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)

REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Introduction

Plaintiffs do not dispute the sufficiency of Defendant Central Intelligence Agency's ("CIA" or "Agency") search for records responsive to Plaintiffs' Freedom of Information Act ("FOIA") request or any of CIA's withholdings under Exemptions 6, 7(C), or 7(D). *See* Pls.' Opp. to Def.'s Mot. for Summ. Jt. ("Pls.' Opp.") at 3 n.1 (ECF No. 18). Thus, the parties' dispute in this FOIA matter is limited to whether CIA has properly justified its claimed withholdings under FOIA Exemptions 1, 3, and 5, and whether CIA has satisfied its burden of demonstrating that no additional information is segregable.

Plaintiffs fail to establish the existence of a genuine dispute of material fact on any of these few remaining issues. Plaintiffs' challenge to CIA's withholdings under Exemption 5 fails because the barely recognized governmental misconduct exception does not negate the deliberative process privilege that applies to the documents at issue. Under Plaintiffs' theory, the privilege would no longer protect internal deliberations communicated during an ongoing investigation by an Agency or its Office of the Inspector General ("OIG") into possible governmental misconduct, but that is not the law of this Circuit. If the Court were to order CIA to disclose its internal deliberations in this case, that would have a chilling effect and discourage the candid exchange of ideas and analysis required for an agency like CIA to conduct a thorough investigation. Plaintiffs' challenge to CIA's invocation of the attorney-client privilege in a single document also fails as a matter of law. Plaintiffs argue that the attorney-client privilege does not protect an attorney's opinion or advice, but under this Circuit's precedent the privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts.

The Court should also reject Plaintiffs remaining challenges to CIA's withholdings under Exemptions 1 and 3. As is the case with the Exemption 5 withholdings, CIA satisfied its

evidentiary burden by providing a *Vaughn* index and supporting declaration that describe the documents and justifications with reasonably specific detail and which together demonstrate that all of the withheld material logically falls within the claimed exemptions. In many cases, Plaintiffs' arguments against the sufficiency of Defendant's showing on particular documents or issues, such as non-segregability, fail to account for all of the undisputed evidence in the record.

CIA's evidence demonstrates, with reasonable specificity, that all of its withholdings in these documents are justified by a specified exemption and that it produced all reasonably segregable information. Plaintiffs believe there must be other undisclosed information in these documents concerning CIA's disposition of Gul Rahman's remains, but Plaintiffs point to no evidence in the record that controverts Defendant's evidence. Plaintiffs' speculation about what information must be contained somewhere in the responsive records is insufficient to overcome the presumption of good faith accorded to CIA's declaration and *Vaughn* index. Therefore, the Court should enter summary judgment for CIA.

Argument

I. CIA Has Properly Justified Its Withholdings Under FOIA Exemption 5.

A. The Deliberative Process Privilege

Plaintiffs fail to show that CIA improperly withheld information under Exemption 5 pursuant to the deliberative process privilege. As explained below, Plaintiffs' allegations of government misconduct do not override the deliberative process privilege that applies to the Agency's internal and pre-decisional deliberations in the documents in question.

This Court recently examined the "government misconduct" exception to the deliberative process privilege in *Bartko v. DOJ*, Civ. A. No. 17-0781 (JEB), 2018 WL 4608239, at *5 (D.D.C. Sept. 25, 2018). According to the *Bartko* decision, the exception may apply "in cases of extreme government wrongdoing" if "there is reason to believe the documents sought may shed

light on government misconduct." *Id.* (citing *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997), *Nat'l Whistleblower Ctr. v. HHS*, 903 F. Supp. 2d 59, 66-69 (D.D.C. 2012)). "The party seeking release of withheld documents under this exception must 'provide an adequate basis for believing that [the documents] would shed light upon government misconduct.'" *Id.* (quoting *Judicial Watch of Fla., Inc. v. DOJ*, 102 F. Supp. 2d 6, 15 (D.D.C. 2000)). Yet the *Bartko* court recognized the need to apply the exception narrowly because:

> If every hint of marginal misconduct sufficed to erase the privilege, the exception would swallow the rule. In the rare cases that have actually applied the exception, the 'policy discussions' sought to be protected with the deliberative process privilege were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government. The very discussion, in other words, was an act of government misconduct, and the deliberative process privilege disappeared.

