the reasonableness of its search. CIA's declaration contains a reasonably

detailed description of its search that demonstrates that it complied with FOIA by conducting a search reasonably calculated to uncover all relevant documents. *See Oglesby*, 920 F.2d at 68; *Leopold v. CIA*, 177 F. Supp. 3d 479 (D.D.C. 2016) (finding that CIA had sufficiently demonstrated that its search for records relating to congressional inquiry into CIA's former RDI program, which included a similar search of RDINet and other offices, was reasonable and that CIA was entitled to summary judgment). Therefore, Defendant is entitled to summary judgment on the sufficiency of its searches.

II. CIA's Withholdings Under FOIA Were Proper.

"The Court may award summary judgment solely on the basis of information provided by the department or agency in declarations [that] describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Citizens for Resp. & Ethics in Wash. v. Dep't of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)).

As with the search issue, the agency bears the burden of sustaining its action of withholding records. 5 U.S.C. § 552(a)(4)(B); *Nat. Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1190 (D.C. Cir. 2000). The most commonly used device for an agency to satisfy its burden is a *Vaughn* index. "[The *Vaughn* Index's purpose is] 'to permit adequate adversary testing of the agency's claimed right to an exemption' and enable 'the District Court to make a rational decision whether the withheld material must be produced without actually viewing the documents themselves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal.'" *King v. DOJ*, 830 F.2d 210 (D.C. Cir. 1987) (quoting *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973)). "Thus, when an

agency seeks to withhold information, it must provide 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant . . . .'" *Id.* "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Media Research Ctr.*, 818 F. Supp. 2d at 137 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

"When a *Vaughn* Index meets these criteria, it is "'accorded a presumption of good faith.'" *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) (quoting *SafeCard Services, Inc.*, 926 F.2d at 1200). The presumption of good faith "cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *SafeCard Services, Inc.*, 926 F.2d at 1201 (citation omitted).

In this case, CIA withheld responsive information pursuant to FOIA Exemptions (b)(1), (b)(3), (b)(5), (b)(6), and (b)(7). As explained below, CIA satisfied its burden of providing a relatively detailed justification that provides a plausible and logical explanation for invoking these exemptions.

A. Exemption (b)(1)

FOIA Exemption (b)(1) ("Exemption 1") provides that the FOIA does not require the production of records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."

In this case, CIA determined, with respect to the information that it withheld under Exemption 1, that the information has been "properly classified" under Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009). Executive Order 13,526 "prescribes a uniform system for classifying, safeguarding, and declassifying national security information" and recognizes that "throughout our history, the national defense has required that certain information be maintained

in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations." The Executive Order "provides that 'information may be originally classified' if four conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the United Stated Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security . . . and the original classification authority is able to identify or describe the damage." *Mobley v. CIA*, 924 F. Supp. 2d 24, 48 (D.D.C. 2013).

CIA's evidence satisfies these requirements and demonstrates that the information at issue is currently and properly withheld from disclosure under Exemption 1. First, CIA's declarant, Antoinette Shiner, is an original classification authority. SMF ¶ 12. Second, the information is owned by, and under the control of, the U.S. Government. *Id.* Third, the information falls under classification category § l.4(c) of the Executive Order because it concerns "intelligence activities (including covert action), [or] intelligence sources or methods," or under § 1.4(d) because it concerns "foreign relations or foreign activities of the United States." *Id.* ¶ 13.

Fourth, the unauthorized disclosure of the information reasonably could be expected to result in damage to national security, and CIA's declarant reasonably describes that damage. *Id.* ¶¶ 13-26. To the greatest extent possible on the public record, CIA's declarant explained the nature of the information withheld under the exemption. *Id.* ¶ 15. Specifically, the classified information at issue consists of details about foreign liaison services (*id.* ¶ 18); locations of

covert CIA installations and former detention centers located abroad (*id.* ¶¶ 19-21); and descriptions of specific intelligence methods and activities, including specific details related to intelligence collection and attempts to identify and capture certain terrorists (*id.* ¶¶ 22-26). *See also Sack v. CIA*, 49 F. Supp. 3d 15, 20 (D.D.C. 2014) (classified documents containing assessments of the CIA's polygraph program, statistics, details of the tests, information detailing protected security equipment, techniques, and tactics were properly withheld under Exemption 1); *DiBacco v. U.S. Dep't of the Army*, 983 F. Supp. 2d 44 (D.D.C. 2013) (CIA properly withheld under Exemption 1 cities and countries in which CIA had covert installations, and information regarding specific intelligence methods including cover mechanisms, among other classified information; the information was properly classified and marked under Executive Order 13,526).[1] CIA's evidence establishes that it properly determined that disclosure of the information withheld under Exemption 1 could reasonably be expected to damage national security.

