assertion of confidentiality is more tenuous particularly given that it is not explained why these descriptions from the prior case could be more detailed in the current description.

Having all this in mind, I reviewed the memorandum of notification with only Ms. Normand present. Ms. Normand did not make any arguments whatever. She simply brought the document to my chambers and I reread it. Having reread it and having revisited the justifications given, I find that it was properly classified. Exemption 1 provides that if a matter is specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and it is in fact classified pursuant to such executive order, it may be exempt from production.

Executive Order No. 13526 dated December 29, 2009 sets out four criteria for the classification of nationality security information:

1: An original classification of clarity must have classified the information;

2: The information must be owned by or produced by or for or under the control of the United States government;

3: The information must fall within one or more of the categories of information set out in Section 1.4 of Executive Order No. 13526; and

4: The original classification authority must have determined that unauthorized disclosure of the information

reasonably could be expected to result in damage to the national security.

The original classification of clarity must also be able to identify or describe the damage. That is Executive Order No. 13526 found at 75 FR 707 (December 29, 2009). The reference the Section 1.4 of Executive Order NO. 13526 in turn lists the following categories of information -- I will read just the two that are applicable here. Subparagraph C provides that it covers intelligence activities, including covert action, intelligence sources or methods or cryptology. Subparagraph D provides that exemptions applied to foreign relations or foreign activities of the United States, including confidential sources. After having reviewed the document, it is clear to me that the document should be exempt under both these categories. I don't think it is necessary for me to describe the reasons why that would be so because that would be giving away the document itself and I don't plan to have any sealed supplement to this that does that. The document speaks for itself.

The government also seeks exemption under Exemption 3, which covers matters exempt from disclosure by statute other than Section 552(b) of this title. If the statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding refers to particular types

of matters to be withheld and if enacted after the date of enactment of the open FOIA Act of 2009 and specifically cites to this paragraph. That is 5, U.S.C., Section 552(b)(3). The government has identified the National Security Act and the CIA Act as statutes qualifying under Exemption 3. The ACLU does not dispute that these qualify under Exemption 3 statutes, but instead argues that the government failed to satisfy its burden with respect to both Exemptions 1 and 3 through the conclusory and generalized nature of its submission.

In this sense, the government's argument that a better identification would divulge too much of the document is accepted. The public information, including the information that became public in this case and other cases and the Senate Report are sufficient to identify the document. That was held by the Second Circuit in 2014 in the case of *N.Y. Times Co. v. U.S. Dep't of Justice*, 758 F.3d 436, 440. "We agree with the District of Columbia Circuit that when the itemization and justification letters are themselves sensitive to place them on public record can damage security in precisely the way that FOIA Exception 1 is intended to prevent." Accordingly for these reasons, I hold that the government properly classified the memorandum of notification, each of the criteria set out in the relevant executive order and statute have been satisfied and the government need not disclose the document.

Now, I would like also to pass on one more

justification used by the government, namely, that the document reflects a presidential communication. In my judgment that reason for exception, a species of executive privilege, does not extend to documents that are themselves authorizations for action, and this memorandum of notification was and is considered as an authorization for action. Accordingly, I hold that the presidential privilege covering presidential communication does not apply to this document. That is my ruling. I don't think anything is deserving of classification here. It should be public, but Ms. Normand will be given until Monday to review the transcript and make such applications as the government deems just and proper.

MS. NORMAND: Thank you your Honor.

THE COURT: Thank you.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, v. DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and OFFICE OF INFORMATION POLICY, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY, Defendants.	**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** 15 Civ. 9317 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Following the release of the Senate's highly critical report on the CIA's use of "enhanced interrogation techniques" on post-September 11 detainees, plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (together, the "ACLU") made a demand under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for documents referenced in the report. Defendants the Central Intelligence Agency ("CIA"), the Department of Defense ("DOD") and the Department of Justice ("DOJ") (together, the "Government") released most of the requested documents, but refused to release twenty-four documents. Of those, nineteen remain in dispute.

The Government now moves for summary judgment on these nineteen documents, arguing that they are exempt from disclosure under FOIA's various statutory exemptions. As I discuss below, I grant the Government's motion in part and deny it in part.

BACKGROUND

I. The Senate Report

Beginning in 2009, the Senate Select Committee on Intelligence undertook what it later described as "the most comprehensive review ever conducted of the CIA's Detention and Interrogation Program," a program that began on September 17, 2001 and officially ended on January 22, 2009. SSCI Report, at 8–9.[1] The SSCI's lengthy review involved over six million pages of CIA materials. The SSCI's full report, *The Committee Study of the CIA's Detention and Interrogation Program*, was finalized in December 2012 and totals more than 6,700 pages. The full report remains classified, but was provided to President Obama and other Executive Branch personnel in early 2013. On December 9, 2014, following a declassification review, the SSCI publicly released a 525 page Executive Summary of the full report.

The SSCI Report concluded that the CIA's use of "enhanced interrogation techniques" was ineffective, illegal, and caused lasting damage to the United States' strategic and moral standing in the world. Among its conclusions, the SSCI found that: (i) the CIA's use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or

[1] The origin of the Committee's interest in the CIA's program "had its roots in an investigation into the CIA's destruction of videotapes of CIA detainee interrogations," SSCI Report, at 1, a topic that came to light as a result of prior FOIA litigation before me brought by the ACLU. *See generally, Am. Civil Liberties Union v. Dep't of Def.*, 04-cv-4151 (S.D.N.Y. 2004). I ultimately declined to hold the CIA in contempt for its destruction of these tapes, but required the CIA to produce a range of materials relating to the CIA's conduct for the purpose of reconstructing the events depicted in the destroyed tapes. *See* Order Regulating Proceedings, Dkt. No. 305 (Aug. 20, 2008). The proceedings in this related case gave rise to numerous opinions and orders. *See, e.g., Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501 (S.D.N.Y. 2004); *Am. Civil Liberties Union v. Dep't of Def.*, 396 F. Supp. 2d 459 (S.D.N.Y. 2005); *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005); *Am. Civil Liberties Union v. Dep't of Def.*, 351 F. Supp. 2d 265 (S.D.N.Y. 2005); *Am. Civil Liberties Union v. Dep't of Def.*, 2006 WL 1638025 (S.D.N.Y. June 9, 2006), *aff'd*, 543 F.3d 59 (2d Cir. 2008), *cert. granted, judgment vacated*, 558 U.S. 1042 (2009); *Am. Civil Liberties Union v. Dep't of Def.*, 723 F. Supp. 2d 621 (S.D.N.Y. 2010), *aff'd in part, rev'd in part sub nom. Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61 (2d Cir. 2012); *Am. Civil Liberties Union v. Dep't of Def.*, 827 F. Supp. 2d 217 (S.D.N.Y. 2011); *Am. Civil Liberties Union v. Dep't of Def.*, 40 F. Supp. 3d 377 (S.D.N.Y. 2014), *vacated and remanded*, No. 15-1606 (2d Cir. Jan. 6, 2016); *Am. Civil Liberties Union v. Dep't of Def.*, 229 F. Supp. 3d 193, 211 (S.D.N.Y. 2017), *appeal docketed*, No. 17-779 (2d Cir. Mar. 20, 2017).

gaining cooperation from detainees; (ii) the interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers and others; (iii) the CIA actively avoided or impeded congressional oversight of the program; (iv) the CIA impeded effective White House oversight and decisionmaking; (v) CIA detainees were subjected to coercive interrogation techniques that had not been approved by the Department of Justice or had not been authorized by CIA Headquarters; (vi) the CIA marginalized and ignored numerous internal critiques, criticisms, and objections concerning the operation and management of the program; and that (vii) the CIA's program damaged the United States' standing in the world and resulted in other significant monetary and non-monetary costs.

II. Procedural History

The SSCI Report referred to a number of documents that previously had not been made available to the public, despite prior FOIA litigation brought by the ACLU seeking documents related to the Government's treatment of detainees apprehended following September 11, 2011. On August 14, 2015, the ACLU submitted a FOIA request to the Central Intelligence Agency, the Department of Defense, the State Department, and to the Department of Justice's Office of Legal Counsel and Office of Information Policy. The request sought 69 records or categories of records cited or referenced in the SSCI Report. On November 25, 2015, after receiving no documents from the Government, the ACLU brought this action to compel the Government to comply with the FOIA request.

In June and September 2016, the Government produced a number of the requested documents. On October 14, 2016, the Government moved for summary judgment on twenty-four documents. The Government argued that these documents, or portions thereof, were properly withheld from production under FOIA's statutory exemptions. The parties refer to

these documents by the following numbers: 1, 2, 4, 6, 7, 8, 9, 10, 13, 14, 15, 17, 18, 19, 28, 29, 37, 43, 44, 45, 46, 50, 55 and 66.

Oral argument on the Government's motion was held on March 29, 2017. Argument began with a public hearing at which both parties presented their arguments. Immediately following this public hearing, I reviewed the documents *in camera*, with the Government alone attending. As I reviewed each document, I made preliminary rulings on the record with respect to all the documents in issue, except Documents 10 and 66 on which I reserved judgment. The following day, after being cleared by the Government, a transcript of the *in camera* session was provided to the ACLU.

Five documents are no longer in issue. In its opposition papers, the ACLU abandoned its request with respect to Documents 17 and 50 and, at oral argument, the ACLU abandoned its request with respect to Document 2. On June 14, 2017, the Government advised the Court that it had voluntarily produced an unredacted version of Document 9, following the Government's production of that same document in a civil action brought by former detainees in the Eastern District of Washington against James Mitchell and John Jessen, CIA contractors who played an integral role in designing the CIA's interrogation program. *See Salim v. Mitchell*, 183 F. Supp. 3d 1121 (E.D. Wash. 2016); *Salim v. Mitchell*, 2017 WL 3389011 (E.D. Wash. Aug. 7, 2017).[2]

By separate order issued on July 31, 2017, I granted summary judgment to the Government with respect to Document 1, a Memorandum of Notification issued by President George W. Bush on September 17, 2001, which authorized the CIA to capture and detain suspected terrorists. I upheld the Government's invocation of Exemption 1, which exempts

[2] The *Salim* case recently settled. *See* Sheri Fink, *Settlement Reached in C.I.A. Torture Case*, N.Y. TIMES, Aug. 18, 2017, at A12.

properly classified material, and Exemption 3, which exempts material that is specifically exempt from disclosure by statute. My oral ruling is reflected in the transcript attached as an appendix to the July 31 Order. *See* Order Granting Summary Judgment For Defendant With Respect to Document 1, Upholding Exemptions, Dkt. No. 76 (July 31, 2017).

LEGAL FRAMEWORK

"FOIA was enacted in order to promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed. FOIA strongly favors a policy of disclosure, and requires the government to disclose its records unless its documents fall within one of the specific, enumerated exemptions set forth in the Act. Consistent with FOIA's purposes, these statutory exemptions are narrowly construed. The Department bears the burden of demonstrating that any claimed exemption applies." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355–56 (2d Cir. 2005) (internal quotation marks and citations omitted).

