UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OBAID ULLAH, AMERICAN CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendants.

No. 18-cv-2785-JEB

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Seventeen years ago, U.S. government officials abducted Gul Rahman and tortured him to death in a CIA prison. CIA personnel subjected Mr. Rahman to extensive and systematic torture and abuse: they stripped him naked, shackled his hands above his head, and forced him to stand for days without sleeping. They deprived him of food and drenched him with freezing water until he showed signs of hypothermia. They subjected him to repeated physical assaults. Within weeks of his abduction, Mr. Rahman—injured, starved, sleepless, and freezing—died of hypothermia in CIA custody. Although the CIA has publicly admitted its culpability in Mr. Rahman's forced disappearance and death, the agency has never informed his grieving family of what it did with his body so that his family may give him a decent burial.

This lawsuit concerns the thirty-five documents that the CIA has identified as responsive to Plaintiffs' requests for information about the agency's disposition of Mr. Rahman's body, its location, and CIA policies with respect to the deaths of prisoners in its custody. The CIA has not disclosed any responsive information about its disposition of Mr. Rahman's remains, and instead moves for summary judgment, claiming that no such information must be revealed under FOIA. The CIA's vague and conclusory justifications for continuing to hide all information about Mr. Rahman's body from his family do not support its sweeping claim.

BACKGROUND

The CIA's torture of Mr. Rahman and his death in the agency's custody have been the subject of extensive media coverage, official investigations, and litigation. The CIA's Inspector General has concluded that the "decision to have Rahman short-chained to a concrete floor, while wearing only a sweatshirt in near freezing temperatures, 'directly led to Rahman's death by hypothermia,'" and that a CIA officer "exhibited 'reckless indifference' to Rahman's life."

Salim v. Mitchell, 268 F. Supp. 3d 1132, 1149 (E.D. Wash. 2017). The CIA has officially acknowledged "Rahman's death in CIA custody," and observed that "CIA leaders erred in not holding anyone formally accountable for the actions and failure of management related to the death of Gul Rahman." CIA, Memorandum from John Brennan, CIA Director, to Sens. Feinstein & Chambliss, *CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program* 4, 9 (June 27, 2013), https://www.cia.gov/library/reports/CIAs_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf ("June 2013 Response"). The CIA has further admitted that "[t]he death of Rahman, under conditions that could have been remediated by Agency officers, is a lasting mark on the Agency's record." *Id.* at 42.

On April 18, 2018, Plaintiffs submitted a FOIA request for 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."

Shiner Decl. ¶ 6, ECF No. 17-3 at 4.

After the CIA did not respond in a timely manner, Plaintiffs Obaid Ullah, the personal representative of the estate of Gul Rahman, and the American Civil Liberties Union brought this FOIA lawsuit on November 29, 2018. Six months later, on May 31, 2019, the CIA identified thirty-eight documents as responsive to the categories Plaintiffs sought, eventually amending this number to thirty-five documents. Mot. 2. None of the information the CIA has disclosed provides any detail with respect to the disposition or location of Mr. Rahman's body, nor describes any CIA policy with respect to the deaths of prisoners in its custody.

ARGUMENT

The CIA seeks to withhold the majority of the responsive documents it has identified, but offers little more than conclusory, boilerplate descriptions to justify its sweeping claims of privilege. It asserts that documents are essential to decisionmaking processes without identifying any decisionmakers, specific decisionmaking processes, or the role of any given record in an identifiable process. It claims that a document is protected by the attorney-client privilege without providing the minimal information necessary to determine if the claim is proper: whether it sets forth confidential communications between a client and an attorney for the purpose of seeking legal advice, and whether any originally protected information has been kept confidential. And while it maintains that "[t]o the greatest extent possible, CIA attempted to explain on the public record the nature of the information subject to Exemption (b)(1)," Def's SMF ¶ 15, ECF No. 17-2 at 5, the agency's submission contains little beyond vague, categorical descriptions of the information it seeks to withhold as classified. The CIA offers even less in support of its claim that no segregable material may be disclosed from the bulk of the documents at issue here, simply asserting as a categorical matter that no additional information may be disclosed.