B. Exemption (b)(3)

Exemption (b)(3) ("Exemption 3") protects information that is specifically exempted from disclosure by statute. To justify withholding under Exemption 3, a statute must either (i) require that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establish particular criteria for withholding or refer to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3).[2] Here, CIA relies upon two statutes to withhold

[1] CIA's evidence also establishes that the classified information is properly marked in accordance with § 1.6 of the Executive Order. *Id.* ¶ 14; *see also Mobley*, 924 F. Supp. 2d at 48.

[2] Because CIA relies on both Exemptions 1 and 3, if the Court finds that CIA properly justified its withholdings under either exemption, the Court should grant summary judgment to Defendant. *See, e.g.*, *DiBacco v. Dep't of the Army*, 926 F.3d 827, 834 (D.C. Cir. 2019) ("Because we conclude that the CIA properly justified each of its redactions under Exemption 3, we need not address its use of Exemption 1.").

information under Exemption: the Central Intelligence Agency Act of 1949, 50 U.S.C. § 3507 (the "CIA Act"), and the National Security Act of 1947, 50 U.S.C. § 3024(i)(1) (the "National Security Act").

Section 6 of the CIA Act provides that CIA shall be exempted from the provisions of "any other law" (in this case, FOIA) which requires the publication or disclosure of, "the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 3507. Section 102A(i)(1) of the National Security Act, 50 U.S.C. § 3024(i)(1), states that "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure."[3] The D.C. Circuit has "held that both statutes may be used to withhold information under Exemption 3." *DiBacco*, 926 F.3d at 834 (citing *DiBacco v. U.S. Army*, 795 F.3d 178, 183 (D.C. Cir. 2015), *Baker v. CIA*, 580 F.2d 664, 667 (D.C. Cir. 1978)).

"To invoke Exemption 3, the government 'need only show . . . that the withheld material falls within' a statute meeting the exemption's conditions." *Id.* (quoting *Larson*, 565 F.3d at 865). "If an agency's statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise, . . . the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." *Larson*, 565 F.3d at 865.

[3] Under the direction of the Director of National Intelligence, pursuant to section 102A of the National Security Act, as amended, and section 1.6(d) of Executive Order 12,333, the Director of the CIA is responsible for protecting CIA intelligence sources and methods from unauthorized disclosure. Shiner Decl. ¶ 25. Section 1.6(d) of Executive Order 12,333, as amended by Executive Order 13,470 (July 30, 2008) requires the Director of the CIA to "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure . . . ." *Id.*

"Indeed, [the D.C. Circuit has] 'consistently deferred to executive affidavits predicting harm to national security, and have found it unwise to undertake searching judicial review.'" *DiBacco*, 926 F.3d at 834 (quoting *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003)); *see also Looks Filmproduktionen GmbH v. CIA*, 199 F. Supp. 3d 153, 173 (D.D.C. 2016) (stating this Court gives great deference to CIA's assertions of harm to intelligence sources and methods in exempting such materials from disclosure under FOIA Exemption 3). In this regard, "Exemption 3 differs from other FOIA exemptions" because "its applicability depends less on the detailed factual contents of specific documents." *Morley v. CIA*, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (citation omitted). Here, CIA has shown that the information is exempt from release under both the National Security Act and the CIA Act and, therefore, squarely within Exemption 3. SMF ¶¶ 28-30. Further, although not necessarily required by either Act, CIA has demonstrated that release of the material can reasonably be expected to lead to unauthorized disclosure of intelligence methods or sources and could impair the Agency's ability to carry out its core mission of gathering and analyzing intelligence. *Id.* ¶ 31. Because the Agency has satisfied its evidentiary burden, the Court should defer to the Agency's judgment and expertise in these matters in light of the national security interests implicated by the material.

C. Exemption (b)(5)

Exemption (b)(5) ("Exemption 5") protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552 (b) (5). This has been construed to exempt documents that are normally protected in the civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). In this case, CIA invoked Exemption 5 to withhold information protected from release by the deliberative process and attorney-client privileges, and by the attorney work product doctrine.