"Summary judgment is the procedural vehicle by which most FOIA actions are resolved." *Jones-Edwards v. Appeal Bd. of Nat. Sec. Agency Cent. Sec. Agency*, 352 F. Supp. 2d 420, 423 (S.D.N.Y. 2005). Summary judgment in favor of the Government is "appropriate where the agency affidavits 'describe 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.' Ultimately, an agency may invoke a FOIA exemption if its justification 'appears logical or plausible.'" *Am. Civil Liberties Union v. Dep't of Justice*, 681 F.3d 61, 69 (2d Cir. 2012) (quoting *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 73 (2d Cir. 2009)). However, "[t]o prevail in a FOIA case, agencies 'must supply the courts with sufficient information to

allow [the courts] to make a reasoned determination that they were correct' in withholding certain materials." *Nat'l Immigration Project of Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec.*, 868 F. Supp. 2d 284, 291 (S.D.N.Y. 2012) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980)).

In this case, the Government has invoked Exemptions 1, 3, and 5. The ACLU has not challenged the Government's invocation of Exemptions 1 and 3 except with respect to Document 66.

I. Exemption 5

Exemption 5 provides that FOIA "does not apply to matters that are … inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested." 5 U.S.C. § 552(b)(5). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5." *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002) (internal quotation marks and citation omitted). "The litigation posture of Exemption 5 cases … focuses on the government proving the applicability of an exemption rather than the plaintiff proving applicability of one of the affirmative provisions because the burden rests on the government to shield documents from disclosure otherwise to be disclosed under FOIA." *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 195 n.7 (2d Cir. 2012).

The Government has invoked Exemption 5 to withhold or redact portions of all nineteen documents that remain in issue. The Government relies on two separate privileges: the attorney-client privilege and the deliberative process privilege.

a. The Attorney-Client Privilege

"The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance." *In re Cty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007). The purpose of the attorney-client privilege is "to encourage attorneys and their clients to communicate fully and frankly and thereby to promote 'broader public interests in the observance of law and administration of justice.'" *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). "A party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *Erie*, 473 F.3d at 419. "The party asserting the [attorney-client] privilege … bears the burden of establishing its essential elements." *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011).

The parties dispute whether the attorney-client privilege extends to confidential legal advice generally, or whether it is limited to situations in which the communication conveys or responds to the client's confidential information. The ACLU relies on decisions from the D.C. Circuit to argue that the attorney-client privilege applies only to the extent necessary "to protect the secrecy of the underlying facts." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977). Some courts in the D.C. Circuit have interpreted this footnote from *Mead* to conclude that 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*, 566 F.2d at 254 n.28). The Government argues that the Second Circuit has not embraced this "secret fact" limitation.

The parties overstate the difference between the D.C. and Second Circuit approaches. Although the Second Circuit has not used the limiting phrase "secrecy of the underlying facts," Second Circuit cases hold that the privilege does not attach unless the "communication relates to a fact of which the attorney was informed … by his client … without the presence of strangers." *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962) (citation omitted); *see also United States v. Int'l Bus. Machines Corp.*, 66 F.R.D. 206, 211 (S.D.N.Y. 1974) ("[T]he focus of the privilege must be on protecting confidential information revealed to the lawyer by the client."); *Nat'l Immigration Project of the Nat. Lawyers Guild v. U.S. Dep't of Homeland Sec.*, 842 F. Supp. 2d 720, 728 (S.D.N.Y. 2012) (the attorney-client privilege "attaches only where information 'was intended to be and was in fact kept confidential.'" (quoting *Erie*, 473 F.3d at 419)). Thus, even in the Second Circuit, legal advice divorced from confidential facts supplied by a client probably is not protected by the attorney-client privilege.[3]

Although "attorney-client privilege is narrowly construed and is limited to those situations in which its purposes will be served," *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980), the fact that a communication involved a lawyer working for a government agency (as opposed to a private party) does not diminish the importance of the attorney-client privilege, for "[u]pholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business." *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005);

[3] We have not found a case on point. This is likely because lawyers seldom provide legal advice in a factual vacuum, or perhaps because such advice is given in connection with or in anticipation of litigation, and therefore is protected under the work product doctrine, obviating the need to rely on the attorney-client privilege. *See* Fed. R. Civ. P. 26(b)(3)(A).

see also Erie, 473 F.3d at 419 ("[P]ublic officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority; thus, their access to candid legal advice directly and significantly serves the public interest.").

That said, in the FOIA context, "[c]ertain limitations to the government attorney-client privilege … may render an otherwise protectable communication unprotected." *Erie*, 473 F.3d at 418 n.5. In *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350 (2d Cir. 2005), the Second Circuit explained that the "attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's policy." 411 F.3d at 360. In such circumstances, the "principal rationale behind the attorney-client privilege" – the promotion of "open communication between attorneys and their clients so that fully informed legal advice may be given" – "evaporates." This is because "once an agency adopts or incorporates [a] document, frank communication will not be inhibited." *Id.* Accordingly, "adopted documents are not protected by the attorney-client privilege." *Id.* Otherwise, "broad attorney-client privilege would permit legal opinions, recognized as authoritative interpretations within the agency, to be hidden from the public." *Id.* at 361 (quoting *Falcone v. IRS*, 479 F.Supp. 985, 990 (E.D. Mich. 1979)).

Lastly, the "attorney-client privilege protects only legal advice, not economic, business, or policy advice." *Fox News Network, LLC v. U.S. Dep't of Treasury*, 911 F. Supp. 2d 261, 271 (S.D.N.Y. 2012); *see also Colton*, 306 F.2d at 638 ("Attorneys frequently give to their clients business or other advice which, at least insofar as it can be separated from their essentially professional legal services, gives rise to no privilege whatever."); *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994) ("[T]he mere fact that a communication is made directly to an attorney, or an attorney is copied on a memorandum, does

not mean that the communication is necessarily privileged."). This limitation on the scope of the attorney-client privilege applies not only to corporate in-house lawyers, but to government lawyers as well. In *Erie*, for example, the Second Circuit held, in the context of "civil suits between private litigants and government agencies," that courts must look to "whether the predominant purpose of the communication is to render or solicit *legal* advice," as opposed to business advice. 473 F.3d at 420 (emphasis added); *see also Fox News Network*, 911 F. Supp. 2d at 271 (distinguishing between legal and policy advice in the context of a FOIA dispute involving Treasury Department lawyers).

b. The Deliberative Process Privilege

The deliberative process privilege is "a sub-species of work-product privilege that covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Tigue*, 312 F.3d at 76 (internal quotation marks and citations omitted).

i. Purpose

The purpose of the privilege is to "promote the quality of agency decisions by preserving and encouraging candid discussion between officials." *La Raza*, 411 F.3d at 356. "Thus, underlying the deliberative process privilege is the rationale 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 decisionmaking process.'" *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999) (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974)). "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open

and frank discussion among those who make them within the Government." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) (internal quotation marks and citations omitted).

The privilege is "designed to safeguard and promote agency decisionmaking processes in at least three ways: '[I]t serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.'" *Cuomo*, 166 F.3d at 481 (quoting *Coastal States*, 617 F.2d at 866).

ii. Elements

"In order for a document to be protected by [the] deliberative process privilege, it must be: (1) an inter-agency or intra-agency document; (2) 'predecisional'; and (3) deliberative." *Tigue*, 312 F.3d at 76.

"A document is predecisional when it is prepared in order to assist an agency decisionmaker in arriving at his decision." *Id.* at 80 (internal quotation marks and citation omitted). A "document will be considered 'predecisional' if the agency can … (i) pinpoint the specific agency decision to which the document correlates ... and (ii) verify that the document precedes, in temporal sequence, the 'decision' to which it relates." *Cuomo*, 166 F.3d at 482 (quoting *Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 557 (1st Cir. 1992)). "Protected by this privilege are recommendations, draft documents, proposals, suggestions, and

other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Tigue*, 312 F.3d at 80 (internal quotation marks omitted).

A document is 'deliberative' if it is "actually ... related to the process by which policies are formulated." *La Raza*, 411 F.3d at 356 (internal citation and quotation marks omitted). "[T]he document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take of the deliberative process by which the decision itself is made." *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

iii. Scope

In determining whether a document qualifies for the deliberative process privilege, a court must consider "the function of the documents in issue in the context of the administrative process which generated them." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). "[T]he privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *Cuomo*, 166 F.3d at 482 (internal quotation marks and citation omitted). In evaluating whether a document is covered by the deliberative process privilege, courts should consider "whether the document (i) formed an essential link in a specified consultative process, (ii) reflect[s] the personal opinions of the writer rather than the policy of the agency, and (iii) if released, would inaccurately reflect or prematurely disclose the views of the agency." *Id.* (internal quotation marks and citation omitted).

Documents that were pre-decisional and deliberative at the time they were created may not be covered by the deliberative process privilege "if the agency has chosen 'expressly to

adopt or incorporate by reference [a]... memorandum previously covered by Exemption 5 in what would otherwise be a final opinion.'" *La Raza*, 411 F.3d at 356 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975)). In such a circumstance, "the document loses its predecisional and deliberative character, and accordingly, the deliberative process privilege no longer applies." *La Raza*, 411 F.3d at 356. Thus, "even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States*, 617 F.2d at 866. In assessing whether a document has been adopted as policy, the Second Circuit has rejected a "bright-line test-whereby a document may be deemed expressly adopted or incorporated only in the event that an agency, in essence, uses specific, explicit language of adoption or incorporation." *La Raza*, 411 F.3d at 357 n.5. Instead, "courts must examine *all* the relevant facts and circumstances in determining whether express adoption or incorporation by reference has occurred." *Id.*

Similarly, a document is not covered by the deliberative process privilege "when the document is more properly characterized as an 'opinion[ ] [or] interpretation [ ] which embod[ies] the agency's effective law and policy,' in other words, its 'working law.'" *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 195 (2d Cir. 2012) (quoting *Sears*, 421 U.S. at 153). "Therefore, the exemption 'properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be.'" *Brennan Ctr.*, 697 F.3d at 196 (quoting *Sears*, 421 U.S. at 153). Documents that have "operative effect" are not covered by the privilege because they are properly characterized as "final opinions." *Id.* at 197.

Lastly, the deliberative process privilege "does not, as a general matter, extend to purely factual material." *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 85 (2d Cir. 1991); *see also Local 3, Int'l Bhd. of Elec. Workers, AFL-CIO v. N.L.R.B.*, 845 F.2d 1177, 1180 (2d Cir. 1988) ("Purely factual material not reflecting the agency's deliberative process is not protected."). Thus, "memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government." *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 87–88 (1973). However, where factual information is intertwined with deliberative policy discussions, disclosure may not be possible without revealing the protected deliberations. Accordingly, a "determination of which if any portions of an otherwise exempt document are nonexempt must begin with a consideration of the nature of the document as a whole. Disclosure of 'purely factual material' in otherwise exempt documents may be ordered only if the material 'is severable without compromising the private remainder of the documents.' More is required than merely plucking factual segments from the reports[;] there must be a sensitive reference to the relation of the factual segments to the report as a whole." *Lead Indus. Ass'n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70, 85 (2d Cir. 1979) (quoting *Mink*, 410 U.S. at 91); *see also Tigue*, 312 F.3d at 82 (upholding withholding of factual material where it "is too intertwined with evaluative and policy discussions to require disclosure.").

In this case, the Court has undertaken its own review of each document to ensure that purely factual, segregable material is not being improperly withheld.