Id. (quoting *ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008)); *see also Judicial Watch, Inc. v. U.S. Dep't of State*, 235 F. Supp. 3d 310, 313-14 (D.D.C. 2017) (rejecting plaintiff's efforts to apply "the narrow government-misconduct exception" because "[e]ven assuming that the conduct hypothesized by [plaintiff] would rise to the level required for the narrow government-misconduct exception, the records show no such acts").

Other members of this Court have expressed skepticism in recent years that a government misconduct exception even exists at all under this Circuit's precedent. *See Bernegger v. EOUSA*, 334 F. Supp. 3d 74, 92 (D.D.C. 2018) (citations omitted) ("The question whether Exemption 5 incorporates a 'government misconduct' exception is unsettled in the D.C. Circuit."); *Judicial Watch, Inc. v. U.S. Dep't of State*, 241 F. Supp. 3d 174, 183 (D.D.C. 2017) ("[T]he only applicable Circuit authority militates against recognizing a government misconduct exception in a FOIA case"). The *Bartko* court cited *In re Sealed Case* in support of its finding that the exception applies in a very limited set of circumstances. But other courts in this jurisdiction

have found that the reasoning of *In re Sealed Case* does not extend to FOIA cases. *See Bernegger*, 334 F. Supp. 3d at 92.

But even assuming that this Circuit recognizes a government misconduct exception and that Plaintiffs' allegations of misconduct rise to the appropriate level, they do not erase the deliberative process privilege that CIA applied to the 26 documents at issue in this case. As CIA's declarant explained, the documents for which CIA invoked the deliberative process privilege fall into two categories: (1) "documents [that] contain recommendations or deliberations at interim stages of Agency inquiries and/or the CIA OIG's investigation into Rahman's death"; and (2) "documents [that] discuss a draft policy regarding internal procedures to be followed in the event of a detainee death in CIA custody." Shiner Decl. ¶ 29. It is undisputed that every document at issue was created after Rahman's death. *See* Pls.' Opp. at 21. But the deliberative process privilege applies to documents prepared as part of "legitimate governmental processes" at CIA and CIA OIG "which may relate to investigations of various forms of government misconduct." *See Bartko*, 2018 WL 4608239, at *6 (citation omitted). Under the *Bartko* decision, the government misconduct exception does not apply to documents that fall into either of the above two categories because "the discussions contained in the documents are not themselves acts of misconduct." *Id.*;[1] *see also ICM Registry, LLC*, 538 F. Supp. 2d at 133. Plaintiffs offer no evidence, nor do they even claim, that any of the 26 documents for which CIA invoked the deliberative process privilege, three of which CIA produced in part, contain acts of misconduct. Instead, the record establishes that the documents

[1] The D.C. Circuit affirmed the *Bartko* court's decision that the records at issue in that case were protected by the deliberative-process privilege, in spite of the requester's arguments based on the government misconduct exception. *See Bartko*, 2018 WL 4608239, at *6; *Bartko v. DOJ*, 898 F.3d 51, 70 (D.C. Cir. 2018).

involve internal Agency investigations of possible misconduct that occurred at an earlier date and general policy matters.