The CIA does not contest that it bears the burden of justifying its claimed exemptions from FOIA. The meager submissions it offers do not carry this burden. The agency's motion for summary judgment should be denied.[1]

[1] In light of the CIA's declaration detailing searches both of the RDINet system as well as relevant CIA offices, Plaintiffs do not challenge the adequacy of the agency's search. Moreover, as the CIA acknowledges, Plaintiffs informed the agency months ago that they would not seek the disclosure of any "identities of CIA personnel who have not been officially identified with the CIA's former rendition, detention, and interrogation program." Mot. 2. Plaintiffs thus do not challenge Defendant's withholding of identifying information of CIA personnel involved in or knowledgeable about Mr. Rahman's death or other matters under investigation by the CIA Office of Inspector General under Exemption b(7)(d). *Cf.* Mot. 19–20. Plaintiffs similarly do not seek

I. The Government Has Not Justified Its Exemption 5 Claims.

In the FOIA context, the deliberative process and attorney-client privileges asserted by the government under Exemption 5 must be "narrowly construed" and "limited to those situations in which [their] purposes will be served." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). "That is so because courts must at all times bear in mind that FOIA mandates a strong presumption in favor of disclosure." *Cable News Network, Inc. v. F.B.I.*, 384 F. Supp. 3d 19, 29 (D.D.C. 2019) (alteration marks and citation omitted). "An agency withholding responsive documents from a FOIA release bears the burden of proving the applicability of claimed exemptions." *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011). To satisfy its burden of proving that Exemption 5 applies, the government must provide information about the function of a document, its role, and the context in which the record was issued and used. *See N.L.R.B. v. Sears*, *Roebuck & Co.*, 421 U.S. 132, 138 (1975) ("Crucial to the decision of this case is an understanding of the function of the documents in issue in the context of the administrative process which generated them."); *Coastal States*, 617 F.2d at 858 ("[T]o determine whether the agency's claim . . . is valid, an understanding of the function the documents serve within the agency is crucial."). The government has not come close to carrying that burden here.

The government's vague *Vaughn* index and the accompanying Shiner declaration fail to support the sweeping exemptions the CIA claims under Exemption 5. *Vaughn* submissions are insufficient where "the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *Quiñon v. F.B.I.*, 86 F.3d 1222, 1227 (D.C. Cir. 1996) (quoting *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)). These

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"personally-identifying information of CIA officers and non-CIA personnel mentioned in these records," Mot. 19, and do not challenge these withholdings under Exemptions b(6) or b(7)(c).

insufficiencies pervade both the index and the Shiner declaration, neither of which establishes that the government may withhold the information it seeks to keep secret.

A. The government has not shown that information may be withheld under the deliberative process privilege.

The CIA claims the deliberative process privilege with respect to twenty-six documents, but its submissions in support of its claims of privilege fall far short of its burden to establish with particularity that each of the withheld documents would reveal a protected and identifiable consultative process.[2] Moreover, "[u]nder the government-misconduct exception to the deliberative-process privilege, 'where there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest, effective government.'" *Nat'l Whistleblower Ctr. v. Dep't of Health & Human Servs.*, 903 F. Supp. 2d 59, 66 (D.D.C. 2012) (quoting *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997)). This exception applies forcefully here, as the information Plaintiffs seek involves the torture, killing, and seventeen-year-long forced disappearance of an individual under circumstances that the CIA itself admits are "a lasting mark on the Agency's record." June 2013 Response at 42.

"To show that a record is deliberative, an agency must demonstrate that the record was generated as part of a definable decision-making process. Such a showing typically includes: (1) the nature of the specific deliberative process involved, (2) the function and significance of the document in that process, and (3) the nature of the decisionmaking authority vested in the document's author and recipient." *Heartland All. for Human Needs & Human Rights v. U.S. Dep't of Homeland Sec.*, 291 F. Supp. 3d 69, 80 (D.D.C. 2018) (quotation marks and citations

[2] Specifically, the CIA claims that information in documents 1, 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 34 may be withheld under the deliberative process privilege.

omitted). The deliberative process privilege protects only documents that are both "predecisional" and "deliberative"—i.e., documents that were "generated before the adoption of an agency policy" and that "reflect[] the give-and-take of the consultative process." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) (quotation marks and citation omitted). The deliberative privilege shields an agency record only if it forms "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975); *see also Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) (stating that the deliberative process privilege "is centrally concerned with protecting the process by which policy is formulated").

