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.

Case No. 15-cv-9317

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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BACKGROUND

This Court has overseen more than a decade of Freedom of Information Act litigation addressing the detention, abuse, and torture of prisoners by U.S. government agencies, including the CIA, in its former "Rendition, Detention, and Interrogation" program. Indeed, documents released as a result of the FOIA litigation before this Court have served a critical role in informing the robust public debate and the extraordinary public interest in the government's use of torture. For many years, however, the CIA invoked classification to shield an enormous amount of information about torture from public scrutiny.

Over the past two years, the CIA's classification of information about its torture program has changed dramatically. On December 9, 2014, following a declassification review by the executive branch, the Senate Select Committee on Intelligence ("SSCI") released the 500-page executive summary of its years-long, comprehensive investigation of the CIA's torture program to the American public. The summary documents widespread abuses that took place in the program, as well as details concerning the CIA's evasions and misrepresentations about its activities in its statements to Congress, the White House, the courts, the media, and the American public. Both the SSCI summary and the CIA's related declassification of additional documents further fueled the public discourse about the legality and wisdom of CIA torture—and highlighted the resulting harm to individuals' human rights, our nation's values, and our national security. The CIA has actively participated in this public debate, including by declassifying and releasing its own response to the SSCI summary, and numerous documents on a website praising and defending the CIA's program. The result of all these disclosures is a significant reduction in the amount of information that is classified.

On August 14, 2015, the ACLU submitted a FOIA request for sixty-nine records and categories of records that were identified in the SSCI investigation summary or whose classification status changed as a result of the broad declassification that took place following release of the summary. The requested records included emails, cables, memoranda, letters, and reports identified and excerpted in the SSCI summary. Records produced in response to the ACLU's request show the lengths to which CIA employees went to hide the use of torture from the American public and the courts, including by seeking assurance that a victim "will remain in isolation and incommunicado for the remainder of his life." Ladin Decl. Exh. 1 (Doc. 7) at 5. One document reveals that, there was "inconsistency," Ladin Decl. Exh. 2 (Doc. 46), between what the CIA told courts and its efforts at manipulating public opinion, leading an agency lawyer to write that the CIA's efforts made the "declaration I just wrote about the secrecy of the interrogation program a work of fiction," Ladin Decl. Exh. 3 (Doc. 45), and to declare that its "Glomar figleaf is getting pretty thin" Ladin Decl. Exh. 4 (Doc. 44) at 1.

The ACLU brought this lawsuit to vindicate the right of the American public to other, undisclosed documents or portions of documents regarding the CIA's use of torture. The documents are not only of historical interest. Today, as torture is once again openly raised as a policy question, these documents are urgently needed to inform a full and fair public debate.

ARGUMENT

The CIA is no longer able to invoke FOIA Exemptions 1 and 3 to justify the wholesale withholding of documents related to torture. Exemption 1 protects properly classified information, while Exemption 3 protects secret intelligence sources and methods; both are inapplicable where the CIA has declassified and made public the underlying "sources and methods." The government instead attempts to invoke Exemption 5, which permits the

withholding of information to which common-law privileges apply, to keep torture-related information secret. If accepted, the government's Exemption 5 arguments would greatly expand carefully-narrowed common law privileges and thereby undermine "the basic purpose of the Freedom of Information Act," which is "to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

The government offers little more than conclusory, boilerplate descriptions to justify its sweeping claims of privilege. It asserts that documents are essential to decisionmaking processes without identifying any decisionmakers, decisionmaking processes, or the role of any given record in an identifiable process. It claims that documents are protected by the attorney-client privilege without providing the minimal information necessary to determine that the claim is proper: whether these documents set forth confidential communications between clients and attorneys for the purpose of seeking legal advice, as opposed to setting policy or, worse, violating the law. Perhaps most strikingly, in its conclusory public defense of withholding the Memorandum of Notification (Doc. 1) ("MON") in full, the government now provides less information about the document and the reasons for keeping it secret than the government provided nine years ago, when even the *title* of the document was classified.

The government has not borne its burden of establishing that the information it seeks to keep secret falls within FOIA's statutory exemptions to disclosure. It even appears to have withheld information under a nonexistent FOIA exemption. Its motion for summary judgment should be denied.