The deliberative process privilege is designed to protect the "decision making processes of government agencies." *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *see also Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 7 (D.C. Cir. 2014) (protecting documents that "'compris[e] part of a process by which governmental decisions and policies are formulated'" (quoting *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010)). Here, the documents in question were prepared during a CIA OIG investigation into the circumstances that led to Rahman's death while in CIA custody. If the Court were to accept Plaintiffs' theory and find that the governmental misconduct exception overrides the privilege in this context in which the documents contain an agency's internal deliberations during a subsequent investigation (but which do not themselves contain acts of misconduct) that would have a chilling effect on agencies' internal deliberations and discourage the candid exchange of ideas and analysis required for agencies to conduct a thorough investigation. *See Am. Civil Liberties Union v. DHS*, 738 F. Supp. 2d 93, 110 (D.D.C. 2010); *Skinner v. DOJ*, 744 F. Supp. 2d 185, 205-06 (D.D.C. 2010) (protecting e-mails between ATF agents and ATF attorneys discussing ongoing criminal investigation as release "'would inhibit the candid, internal discussion necessary for efficient and proper . . . preparation"). The same holds true for any subsequent internal deliberations about general policy matters and internal procedures to be followed in the event of a detainee death in CIA custody, discussions which may or may not have been the result of Rahman's death. CIA's evidence establishes that "[d]isclosure of these documents would significantly hamper the ability of Agency personnel to candidly discuss and assess the viability of certain courses of action." Shiner Decl. ¶ 31. "The purpose of the

deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny." *Missouri ex rel. Shorr v. U.S. Army Corps of Eng'rs*, 147 F.3d 708, 710 (8th Cir. 1998). This would no longer be possible if all of the agency's internal debates were open to public scrutiny simply because the topic generally relates to an earlier act of misconduct, such as, in this case, the death of Rahman.

Plaintiffs' remaining arguments against application of the deliberative process privilege fare no better. First, Plaintiffs argue that the records are neither pre-decisional nor deliberative because CIA "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." Pl.'s Opp. at 7-8.[2] But as explained in CIA's declaration and *Vaughn* index, a decision on what action to take with respect to Mr. Rahman's remains is not the final decision in question. Shiner Decl. ¶ 29. Therefore, it is immaterial that these documents were generated after that date.

Second, Plaintiffs contend that any "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." Pls.' Opp. at 8. But as explained above and demonstrated by the record, the deliberative process privilege applies because the decisions at issue were not what to do about Rahman's remains. Rather, the

[2] The cases that Plaintiffs cite are distinguishable. In *Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153, 162 (D.D.C. 2003), the court found that the deliberative process privilege did not shield from discovery in a Title VII race discrimination action interview notes taken during the agency's internal affairs investigation. But unlike here, the agency did not claim that the interview notes constituted opinions, recommendations, and deliberations, or that the notes were created by agency employees who had the responsibility of recommending that a particular policy be adopted by the agency. In *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980), "it [was] readily apparent that the memoranda in issue [bore] little resemblance to the types of documents intended to be protected under the deliberative process privilege." For one thing, they contained no suggestions or recommendations as to what agency policy should be, which is not the case here.

documents contain internal deliberations exchanged during interim stages of an investigation by CIA's OIG into the circumstances surrounding Rahman's death in CIA custody and recommendations and deliberations exchanged as part of a policymaking process. And by shielding these internal deliberations from public disclosure, the privilege protects not merely the documents but also the integrity of agencies' decision-making processes. *See Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987); *Skinner*, 744 F. Supp. 2d at 205-06.

Third, CIA satisfied its evidentiary burden by providing a *Vaughn* index and supporting declaration that describe the documents and Exemption 5 withholdings with "reasonably specific detail." And together the Agency's evidence demonstrates that all of the material CIA withheld "logically falls within the claimed exemption." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Plaintiffs contend that CIA failed to identify a plausible policy decision that these documents preceded and the specific role that the documents played in the decision-making process. *See* Pl.'s Opp. at 6-7. But in fact, every entry on the *Vaughn* index for which the deliberative process privilege was invoked contains a reasonably specific description of how the portions withheld meet these requirements.