Because the applicability of Exemption 5 is so case-specific—turning on, among other things, how each document was ultimately used, with whom it was shared, and whether it has portions that are factual and therefore disclosable—courts require the government to set forth specific facts in order to justify claims of privilege. *See Senate of P.R. v. U.S. Dep't of Justice*, 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); *see also Coastal States*, 617 F.2d at 867 ("[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process."). "[I]n order to discharge its burden, the government must specifically 'establish[ ] what deliberative process is involved, and the role played by the documents in issue in the course of that process.'" *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 955 F. Supp. 2d 4, 17 (D.D.C. 2013) (quoting *Coastal States*, 617 F.2d at 868). "The government . . . bears the burden of situating the document within that process and

must provide detailed information on the 'nature of the decisionmaking authority vested in the office or person issuing the disputed document,' as well as the 'relative positions in the agency's "chain of command" occupied by the document's author and recipient.'" *Citizens for Responsibility & Ethics in Wash.*, 955 F. Supp. 2d at 17 (quoting *Taxation with Representation Fund v. Internal Revenue Serv.*, 646 F.2d 666, 678 (D.C. Cir. 1981) and *Senate of P R.*, 823 F.2d at 586). The government has not even attempted to satisfy these requirements here.

In most instances, the government provides only a boilerplate assertion of privilege without even trying to identify a plausible policy decision that these documents preceded. The government identifies an allegedly years-long, vague and abortive process of creating "a final policy for dealing with the death of a detainee." *See, e.g.*, *Vaughn* Index Doc. 22, ECF No. 17-3 at 35. But clearly, the agency had already taken actions with respect to Mr. Rahman's remains in the years prior to the production of these documents between 2005 and 2007, under whatever policy it had in November 2002 when Mr. Rahman died in its custody. *See, e.g.*, *Vaughn* Index Docs. 22, 23, 24, 25, 26, 27, 30, ECF No. 17-3 at 35–37, 39 (documents undated or dated 2005–2007). Even if the decision had originally been to keep Mr. Rahman's remains in agency custody and later documents urged a change in that policy, an agency may not "avail itself of Exemption 5 to shield existing policy from disclosure simply by describing the policy in a document that as a whole is predecisional, such as a memo written in contemplation of a change in that very policy. Only those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010). Under any contrary rule, "it would be hard to imagine any government policy document that would be sufficiently final to qualify as non-predecisional and thus subject to disclosure under FOIA." *Id.*

Similarly, although the CIA asserts that many documents concern "the investigation into the death of Gul Rahman" and related reports, there is no reason to believe that the information in these documents is categorically deliberative or predecisional. *See, e.g.*, *Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153, 162 (D.D.C. 2003) (concluding that "application of this privilege to the investigators' notes . . . is a poor fit"); *see also Coastal States*, 617 F.2d at 868 ("Characterizing these documents as 'predecisional' simply because they play into an ongoing audit process would be a serious warping of the meaning of the word."). In short, information contained in these documents about whatever the agency had *already* done to Mr. Rahman's body at the time these documents were created cannot be withheld under the deliberative process privilege, even if other portions of these documents involve discussion of potential future policies.

Moreover, the agency's submissions provide none of the necessary detail to establish that these documents contain "advisory opinions, recommendations[, or] deliberations" regarding the agency process at issue. *Sears, Roebuck & Co.*, 421 U.S. at 150. Nor is there any information as to additional "required elements of the deliberative-process privilege," including "the relative positions in the chain of command of the author and recipient, the deliberative process involved, the role played by the documents in that process, and the nature of the author's decisionmaking authority." *Citizens for Responsibility & Ethics in Wash.*, 955 F. Supp. 2d at 18 (citations omitted).

That some of the documents are labeled "draft" does not carry the government's burden. "Mere classification of a document as a 'draft document' does not end the inquiry; the government must also prove that the document is pre-decisional and related to the deliberative process." *Techserve All. v. Napolitano*, 803 F. Supp. 2d 16, 27 (D.D.C. 2011) (citing *Coastal*

States, 617 F.2d at 866). "The fact that [ ] documents are drafts and contain edits does not, alone, qualify them for protection under the deliberative process privilege[.]" *Heartland All. for Human Needs & Human Rights*, 291 F. Supp. 3d at 80; *see also id*. at 79 ("[N]ot all draft documents are predecisional and protected by the deliberative process privilege."). The government must still establish that the information it seeks to withhold is "deliberative in nature." *Arthur Andersen & Co. v. Internal Revenue Serv.*, 679 F.2d 254, 257–58 (D.C. Cir. 1982). It has not done so here.