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

In the FOIA context, the common-law privileges asserted by the government here—the deliberative-process, attorney–client, and presidential-communications privileges—are to be

"narrowly construed" and "limited to those situations in which [their] purposes will be served." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980); *see Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. Dep't of Justice*, 697 F.3d 184, 194 (2d Cir. 2012). Courts adjudicating FOIA disputes enforce "the strong presumption in favor of disclosure." *Associated Press v. Dep't of Defense*, 554 F.3d 274, 283 (2d Cir. 2009). Accordingly, when the government seeks to withhold information under one of the Exemption 5 privileges, "it is the government's burden to prove that the privilege applies." *Brennan Ctr.*, 697 F.3d at 201–02. The government has not come close to satisfying that burden here.

To satisfy its burden of proving that a FOIA exemption applies, the government "must supply the courts with sufficient information to allow [them] to make a reasoned determination that they were correct." *Nat'l Immigration Project v. Dep't of Homeland Sec.*, 868 F. Supp. 2d 284, 291 (S.D.N.Y. 2012) (quoting *Coastal States*, 617 F.2d at 861). That determination is particularly fact-dependent for Exemption 5 claims, and the government must provide information about the function of a document, its role, and the context in which the record was issued and used. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975) ("Crucial to the decision of this case is an understanding of the function of the documents in issue in the context of the administrative process which generated them."); *Lead Indus. Ass'n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70, 80 (2d Cir. 1979) ("Whether a particular document is exempt under (b)(5) depends not only on the intrinsic character of the document itself, but also on the role it played in the administrative process."); *Tigue v. Dep't of Justice*, 312 F.3d 70, 78 (2d Cir. 2002) (same); *Coastal States*, 617 F.2d at 858 ("[T]o determine whether the agency's claim . . . is valid, an understanding of the function the documents serve within the

agency is crucial."); *id.* at 867 ("[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.").

In this case, the government's vague and conclusory *Vaughn* index and the accompanying Shiner declaration fail to support the sweeping redactions it has made, and strongly suggest that it has not complied with the requirement that it conduct a rigorous segregability analysis. *Vaughn* submissions are insufficient where "the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *Quinon v. F.B.I.*, 86 F.3d 1222, 1227 (D.C. Cir.1996) (quoting *Hayden v. Nat'l Sec.Agency/Central Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir.1979)). These insufficiencies pervade both the index and the Shiner declaration, neither of which establishes that the government may withhold the information it seeks to keep from the public. Moreover, because the government has released language in the contested documents that was directly quoted in the SSCI investigation summary or that was made public as the result of other litigation, many of the documents themselves contain underacted passages that strongly suggest that the government has improperly claimed a privilege.

A. The government has not shown that withheld information is predecisional and deliberative.

The government's submissions largely fail to meet the strict limitations of the deliberative process privilege, which shields only information that is "predecisional" and "deliberative." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005). A document is "predecisional" if it was "prepared in order to assist an agency decisionmaker in arriving at his decision" and "deliberative" if it is "actually . . . related to the process by which policies are formulated." *Id.* at 356 (quotation marks omitted). As the Second Circuit has instructed, "the 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." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (quoting *Ethyl Corp. v. E.P.A.*, 25 F.3d 1241, 1248 (4th Cir. 1994)). "[W]hile an agency need not actually demonstrate that a specific decision was made in reliance on the allegedly predecisional material, the government must show that the material was prepared to assist the agency in the formulation of some *specific* decision." *Tigue*, 312 F.3d at 80 (emphasis added); *see Coastal States*, 617 F.2d at 868 ("Characterizing these documents as 'predecisional' simply because they play into an ongoing audit process would be a serious warping of the meaning of the word.").

Because the applicability of Exemption 5 is so case-specific—turning on, among other things, how each document was ultimately used, who it was shared with, and whether it has portions that are factual and therefore disclosable—courts require the government to set forth specific facts in order to justify claims of privilege. *See Senate of P.R. v. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (finding cursory description of "each document's issue date, its author and intended recipient, and the briefest of references to its subject matter" inadequate to sustain withholding under Exemption 5). In *Brennan*, the Second Circuit described the factual analysis that must be undertaken when an agency invokes Exemption 5: "We begin our analysis of the status of this document, as we must with respect to all three memoranda at issue, by examining the process by which the memorandum was created." 697 F.3d at 202. "[R]elevant factors to be considered in determining whether privilege applies to a record are 'the identity and position of the author and any recipients of the document, along with the place of those persons within the decisional hierarchy.'" *Grand Cent. P'ship*, 166 F.3d at 482 (quoting *Ethyl Corp.*, 25 F.3d at 1248). Unlike the record in this case, the record in *Brennan* supplied extensive detail about the process by which the documents at issue came into being and were used: who made the

request for the memoranda and why, who received copies of the memoranda, how the agency relied on the memoranda, and details of the decision-making process. *See* 697 F.3d at 190–92, 202, 205–06. The same kind of detailed analysis is found in the Supreme Court precedents relied upon in *Brennan*. *See id.* at 195-98 (discussing *Sears*, 421 U.S. 132, and *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168 (1975)).