For example, the second entry on the *Vaughn* index refers to a CIA OIG Report of Investigation entitled "Death of a Detainee in [REDACTED] (2003-7402-IG)." CIA *Vaughn* Index at 2 (ECF No. 17-3); Ex. 2 at 8-76 (copy of the document as it was produced to Plaintiffs).[3] The entry for this document on the *Vaughn* index states:

> Exemption (b)(5) was also applied to protect pre-decisional, intra-agency deliberations, including draft comments, proposed language, preliminary report

[3] Defendant attaches as Exhibit 2 to this Reply a copy of its final document production from May 31, 2019. The final production included a total of nine documents; these also correspond with the first nine entries on the *Vaughn* index.

> language, and recommendations pursuant to the Deliberative Process Privilege; as each of these were a part of the Agency's deliberation process regarding the RDI program as a whole, and discipline in response to the death of Gul Rahman.

CIA *Vaughn* Index at 2. Thus, it is apparent from the *Vaughn* index and CIA's supporting declaration that the document is deliberative on at least two levels. First, as a draft version of the OIG Report that includes "draft comments" and "proposed language" it is both deliberative and pre-decisional in terms of preparing a final composition of the document. Second, the document is deliberative as part of a larger decision-making process "regarding the RDI program as a whole, and discipline in response to the death of Gul Rahman." *See also* Shiner Decl. ¶ 29 (further explaining why the deliberative process privilege applies to these documents).

Moreover, the Agency's descriptions of each individual document on the *Vaughn* index are reasonably specific in describing "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. v. DOJ*, 955 F. Supp. 2d 4, 18 (D.D.C. 2013). For example, the first entry on the *Vaughn* index is a document entitled "Rahman Death Investigation – Interview of [REDACTED]." CIA *Vaughn* Index at 1; Ex. 2 at 1-7 (copy of the document as produced to Plaintiffs). CIA described the document on the *Vaughn* index as a "draft memorandum for the record regarding the investigation into the death of Gul Rahman which contains comments for the author." In the case of this specific document and the other documents containing information for which CIA invoked the deliberative process privilege, CIA provided reasonably specific descriptions on the *Vaughn* index and supporting declaration that allow Plaintiffs and the Court to verify that the information that CIA redacted in part or withheld in full meets all of the required elements of the privilege.

As to Plaintiffs' last argument, although the mere labeling of a document as a "draft" does not automatically carry the government's burden (see Pls.' Opp. at 8-9), courts have

frequently found draft documents to be covered by the deliberative process privilege. *See, e.g.*, *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 465 (D.C. Cir. 2014) (finding draft exempt in its entirety under Exemption 5 because in creating draft, selection of facts thought to be relevant was part of deliberative process); *Coastal States Gas Corp.*, 617 F.2d at 867 (holding that deliberative process 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"). Plaintiffs' cases are distinguishable because in this case the documents were not merely labeled as drafts but rather meet all of the requirements of the privilege. CIA determined that the documents that it designated as drafts – which include most of the documents that CIA withheld under the deliberative process privilege – did not convey a final decision. Shiner Decl. ¶ 29. Instead, they "reflect different considerations, opinions, options, and approaches that preceded an ultimate decision and [which were] part of a policymaking process." *Id.* Further, "[a]s noted in the *Vaughn* index, certain drafts were circulated via email or memorandum and request that personnel from various offices provide comments and/or edits." *Id.* "Each of these copies is deliberative insofar as it represents a particular stage in the drafting process and reflects different considerations contemplated by Agency employees." *Id.*; *see also Dudman Commc'ns Corp.*, 815 F.2d at 1569 (("[T]he disclosure of editorial judgments – for example, decisions to insert or delete material or to change a draft's focus or emphasis – would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work."). Therefore, the Court should affirm all of CIA's withholdings under the deliberative process privilege.