Finally, the government-misconduct exception should override any otherwise applicable claim of deliberative process privilege here. Government efforts to cover up evidence of a horrific crime, especially by taking actions as egregious as disappearing the body of a torture victim, cannot "serve 'the public's interest in honest, effective government.'" *In re Sealed Case*, 121 F.3d at 738 (quoting *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995)). Just a few short months before Mr. Rahman's death, the CIA had already engaged in detailed discussions about destroying the body of another prisoner if he were to die during CIA torture. *See* Ladin Decl. Exh. 1 at 5 (CIA cable released pursuant to FOIA disclosing that CIA field operatives planned to arrange for "the cremation of" a prisoner in the event of his death by torture). This effort to conceal by cremation was in keeping with the agency's determination to silence and disappear its prisoners so that they could not divulge that the CIA had tortured them. *See id.* at 5 ("[I]n light of the planned psychological pressure techniques to be implemented, we need to get reasonable assurances that subject [Abu Zubaydah] will remain in isolation and incommunicado for the remainder of his life."); Ladin Decl. Exh. 2 at 4 (CIA cable released pursuant to FOIA responding that "all major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life.").

The CIA's decision to disappear Mr. Rahman's body and keep his remains from his family constitutes outrageous government conduct and a violation of basic and universal norms. As the Supreme Court has recognized, burial rites "are a sign of the respect a society shows for the deceased and for the surviving family members. The power of Sophocles' story in Antigone maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167–68 (2004). "Under traditional common law principles, serving a duty to protect the dignity of the human body in its final disposition that is deeply rooted in our legal history and social traditions, the parents had exclusive and legitimate claims of entitlement to possess, control, dispose and prevent the violation of the . . . bodies of their deceased children." *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796 (9th Cir. 2002). "Family members have a personal stake in honoring and mourning their dead." *Favish*, 541 U.S. at 168. Courts have for centuries recognized the importance of the "rites and respect [family members] seek to accord to the deceased person who was once their own." *Id.* This recognition extends to wartime, as the laws of war require not merely that "internees who die while interned" shall be "honourably buried," but that "their graves are respected, properly maintained, and marked in such a way that they can always be recognized." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 130, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Yet here, in spite of conceding that Mr. Rahman died in its custody, and that "[t]he death of Rahman, under conditions that could have been remediated by Agency officers, is a lasting mark on the Agency's record," June 2013 Response at 42, the CIA still has not informed Mr. Rahman's family of where his remains are located. The CIA's efforts to hide Mr. Rahman's body from his kin are grotesque and contrary to centuries of law. Forced disappearance, like the

torture and arbitrary detention that Mr. Rahman also suffered, constitutes gross governmental misconduct. *See, e.g.*, *Meshal v. Higgenbotham*, 804 F.3d 417, 438–39 (D.C. Cir. 2015) (Pillard, J., dissenting) ("The Convention Against Torture and other treaties prohibit the United States from engaging in torture, forced disappearances, and arbitrary detentions. As the State Department acknowledged in 2014, the United States is bound by the terms of the Convention Against Torture for actions committed either domestically or abroad, whether during a time of conflict or peace.").

B. The government has not established that the attorney-client privilege applies.

The government asserts that the attorney-client privilege applies to Document 2, an Inspector General report addressing Mr. Rahman's death that "recounts discrete pieces of legal analysis and advice." Mot. 16. But the attorney-client privilege does not protect an attorney's opinion or advice, "but only 'the secrecy of the underlying facts' obtained from the client." *Alexander v. F.B.I.*, 193 F.R.D. 1, 5 (D.D.C. 2000) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977)); *accord Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 618 (D.C. Cir. 1997). Thus, the privilege does not promote secrecy of attorney-client legal communications generally, but only where particular communications convey or respond to the client's "confidential information." *Coastal States*, 617 F.2d. at 863; *see also Schlefer v. United States*, 702 F.2d 233, 245 (D.C. Cir. 1983). Moreover, the privilege can be waived if the communications are not closely held. The government's threadbare submissions here fail to carry its "burden to demonstrate that all of the information contained in these records is fully protected," and that "the factual information conveyed between its counsel and its entities 'was not known by or disclosed to any third party.'" *Am. Civil Liberties Union v.*

U.S. Dep't of Homeland Sec., 738 F. Supp. 2d 93, 115 (D.D.C. 2010) (quoting *Mead*, 566 F.2d at 253–54).

First, the inclusion of legal advice in an OIG report is not consistent with the requirement that both the confidential facts and the legal advice given be closely held. The D.C. Circuit long ago rejected the argument that the privilege survives circulation within an "agency of a document otherwise entitled to protection under the attorney-client privilege," because "that would be far too broad a grant of privilege." *Coastal States*, 617 F.2d at 863. Instead, the "test in this circumstance is whether the information was circulated no further than among those members of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication." *Reinhard v. Dep't of Homeland Sec.*, No. 18-cv-1449 (JEB), 2019 WL 3037827, at *14 (D.D.C. July 11, 2019) (quotation marks and citation omitted). Inclusion of advice in an OIG report is difficult to square with any claim that the advice was "circulated no further" than the required small group. The CIA's submissions do not provide information sufficient to meet that standard or otherwise demonstrate the applicability of the privilege.