By contrast, the government makes little attempt to show that withheld information is "predecisional," disregarding the requirement that it identify decisionmaking processes with particularity and providing scant information as to documents' authors, recipients, and their respective places in the decisional hierarchy. "It is hard to understand why Exemption 5 would be applicable" where "[t]here is not the slightest indication that the document formed an 'essential link' in the agency's policy development." *Grand Cent. P'ship*, 166 F.3d at 484. Specificially, the *Vaughn* indices provide little of the information courts regularly require:

> [A] log of documents withheld on the basis of the deliberative process privilege should provide various pieces of information, including, but not limited to, a description of the decision to which the documents relate, the date of the decision, the subject-matter of the documents in issue, the nature of the opinions and analyses offered, the date that documents were generated, the roles of the agency employees who authored or received the withheld documents and the number of employees among whom the documents were circulated. These sort of details, while not exhaustive, would provide the receiving party with sufficient facts to assess whether the documents were "related to the process by which policies are formulated."

Auto. Club of N.Y. v. Port Auth. of N.Y. and N.J., 297 F.R.D. 55, 60 (S.D.N.Y. 2013) (quoting and applying *La Raza*, 411 F.3d at 356). *Cf.* ECF No. 48-1 (*Vaughn* index filed in this case, which provides only conclusory details as to documents claimed to be predecisional and deliberative).

In most instances, the government provides only a boilerplate assertion of privilege, without even trying to identify a plausible policy-making process. In many cases these

conclusory and insufficient submissions are further undercut by the documents themselves, which contain unredacted passages that were released if they were directly quoted in the SSCI investigation summary or made public as the result of other litigation. For example, a document entitled "Summary and Reflections of Chief of Medical Services on OMS Participation in the RDI Program" (Doc. 66), described below, appears to consist largely of a retrospective account of actions taken by the agency over the course of the CIA torture program.[1] The government justifies the wholesale withholding of this document based only on the mere statement that the document contains "pre-decisional intra-agency deliberations." *See* ECF No. 48-1 at 19. Other documents appear to recount decisions that have already been made, and, moreover, are apparently communications by decisionmakers to subordinates. For example, Document No. 8 is a cable from CIA headquarters assuring a remote interrogation team that a prisoner about to be tortured "will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released." Ladin Decl. Exh. 5 (Doc. 8) at 4. Similarly, Document No. 13 appears to communicate a decision by Jose Rodriguez, the then-Director of the CIA's Counterterrorism Center, admonishing the (apparently subordinate) recipients to refrain

[1] The "Summary and Reflections" were apparently never finalized. But stamping a document with a "draft" marker does not render a document automatically exempt from FOIA. *See N.Y. Times Co. v. U.S. Dep't of Def., 499* F. Supp. 2d 501, 515 (S.D.N.Y. 2007) (denying agency attempt to withhold document based on the "'mere fact that a document is a draft'" and observing that this was not "sufficient reason to automatically exempt it from disclosure" (quoting *Lee v. FDIC,* 923 F. Supp. 451, 458 (S.D.N.Y. 1996)); *see also Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 811 F. Supp. 2d 713, 741 n.103 (S.D.N.Y. 2011), *as amended on reconsideration* (Aug. 8, 2011) (same); *Arthur Andersen & Co. v. Internal Revenue Serv.,* 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 ascertain whether the document is deliberative in nature.") (quotation marks and citation omitted). Here, the government has offered nothing to suggest that the Chief of Medical Services' retrospective account of agency decisionmaking "was prepared to assist the agency in the formulation of some *specific* decision." *Tigue*, 312 F.3d at 80 (emphasis added).