In order to apply Exemption 5, agencies must first satisfy the threshold requirement – i.e., show that the information protected was "inter-agency or intra-agency." 5 U.S.C. § 552(b)(5). CIA's evidence satisfies the threshold requirement; the declaration and *Vaughn* index establish that the (b)(5) withholdings contain internal, i.e., intra-agency, communications. SMF ¶ 32.

1. Deliberative Process Privilege

The deliberative process privilege protects pre-decisional, deliberative communications that are part of a process by which agency decisions are made. *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997); *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). The privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Congress intended for this exemption "to encourage frank discussion of policy matters, prevent premature disclosure of proposed policies, and avoid public confusion that may result from disclosure of rationales that were not ultimately grounds for agency action." *Petrucelli v. DOJ*, 51 F. Supp. 3d 142, 161 (D.D.C. 2014); *see also Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977). "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process." *United States v. Nixon*, 418 U.S. 683, 705 (1974).

To be "pre-decisional," the withheld information must be antecedent to a final agency decision. In this respect, the agency must show "'what deliberative process is involved, and the role played by the documents at issue in the course of that process[.]'" *Shapiro v. CIA*, 247 F. Supp. 3d 53, 63 (D.D.C. 2017) (citation omitted); *see also Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011).

Information is "deliberative" if it is part of the process in which the agency engaged in an effort to reach a final decision, whether or not any final decision was ever reached. *Shapiro*, 247 F. Supp. 3d at 63 (citation omitted) ("Information is deliberative if 'it makes recommendations or expresses opinions on legal or policy matters.'"); *Coastal States Gas Corp.*, 617 F.2d at 866 (communication is deliberative if "it reflects the give-and-take of the consultative process"); *Brennan Ctr. for Justice at New York Univ. Sch. of Law v. DOJ*, 697 F.3d 184, 194 (2d Cir. 2012) (documents are deliberative when they are "related to the process by which policies are formulated").

Here, the majority of the documents for which the deliberative process privilege was claimed are labeled as drafts, reflect information at the interim stages, and/or are associated with a given deliberation concerning how to handle different policies and/or procedures related to the former RDI program. SMF ¶ 33. These communications do not convey final Agency viewpoints on a particular matter, but rather reflect different considerations, opinions, options, and approaches that preceded an ultimate decision and are part of a policymaking process. *Id.* The deliberative material includes recommendations or deliberations at interim stages of Agency inquiries and/or the CIA OIG's investigation into Rahman's death. *Id.* Other documents discuss a draft policy regarding internal procedures to be followed in the event of a detainee death in CIA custody. *Id.* ¶¶ 34-35; *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 174 (D.D.C. 2004) ("Drafts and comments on drafts are squarely within the scope of Exemption 5."). As CIA explains, there is no indication that the policy was ever finalized. SMF ¶ 34; *see also Coastal States Gas Corp.*, 617 F.2d at 866 (deliberative process privilege protects documents that would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which was as yet only a personal position).

Moreover, CIA examined the documents or portions of the documents withheld pursuant to the deliberative process privilege and determined that, to the extent there is any factual material, it is part and parcel of the deliberations and cannot be segregated. SMF ¶ 36; *see also Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 13 (D.C. Cir. 2014) (finding that "context matters," and here entire document, including factual material, "'reflects the full and frank exchange of ideas'" so that factual portions "'could not be released without harming the deliberative processes of the government'" (citation omitted)); *Quarles v. Dep't of the Navy*, 893 F.2d 390, 392-93 (D.C. Cir. 1990) (withholding factual material because it would expose agency's decision-making process and chill future deliberations).

Further, disclosure of the documents would significantly hamper the ability of Agency personnel to candidly discuss and assess the viability of certain courses of action. SMF ¶ 37; *see also Morley v. CIA*, 699 F. Supp. 2d 244, 255-56 (D.D.C. 2010) (deliberative process privilege is "intended to prevent chilling future government employees from engaging in frank discussions during the deliberative process"); *Kidd v. DOJ*, 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (protecting documents on basis that disclosure would "inhibit drafters from freely exchanging ideas, language choice, and comments in drafting documents"). Thus, CIA satisfied its burden of establishing that it properly invoked the deliberative process privilege.

2. Attorney-Client Privilege

The attorney-client privilege protects confidential communications between an attorney and his or her client relating to a legal matter for which the client has sought professional advice. The attorney-client privilege should be given the "same meaning" in "both the discovery and FOIA contexts" to ensure that "FOIA may not be used as a supplement to civil discovery – as it could be if the attorney-client privilege were less protective under FOIA." *Zander v. DOJ*, 885 F. Supp. 2d 1, 15 (D.D.C. 2012). In this case, the attorney-client privilege applies to confidential

client communications between Agency employees and attorneys within the CIA on issues related to the former RDI program that were made for the purpose of obtaining legal advice. SMF ¶ 38.