DISCUSSION

The rulings I made during the *in camera* hearing, because they were intended for public dissemination, could not address the substance of each of the documents in issue. Because of the importance of the issues on which I had to rule, and the absence of adversarial argument on the application of the law of FOIA to these particular documents, I hesitated to express as final the rulings I made during the *in camera* hearing. Thus, since the release of the transcript of the *in camera* hearing, I have reviewed the documents and the parties' submissions several more times. The rulings below are the same as my preliminary rulings for most of the documents, but differ from my prior rulings with respect to Documents 7, 8, 10 and 15. My final rulings with respect to these four documents are discussed below.

I. Document 4

The Government describes this document as "email exchanges between CIA attorneys personnel (sic) regarding the POW status and questioning of detainees." Dkt. No. 67-1 ("Amended Vaughn Index") at 4. The Government argues that the redacted portions of Document 4 are privileged under both the attorney-client privilege and the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redacted portions of Document 4, which consist of a CIA attorney's preliminary, pre-decisional legal analysis concerning the applicability of the Geneva Conventions in relation to the CIA's detention program, are exempt from disclosure under both the deliberative process privilege and the attorney-client privilege. The document clearly indicates that the lawyer is providing this analysis in the context of the development of policy and in response to information provided by the client. *See New York Times Co. v. U.S. Dep't of*

Justice, 756 F.3d 100, 121 (2d Cir. 2014) (affirming withholding under Exemption 5 of informal memoranda reflecting preliminary legal analysis).

II. Document 6

The Government describes this document as "an email from a CIA attorney to Agency component personnel forwarding a draft letter to the Attorney General regarding the former detention and interrogation program." Amended Vaughn Index at 3. The unredacted portions of the document indicate that the draft letter included a request that the Attorney General grant a formal declination of prosecution, in advance, of CIA employees involved in the interrogation of detainee Abu Zubaydah. The Government argues that the redacted portions of Document 6 are privileged under both the attorney-client privilege and the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redacted portions of Document 6 are exempt from disclosure under both privileges. A draft letter that is prepared by counsel and sent to the client for review is protected under the attorney-client privilege because it is part of the iterative process by which lawyers receive information from their clients, assess the information, and deliver legal advice to the client regarding the information. Disclosing the draft inevitably would disclose the confidential facts to which the advice relates. It is therefore protected by the attorney-client privilege. The redactions are also proper under the deliberative process privilege because the draft letter was part of the deliberations by which the CIA sought to resolve how and whether to seek a formal

declination of prosecution for employees involved in the interrogation of detainee Abu Zubaydah.

III. Document 7

The Government describes this document, which is a cable entitled "Eyes Only – Additional Operational and Security Considerations for the Next Phase of Abu Zubaydah Interrogation," as "a communication between an Agency client and OGC attorney providing information in connection with a request for legal advice." Amended Vaughn Index at 4. The Government argues that the redacted portions of Document 7 are privileged under both the attorney-client privilege and the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redacted portions of Document 7 are exempt from disclosure under the deliberative process privilege, but not the attorney-client privilege. The Government argues that the attorney-client privilege applies because the "communication was sent to CIA attorneys for their legal review of the proposed course of action." Shiner Supp. Decl. ¶ 7. The cable, however, which was authored by "agency employees in the field," is completely devoid of any request for legal advice. The requested policy guidance was operational and logistical in nature, not legal. CIA lawyers may have been included among the recipients of this cable, but that fact alone does not make the document privileged, for "the mere fact that a communication is made directly to an attorney, or an attorney is copied on a memorandum, does not mean that the communication is necessarily privileged." *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994).

The authors do, however, request "guidance from Headquarters employees regarding the next phase of interrogation of Abu Zubaydah." Shiner Supp. Decl. ¶ 7. Thus,

although not covered by the attorney-client privilege, the redacted portions are properly withheld under the deliberative process privilege. *See New York Legal Assistance Grp., Inc. v. United States Dep't of Educ.*, 2017 WL 2973976, at *6 (S.D.N.Y. July 12, 2017) (documents that "seek guidance in advance of deciding how to handle" a particular issue "are both predecisional and deliberative, and are properly withheld under the deliberative process privilege.").

Lastly, the ACLU surmises, based on unredacted portions of the document, that the Government is using the deliberative process privilege as cover to withhold decisions that were previously made, which by definition cannot be pre-decisional or deliberative. There is no basis for the ACLU's speculation.

IV. Document 8

The Government describes this document, which is a cable entitled "Eyes Only – HQS Feedback on Issues Pending for Interrogation of Abu Zubaydah," as a cable "from Headquarters employees and lawyers to Agency employees in the field providing initial feedback on pending issues related to Abu Zubaydah's interrogation." Amended Vaughn Index at 5. The Government argues that the redacted portions of Document 8 are privileged under both the attorney-client privilege and the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

None of the redacted portions of Document 8 is covered by the attorney-client privilege. There is no indication that this cable was sent in response to a request for legal advice, and, like Document 7, the guidance and deliberations contained in Document 8 are distinctly operational, not legal, in nature. The Amended Vaughn Index states that this "cable is from Headquarters employees and lawyers." Even accepting that a lawyer authored this cable, the contents of the cable indicates that the lawyer gave policy advice, which is not protected by the

attorney-client privilege. *Fox News Network*, 911 F. Supp. 2d at 271 (the "attorney-client privilege protects only legal advice, not economic, business, or policy advice.").

With respect to the deliberative process privilege, I hold that some, but not all, of the redacted portions of Document 8 are exempt from disclosure. Much of the redacted material consists of the "give-and-take of the consultative process," *Brennan Ctr.*, 697 F.3d at 202 (citation omitted), by which the CIA resolved how to proceed with the interrogation of Abu Zubaydah. As the Government accurately states, the cable contains numerous requests for "additional information from employees in the field for the purpose of making a final decision on the interrogation." Shiner Supp. Decl. ¶ 8. Those portions thus "formed an essential link in a specified consultative process." *Cuomo*, 166 F.3d at 482.

However, other redacted passages are not deliberative in nature, but instead provide directions to employees in the field. The Government characterizes these passages as "preliminary input in advance of a final decision from Headquarters as to how to conduct the next phase of Abu Zubaydah's interrogation." Shiner Supp. Decl. ¶ 8. However, this guidance was clearly intended to have "operative effect." *Brennan Ctr.*, 697 F.3d at 198. It may have been the case that further guidance was forthcoming. "'More guidance soon,' however, does not undercut the finality of the guidance already given." *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 220 (D.D.C. 2012). Because these sections "embody the agency's effective law and policy," *Brennan Ctr.*, 697 F.3d at 196 (citation omitted), they are not exempt from production. Accordingly, the following portions of Document 8 are not covered by the deliberative process privilege and must be produced:

- The sentence appearing on lines 5-8 of the third paragraph on page 2;
- The entirety of Sections 4A and 4B on page 3;

- The first paragraph of Section 4E on page 4;
- The entirety of Section 4F on page 4;
- The sentence that begins with phrase "As has been…" that appears at the bottom of page 4.

V. Document 10

The Government describes this document as "email exchanges from CIA attorneys to Agency component personnel providing legal guidance provided by DOJ attorneys." Amended Vaughn Index at 7. The Government argues that the redacted portions of Document 10 are privileged under both the attorney-client privilege and the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

I initially reserved judgment on portions of Document 10 pending further consideration of the proper scope of the attorney-client privilege. Upon further review of both the document itself and the relevant case law, I now hold that none of the redactions made to the email appearing on the first page of the document are proper under either the attorney-client privilege or the deliberative process privilege.

An unredacted portion of this email states that "[Deputy Assistant Attorney General John] Yoo advised me that Attorney General John Ashcroft has approved the use of the water board in the interrogation of Abu Zubaydah." Since the Government concedes that the policy of waterboarding, and its approval by the Attorney General may be made public, there is no basis to withhold the balance of the email. The remainder of the email, authored by a CIA attorney, adds nothing new to the material already disclosed. It is public knowledge that the CIA adopted a policy of waterboarding detainees, including Abu Zubaydah. The SSCI Report, for example, contains sections entitled, "The CIA Obtains Legal and Policy Approval for Its

Enhanced Interrogation Techniques," and "The CIA Uses the Waterboard and Other Enhanced Interrogation Techniques Against Abu Zubaydah." *See* SSCI Report at 37-46; *id.* at 43-44 ("Waterboarding sessions 'resulted in immediate fluid intake and involuntary leg, chest and arm spasms' and 'hysterical pleas.' In at least one waterboarding session, Abu Zubaydah 'became completely unresponsive, with bubbles rising through his open, full mouth.'" (citations omitted)).

The attorney-client privilege, however, "may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's policy." *La Raza*, 411 F. 3d at 360. The "purpose of the privilege is not to protect communications which are statements of policy and interpretations adopted by the agency." *Id.* at 360–61 (citation omitted). Document 10 is a statement of policy. The Government may not withhold this email.

Nor is the document exempt from disclosure under the deliberative process privilege. The Government argues that Attorney General Ashcroft's legal approval was merely one piece of information that the CIA considered before deciding whether to waterboard Zubaydah. This argument fails because, as just noted, it is public knowledge that the CIA adopted a policy of waterboarding Zubaydah, and the "deliberative process privilege no longer applies" where the "agency has chosen expressly to adopt or incorporate by reference a memorandum previously covered by Exemption 5." *La Raza*, 411 F.3d at 356 (internal quotation marks and alterations omitted). Put another way, the email appearing on the first page of Document 10 is not pre-decisional; it is the decision itself. Consequently, it must be produced in full.

The second page of the document, however, which consists of a separate email, is protected by the attorney-client privilege because it is a request for legal advice concerning the

use of waterboarding on Abu Zubaydah, as reflected in the unredacted subject of the email, "Re: Abu Zubaydah – Need Written Confirmation from OLC." As a request for guidance on specific policy, it is also protected under the deliberative process privilege, and need not be produced.

VI. Document 13

The Government describes this document as "an email between Agency employees providing opinions and assessments of ongoing issues about, and recommending next steps for, detention and interrogation activities." Amended Vaughn Index at 8. The Government argues that the redacted portions of Document 13 are privileged under the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

With one exception, the redacted portions of Document 13 are exempt from disclosure under the deliberative process privilege because they consist of opinions and assessments concerning aspects of the CIA's detention and interrogation program. Disclosure of the first two paragraphs of the second email, however, would not reveal anything of substance. Those two paragraphs are not deliberative and can be segregated from that which is deliberative, and therefore must be disclosed, except for the names of personnel and locations, which are properly withheld under Exemption 1.

VII. Document 14

The Government describes this document as "an email between Agency component personnel providing opinions and assessments of ongoing issues about, and recommending next steps for, detention and interrogation activities." Amended Vaughn Index at

8. The Government argues that the redacted portions of Document 14 are privileged under the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redacted portions of Document 14 are exempt from disclosure under the deliberative process privilege because they reflect the author's assessment from the field regarding medical issues relating to ongoing interrogations, upon which policymakers rely in formulating policy. No factual material is segregable from that which is deliberative.