B. The Attorney-Client Privilege

Plaintiffs next challenge CIA's invocation of the attorney-client privilege as a basis for some of its withholdings in a draft OIG Report of Investigation, which is Entry No. 2 on the

Vaughn index. CIA *Vaughn* Index at 2. The *Vaughn* entry for this record states that "Exemption (b)(5) was asserted to protect privileged communications within the Agency, including legal advice provided to the field by Agency attorneys in response to questions related to the RDI program protected by the Attorney-Client Privilege." CIA's declarant further explained:

> In this case, the attorney-client privilege applies to confidential client communications between Agency employees and attorneys within the CIA on issues relating to the former RDI program that were made for the purpose of obtaining legal advice. Here, the attorney-client privilege only applies to a portion of the CIA OIG Report of Investigation . . . which recounts discrete pieces of legal analysis and advice from Agency attorneys to senior leadership and the field regarding aspects of the RDI program.

Shiner Decl. ¶ 32.

Plaintiffs contend that "the attorney-client privilege does not protect an attorney's opinion or advice," only the secrecy of the underlying facts obtained from the client. Pls.' Opp. at 11 (citing *Alexander v. FBI*, 193 F.R.D. 1, 5 (D.D.C. 2000)). But most courts in this jurisdiction do not construe the attorney-client privilege so restrictively as that. "Although it *principally* applies to facts divulged by a client to his attorney, [the attorney-client] privilege also encompasses any opinions given by an attorney to his client based on, and thus reflecting, those facts as well as communications between attorneys that reflect client-supplied information." *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005) (emphasis added); *see also Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) (privilege protects both lawyer's professional advice to client and client's disclosure of confidential information to lawyer to enable lawyer to give advice); *Coastal States Gas Corp.*, 617 F.2d at 863 (finding that courts can infer confidentiality when the communications suggest that "the government is dealing with its attorneys as would any private party seeking advice to protect personal interests"). In explaining the distinction between the attorney-client privilege and the deliberative process privilege for

interagency and intra-agency memoranda and letters, both of which are encompassed by Exemption 5, the D.C. Circuit in *Mead Data Central* stated:

> The distinction between the two is that the attorney-client privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts, while the deliberative process privilege directly protects advice and opinions and does not permit the nondisclosure of underlying facts unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process.

Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977). Although the *Alexander* court appears to have interpreted this footnote as meaning that the attorney-client privilege "does *not* protect an attorney's opinion or advice" (an interpretation that appears to be directly contrary to the plain language of the cited footnote) that is not a commonly accepted limitation on the privilege in this Circuit. *See, e.g.*, *EPIC*, 384 F. Supp. 2d at 114.

Finally, CIA carried its burden of demonstrating that it maintained the confidentiality of this communication. *See* Pls.' Opp. at 11-12 (speculating that the OIG Report may have been widely disseminated within the Agency or to third parties). CIA only withheld under the attorney-client privilege a "discrete piece of legal advice from Agency attorneys to senior leadership and the field regarding aspects of the RDI program." The record thus establishes that this was a confidential communication by an Agency attorney to Agency employees in response to a specific request for legal advice, which the attorney-client privilege protects from disclosure.

C. Attorney-Work Product Privilege

In a footnote Plaintiffs state that "to the extent the CIA claims the [attorney-work product] privilege over a document created by an attorney in anticipation of litigation, Plaintiffs do not contest the application of Exemption 5." Pls.' Opp. at 13 n.3. Plaintiff should not need to qualify this at all, because CIA's declaration makes clear that CIA invoked the attorney-work product privilege "to protect work product in Document 14 *created by the attorney* who

documented and identified certain details that could pose a litigation risk." Shiner Decl. ¶ 34 (emphasis added). CIA determined that "[i]f this information were to be released, it would expose the attorney's work to scrutiny and could reveal preliminary litigation risk analysis and strategy." *Id.* Plaintiffs fail to demonstrate any genuine fact dispute on CIA's withholding of attorney-work product material and thus CIA is entitled to summary judgment on that issue as well.