Second, the government's assertion that disclosure could reveal "analysis and advice," Mot. 16, is beside the point: "The attorney-client privilege [] does not protect an attorney's opinion or advice, but only 'the secrecy of the underlying facts' obtained from the client." *Alexander*, 193 F.R.D. at 5 (quoting *Mead*, 566 F.2d at 254 n.28). Therefore, to the extent the analysis turns on facts that were disclosed, the government's claim of privilege must fail. "It is the defendants' burden to demonstrate that all of the information contained in these records is fully protected, and unless the defendants can show that the factual information conveyed between its counsel and its entities was not known by or disclosed to any third party, the Court

cannot grant summary judgment in their favor." *Am. Civil Liberties Union*, 738 F. Supp. 2d at 115 (quotation marks and citation omitted).[3]

II. The Government Has Not Justified Its Claimed Withholdings Under Exemptions 1 (Properly Classified Information) and 3 (Information Exempted by Statute).

The CIA asserts that every document at issue contains information that may be withheld under Exemption 3, pursuant to the CIA and National Security Acts, and that every document with the exception of documents 30 and 32 contains information that may be withheld under Exemption 1 as properly classified under Executive Order 13526. The agency's burden to supply sufficient information to permit *de novo* review applies with equal force to cases invoking national security concerns. *See CIA v. Sims*, 471 U.S. 159, 188–89 (1985) ("[T]his sort of judicial role is essential if the balance Congress believed ought to be struck between disclosure and national security is to be struck in practice.") (citation omitted); *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (courts do not "relinquish[] their independent responsibility" to review agency's withholdings *de novo* in national security context). Thus, while Exemptions 1 and 3 provide the government with authority to withhold properly classified information, the government's declarations must "afford the FOIA requester a meaningful opportunity to contest" the withholding. *Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) (quotation marks and citation omitted). The government's conclusory justifications in this case deny Plaintiffs that opportunity.

[3] The CIA maintains Document 14 contains information that may be withheld under the attorney work-product privilege because it "reflects attorney notes created in reasonable anticipation of litigation." Mot. 16. This description is confusing. To the extent the CIA claims the privilege over a document created by an attorney in anticipation of litigation, Plaintiffs do not contest the application of Exemption 5. But that is not what the CIA says. It says only that the document "reflects" the notes of an attorney. The CIA must therefore explain why any work-product privilege has not been waived or why any privileged notes cannot be segregated.

As this Court has observed with respect to Exemption 1, "a declaration passes muster only if it is sufficient to afford the district court an adequate foundation to review the soundness of the withholding." *Cable News Network, Inc.*, 384 F. Supp. 3d at 33 (citation and alteration marks omitted). Similarly, "an agency invoking Exemption 3 must demonstrate its applicability 'in a nonconclusory and detailed fashion,' … and must provide 'the kind of detailed, scrupulous description [of the withheld documents] that enables a District Court judge to perform a searching de novo review.'" *Shapiro v. Dep't of Justice*, 239 F. Supp. 3d 100, 123 (D.D.C. 2017) (brackets in original) (quoting *Goland v. CIA*, 607 F.2d 339, 351 (D.C. Cir. 1978) and *Church of Scientology of Ca., Inc. v. Turner*, 662 F.2d 784, 786 (D.C. Cir. 1980)). "[C]ategorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate." *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007) (quotation marks and citation omitted). While it may well be that certain information in the documents is properly classified, "[w]ithout submitting a rationale that affords the Court an adequate foundation to review the soundness of the withholding, the Government cannot prevail." *Cable News Network, Inc.*, 384 F. Supp. 3d at 36 (citation and alteration marks omitted).

One of the only explanations the agency offers is that "the CIA routinely protects information such as dates because they would reveal intelligence methods and activities." Shiner Decl. ¶ 20. According to the CIA's declarant, the danger is that "releasing precise dates of different operations or communications could reveal the CIA's involvement, or lack thereof, in world events that are reported in the press." *Id.* This may be true in certain instances, but does not logically or plausibly bear on the specific withholdings at issue here, where the world already knows that the CIA was involved in Gul Rahman's torture and death in November 2002. For

example, the agency has not remotely described how it is that any intelligence methods or activities could be revealed by disclosing that the entry "Rahman's pants removed" on the Chronology document refers to, for example, November 7 rather than November 8. *See* Ladin Decl., Exh. 3 at 1 (Document 7). As this Court has explained, an agency may not simply rely on "abstract and conclusory statements about national security untethered to the specific information withheld. That is plainly not enough to carry its burden." *Cable News Network, Inc.*, 384 F. Supp. 3d at 38. The CIA's "failure to establish a logical connection between the disclosure of the subject information and a risk to the national security — a necessary element under Exemption 1 . . . dooms its attempt to invoke this protection." *Id.* at 33 (quotation marks and citation omitted).