VIII. Document 15

The Government describes this document, which is a cable entitled "Eyes Only – Statue (sic) of Interrogation Phase," as "a communication from an Agency employee in the field to Headquarters containing a summary of Abu Zubaydah's interrogation, an assessment of the situation and a recommendation based on that information." Amended Vaughn Index at 9. The Government argues that the redacted portions of Document 15 are privileged under both the attorney-client privilege and the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

Some, but not all, of the redacted portions of Document 15 are exempt from disclosure under the deliberative process privilege. The portions that "recommend[] a plan of action" regarding the interrogation of Zubaydah and "request[] Headquarter's final decision with respect to that proposal," Shiner Supp. Decl. ¶ 13, are both pre-decisional and deliberative and therefore exempt. Other passages, however, consist entirely of "purely factual material" that is segregable from the deliberative passages, and therefore must be produced. *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 85 (2d Cir. 1991).

Nor are these purely factual passages covered by the attorney-client privilege. The Government argues that the attorney-client privilege applies "because the communication is

sent to CIA attorneys for their legal review of the proposed course of action," Shiner Supp. Decl. ¶ 13, and because the document "contains information exchanged in furtherance of requesting legal advice." Amended Vaughn Index at 9. But this document contains no requests for legal advice whatsoever. To the extent the Government contends this document contains an implicit request for legal advice, the "predominant purpose of the communication" was not "to render or solicit legal advice." *Erie*, 473 F.3d at 420. The purely factual material contained in the document is therefore not covered by the attorney-client privilege.

Accordingly, the following portion of Document 15 must be produced:

- The passage that begins at paragraph "A" on page 2 and ends at paragraph "3" on the bottom of page 4, with the exception of the sentence appearing in the middle of page 4 that begins with the word "Note."

IX. Document 18

The Government describes this document, which is an email with the subject "Concerns Over Revised Interrogation Plan for Nashiri," as "an email from an Agency employee to a supervisor." Amended Vaughn Index at 10. The author of the email attaches a draft cable. The Government argues that the redacted portions of Document 18 are privileged under the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redacted portions of Document 18 are exempt from disclosure under the deliberative process privilege because they consist of pre-decisional policy recommendations regarding the "interrogation plan" of a detainee identified in the subject of the email as Nashiri. Although the author notes in an unredacted portion that he did not expect his draft cable "to go

anywhere," he made clear he wanted "it entered for the record," which reflects a desire to contribute to future deliberations regarding the policy at issue.

X. Document 19

The Government describes this document as "an email containing a memorandum from one Agency employee to another discussing proposed internal training." Amended Vaughn Index at 11. The Government argues that the redacted portions of Document 19 are privileged under the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redacted portions of Document 19, which the Government has accurately described as "one employee's recommendation for future training and the development of a curriculum," Shiner Supp. Decl. ¶ 15, are exempt from disclosure under the deliberative process privilege. This material "reflect[s] the personal opinions of the writer rather than the policy of the agency," and "if released, [could] inaccurately reflect … the views of the agency." *Cuomo*, 166 F.3d at 482. At the same time, the redacted portions clearly present policy recommendations regarding CIA interrogation policy. Accordingly, the redacted portions need not be produced.

XI. Document 28

The Government describes this document as "a memorandum provided by the Office of Medical Services to the CIA Office of Inspector General containing comments on the OIG's 'Draft Special Review – Counterterrorism Detention and Interrogation Program.'" Amended Vaughn Index at 12. The Government argues that the redacted portions of this

document are privileged under the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redacted portions of Document 28 are exempt from disclosure under the deliberative process privilege because they consist of edits and comments provided by the CIA's Office of Medical Services ("OMS") on a draft of the CIA's Office of the Inspector General's "Special Review" of the detention and interrogation program. Comments and edits such as this, particularly to a draft document, are quintessentially deliberative, as they are steps in the formulation of policy. The ACLU posits that this document contains purely factual information that is not covered by the deliberative process privilege. Although Document 28 does include factual information, this information is "too intertwined with evaluative and policy discussions to require disclosure." *Tigue*, 312 F.3d at 82.

XII. Document 29

The Government describes this document as "a communication from the CIA General Counsel to Agency clients providing legal guidance." Amended Vaughn Index at 13. The Government argues that the redacted portions of Document 29 are privileged under both the attorney-client privilege and the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redacted portions of Document 29, which consist of pre-decisional legal advice regarding whether CIA detainees should be moved from Guantanamo Bay, Cuba in light of a pending Supreme Court case, are exempt from disclosure under both the deliberative process privilege and the attorney-client privilege.

XIII. Document 37

The Government describes this document as "a memorandum for the record documenting a discussions (sic) between Department of Justice attorneys, OGC attorneys and Agency officials regarding specific interrogation techniques." Amended Vaughn Index at 14. The Government argues that the redacted portions of Document 37 are privileged under both the attorney-client privilege and the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redacted portions of Document 37 are exempt from disclosure under both privileges. Document 37 is a memorandum documenting a meeting that consisted of requests for legal advice, information provided to counsel for the purpose of obtaining legal advice, and questions from counsel relating to the legal advice to be provided, all of which are protected by the attorney-client privilege. The redacted portions of Document 37 are also exempt under the deliberative process privilege because they reflect "discussions that preceded DOJ's final decision regarding its assessments as to the lawfulness of certain proposed techniques." Shiner Supp. Decl. ¶ 18.

The ACLU argues that this document contains descriptions of existing policy, which are not covered by the deliberative process privilege. *See Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010) (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."). Although the document does contain references to then-existing interrogation procedures, those references are inextricable from the "give and take of the deliberative process," and therefore need not be disclosed. *Id*; *see also Tigue*, 312 F.3d at 82

(upholding withholding of non-exempt material where it "is too intertwined with evaluative and policy discussions to require disclosure.").

XIV. Document 43

The Government describes this document as "a communication from Agency clients to a CIA attorney providing comments and concerns on a draft DOJ legal opinion." Amended Vaughn Index at 15. The Government argues that the redacted portions of Document 43 are privileged under both the attorney-client privilege and the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redacted portions of Document 43 are exempt from disclosure under both privileges. Like Document 28, the redacted portions consist of comments provided by OMS regarding a draft document, and therefore are both deliberative and pre-decisional. Here, that document is a draft DOJ legal opinion. Because the redacted portions consist of information provided to counsel in order to obtain legal advice, they are covered by the attorney-client privilege as well.

XV. Documents 44, 45, and 46

The Government describes Documents 44 and 45 as "email exchanges between CIA attorneys and CIA Office of Public Affairs personnel providing legal advice on draft talking points related to the interrogation program," and Document 46 as "email exchanges between CIA attorneys and legal staff containing comments on OPA's draft press briefing." Amended Vaughn Index at 15-16. These email exchanges concern "whether and how to present certain information about the detention and interrogation program to the public." Shiner Supp. Decl. ¶ 20. The unredacted portions reflect the CIA attorneys' concern that public discussion of the program would jeopardize its secrecy. The Government argues that the redacted portions of Documents

44, 45 and 46 are privileged under both the attorney-client privilege and the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redactions portions of Documents 44, 45 and 46 are exempt from disclosure under both privileges. The ACLU contends, based on inferences drawn from unredacted portions of these documents, that the redacted portions consist not of legal advice, but of policy advice rendered by CIA attorneys regarding the CIA's public relations strategy. A careful review of these documents, however, confirms that the advice rendered in the redacted portions was legal in nature because it focused on the legal ramifications of disclosure, and not public relations or other reputational concerns. The redactions to these three documents are also proper under the deliberative process privilege because the redactions are of pre-decisional deliberations regarding the CIA's decision to publicly discuss the detention and interrogation program.

XVI. Document 55

The Government describes this document as "an email between Agency employees." Amended Vaughn Index at 17. The Government argues that the redacted portions of Document 55 are privileged under the deliberative process privilege and therefore exempt from disclosure under Exemption 5.

The redacted portions of Document 55 are exempt from disclosure under the deliberative process privilege because they reflect interim discussions between James Mitchell, a CIA contractor, and George Tenet, the then-director of the CIA, regarding the use of enhanced interrogation methods. Shiner Supp. Decl. ¶ 21. The questions asked by Director Tenet, and the recommendations provided by Mitchell, are clearly part of the "give and take of the deliberative

process." *Pub. Citizen*, 598 F.3d at 876. No factual material is segregable from that which is deliberative.

XVII. Document 66

Document 66 is a draft report entitled "Summary and Undated Reflections of Chief of Medical Services on OMS Participation in the RDI Program." Amended Vaughn Index at 18. Document 66, which is 89 pages long, consists of a detailed account of the CIA's detention and interrogation program from the perspective of the author. With the exception of one unredacted paragraph, the Government seeks to withhold the entire document under the deliberative process privilege. The Government also claims that "certain material" is exempt under Exemption 1 and 3 because that material "reflects intelligence sources and methods (dissemination/control markings, CIA intelligence activities, counterterrorism techniques, field installations)." *Id.*

I initially reserved judgment on Document 66. Upon further review of both the document itself and the relevant case law, I now hold that Document 66 is not covered by the deliberative process privilege. I further hold that the Government may not rely on Exemptions 1 and 3, which protect "properly classified" information from disclosure, to withhold information in Document 66 that the Government claims reflects "intelligence sources and methods," "CIA intelligence activities," or "counterterrorism techniques." The Government has failed to identify which portions of Document 66 reflect such information. The Government also has failed to satisfy its burden to show that the material in Document 66 that it claims was "properly classified" was, in fact, "properly classified." 5 U.S.C. § 552(b)(1).

a. Exemption 5

The Government argues that Document 66 (i) "is pre-decisional and deliberative because it is a selective, draft account of one Agency officer's impressions of the detention and interrogation program," (ii) that "this document remained a working draft and was never finalized," and that (iii) "it is not the Agency's or OMS's final official history, or assessment, of the program." Shiner Supp. Decl. ¶ 22. These averments are insufficient to meet the Government's burden to show that Document 66 is covered by the deliberative process privilege.

The Government has provided scant context for this document. It is unclear based on the Government's submission why this document was created, whether it was circulated within OMS or the CIA, whether other CIA employees edited or provided comments on the document, and most importantly, whether decisionmakers relied on the document in connection with a policy decision. In short, we do not know anything about the document other than what is apparent from the document itself. Consequently, the Government has failed to show that the document "formed an essential link in a specified consultative process," *Cuomo*, 166 F.3d at 482, or that the document "was prepared to assist the agency in the formulation of some specific decision," *Tigue*, 312 F.3d at 80, or that it in any way "bear[s] on the formulation or exercise of policy-oriented judgment." *Cuomo*, 166 F.3d at 482 (internal quotation marks and citation omitted).

The Government points out that the document "does not appear on Agency letterhead" and emphasizes the "evaluative" qualities of the document. It is true that one consideration is whether the document "reflect[s] the personal opinions of the writer rather than the policy of the agency." *Id.* But a government employee's "impressions" of past events are not deliberative merely because they are unofficial or personal to the author, absent some non-

peripheral connection to an as-of-yet-made policy decision. *See Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011) ("[A] draft is only privileged if it contains discussions that reflect the policy-making process. It is not privileged if it reflects the personal opinions of a writer with respect to how to explain an *existing* agency policy or decision."); *Fox News Network*, 911 F. Supp. 2d at 279 (requiring disclosure of document where "there is no indication that this recitation of past events relates in any way to a future policy decision."); *id.* at 278 (requiring disclosure of document where agency "failed to point to any later substantive policy decision that was furthered by this discussion, which simply rehearses past events.").