Here, the attorney-client privilege only applies to a portion of the CIA OIG Report of Investigation entitled "Death of a Detainee in [REDACTED] (2003-7402-IG)" (*Vaughn* Index, Entry No. 2), which recounts discrete pieces of legal analysis and advice from Agency attorneys to senior leadership and the field regarding aspects of the RDI program. SMF ¶¶ 38-40. This communication qualifies for protection under the attorney-client privilege because it contains "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc.*, 566 F.2d at 252. The Agency met its burden of demonstrating that the communication was properly withheld under the attorney-client privilege. *See, e.g.*, *Conservation Force v. Jewell*, No. 15-5131, 2015 WL 9309920, at *1 (D.C. Cir. Dec. 4, 2015) (finding that agency met its burden of demonstrating that documents redacted under the attorney-client privilege reflected confidential communications involving attorneys that related to legal strategy).

3. Attorney Work-Product Privilege

The attorney work-product privilege protects material prepared by Agency attorneys in reasonable anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); *see also Rule* 26(b)(3) (codifying privilege in Federal Rules of Civil Procedure). Here, the attorney work-product privilege was asserted to protect attorney work-product in one document (*Vaughn* Entry No. 14). SMF ¶ 42. The Agency's entry for this document on the *Vaughn* index states that "the attorney work-product privilege was asserted to protect this document as it reflects attorney notes created in reasonable anticipation of litigation following the death of Gul Rahman." *See also* Shiner Decl. ¶ 34. If this information were to be released, it would expose the attorney's work to

scrutiny and could reveal preliminary litigation risk analysis and strategy. SMF ¶ 42. The document is inarguably attorney work product that is properly withheld under Exemption 5. *See, e.g.*, *Citizens for Resp. & Ethics in Wash. v. Nat'l Archives & Records Admin.*, 715 F. Supp. 2d 134, 138-39 (D.D.C. 2010) (protecting documents prepared in contemplation of litigation); *Wolfson v. United States*, 672 F. Supp. 2d 20, 30 (D.D.C. 2009) (concluding that attorney work-product privilege was properly invoked to withhold information whose disclosure "would reveal . . . attorneys' thought processes and litigation strategy").

D. Exemptions (b)(6) and (b)(7)(C)

CIA also determined that certain information must be withheld pursuant to FOIA Exemptions (b)(6) and (b)(7) ("Exemption 6" and "Exemption 7," respectively).

The Exemption 7 threshold requires that the records or information be "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). For records to constitute records "compiled for law enforcement purposes," the records must meet two criteria: (1) the activity that gave rise to the documents must be related to enforcement of federal laws or maintenance of national security; and (2) the nexus between the activity and "one of the agency's law enforcement duties must be based on information sufficient to support at least a 'colorable claim' of rationality." *Pratt v. Webster*, 673 F.2d 408, 420-21 (D.C. Cir. 1982); *Keys v. DOJ*, 830 F.2d 337, 340 (D.C. Cir. 1987). In assessing whether records are compiled for law enforcement purposes, the "focus is on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Jefferson v. DOJ, Off. of Prof'l Resp.*, 284 F.3d 172, 176-77 (D.C. Cir. 2002).

The records at issue here in which the Agency invoked Exemption 7 were compiled for law enforcement purposes within the meaning of the exemption. The records were generated by CIA's OIG during its investigation into the death of Gul Rahman, which was in the context of an

active law enforcement investigation. SMF ¶ 48; *see also Vaughn* Index, Entry Nos. 1-2, 4, 6 (examples of descriptions for Exemption 7 withholdings). Thus, the documents at issue were related to the enforcement of federal laws and the maintenance of national security and there is a clear nexus between the investigatory process and CIA's law enforcement duties. *See Pratt*, 673 F.2d at 420-21.