The CIA also puts forward the categorical assertion that locations of former CIA facilities or the identities of foreign liaisons may properly be kept classified in perpetuity. *See* Shiner Decl. ¶¶ 17–18. But it is no secret that CIA operated on bases throughout Afghanistan or that its personnel interrogated prisoners in Afghanistan in 2002 and 2003. For example, the criminal conviction of CIA contractor David A. Passaro for the June 2003 death of Afghan prisoner Abdul Wali is replete with the type of detail the CIA now claims must be kept secret. As the Fourth Circuit recounts:

> Sometime on the evening of the next day, June 19, the CIA commander at Asadabad [in northeast Afghanistan] authorized Passaro to interrogate Wali. It is undisputed that for the next two days, Passaro "interrogated" Wali. This "interrogation" involved Passaro's brutal attacks on Wali, which included repeatedly throwing Wali to the ground, striking him open handed, hitting him on the arms and legs with a heavy, Maglite-type flashlight measuring over a foot long, and, while wearing combat boots, kicking Wali in the groin with enough force to lift him off the ground.
>
> Passaro "interrogated" Wali in this manner throughout the next day, June 20. And, although Wali's condition greatly deteriorated, Passaro continued the "interrogation" through the night of June 20. By June 21, Wali had lapsed into delirium, to the point where he twice asked his guards to shoot him and even lunged at a guard as if to take his

> gun. Later that day, while still in United States custody at Asadabad, Wali collapsed and died.

United States v. Passaro, 577 F.3d 207, 211–12 (4th Cir. 2009).

The Ninth Circuit recently found that "the fact that the CIA operated in Poland and possibly collaborated with Polish individuals over Abu Zubaydah's detention is not a secret that would harm national security." *Husayn v. Mitchell*, 938 F.3d 1123, 1134 (9th Cir. 2019). As the Ninth Circuit found in a non-FOIA context, the CIA's broad claims of secrecy cannot stand in perpetuity—particularly when existing prosecutions turn on the very facts the CIA continues to maintain are secret. *See id.* at 1133–34 (noting that existence of Polish "prosecutors who have been tasked by the ECHR and the Polish government to investigate the circumstances surrounding Abu Zubaydah's detention in Poland" affirms that national security would not be harmed by acknowledging the truth that the CIA operated in Poland). The CIA's claims of secrecy with respect to any operations in Afghanistan are even weaker here than they were in *Husayn*, where it was foreign prosecutors who were investigating CIA actions. When it comes to Afghanistan, "the [U.S.] Executive itself elected" to prosecute a CIA contract interrogator for the abuse and death of an Afghan prisoner in Afghanistan in May 2003. *Passaro*, 577 F.3d at 216. The CIA has likewise itself confirmed that Bruce Jessen, another CIA contract interrogator, was involved in the torture of Afghan prisoner Gul Rahman in November 2002. *See, e.g,*, Ladin Decl., Exhibit 3. There is no justification for claiming secrecy over the fact that Mr. Rahman's torture and death likewise took place in Afghanistan.

Finally, the CIA asserts, without elaboration, that it may withhold other "undisclosed details" relating to its activities and intelligence collection. *See* Shiner Decl. ¶ 21. Perhaps. But FOIA requires the agency to provide enough detail to permit meaningful de novo review. Congress "stressed the need for an objective, independent judicial determination, and insisted

that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978). When, as here, an agency offers only threadbare, nonspecific justifications, courts properly reject them. *See Halpern v. FBI*, 181 F.3d 279, 293 (2d Cir. 1999) (rejecting as insufficient a declaration that "read[s] more like a policy justification for § 1.3(a)(4) of Executive Order 12,356, while barely pretending to apply the terms of that section to the specific facts of the documents at hand").