The Government also argues that because the document is labeled as a draft, it is inherently deliberative and thus covered by the privilege. Many draft documents are indeed covered by the deliberative process privilege, as reflected in my rulings on Documents 6 and 18. But the mere fact that a document is labeled as a draft does not, standing alone, make it deliberative. Rather, a document is deliberative if is "actually … related to the process by which policies are formulated," *La Raza*, 411 F.3d at 356 (internal citation and quotation marks omitted), and courts have rejected the notion that draft documents are automatically covered by the deliberative process privilege. In *N.Y. Times Co. v. U.S. Dep't of Def.*, 499 F. Supp. 2d 501 (S.D.N.Y. 2007), for example, the court explained that the "mere fact that a document is a draft … is not a sufficient reason to automatically exempt it from disclosure," particularly where the agency's "descriptions do not include specific information about the draft documents such as their function and significance in the agency's decisionmaking process." 499 F. Supp. 2d at 515 (internal quotation marks and citations omitted); *see also Arthur Andersen & Co. v. I.R.S.*, 679 F.2d 254, 257–58 (D.C. Cir. 1982) ("Even if a document is a draft of what will become a final

document, the court must also ascertain whether the document is deliberative in nature.") (internal quotation marks and citation omitted).

The Government further relies on *Am. Civil Liberties Union v. United States Dep't of Justice*, 844 F.3d 126 (2d Cir. 2016), in which the Second Circuit upheld the Government's withholding of a document under Exemption 5 on the ground that "it is a draft and for that reason predecisional." 844 F.3d at 133. That decision, however, contained no substantive analysis of the deliberative process privilege. In fact, the word "deliberative" does not appear in the opinion. The decision also does not cite or discuss the numerous prior decisions of the Second Circuit which make clear that a document must be deliberative, in addition to being pre-decisional, in order to qualify for the privilege. *See, e.g.*, *Local 3, Int'l Bhd. of Elec. Workers, AFL-CIO v. N.L.R.B.*, 845 F.2d 1177, 1180 (2d Cir. 1988) ("For this privilege to apply, an agency document must be (1) predecisional and (2) deliberative—that is, indicative of the agency's thought processes."); *La Raza*, 411 F.3d at 356 (identifying "deliberative" as one of the elements of the deliberative process privilege).

The Government also relies on a line of D.C. Circuit cases holding that drafts of official agency histories are covered by the deliberative process privilege. *See, e.g.*, *Nat'l Sec. Archive v. C.I.A.*, 752 F.3d 460, 463 (D.C. Cir. 2014) (holding that "a *draft* of an agency's official history is pre-decisional and deliberative, and thus protected under the deliberative process privilege."). I decline to follow this line of cases for two reasons.

First, the Government has not shown that Document 66 is a draft of an "official agency history." To the contrary, the Government describes the document as a "selective, draft account of one Agency officer's impressions of the detention and interrogation program," and emphasizes that it "is not the Agency's … final or official history, or assessment, of the

program." Shiner Supp. Decl. ¶ 22. As discussed above, the Government has provided no information from which I can infer that Document 66 has any connection to any official history of the CIA's detention and interrogation program, assuming such a history exists. In *Nat'l Sec. Archive*, the D.C. Circuit specifically noted the "narrow confines of this case, which involves a draft agency history." 752 F.3d at 465. Outside this narrow circumstance, however, the D.C. Circuit has made clear 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); *see also Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 60 (D.D.C. 2014) ("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." (internal quotation marks and citation omitted)).

Second, even if Document 66 was a draft of the CIA's official history of its interrogation and detention program, I find the D.C. Circuit's reasoning in *Nat'l Sec. Archive* unpersuasive. As Judge Rogers explains in her dissent in that case, the rationale for withholding draft histories under the deliberative process privilege is "because the agency's deliberative process would be revealed by means of 'a simple comparison between the pages sought and the final, published document,' which 'would reveal what material supplied by subordinates senior officials judged appropriate for the history and' what they did not." 752 F.3d at 466 (Rogers, J., *dissenting*) (quoting *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1538 (D.C. Cir. 1993)); *see also Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987) ("[D]isclosure of editorial judgments … would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work.").

Here, however, the Government concedes that this document was "never finalized," which means that there is no document against which to compare Document 66. The D.C. Circuit did observe that although "there may be no final agency document because a draft died on the vine," the "draft is still a draft and thus still pre-decisional and deliberative." *Nat'l Sec. Archive*, 752 F.3d at 463. But as Judge Roger's dissent illustrates, this holding is tautological. In situations such as this, where no final version of a draft document exists, shielding the draft from disclosure does not serve the purpose of the deliberative process privilege because the public cannot scrutinize the draft against its final version.

Finally, I recognize that in *Salim v. Mitchell*, No. CV-15-0286-JLQ (E.D. Wash. May 31, 2017), Judge Quackenbush, in the context of civil discovery, denied a motion to compel production of Document 66 (it appeared in that case as Document 46), holding that it was covered by the deliberative process privilege. Judge Quackenbush held that "the document contains the author's assessment and summary and is predecisional and deliberative." But Judge Quackenbush did not provide any support for this finding and, without any reasoning, the case is not persuasive. I decline to follow this decision.

In sum, the deliberative process privilege cannot serve as a basis to withhold any of the redacted portions of Document 66.

b. Exemptions 1 and 3

The Government also seeks to withhold "certain material" in Document 66 under Exemptions 1 and 3. Exemption 1 provides that FOIA "does not apply to matters that are … 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." 5 U.S.C. § 552(b)(1). Executive Order 13526, dated December 29,

2009, sets out four requirements for the classification of national security information: (1) an "original classification authority" must have classified the information; (2) the information must be "owned by, produced by or for, or [be] under the control of the United States Government"; (3) the information must fall within one or more of the categories of information set out in Section 1.4 of Executive Order 13526; and (4) the original classification authority must have determined that "unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." The original classification authority also must be "able to identify or describe the damage." Exec. Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009).

Section 1.4 of Executive Order 13526, in turn, lists the following "categories of information": (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development, production, or use of weapons of mass destruction.

The Government has also invoked Exemption 3 to withhold "certain material" that is classified under Executive Order 13526. Exemption 3 provides that FOIA "does not apply to matters that are ... specifically exempted from disclosure by statute (other than section 552b of this title), if that statute ... (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for

withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Applied here, the Government relies on the National Security Act, which requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure," including through the "classification of information under applicable law, Executive orders, or other Presidential directives." 50 U.S.C. § 3024.

For two reasons, the Government has failed to satisfy its burden to show that Exemptions 1 and 3 apply to information in Document 66 that reflects "intelligence sources and methods," "CIA intelligence activities" or "counterterrorism techniques."[4]

First, the Government has not made clear which information in Document 66 it seeks to withhold pursuant to Exemptions 1 and 3. For every document other than Document 66, the Government provided an annotation specifying which FOIA exemption applied to which material. For Document 66, by contrast, the Government has instead stamped each page of the document with the phrase "Page Denied." As a result, it is impossible to know whether the Government is relying on Exemptions 1 and 3 to withhold merely a few scattered phrases, the entire document, or something in between. FOIA requires the Government to "supply the courts with sufficient information to allow us to make a reasoned determination that they were correct." *Coastal States*, 617 F.2d at 861. But if the Government does not make clear which information it claims is exempt, it is impossible for the Court to assess whether the Government has "demonstrate[d] that the information withheld logically falls within the claimed exemption."

[4] The ACLU has clarified that it does not seek disclosure of information concerning "foreign liaison services," "locations of covert CIA installations and former detention centers," classified code words and pseudonyms," or "classification and dissemination control markings." Accordingly, as I stated during the March 29 hearing, to the extent Document 66 reflects information that falls within these categories, such as the names of CIA personnel, locations of facilities, and agency code words, the Government's redaction of such material is proper.

Wilner, 592 F.3d at 73. The statute does not permit the Government to assert exemptions in such an opaque, imprecise manner.

Second, the Government has failed to satisfy the criteria set out in Executive Order 13526 because it has not shown that "unauthorized disclosure of the information reasonably could be expected to result in damage to the national security," nor has it sufficiently "identif[ied] or describe[d] the damage." The Government states generally, and without specific reference to information contained in Document 66, that disclosure of intelligence methods and activities "could reasonably be expected to cause harm" because release of the information "could provide adversaries with valuable insight into CIA operations that would damage their effectiveness." Shiner Decl. ¶¶ 12, 17. Such conclusions without reasons are insufficient. The Government must justify its withholdings with "reasonable specificity" and "without resort to conclusory and generalized allegations of exemptions." *Halpern v. F.B.I.*, 181 F.3d 279, 290 (2d Cir. 1999) (internal quotation marks and citations omitted). It must also show that its justification for withholding is "logical or plausible." *Wilner*, 592 F.3d at 73.

In light of the extensive declassification of many aspects of the CIA's detention and interrogation program, the Government's sparse submission on this point suggests an effort to claim an exemption without hope of success. In *New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100 (2d Cir. 2014), which concerned documents related to the legality of "targeted killings" of suspected terrorists, the Second Circuit held that the Government's reliance on Exemption 1 was neither logical nor plausible in light of public disclosures concerning the topic at issue. Consequently, disclosure of the "additional discussion" contained in redacted and withheld documents would "add[] nothing to the risk" of disclosing properly classified material. 756 F.3d at 120. Likewise here, the Government has made no effort – despite its decision to

bolster its initial submission with an Amended Vaughn Index and a supplemental declaration – to show that the redacted information in Document 66 was in fact "properly classified."

Accordingly, Exemptions 1 and 3 cannot serve as a basis to withhold Document 66, except to the extent the document reflects information concerning "foreign liaison services," "locations of covert CIA installations and former detention centers," classified code words and pseudonyms," or "classification and dissemination control markings." Beyond these specific categories of information, the Government must produce Document 66 in full.

CONCLUSION

For these reasons, the Government's motion is granted in part and denied in part. The Government shall timely produce versions of Documents 8, 10, 13, 15, and 66 that comply with this Order. The Clerk shall terminate the motion (Dkt. No. 47), and mark the case closed.

SO ORDERED.

Dated: September 27, 2017
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

-v-

DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and OFFICE OF INFORMATION POLICY, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

----------X

15 **CIVIL** 9317 (AKH)

JUDGMENT

The Government having moved for summary judgment, and the matter having come before the Honorable Alvin K. Hellerstein, United States District Judge, and the Court, on September 27, 2017, having rendered its Opinion and Order granting the Government's motion in part and denying in part. The Government shall timely produce versions of Documents 8, 10, 13, 15, and 66 that comply with the Order; and directing the Clerk to mark the case closed, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated September 27, 2017, the Government's motion is granted in part and denied in part. The Government shall timely produce versions of Documents 8, 10, 13, 15, and 66 that comply with the Order; accordingly, the case is closed.

Dated: New York, New York
September 28, 2017

RUBY J. KRAJICK
Clerk of Court

BY: kmango
Deputy Clerk

United States District Court
Southern District of New York

Ruby J. Krajick
Clerk of Court

Dear Litigant:

Enclosed is a copy of the judgment entered in your case. If you disagree with a judgment or final order of the district court, you may appeal to the United States Court of Appeals for the Second Circuit. To start this process, file a "Notice of Appeal" with this Court's Pro Se Intake Unit.