Exemption 7(C) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). FOIA Exemption 6 provides that agencies may withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

"If Defendant satisfies the Exemption 7 threshold that the information being withheld was compiled 'for law enforcement purposes,' the Court's task, then, is 'to balance the [ ] privacy interest against the public interest in disclosure.'" *Roseberry-Andrews v. DHS*, 299 F. Supp. 3d 9, 31 (D.D.C. 2018) (quoting *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (quotation marks and additional citation omitted). "Although the balancing test is applied to both Exemption 6 and 7(C), 'Exemption 7(C) is more protective of privacy than Exemption 6 and thus establishes a lower bar for withholding material.'" *100Reporters LLC v. DOJ*, 248 F. Supp. 3d 115, 158-59 (D.D.C. 2017) (quoting *Prison Legal News v. Samuels*, 787 F.3d 1142, 1146 n.5 (D.C. Cir. 2015)); *see also Citizens for Resp. & Ethics in Wash. v. DOJ*, 854 F.3d 675, 681 (D.C. Cir. 2017) (quoting *Citizens for Resp. & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1091 n.2) (D.C. Cir. 2014) ("When information is claimed to be exempt from disclosure

under both provisions, courts 'focus . . . on Exemption 7(C) because it provides broader privacy protection than Exemption 6 and thus establishes a lower bar for withholding material.'").

Pursuant to FOIA Exemptions 6 and 7(C), CIA withheld personally-identifying information of CIA officers and non-CIA personnel mentioned in these records. SMF ¶¶ 43-47 (Exemption 6 withholdings); *id.* ¶¶ 48-49. As to the Exemption 6 withholdings, CIA's evidence establishes that disclosure of this information would constitute a clearly unwarranted invasion of their personal privacy. *Id.* ¶¶ 43-47. With respect to Exemption (b)(7)(C), which sets a lower bar for the withholdings, the Agency's evidence satisfies its burden of showing that release of the individuals' personal information could reasonably be expected to constitute an unwarranted invasion of personal privacy. *Id.* ¶¶ 48-49. Consistent with this Circuit's precedent, CIA properly concluded that the individuals' privacy interests in the information outweighed any minimal public interest that could possibly exist in the disclosure of this information.

E. Exemption (b)(7)(D)

Finally, Exemption 7(D) was applied to protect the identities of individuals interviewed by CIA OIG and the information that they provided. SMF ¶¶ 50-51. Exemption 7(D) provides protection for "records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."

As a matter of Agency policy, the OIG does not disclose the identities of persons it interviews or the substance of their statements unless such disclosure is determined to be

necessary for the full reporting of a matter or the fulfillment of other OIG or Agency responsibilities. SMF ¶ 50; *see also Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 528-29 (S.D.N.Y. 2010) (deciding that witness statements made during course of CIA OIG investigation were made pursuant to express promise of confidentiality because OIG regulations require OIG to maintain confidentiality of statements made in course of investigations except when OIG deems disclosure to be necessary). Here, the information that CIA withheld under Exemption 7(D) would disclose the identity of, or information provided by, a confidential source. *See, e.g.*, *Vaughn* Index, Entry No. 14. As the CIA's declarant explains, the documents contain details that would tend to identify the interviewed parties by virtue of their position in the Agency and or their role in, or knowledge of, the underlying events. SMF ¶ 51. As the OIG and Department of Justice investigations were criminal nature, all information provided by these confidential sources was protected pursuant to Exemption 7(D). *Id.*

III. Defendant Released All Reasonably Segregable Information.

"While agencies may properly withhold certain materials under FOIA's enumerated exemptions, they must release 'any reasonably segregable portions' of responsive documents once they have redacted the exempted information." *Barnard v. DHS*, 598 F. Supp. 2d 1, 25 (D.D.C. 2009) (citing 5 U.S.C. § 552(b)). "The question of segregability is 'subjective based on the nature of the document in question, and an agency must provide a reasonably detailed justification rather than conclusory statements to support its claim that the non-exempt material in a document is not reasonably segregable.'" *Id.* (quoting *Mead Data Central, Inc.*, 566 F.2d at 261).

Defendant has also demonstrated that it conducted a proper segregability analysis prior to issuing the final response. SMF ¶¶ 53-54. CIA conducted a document-by-document and line-by-line review and released all reasonably segregable non-exempt information. *Id.* ¶ 53. In

instances where no segregable, non-exempt portions of documents could be released without potentially compromising classified or privileged information or other information protected under the FOIA, then such documents were withheld from Plaintiffs in full. *Id.* After reviewing all of the records at issue, CIA determined that no additional information can be released without jeopardizing classified or privileged material, individuals' personal privacy, and/or other protected information that falls within the scope of one or more FOIA exemptions. *Id.* ¶ 54.

Conclusion

For all of the foregoing reasons, Defendant requests that the Court grant this Motion and enter summary judgment in its favor.

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Respectfully submitted,

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