As to Exemption 3, the government merely recites the statutory standards to support its secrecy claims. But Plaintiffs do not seek the "organization, names, or official titles of personnel employed by the CIA," *see supra* n.1, leaving at issue only the exemptions claimed to relate to "intelligence sources and methods and their application by Agency personnel." Shiner Decl. ¶ 25. Because the government does not even attempt to provide any explanation with respect to the scope of these claimed Exemption 3 withholdings or the rationale for including information under this umbrella, it has not carried its burden. *See Shapiro v. U.S. Dep't of Justice*, 239 F. Supp. 3d 100, 123 (D.D.C. 2017) ("Although the FBI's reliance on the [National Security Act] is entitled to substantial deference, the declarations it has provided to date are simply too broad and conclusory to allow the Court to perform the type of 'searching de novo review' required by the governing precedent." (quoting *Church of Scientology*, 662 F.2d at 786)).

III. The Government Has Not Demonstrated That No Information Is Segregable.

A. The government's conclusory submissions cannot carry its burden.

Under the common law privilege from which Exemption 5 derives, "purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery." *E.P.A. v. Mink*, 410 U.S. 73, 87–88 (1973). "Only those portions of a predecisional document that reflect the give and take of the deliberative process may be

withheld." *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010). Thus, "agencies must disclose those portions of predecisional and deliberative documents that contain factual information that does not 'inevitably reveal the government's deliberations.'" *Id.* Similarly, "[e]ven if Exemption 1 is found to justify withholding the documents, [the government] may not automatically withhold the full document as categorically exempt without disclosing any segregable portions." *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 505 F. Supp. 2d 150, 158 (D.D.C. 2007). To allow the Court to make the required "specific findings of segregability," *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007), agencies must provide a detailed justification for non-segregability, and a description of "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Mead*, 566 F.2d at 261. The government has not even attempted to meet that standard.

As to Exemption 5, the government does not attempt to differentiate between different documents and simply asserts that "to the extent there is any factual material, it is part and parcel of the deliberations and cannot be segregated." Mot. 15. But "a blanket declaration that all facts are so intertwined to prevent disclosure under the FOIA does not constitute a sufficient explanation of non-segregability." *Ctr. for Biological Diversity v. EPA*, 279 F. Supp. 3d 121, 152 (D.D.C. 2017) (quoting *Wilderness Soc'y v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 19 (D.D.C. 2004)). "Rather, for *each* entry the defendant is required to 'specify in detail which portions of the document are disclosable and which are allegedly exempt.'" *Wilderness Soc'y*, 344 F. Supp. 2d at 19 (quoting *Animal Legal Def. Fund, Inc. v. U.S. Dep't of Air Force*, 44 F. Supp. 2d 295, 302 (D.D.C. 1999) (emphasis in original). This Court has rejected as insufficient an agency's conclusory assertion that "following a line-by-line review, all reasonably segregable, non-exempt

information has been released in full or in part to the plaintiff." *Citizens for Responsibility & Ethics in Wash.*, 955 F. Supp. 2d at 24 (quotation marks omitted); *see also, e.g.*, *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 248 (D.D.C. 2013) ("Defendants' current conclusory assertion that ICE 'has reviewed each record line-by-line to identify information exempt from disclosure . . . [finding that] all information not exempted . . . was correctly segregated,' will not suffice to discharge this burden.'" (alteration in original)). The CIA must establish—rather than merely assert—that the factual material it seeks to withhold under the deliberative process privilege "reflect[s] the 'exercise of discretion and judgment calls' or otherwise reveal[s] something about the 'agency's deliberative process.'" *Reinhard*, No. 18-cv-1449 (JEB), 2019 WL 3037827, at *6 (quoting *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011)). It has not done so here.

Nor is it enough for the government to simply state that "[i]n some instances, the selection of facts in these documents would reveal the nature of the preliminary recommendations and opinions preceding final determinations." SMF ¶ 36. This conclusory description cannot carry the agency's burden, and is in considerable tension with the longstanding requirement that the deliberative process privilege applies only to the "'opinion' or 'recommendatory' portion of the report, not to factual information which is contained in the document." *Coastal States*, 617 F.2d at 867. Generally, absent "any expression of opinion," factual material in an otherwise deliberative document "is not 'so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.'" *Cause of Action Inst. v. U.S. Dep't of Justice*, 330 F. Supp. 3d 336, 353 (D.D.C. 2018) (quoting *Coastal States*, 617 F.2d at 866). To the extent the government is arguing that the selection of facts in the withheld documents is itself deliberative, the D.C. Circuit has cautioned

that "[a]nyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material." *Playboy Enter. v. Dep't of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982). Instead, "the basic rule" is that "in most situations factual summaries prepared for informational purposes will not reveal deliberative processes and hence should be disclosed." *Paisley v. C.I.A.*, 712 F.2d 686, 699 (D.C. Cir. 1983), *opinion vacated in part*, 724 F.2d 201 (D.C. Cir. 1984). This "basic rule" applies to drafts as well: "Thus, notwithstanding its status as a 'draft,' a document that does not reflect the genuine evolution of an agency's decisionmaking process and instead merely recites 'factual information which does not bear on [] policy formation,' is not entitled to protection under the deliberative process privilege." *Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 60 (D.D.C. 2014) (quoting *Wilderness Soc'y*, 344 F. Supp. 2d at 14)) (alteration in original).