from committing to writing "any speculative language as to the legality of given activities or, or [*sic*] more precisely, judgment calls as to their legality vis-à-vis operational guidelines for this activity agreed upon and vetted at the most senior levels of the agency." Ladin Decl. Exh. 6 (Doc. 13) at 2. One set of documents describe the decision to withhold certain medical care from a torture victim and destroy his body if he dies. *See* Ladin Decl. Exh. 5 (Doc. 8) at 3 ("the interrogation process takes precedence over preventative medical procedures"); Ladin Decl. Exh. 7 (Doc. 14) at 1 (confirming that "We are currently providing absolute minimum wound care []as evidenced by the steady deterioration of the wound"); Ladin Decl. Exh. 1 (Doc. 7) at 5, ("If subject dies, we plan on seeking [redacted] assistance for the cremation of subject."). The government makes no attempt to explain why these, or other documents that appear to describe decisions already taken, can possibly fall within the narrow scope of the privilege.[2]

The government also appears to disregard the requirement that withheld information be deliberative. The government has not made the necessary showing that any document formed an "'essential link' in the agency's policy development." *Grand Cent. P'ship*, 166 F.3d at 482, 484. Even in cases where the government makes that showing, the entire document is not automatically exempt from disclosure because "[t]he privilege does not, however, as a general

[2] The government may argue that descriptions of policy decisions already made are nonetheless "predecisional" if the agency described past decisions in the context of contemplated changes. But, as the D.C. Circuit has explained, an agency may not "avail itself of Exemption 5 to shield existing policy from disclosure simply by describing the policy in a document that as a whole is predecisional, such as a memo written in contemplation of a change in that very policy. Only those portions of a predecisional document that reflect the give and take of the deliberative process may be withheld." *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010). Under any contrary rule, "it would be hard to imagine any government policy document that would be sufficiently final to qualify as non-predecisional and thus subject to disclosure under FOIA." *Id.*

matter, cover 'purely factual' material." *Id*. Under the common law privilege from which Exemption 5 derives, "purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery." *E.P.A. v. Mink*, 410 U.S. 73, 87–88 (1973); *see also Int'l Bhd. Of Elec. Workers 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."); *Providence Journal Co. v. Dep't of Army*, 981 F.2d 552, 559 (1st. Cir. 1992) ("segregable factual portions of [ ] document might still be subject to compelled disclosure"). Accordingly, "agencies must disclose those portions of predecisional and deliberative documents that contain factual information that does not 'inevitably reveal the government's deliberations.'" *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010). "For each withheld portion, the agency must . . . show that the information withheld is not reasonably segregable." *Lawyers Comm. for Human Rights v. I.N.S.*, 721 F. Supp. 552, 560 (S.D.N.Y. 1989).

In many cases, a FOIA requestor must guess at the factual information an agency may be improperly withholding, but here that guesswork is unnecessary. As information released as the result of separate litigation reveals, the government has made little attempt here to segregate nondeliberative, factual material. The government asserts that Document No. 66, the "Summary and Reflections" of the Chief of Medical Services on the history of his office's involvement in the CIA's torture program, may be entirely withheld under the deliberative process privilege. But during civil discovery in a case brought by the estate of Gul Rahman against two CIA contractors involved in the torture that resulted in his death, the government released, "as a matter of discretion," several pages of an 89-page document that it here asserts is protected by the deliberative process privilege. Shiner Decl., ECF No. 48 at 4 n.2.

The released pages make plain that the government is using the deliberative privilege to withhold a wholly factual recitation of retrospective events. *Compare* Dror Ladin Decl. Exh. 8 (original release of pages) *with* Ladin Decl. Exh. 9 (pages released "as a matter of discretion"). These pages narrate how the CIA "again returned to the subject of interrogation," contracted psychologists to consult on interrogation and ultimately to devise "a more aggressive approach to interrogation," Exh. 9 at 1, 3. They describe the conditions at the prison where Gul Rahman was held until his death, the findings of Mr. Rahman's autopsy, and the formalization of aspects of the CIA's torture program in response to Mr. Rahman's death. *See id.* at 5–6. Of course, that withheld information is precisely the type of "purely factual material" that the Supreme Court has explained must be segregated and disclosed even if "contained in deliberative memoranda." *Mink*, 410 U.S. at 87–88. The government has simply not heeded this command with regard to certain documents which clearly should not have been deemed deliberative in full; this fact also undermines the credibility of the government's claim that other documents are properly withheld in full.[3]

These documents also reveal the government's failure to properly segregate factual material, notwithstanding the Shiner declaration's bald assertion that "no additional information can be released." Shiner Decl., ECF No. 48 at 20. As this Court well knows, the government bears the burden of establishing that they have segregated and released non-exempt portions of