II. CIA Has Properly Justified Its Withholdings Under FOIA Exemptions 1 and 3.

Similar to their Exemption 5 challenges, Plaintiffs contend that CIA failed to submit sufficient information for Plaintiffs and the Court to review the validity of the withholdings that CIA made under Exemption 1 and 3. *See* Pls.' Opp. at 14. Yet, Plaintiffs' specific arguments against CIA's withholdings reveal that although Plaintiffs purport to dispute the specificity of the information CIA provided, Plaintiffs simply disagree with the rationale that CIA provided. In other words, Plaintiffs primarily contend that the record affirmatively establishes that CIA improperly withheld information that is not properly classified under Executive Order 13526 (in the case of the Exemption 1 withholdings) or which is not properly withheld pursuant to the CIA and the National Security Acts (in the case of the Exemption 3 withholdings). On both issues, however, Plaintiffs fail to demonstrate any genuine dispute of material fact that precludes summary judgment for CIA.

"'When information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim.'" *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). "A plaintiff mounting an official acknowledgment argument 'must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld.'" *Am. Civil Liberties Union v. CIA*, 710 F.3d 422, 426 (D.C. Cir. 2013) (quoting *Wolf*, 473 F. 3d at

378). Courts in this Circuit construe the official acknowledgement doctrine narrowly. *See Associated Press v. FBI*, 265 F. Supp. 3d 82, 96 (D.D.C. 2017) (a claim that information has been officially acknowledged must meet a "strict test"). To prevail, the plaintiff must show that the specific information sought by the plaintiff is already in the public domain through an official and documented disclosure. *Wolf*, 473 F.3d at 378 (citing *Fitzgibbon*, 911 F.2d at 765). Prior disclosure of similar information does not suffice. *Id.*; *see also Afshar v. U.S. Dep't of State*, 702 F.2d 1125, 1130, 1131 (D.C. Cir. 1983) ("[T]he fact that information exists in some form in the public domain does not necessarily mean that official disclosure will not cause harm cognizable under a FOIA exemption.").

In this case, Plaintiffs' arguments fail because they have not shown, as they must to carry their burden at this stage, that CIA has already officially acknowledged the specific categories of information that CIA withheld and which remain in dispute. First, Plaintiffs contest the application of Exemption 1 to protect dates and other details about operations that would reveal intelligence methods and activities including information about CIA's involvement, or lack thereof, in world events. *See* Pls.' Opp. at 14-15. Plaintiffs dispute these withholdings because "the world already knows that the CIA was involved in Gul Rahman's torture and death in November 2002." Second, Plaintiffs challenge CIA's withholding of the locations of former CIA detention facilities. *See id.* at 15.

Although CIA has publicly acknowledged its responsibility for Rahman's death in November 2002, this does not show that CIA publicly disclosed the location of its field installations and the other information relating to its intelligence methods, sources, and activities that it withheld from release. CIA's declaration confirms that CIA maintains the confidentiality of the information at issue. *See* Shiner Decl. ¶ 18 (stating that CIA "has consistently refused to

confirm or deny the location of these facilities"), ¶ 20 (stating that CIA "routinely protected information such as dates because they would reveal intelligence methods and activities"); ¶ 21 (stating that CIA protected "other undisclosed details about the practice of intelligence gathering and Agency tradecraft"). Thus, the record affirmatively establishes that the information is not in the public domain.

Plaintiffs fail to point to any evidence that contradicts CIA's assertions. Plaintiffs point to a memorandum in which CIA acknowledged Rahman's death in CIA custody. *See* Mem. from J. Brennan, CIA Director, to Senators Feinstein and Chambliss, *CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program* (June 27, 2013) (hereinafter, the "Brennan Memorandum"); Pls.' Opp. at 2. Same as in its production in this case, CIA redacted from the public version of the Brennan Memorandum details regarding the specific locations of covert CIA installations and former detention centers located abroad. *See generally* Ex. 3 hereto (excerpts of the Brennan Memorandum in which CIA redacted the name and location of the detention center in which Rahman was detained). Thus, the public version of the Brennan Memorandum does not support Plaintiffs' claim that CIA publicly disclosed any of the specific information that it redacted in this case. Indeed, CIA's decision to redact information in the Brennan Memorandum relating to the locations of the facilities and other sensitive and classified details about its operational methods and activities actually undermines Plaintiffs' arguments that the information is already in the public domain.