You must file your notice of appeal in this Court within 30 days after the judgment or order that you wish to appeal is entered on the Court's docket, or, if the United States or its officer or agency is a party, within 60 days after entry of the judgment or order. If you are unable to file your notice of appeal within the required time, you may make a motion for extension of time, but you must do so within 60 days from the date of entry of the judgment, or within 90 days if the United States or its officer or agency is a party, and you must show excusable neglect or good cause for your inability to file the notice of appeal by the deadline.

Please note that the notice of appeal is a *one-page* document containing your name, a description of the final order or judgment (or part thereof) being appealed, and the name of the court to which the appeal is taken (the Second Circuit) – *it does not* include your reasons or grounds for the appeal. Once your appeal is processed by the district court, your notice of appeal will be sent to the Court of Appeals and a Court of Appeals docket number will be assigned to your case. At that point, all further questions regarding your appeal must be directed to that court.

The filing fee for a notice of appeal is $505 payable in cash, by bank check, certified check, or money order, to "Clerk of Court, S.D.N.Y." *No personal checks are accepted*. If you are unable to pay the $505 filing fee, complete the "Motion to Proceed *in Forma Pauperis* on Appeal" form and submit it with your notice of appeal to the Pro Se Intake Unit. If the district court denies your motion to proceed *in forma pauperis* on appeal, or has certified under 28 U.S.C. § 1915(a)(3) that an appeal would not be taken in good faith, you may file a motion in the Court of Appeals for leave to appeal *in forma pauperis*, but you must do so within 30 days after service of the district court order that stated that you could not proceed *in forma pauperis* on appeal.

For additional issues regarding the time for filing a notice of appeal, see Federal Rule of Appellate Procedure 4(a). There are many other steps to beginning and proceeding with your appeal, but they are governed by the rules of the Second Circuit Court of Appeals and the Federal Rules of Appellate Procedure. For more information, visit the Second Circuit Court of Appeals website at **http://www.ca2.uscourts.gov/.**

THE DANIEL PATRICK MOYNIHAN
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NY 10007-1312

THE CHARLES L. BRIEANT, JR.
UNITED STATES COURTHOUSE
300 QUARROPAS STREET
WHITE PLAINS, NY 10601-4150

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____

(List the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

_____

(List the full name(s) of the defendant(s)/respondent(s).)

_____CV_____ ( )( )

NOTICE OF APPEAL

Notice is hereby given that the following parties: _____

(list the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit from the ☐ judgment ☐ order entered on: _____

(date that judgment or order was entered on docket)

that: _____

(If the appeal is from an order, provide a brief description above of the decision in the order.)

Dated | Signature*

Name (Last, First, MI)

Address | City | State | Zip Code

Telephone Number | E-mail Address (if available)

* Each party filing the appeal must date and sign the Notice of Appeal and provide his or her mailing address and telephone number, EXCEPT that a signer of a pro se notice of appeal may sign for his or her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.

Rev. 12/23/13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____

(List the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

_____

(List the full name(s) of the defendant(s)/respondent(s).)

_____CV_____ ( )( )

MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

I move under Rule 4(a)(5) of the Federal Rules of Appellate Procedure for an extension of time to file a notice of appeal in this action. I would like to appeal the judgment entered in this action on _____ (date) but did not file a notice of appearance within the required time period because:

_____

_____

_____

(Explain here the excusable neglect or good cause that led to your failure to file a timely notice of appeal.)

Dated: _____ Signature _____

Name (Last, First, MI) _____

Address _____ City _____ State _____ Zip Code _____

Telephone Number _____ E-mail Address (if available) _____

Rev. 12/23/13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____

_____ _____CV_____ ( )( )
(List the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL

_____
(List the full name(s) of the defendant(s)/respondent(s).)

I move under Federal Rule of Appellate Procedure 24(a)(1) for leave to proceed *in forma pauperis* on appeal. This motion is supported by the attached affidavit.

Dated		Signature	
Name (Last, First, MI)			
Address	City	State	Zip Code
Telephone Number		E-mail Address (if available)	

Rev. 12/23/13

JA-181

Application to Appeal In Forma Pauperis

_____**v.** _____ Appeal No. _____

District Court or Agency No. _____

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: _____	Date: _____

My issues on appeal are: (required):

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$	$	$	$
Self-employment	$	$	$	$
Income from real property (such as rental income)	$	$	$	$

Interest and dividends	$	$	$	$
Gifts	$	$	$	$
Alimony	$	$	$	$
Child support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$	$	$
Disability (such as social security, insurance payments)	$	$	$	$
Unemployment payments	$	$	$	$
Public-assistance (such as welfare)	$	$	$	$
Other (specify):	$	$	$	$
Total monthly income:	**$** 0	**$** 0	**$** 0	**$** 0

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
			$
			$
			$

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
			$
			$
			$

4. *How much cash do you and your spouse have? $_____*

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	**Type of Account**	**Amount you have**	**Amount your spouse has**
		$	$
		$	$
		$	$

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home	**Other real estate**	**Motor vehicle #1**
(Value) $	(Value) $	(Value) $
		Make and year:
		Model:
		Registration #:

Motor vehicle #2	**Other assets**	**Other assets**
(Value) $	(Value) $	(Value) $
Make and year:		
Model:		
Registration #:		

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	**Amount owed to you**	**Amount owed to your spouse**
	$	$
	$	$
	$	$
	$	$

7. *State the persons who rely on you or your spouse for support.*

Name [or, if a minor (i.e., underage), initials only]	**Relationship**	**Age**

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	**Your Spouse**
Rent or home-mortgage payment (including lot rented for mobile home) Are real estate taxes included? [ ] Yes [ ] No Is property insurance included? [ ] Yes [ ] No	$	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$

Transportation (not including motor vehicle payments)	$	$
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's:	$	$
Life:	$	$
Health:	$	$
Motor vehicle:	$	$
Other:	$	$
Taxes (not deducted from wages or included in mortgage payments) (specify):	$	$
Installment payments		
Motor Vehicle:	$	$
Credit card (name):	$	$
Department store (name):	$	$
Other:	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify):	$	$
Total monthly expenses:	**$** 0	**$** 0

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

[ ] Yes [ ] No If yes, describe on an attached sheet.

10. *Have you spent — or will you be spending —any money for expenses or attorney fees in connection with this lawsuit?* [ ] Yes [ ] No

If yes, how much? $ _____

11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

12. *Identify the city and state of your legal residence.*

City _____ State _____

Your daytime phone number: _____

Your age: _____ Your years of schooling: _____

Last four digits of your social-security number: _____

JA-187

United States District Court
Southern District of New York

HOW TO APPEAL YOUR CASE TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

If you disagree with a judgment or final order of the district court, you may appeal to the United States Court of Appeals for the Second Circuit. To start this process, file a "Notice of Appeal" with this Court's Pro Se Intake Unit.

You must file your notice of appeal in this Court within 30 days after the judgment or order that you wish to appeal is entered on the Court's docket, or, if the United States or its officer or agency is a party, within 60 days after entry of the judgment or order. If you are unable to file your notice of appeal within the required time, you may make a motion for extension of time, but you must do so within 60 days from the date of entry of the judgment, or within 90 days if the United States or its officer or agency is a party, and you must show excusable neglect or good cause for your inability to file the notice of appeal by the deadline.

Please note that the notice of appeal is a *one-page* document containing your name, a description of the final order or judgment (or part thereof) being appealed, and the name of the court to which the appeal is taken (the Second Circuit) – *it does not* include your reasons or grounds for the appeal. Once your appeal is processed by the district court, your notice of appeal will be sent to the Court of Appeals and a Court of Appeals docket number will be assigned to your case. At that point, all further questions regarding your appeal must be directed to that court.

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For additional issues regarding the time for filing a notice of appeal, see Federal Rule of Appellate Procedure 4(a). There are many other steps to beginning and proceeding with your appeal, but they are governed by the rules of the Second Circuit Court of Appeals and the Federal Rules of Appellate Procedure. For more information, visit the Second Circuit Court of Appeals website at **http://www.ca2.uscourts.gov/.**

THE DANIEL PATRICK MOYNIHAN
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NY 10007-1312

THE CHARLES L. BRIEANT, JR.
UNITED STATES COURTHOUSE
300 QUARROPAS STREET
WHITE PLAINS, NY 10601-4150

Rev. 5/23/14

JA-187.1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....x

AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and OFFICE OF INFORMATION POLICY, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

.....x

15 Civ. 9317 (AKH)

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the accompanying memorandum of law, and upon all prior proceedings herein, defendant the Central Intelligence Agency, by and through its attorney, Joon H. Kim, Acting United States Attorney for the Southern District of New York, will move this Court, pursuant to Federal Rule of Civil Procedure 59(e) and Local Rule 6.3, to alter or amend the judgment entered in this action on September 28, 2017 (ECF No. 78), and to reconsider the Court's Opinion and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment issued on September 27, 2017 (ECF No. 77).

Dated: New York, New York
October 26, 2017

JOON H. KIM
Acting United States Attorney for the
Southern District of New York,
Attorney for Defendants

By: /s/ *Sarah S. Normand*
SARAH S. NORMAND

JA-187.2

ELIZABETH M. TULIS
Assistant United States Attorneys
86 Chambers Street, Third Floor
New York, New York 10007
Telephone Nos. (212) 637-2709
Facsimile Nos. (212) 637-2730
Email: Sarah.Normand@usdoj.gov

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---------- x

AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and OFFICE OF INFORMATION POLICY, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO ALTER JUDGMENT OR FOR RECONSIDERATION

15 Civ. 9317 (AKH)

Central Intelligence Agency ("CIA"), one of the defendants in this FOIA lawsuit, moves to alter or amend the order of September 28, 2017, granting and denying summary judgment to Plaintiff and Defendant, and for reconsideration of the order, *see* Dkt. No. 77. For the reasons stated below, the Government may make a supplemental submission, as it requests, to identify the portions of Document 66 that it believes should not be disclosed, and to justify such nondisclosure. The Court particularly wishes to see, for *ex parte* and *in camera* review, the version of Document 66, prepared by the Government, that identifies the discrete information that the Government contends were, and should be, protected from disclosure. The Government offers to file, under seal, a supplemental declaration explaining why the indicated information remains currently and properly

classified or otherwise protected from disclosure. The Court accepts the Government's offer.

Plaintiff, opposing the Government's motion, points out that the Government already has supplemented its submissions several times, and that it is complaining, not that the court overlooked "controlling decisions or data," *see Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995), but that the Court decided incorrectly. Plaintiff is correct that Defendant wishes to "relitigate an issue already decided," *see* Drapkin v. Mafco Consol. Grp., Inc., 818 F. Supp. 2d 678, 696 (S.D.N.Y. 2011), and that it points to nothing that the Court overlooked.

Defendant has not made a sufficient showing to warrant reconsideration under well-settled case-law. *See Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F. 3d 99, 104 (2d Cir. 2013) (motion for reconsideration warranted where the moving party identifies "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice). However, in the interest of justice, I grant the Government's motion for leave to supplement one more time, consistently with its requests, as described above. Issues of national security are involved, and technical rules of judicial convenience should not prevent the Government from making full and proper arguments to support its position. Defendant's motion for reconsideration will be considered following the Court's review of Defendant's supplemental submission.