[3] The government may argue that it is entitled to keep secret all withheld factual material because any factual narration necessarily reflects a deliberative process of selecting *which* facts to include in a document. But the D.C. Circuit rejected this sweeping argument decades ago, because it would eviscerate FOIA by converting a limited common law privilege to a broad license for secrecy. *See Playboy Enter. v. Dep't of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) ("Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as a part of the deliberative process.").

individual records. *See, e.g.*, *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 496 (S.D.N.Y. 2010). "For each withheld portion, the agency must . . . show that the information withheld is not reasonably segregable." *Lawyers Comm.*, 721 F. Supp. at 560. "Unless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts." *Mead Data Cent. v. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977). To allow the Court to make the required "specific findings of segregability," *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007), agencies must provide a detailed justification for non-segregability, and a description of "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Mead*, 566 F.2d at 261. As this Court has held, it is insufficient for the government to merely assert that a "'line-by-line review was conducted for all the documents, individually and as [a] whole.'" *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 567 (S.D.N.Y. 2005). This Court has explained that a conclusory statement that "'there are no meaningful, reasonably segregable, non-exempt portions,'" which "does not describe the individual documents paragraph by paragraph and line by line," leaves the district judge with "no feasible way for me to evaluate the conclusory determination of lack of segregability" and requires *in camera* review. *Id.* The entirely conclusory statement on segregability the government offers here provides as little detail as the declaration rejected by this Court more than ten years ago. *See* Shiner Decl., ECF No. 48 at ¶ 32.

There is little reason to believe that the remaining 80 pages in the "Summary" of past decisions involving the Office of Medical Services contain no segregable "purely factual material." And the government further appears to be withholding factual matter in other

documents as well, such as a Memorandum from the CIA's Office of Medical Services to the CIA's Inspector General, which apparently reported on troubling facts related to medical aspects of the CIA's program (Doc. 28), and a cable providing an "Aggressive Interrogation Phase Synopsis," that appears to narrate 17 days of torture , *see* Ladin Decl. Exh. 10 (Doc. 15) at 2. The government has not justified the wholesale redaction of these and other documents, nor its claim that factual material cannot be segregated.[4]

B. The government has not shown that withheld information is protected by the attorney-client privilege.

The government has also failed to demonstrate that it is entitled to withhold responsive documents under the attorney-client privilege, as it claims, Gov. Br., ECF No. 50 at 18-20, instead relying upon broad, conclusory assertions of privilege that are not only patently insufficient but are undercut by the documents themselves. Unredacted portions of several documents reveal either no apparent purpose to seek or provide legal advice, or suggest that no confidential factual information would be revealed by disclosure, each of which is a prerequisite for application of the privilege. Accordingly, the government's motion for summary judgment on the basis of attorney-client privilege should be denied.

"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); *accord Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged."). The purpose of this privilege is "to encourage full and frank communication between attorneys and their clients" in service of the "broader public interests in the observance

[4] In addition to Documents Nos. 7, 8, 13, 14, 15, 28, and 66, which are specifically discussed above, the government has failed to justify the deliberative process privilege as to Documents Nos. 2, 4, 6, 9, 10, 18, 19, 29, 37, 43, 44, 45, 46, and 55.

of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Courts look to discovery law as a "rough guide" to determine the scope of the attorney-client privilege in the FOIA context. *Coastal States*, 617 F.2d at 862. The claimant bears the burden of presenting "sufficient facts to establish the privilege," which it "must demonstrate with reasonable certainty." *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984); *accord United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011) ("The party asserting the privilege . . . bears the burden of establishing its essential elements."). Because the privilege renders information undiscoverable and so impedes transparency, it is "'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (internal citation omitted); *accord Fisher*, 425 U.S. at 403 ("[The privilege] protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege."). Accordingly, "[a]ny ambiguities as to whether the essential elements have been met are construed against the party asserting the privilege." *Koumoulis v. Indep. Fin. Marketing Grp.*, 295 F.R.D. 28, 38 (E.D.N.Y. 2013).[5]

To invoke the attorney-client privilege, a party must establish "(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. Critically, the privilege extends only so far as is necessary to "protect the secrecy of the underlying facts." *Mead*, 566 F.2d at 254 n.28; *accord Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). Thus, the privilege does not promote secrecy of attorney-client legal