Moreover, Plaintiffs' general statement that "it is no secret that CIA operated on bases throughout Afghanistan or that its personnel interrogated prisoners in Afghanistan in 2002 and 2003" (Opp. at 15) falls far short of the burden of proof required for Plaintiffs to show that the specific information relating to its field installations and intelligence methods and activities that

CIA withheld from the documents is already in the public domain. Likewise, the two non-FOIA cases that Plaintiffs cite do not lend any support to their argument that CIA has publicly disclosed matching information relating to Rahman's detention. *See* Pls.' Opp. 15-16 (citing *Husayn v. Mitchell*, 938 F.3d 1123, 1134 (9th Cir. 2019); *United States v. Passaro*, 577 F.3d 207, 211-12 (4th Cir. 2009)). On their face, the facts of these cases are unrelated to the CIA's detention of Rahman in November 2002. The *Hasayn* case is further distinguishable because the court's general reference to the fact that CIA operated "in Poland" does not refer to a specific field installation or operational activities. *See Husayn*, 938 F.3d at 1134. It is more akin to Plaintiffs' statement in their Opposition that CIA operated "throughout Afghanistan" over a two-year period. Because Plaintiffs fail to point to any information in the public domain concerning CIA's field installations or its intelligence methods, sources, and activities, Plaintiffs fail to meet the "strict test" established by the D.C. Circuit to overcome CIA's application of Exemption 1 and their challenge must fail. *See Associated Press*, 265 F. Supp. 3d at 96.

The scope of the dispute relating to CIA's Exemption 3 withholdings is even more limited. Plaintiffs do not challenge any of the withholdings that CIA made pursuant to Section 6 of the CIA Act. *See* Pls.' Opp. at 17; Shiner Decl. ¶ 24. As concerning the withholdings that CIA made pursuant to the National Security Act of 1947, Plaintiffs do not appear to dispute that the National Security Act is a statute of exemption as contemplated by Exemption 3. *See* Pls.' Opp. at 17. Therefore, the only remaining question is whether, under the second prong of the analysis, the material CIA withheld is of the kind protected by the National Security Act. *See Fitzgibbon*, 911 F.2d at 761-62. CIA's evidence shows that it is.

As explained in Defendant's opening memorandum, Section 102A(i)(1) of the National Security Act protects intelligence sources and methods from unauthorized disclosure. *See* Defs.'

Mem. at 11; Shiner Decl. ¶ 25. In this case, CIA withheld under the National Security Act "information that would reveal intelligence sources and methods and their application by Agency personnel." Shiner Decl. ¶ 25. Plaintiffs contend that "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." Pls.' Opp. at 17. But again, this argument ignores undisputed material facts in the record. The following are a few examples of the specific information that CIA provided in the *Vaughn* index relating to Exemption 3 withholdings it made pursuant to the National Security Act of 1947:

- Entry No. 1: "Exemption (b)(3) (National Security Act of 1947) was asserted to protect intelligence sources and methods, including locations of sensitive facilities and dates;"
- Entry Nos. 2 and 3: "Exemption (b)(3) (National Security Act of 1947) was asserted to protect intelligence sources and methods, including locations of sensitive facilities, dates, and foreign liaison information;
- Entry No. 5: "Exemption (b)(3) (National Security Act of 1947) was asserted to protect intelligence sources and methods, including locations of sensitive facilities, intelligence targets and interests, and dates."

See Vaughn Index at 1-3. Under this Circuit's precedent, these are reasonably specific descriptions that allow the Court to verify that the information that CIA withheld is of the kind protected by the National Security Act. *See Leopold v. CIA*, 106 F. Supp. 3d 51, 56-57 (agency's description is sufficient so long as it reasonably describes the contents of the documents or portions of documents withheld and their connection to specific exemptions); *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 147 (D.C. Cir. 2006) ("We have never required repetitive, detailed explanations for each piece of withheld information . . . to carry the agency's burden of proof."); *Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007) (affirming summary judgment for CIA because its descriptions, "while categorical and with little variation . . . ,

convey enough information for . . . the court to identify the records referenced and understand the basic reasoning behind the claimed exemptions").