The government's submissions with respect to the segregability of information from any proper invocations of Exemptions 1 and 3 are likewise insufficient. Although the government's declarant "asserts that none of the withheld documents contains segregable material . . . . the record is insufficient as to this point because [the agency] does not explain which underlying facts in the documents are confidential in nature." *Ctr. for Int'l Envtl. Law*, 505 F. Supp. 2d at 158. As this Court has written, "the D.C. Circuit stressed in *Mead Data*, '[U]nless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts.'" *Am. Immigration Council*, 950 F. Supp. 2d at 248 (quoting *Mead*, 566 F.2d at 261). The CIA has not done so here. The Court

should reject the government's unsubstantiated claim that no additional information may be released.[4]

B. The government has specifically failed to justify its total withholding of any information on the disposition of Gul Rahman's remains.

The documents at issue are those the CIA has identified as responsive to the specific questions of the "disposition of Mr. Rahman's body after his death in CIA custody" and "the location of Mr. Rahman's body," as well as its guidelines for actions "to be followed in the event of a CIA detainee's death." Mot. 1. At bottom Plaintiffs seek answers to a specific question: what did the CIA do to hide Gul Rahman's body from his family? The CIA's apparent position is that although these documents are responsive this basic question, they contain no segregable information with respect to it. Defendant's meager submissions do not support this conclusion.

Mr. Rahman died in CIA custody in November 2002. Every document at issue was created after his death and thus presumably after at least an initial decision about what the CIA would do with his remains.[5] Regardless of whether the documents refer to later decisions about what the CIA might do with prisoners' remains, or how it might respond to investigations, Exemption 5 cannot reasonably extend to a recitation of the agency's previous decision with respect to Mr. Rahman's remains. Such a discussion by definition could not be predecisional: "[t]he most basic requirement of the privilege is that a document be *antecedent* to the adoption of

[4] The CIA's redactions do not indicate a thorough review for segregable information. For example, on page 2 of document C06630281, the CIA appears to have redacted the words "with Jessen" from the phrase "Rahman admits identity during interrogation with Jessen." *See* Ladin Decl. Exh. 3. The CIA previously made these words public when producing the document in December 2016, *see* Ladin Decl. Exh. 4, and its new redaction here is particularly inexplicable in light of the numerous additional references to Bruce Jessen in the same document.

[5] Defendants have misdated the "Chronology of Significant Events" document on the *Vaughn* index as having been created on 1/1/2002, but that date is clearly wrong because the document, by its own terms, describes events that occurred in November 2002. *See* Ladin Decl. Exh. 3.

an agency policy. A post-decisional document, draft or no, by definition cannot be 'predecisional.'" *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 260 (D.D.C. 2004).

Similarly, even if the CIA's disposition of Mr. Rahman's body appears in proximity to a properly-classified fact, there is no apparent reason why information about Mr. Rahman's body cannot be segregated. Even assuming that the CIA may keep classified the locations of former CIA facilities, the agency has not explained why it cannot redact a reference to a geographical location while leaving intact a description of what it did with Mr. Rahman's body. For example, disclosing that "Rahman was buried around the perimeter of [REDACTED] base in an unmarked grave" would not disclose the location of any CIA facility. Similarly, even if the CIA is entitled to keep secret the role of any foreign nation's intelligence service, there is no apparent reason that it cannot disclose a sentence like "Rahman was cremated with assistance from [REDACTED]," or "Representatives of [REDACTED COUNTRY] accepted custody of Rahman's corpse." *See* Ladin Decl. Exh. 1 at 5 (CIA cable acknowledging that CIA field operatives planned to arrange for "assistance for the cremation of" a different prisoner in the event of his death under torture).

CONCLUSION

For seventeen years, the CIA has hidden what it did with Gul Rahman's body and prevented his family from obtaining his remains to provide him a decent burial. The CIA's continued insistence on the secrecy of any information concerning Mr. Rahman's remains violates both FOIA's requirements as well as "the universal acceptance" of family members' "right to insist on respect for the body" of their kin. *Favish*, 541 U.S. at 167–68. The CIA's motion for summary judgment should be denied.

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Respectfully submitted,

/s/ Dror Ladin

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