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Defendant will file supplemental papers by November 28, 2017. Because the submission will be *ex parte*, there will be no opposition papers, except as ordered. A hearing, *in camera* and on the record, will be held on December 6, 2017, at 2:30 P.M.

SO ORDERED.

Dated: November 13, 2017
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....x

AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and OFFICE OF INFORMATION POLICY, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

.....x

15 Civ. 9317 (AKH)

NOTICE OF LODGING OF CLASSIFIED SUBMISSION

The Central Intelligence Agency ("CIA"), a defendant in the above-captioned matter, hereby provides notice that on November 29, 2017, it lodged for the Court's *in camera*, *ex parte* review a supplemental classified declaration by Antoinette B. Shiner dated November 29, 2017. The classified declaration attaches three classified exhibits: (A) an index of the classified and statutorily protected information contained in Document 66 that the Court, in its Opinion and Order dated September 27, 2017, has permitted the CIA to withhold, (B) an index of the classified and statutorily protected information in Document 66 that would be disclosed by virtue of the Court's September 27 Opinion and Order, and (C) a version of Document 66 that identifies the CIA's withholdings from the document pursuant to FOIA exemptions 1, 3, and 5, 5 U.S.C. § 552(b)(1), (3) and (5).

This submission is classified pursuant to Executive Order 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010), and cannot be disclosed without proper authorization. The submission was lodged in a secure facility for secure storage and transmission to the Court.

Dated: New York, New York
December 1, 2017

JOON H. KIM
Acting United States Attorney for the
Southern District of New York,
Attorney for Defendants

By: /s/ *Sarah S. Normand*
SARAH S. NORMAND
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
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Facsimile Nos. (212) 637-2730
Email: Sarah.Normand@usdoj.gov

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U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

December 6, 2017

BY ECF
Hon. Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street, Room 1050
New York, New York 10007

Re: *ACLU et al. v. Department of Defense et al.*, No. 15 Civ. 9317 (AKH)

Dear Judge Hellerstein:

At the Court's request, we are filing on the public docket the enclosed amended supplemental declaration, with redactions to protect classified and statutorily protected information.

Respectfully,

JOON H. KIM
Acting United States Attorney

By: /s/ *Sarah S. Normand*
SARAH S. NORMAND
Assistant United States Attorney
Telephone: (212) 637-2709
sarah.normand@usdoj.gov

Encl.
cc: Counsel of record

~~SECRET//NOFORN~~

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES FOUNDATION, Plaintiffs, v. DEPARTMENT OF DEFENSE, et. al. Defendants.	Case No. 15-cv-9317 (AKH) Filed **In Camera** and **Ex Parte** Filed **UNDER SEAL**

AMENDED SUPPLEMENTAL CLASSIFIED DECLARATION OF
ANTOINETTE B. SHINER
INFORMATION REVIEW OFFICER
FOR THE LITIGATION INFORMATION REVIEW OFFICE
CENTRAL INTELLIGENCE AGENCY

I, ANTOINETTE B. SHINER, hereby declare and state:

1. (U) I am the Chief of the Litigation Information Review Office of the Central Intelligence Agency ("CIA" or "Agency"). Through the exercise of my official duties, I am familiar with this civil action and the underlying Freedom of Information Act ("FOIA") request. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

[redacted]

~~SECRET//NOFORN~~

2. (U) The purpose of this declaration is to provide additional detail about the classified and statutorily protected information contained in "Document 66" in the CIA's initial Vaughn index entitled "Summary and Reflections of Chief of Medical Services on OMS Participation in the RDI Program," to assist the Court in reconsidering its decision to order release of the document in full, with the exception of certain specific categories of information.[1] Two indices are attached as Exhibits A and B, respectively, to aid the Court in reviewing the information that the CIA asserts is currently and properly classified and protected from disclosure by statute.

I. (U) CLASSIFICATION AND CONTROL MARKINGS

3. (U) The classification level of this declaration as a whole is the same as the highest classification level of information contained in any of its paragraphs. The overall classification of this declaration, without the attached exhibits, is S//NF. Each individual paragraph in the declaration is portion-marked to indicate the classification level of that paragraph: "(U)" for UNCLASSIFIED or "(S)" for SECRET. The dissemination

[1] (U) In the 27 September 2017 Order, the Court denied the Government's application of Exemptions 1 and 3, except "to the extent the document reflects information concerning "foreign liaison services," "locations of covert CIA installations and former detention centers," "classified code words and pseudonyms," or "classification and dissemination control markings." In footnote 4 of the opinion, the Court also noted that during the March 29 in camera hearing, the Court ruled that the names of CIA personnel, locations of facilities, and agency code words could be redacted.

~~SECRET//NOFORN~~

marking "NOFORN" and "NF" means that information cannot be released to foreign nationals.

5. (U) Because this declaration and exhibits contain classified information, I am submitting them *in camera* and *ex parte* solely for the eyes of the presiding Article III judge reviewing this case. They must be stored in accordance with government-approved security procedures, and in a Sensitive Compartmented Information Facility, or "SCIF," when not in the personal possession of the presiding judge.

II. INFORMATION AT ISSUE

6. (U) The first index, attached as Exhibit A, describes the classified and statutorily protected information in Document 66 that I have interpreted as falling within the categories of

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classified and statutorily protected information that the Court expressly noted in the 27 September 2017 Order could be withheld: foreign liaison services, locations of covert CIA installations and former detention centers, code words and pseudonyms, names of CIA personnel, and classification and control markings.

7. (U) The second index, attached as Exhibit B, describes the additional classified and statutorily protected information contained in Document 66 that does not fall within the specific categories that the Court has exempted from release, and therefore would be disclosed as a result of the 27 September 2017 Order. These additional withholdings include classified and statutorily protected information concerning operations unrelated to the former detention and interrogation program, as well as certain details about the former detention and interrogation program that remain classified and statutorily protected notwithstanding the declassification and release of other information about that program.

8. (U) In each index, I have identified the specific classified and statutorily protected information at issue and described the harm(s) that could reasonably be expected to result if the information were to be publicly released.

9. (U) Also attached, as Exhibit C, is a version of Document 66 that identifies (via shaded text) the particular classified and statutorily protected information in the document that the CIA has withheld pursuant to Exemptions 1 and 3. The shaded text in

~~SECRET//NOFORN~~

Exhibit C corresponds to the classified and statutorily protected information as described in Exhibits A and B, respectively: (A) the information I have interpreted as falling within the categories of classified and statutorily protected information that the Court noted in its 27 September 2017 Order may be withheld, and (B) the additional classified and statutorily protected information that does not fall within those specific categories. Exhibit C also identifies (via water marks and exemption codes) the privileged information that has been withheld pursuant to Exemption 5.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of December, 2017.

Antoinette B. Shiner

ANTOINETTE B. SHINER
Information Review Officer
Litigation Information Review Office
Central Intelligence Agency

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and OFFICE OF INFORMATION POLICY, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

ORDER AND NOTICE ON REDACTED TRANSCRIPT

15 Civ. 9317 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

On January 18, 2018, I held an *in camera* hearing in my chambers to reconsider my previous rulings on Document 66 and 8. On February 26, 2018, the government provided a redacted transcript of that hearing for public filing. I have reviewed the redacted transcript and approve same, subject to the following exceptions, which shall not be redacted from the public filing:

- Page 4, except for the redaction of line 14 words 6–7.
- Page 5.
- Page 6.
- Page 7, except for the redactions of line 9 words 8–9.
- Page 12 line 2.

- Page 13, except for the redactions of the last word on line 5 and the first word on line 7.
- Page 14, except for the redactions on lines 20–22.
- Page 15, except for the redactions beginning on line 1 word 6 through the redactions of line 13.
- Page 16, except for the redactions on lines 2–12.
- Page 17, except for the redactions on lines 2, 3, and 6–8.
- Page 19, except for the redactions on lines 4–14.
- Page 21 lines 9–11.
- Page 24 lines 14 and 21, and the first two words of line 22.
- Page 25 lines 19–20.
- Page 26, except for the redactions on lines 1 and 21.
- Page 28 lines 3–7.

The government shall comment on this order by April 10, 2018.[1]

SO ORDERED.

Dated: March 27, 2018
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

[1] There also appears to be a typographical error on page 11 line 7 (stating "10" instead of "12"), which shall be corrected as well.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....x

AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and OFFICE OF INFORMATION POLICY, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

.....x

15 Civ. 9317 (AKH)

NOTICE OF LODGING OF CLASSIFIED SUBMISSION

The Central Intelligence Agency ("CIA"), a defendant in the above-captioned matter, hereby provides notice that on April 10, 2018, the CIA lodged a classified letter for the Court's *ex parte*, *in camera* review, in response to the Court's March 27, 2018 Order (ECF No. 90). This submission is classified pursuant to Executive Order 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010), and cannot be disclosed without proper authorization.

Dated: New York, New York
April 11, 2018

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York,
Attorney for Defendants

By: /s/ *Sarah S. Normand*
SARAH S. NORMAND
Assistant United States Attorney
86 Chambers Street, Third Floor

New York, New York 10007
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Email: Sarah.Normand@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, including its components the OFFICE OF LEGAL COUNSEL and OFFICE OF INFORMATION POLICY, DEPARTMENT OF STATE, and CENTRAL INTELLIGENCE AGENCY,

Defendants.

ORDER ON REDACTED TRANSCRIPT

15 Civ. 9317 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

On March 27, 2018, I issued an "Order and Notice on Redacted Transcript," denying certain redactions proposed by the government of the transcript of the *in camera* hearing held before me on January 18, 2018. In a letter dated April 10, 2018, the government objected to certain of my rulings (*see* Notice of Lodging of Classified Submission, Dkt. No. 91). The following are my rulings on the government's objections:

- **Page 5:** The objections are overruled.
- **Page 6:** The objections are sustained, except with respect to line 20 and the first word of line 21, which may not be redacted.
- **Page 12:** The objections are overruled. Page 12 shall contain no redactions except for the proposed redactions on line 2.

- **Page 13:** The objections are overruled, except with respect to lines 11–12, which may be redacted.
- **Page 14:** The objections are overruled.
- **Page 17:** The objections are overruled.
- **Page 21**: The objection is sustained.

Within 10 days, the Government shall prepare and docket a transcript consistent with my order dated March 27, 2018, as modified herein.

SO ORDERED.

Dated: April 17, 2018
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

JA-205

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

May 10, 2018

BY ECF
Hon. Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street, Room 1050
New York, New York 10007

Re: *ACLU et al. v. Department of Defense et al.*, No. 15 Civ. 9317 (AKH)

Dear Judge Hellerstein:

In accordance with the Court's Order dated May 1, 2018 (ECF No. 95), the government files herewith the redacted transcript provided to the Court on April 11, 2018.

Respectfully,

GEOFFREY S. BERMAN
United States Attorney

By: /s/ *Sarah S. Normand*
SARAH S. NORMAND
Assistant United States Attorney
Telephone: (212) 637-2709
sarah.normand@usdoj.gov

Encl.
cc: Counsel of record (by ECF)

XI1IACLC SEALED - CLASSIFIED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

v. 15 CV 9317 (AKH)

THE DEPARTMENT OF DEFENSE, et al.,

Defendants.