III. Defendant Released All Reasonably Segregable Information.

Lastly, CIA's declaration establishes that it reviewed the records carefully and released all reasonably segregable non-exempt information. Shiner Decl. ¶ 42. Plaintiff takes issue with the fact that Paragraph 42 of CIA's declaration addressing non-segregability includes a few general statements that do not differentiate between different categories of records. If the single paragraph addressing non-segregability constituted all of the evidence in the record on that issue, that may very well be insufficient for CIA to carry its burden, but it is not. For example, Plaintiffs contend there is insufficient evidence to support CIA's statement of undisputed material facts that "in some instances, the selection of facts in these documents would reveal the nature of the preliminary recommendations and opinions preceding final determinations." *See* Pls.' Opp. at 19 (citing Def.'s SMF ¶ 36). But that overlooks all of the evidence that CIA produced in both the declaration and accompanying *Vaughn* index concerning its application of the deliberative process privilege to those 26 specific documents. For example, in explaining the deliberative process privilege withholdings in a section separate from the stand-alone paragraph addressing non-segregability CIA's declarant stated:

> I have examined the documents or portions of the documents withheld pursuant to the deliberative process privilege and have determined that, to the extent there is any factual material, it is part and parcel of the deliberations and cannot be segregated. In some instances, the selection of facts in these documents would reveal the nature of the preliminary recommendations and opinions preceding final determinations.

Shiner Decl. ¶ 30. The statements in the supporting declaration must also be read in conjunction with the various specific entries on the *Vaughn* index, all which establish that no additional facts are reasonably segregable. *See Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 146

(D.C. Cir. 2006) (support for the principle that the Court should consider the entirety of the Agency's evidence at summary judgment relating to its withholdings in the *Vaughn* index and supporting declaration). For example, CIA's explanation for Entry No. 1 states that it invoked the privilege to "protect[ ] pre-decisional, intra-agency deliberations regarding the investigation into the death of Gul Rahman," including specifically "suggest[ed] edits and comments for the draft." CIA *Vaughn* Index at 1.

In the last section of the Opposition brief, Plaintiffs contend that "the government has specifically failed to justify its total withholding of any information on the disposition of Gul Rahman's remains." Pls.' Opp. at 21-22. In effect, this last section is a variation of their argument that CIA failed to produce all reasonably segregable information, except that Plaintiffs are now arguing hypotheticals that do not apply to the facts of this case. First, Plaintiffs provide the straightforward principle that a document that postdates a decision cannot be pre-decisional. As explained above, this argument fails because CIA does not contend that any of the documents that it withheld in full or in part under the deliberative process privilege are pre-decisional with respect to an earlier decision on how to dispose of Mr. Rahman's remains. Second, Plaintiffs provide the clear-cut yet undisputed principle that a piece of information that must be disclosed under FOIA does not become exempt merely because it is close in proximity to a properly-classified fact. Third, Plaintiffs' few hypotheticals about the types of sentences that they would expect to find somewhere in CIA's documents is mere conjecture that is insufficient to overcome the presumption of good faith accorded to CIA's declaration and *Vaughn* index. *See SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991); *Porter v. CIA*, 579 F. Supp. 2d 121, 125-26 (D.D.C. 2008) (agency's reasonably detailed and non-conclusory declaration is accorded

presumption of good faith that cannot be rebutted by purely speculative claims about the existence and discoverability of other information).

Conclusion

CIA's evidence demonstrates that the challenged withholdings are all justified and that it produced all reasonably segregable information. Therefore, Defendant respectfully renews its request that the Court enter summary judgment in its favor.

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Respectfully submitted,

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