----------x

New York, N.Y.
January 18, 2018
2:45 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
Interim United States Attorney for the
Southern District of New York
BY: SARAH NORMAND
Assistant United States Attorney

ALSO PRESENT: Two Associate General Counsel, CIA

Harry Rucker, Classified Information Security Officer

(In chambers)

THE COURT: This record will be under seal with definitions of what may be public to be decided on later.

The purpose of our gathering is to develop what I ordered reconsidered. My original order of September 27, 2017, stands, and I did not intend to grant reconsideration to reconsider any of the points made here, except one particular point, and that point was in my opinion the neglect of the government to identify specific portions of the document that for one reason or another should be privileged and withheld from publication.

That's what we'll do. I'm not entertaining any reconsideration of points already made and considered and ruled on.

So, with that in mind, I have a copy before me of Document No. 66. I think that was the focus of the reconsideration. And I intend to go down page by page and make rulings on what the government wishes to redact.

MS. NORMAND: Thank you, your Honor. We understood from the Court's original ruling from September that the Court had rejected the argument that the document in its entirety was privileged, but had permitted certain withholdings under Exemptions 1 and 3 as to, for example, the identity of CIA personnel, certain locations, and other things. And we thank the Court for allowing us to put in a redacted version

identifying the specific classified and statutorily protected information in the document.

It falls into two categories. One category is the redactions that we believe the Court has essentially already permitted, foreign liaison services, locations of covert CIA installations, and former detention centers, code words, pseudonyms, names of CIA personnel.

The other category includes additional information pertaining to intelligence methods and activities that does not fall into those specific categories the Court has already permitted to be withheld.

With that, I'll just got page by page if the Court is amenable.

THE COURT: No, I've not focused the same logic that you presented. I looked at each page again, looked at what the government wanted me to do, and I'm prepared to make rulings, and I'd rather do that.

MS. NORMAND: Very well, your Honor.

THE COURT: These pages are all numbered. My first ruling is on page two.

MS. NORMAND: On page two of the document, what's been redacted here are dissemination markings, classification markings that are classified.

THE COURT: At the very top.

MS. NORMAND: Correct.

THE COURT: I'm not touching those.

MS. NORMAND: Thank you, your Honor. These will continue page by page.

THE COURT: Page by page, I'm not touching those. All those are allowed.

In the first paragraph in the second sentence, the government took issue with the name of a city, the name of a war. I can't see how this could be covered under anything, and it should be produced.

MS. NORMAND: Your Honor, if I could explain the basis for the government's redaction.

THE COURT: You may.

MS. NORMAND: This description pertains to CIA activities and assistance during the [redacted], and including the assistance of medical services component of CIA that have not been identified. And so as a result, if this is released, it will associate the CIA with activities, intelligence activities during that period of time and in that location. That remain classified and statutorily protected.

THE COURT: This is so old now, there is no harm that could flow from this.

ASSOCIATE GENERAL COUNSEL OF CIA 1: It is also withheld pursuant to the National Security Act as an intelligence source method.

THE COURT: Where is the method?

ASSOCIATE GENERAL COUNSEL OF CIA 1: The method is that [redacted] and it is not known that, in that specific instance, that this was done, and also that this is a method that is [redacted]

THE COURT: I value your argument. I disagree. That's to be produced. It is too old and too ordinary.

The second paragraph redaction is proper.

In the third paragraph redaction is proper.

In the footnote, I can't see the need for classification of [redacted]

ASSOCIATE GENERAL COUNSEL OF CIA 1: I think one of the things, and this also applies to the first redaction as well, is that the date of the -- that timing is considered when these classification decisions are made. And just because something has happened in the past, it's not, it doesn't play -- I mean, it's a consideration in a classification determination, but that determination was made that there still is harm of release of that information now.

THE COURT: It's [redacted] years ago, no relationship between what was and what came after that. Redaction is denied.

Page three. There is a redaction between the second full paragraph and third paragraph which is appropriate.

MS. NORMAND: On page three, your Honor?

THE COURT: Yes.

MS. NORMAND: If you're referring to the redaction --

THE COURT: Wait a minute. I'm confused. Hold on a minute.

MS. NORMAND: There may be confusion with the page numbering. We were referring to the number at the bottom of the page which is actually --

THE COURT: We're up to page three.

MS. NORMAND: If I could just, for clarity, if you could use the page numbers at the bottom.

THE COURT: That's what I'm doing.

MS. NORMAND: Very good. Now we're on page three.

THE COURT: Yes.

MS. NORMAND: Thank you, your Honor. This particular redaction pertains to [redacted] that is used by the CIA.

THE COURT: Which one?

MS. NORMAND: The redaction in the middle of page three pertaining to the use -- the fact that these particular crises were responded to [redacted]

THE COURT: I didn't appreciate that. Redaction is proper.

Page four. The redaction suggested in the first full

paragraph is appropriate. I uphold it.

The redaction in the third full paragraph is appropriate.

As to the footnotes, footnote seven and eight may be redacted. Footnote nine should be produced.

ASSOCIATE GENERAL COUNSEL OF CIA 1: Your Honor, that's a reference, it appears to be a reference to an internal -- Studies and Intelligence is an internal CIA publication, and that article itself is marked [redacted].

THE COURT: But you're talking about the publication in a book form.

ASSOCIATE GENERAL COUNSEL OF CIA 1: It is a CIA internal publication. It is a CIA journal.

THE COURT: It is not published?

ASSOCIATE GENERAL COUNSEL OF CIA 1: There is a published version, but this is not the published version. This is the internal version.

THE COURT: I misapprehended what was going on. I withdraw that ruling. I uphold the propriety of redacting footnote seven, eight and nine.

Ms. Normand, did I make a ruling on page five?

MS. NORMAND: I don't believe so because the only material redacted there is the dissemination and the classification markings.

THE COURT: So we're on page six. On page six, full

paragraph one, on line five, there is a place name. But isn't this well known?

ASSOCIATE GENERAL COUNSEL OF CIA 1: I believe that the location, the exact location which Abu Zubaydah was captured was not disclosed.

THE COURT: Wasn't this all over the public trial in Washington or Virginia?

MS. NORMAND: Judge Brinkema? The Moussaoui trial?

THE COURT: Yes.

ASSOCIATE GENERAL COUNSEL OF CIA 1: No, this is a different, this is for Abu Zubaydah.

MS. NORMAND: Abu Zubaydah is a detainee at Guantanamo. He has not been charged.

THE COURT: It is not publicly known where he was captured?

MS. NORMAND: Correct.

THE COURT: I uphold the redaction.

Page six, paragraph two, I uphold the redactions, paragraph two.

Paragraph three I uphold the redaction in line one. Why can't I order public disclosure of the second line?

ASSOCIATE GENERAL COUNSEL OF CIA 1: The line regarding [redacted]?

THE COURT: The [redacted]

MS. NORMAND: These were individuals who were

[redacted] and this would identify them. [redacted]

[redacted]

[redacted]

THE COURT: Suppose we just redact [redacted]?

ASSOCIATE GENERAL COUNSEL OF CIA 1: That might not be sufficient to protect his identity.

THE COURT: [redacted]

[redacted]

MS. NORMAND: The fact that it was [redacted] would provide information.

THE COURT: It doesn't say that.

MS. NORMAND: In the second line, [redacted] This would be an individual [redacted]

[redacted]

THE COURT: I agree with that, but where does it say that?

MS. NORMAND: In the second line of this paragraph. The paragraph begins [redacted]

[redacted]

[redacted]

THE COURT: That's the redacted?

MS. NORMAND: Correct. The information that's in gray is what would be redacted.

THE COURT: I upheld that.

MS. NORMAND: I'm sorry, I misunderstood.

THE COURT: So the next sentence, [redacted] we'll delete [redacted] And I uphold the rest of the redactions in that paragraph.

So the second line only [redacted] is to be --

ASSOCIATE GENERAL COUNSEL OF CIA 1: [redacted]

THE COURT: It is too well known.

ASSOCIATE GENERAL COUNSEL OF CIA 1: [redacted]

THE COURT: It's too well known. That's to be published.

I uphold paragraph 13 redaction. Footnote 13 redaction.

Next, page seven. In the first full paragraph, on the fifth line, the word [redacted] may be redacted. And I think the rest of it should be produced.

MS. NORMAND: Okay.

THE COURT: And the second paragraph redactions are appropriate.

The third paragraph the redactions are appropriate.

The footnote 14 the redaction is appropriate.

Now on page eight. Redactions are appropriate.

Page nine. Redactions are appropriate.

Page 10. Redactions are appropriate.

Page 11. Redactions are appropriate.

Page 12. The redaction is appropriate.

Page 13. Appropriate.

Page 14. No ruling is to be made.

Page 15, why shouldn't I order publication of footnote 26?

ASSOCIATE GENERAL COUNSEL OF CIA 1: This is a technique, this is an intelligence technique that's not known.

THE COURT: I can't believe that.

ASSOCIATE GENERAL COUNSEL OF CIA 1: It's --

THE COURT: It's so well known.

ASSOCIATE GENERAL COUNSEL OF CIA 1: [redacted]

THE COURT: What's wrong with that?

ASSOCIATE GENERAL COUNSEL OF CIA 1: It is not a technique that's acknowledged by the agency. And there would be harm in disclosing it.

THE COURT: What would be the harm?

ASSOCIATE GENERAL COUNSEL OF CIA 1: Harm to foreign relations [redacted]

THE COURT: I'll uphold the redaction. And the other redactions on the page are appropriate.

Page 16. No ruling is to be made.

Page 17. Redactions are appropriate.

Page 18. Appropriate.

Page 19. Appropriate.

Page 20. Paragraph one, redactions are appropriate. Paragraph two, why is it secret [redacted] ?

ASSOCIATE GENERAL COUNSEL OF CIA 1: This is not something that's related to the rendition, detention, and interrogation program. This is not something that's been acknowledged by the agency.

THE COURT: But the fact of [redacted]

ASSOCIATE GENERAL COUNSEL OF CIA 1: The fact of [redacted] has not been --

THE COURT: [redacted]

ASSOCIATE GENERAL COUNSEL OF CIA 1: I -- I think that this is, this is something that is not linked to the RDI program.

ASSOCIATE GENERAL COUNSEL OF CIA 2: [redacted]

[redacted] and we have not -- if we acknowledge it, it could thwart effectiveness of future operations and partnerships. This is not something that we've acknowledged.

THE COURT: Suppose I just redact [redacted]"?

ASSOCIATE GENERAL COUNSEL OF CIA 2: I think it's [redacted] too.

ASSOCIATE GENERAL COUNSEL OF CIA 1: I don't think that sufficiently protects it.

MS. NORMAND: I think the theory here, your Honor, is that [redacted] as reflected in the index.

THE COURT: I uphold the redaction. So everything in paragraph two that you want to redact may be redacted. The rest of the page, except for the footnote, redactions are appropriate.

The footnote may be redacted.

Page 21. Redactions are appropriate.

22. Why shouldn't footnotes 43 and 44 be produced?

MS. NORMAND: This is an issue that recurs throughout the document, your Honor. And there is discussion in various places of media reports and the correctness or lack of correctness of certain information in media reports. Many of those reports include information [redacted]