[5] The court in *Coastal States* noted that discovery law does not map precisely onto Exemption 5 because, among other things, "decisions as to discovery are usually based on a balancing of the relative need of the parties," a consideration that is absent in the FOIA context. 617 F.2d at 862. This difference suggests that the attorney-client privilege should be interpreted to apply even more narrowly in Exemption 5 cases, consistent with the purpose of FOIA, "to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 372.

communications, generally, but only where particular communications convey or respond to the client's "confidential information." *Coastal States*, 617 F.2d. at 863; *see also Schlefer v. United States*, 702 F.2d 233, 245 (D.C. Cir. 1983) (Ginsburg, J.). Moreover, "[t]he 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.). To claim the benefit of the privilege, the government must demonstrate that the "predominant purpose of the communication is to render or solicit legal advice." *Erie*, 473 F.3d at 420; *accord Urban Box Office*, 2006 WL 1004472, at *6 ("Where there are several possible interpretations of a document based upon the surrounding circumstances, the party asserting the privilege must produce evidence sufficient to satisfy a court that legal, not business, advice is being sought."). Courts make this determination by examining "the overall needs and objectives that animate the client's request," taking into account whether the advice "can be rendered only by consulting the legal authorities" or whether instead it "can be given by a non-lawyer." *Erie*, 473 F.3d at 420-21. Communications with counsel, "in a capacity other than as a lawyer, as (for example) a policy advisor" are not privileged. *Id.* at 421. In short, "'[t]he mere fact that the services are rendered by an attorney does not necessarily establish that he was acting in such capacity so as to render the communications as privileged.'" *Vingelli v. Drug Enf'nt Agency*, 992 F.2d 449, 454 (2d Cir. 1993) (quoting 8 J. Wigmore, *On Evidence* § 2303 (Supp. 1991)); *accord Urban Box Office Network*, WL 1004472 at *5 ("[M]erely because a document is sent to an attorney does not render it a privileged attorney-client communication."); *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F.Supp. 156, 160 (E.D.N.Y. 1994) ("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.").

Here, the government has not even sought to make the required showing, let alone established that the primary purpose of the relevant communications was to seek or render legal advice. To be sure, the government asserts, very generally, that the communications are between CIA personnel and government attorneys and "consist[] of factual information supplied by clients in connection with requests for legal advice, discussions between attorneys that reflect those facts, and legal analysis and advice provided to the clients." Gov. Br. at 20 (quoting Shiner Decl.). But it has not provided the necessary factual basis for the Court to assess the claim of privilege. *See Senate of P.R.*, 823 F.2d at 585 (mere description of "each document's issue date, its author and intended recipient, and the briefest of references to its subject matter" held insufficient to justify withholding under Exemption 5); *Mead*, 566 F.2d at 258 ("[An agency] must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA."). The government's *Vaughn* Index, which provides only a cursory description of the relevant documents, is no better, offering a patently insufficient basis upon which the Court could possibly conclude that legal advice was sought or rendered. *See*, *e.g.*, ECF No. 48-1 at 2, 7, 14, 16-17 (re. Docs. 4, 10, 29, 44, 45-46, "contains" or "conveys legal advice"); *id.* at 3 (re. Doc. 6, "contains a preliminary request for legal advice"); *id.* at 4-6, 9, 11, 15-16 (re. Docs. 7-9, 15, 18, 37, 43, "contains information exchanged in furtherance of requesting legal advice"). That is because conclusory assertions of this sort, which "merely recit[e] statutory standards," and which are otherwise "too vague or sweeping," are inadequate to justify any FOIA exemption, *Quinon*, 86 F.3d at 1227, as courts have specifically held in the context of the attorney-client privilege. *See*, *e.g. ACLU v. Dep't. of Justice*, 90 F. Supp. 3d 201,

215 (S.D.N.Y. 2015) (District Court could not determine propriety of withholding under Exemption 5, and required *in camera* inspection, where "*Vaughn* index is vague and conclusory, and the accompanying affidavit does little to fill in the gaps."); *see also Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 564 (S.D.N.Y. 2008) (ordering disclosure of contested communication where "the description provided in Defendants' memorandum of law is far too vague, and simply makes the conclusory assertion that it is subject to attorney-client privilege").

In fact, the unredacted portions of several documents already produced by the government show no apparent solicitation or rendering of legal advice. Instead, those documents describe discussions regarding CIA policy—the way it did "business," including its detailed plans for the use of torture and the ways in which it would avoid subsequent detection. But this type of discussion of business is simply not privileged, even if conducted by or with attorneys. *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962) ("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."); *Erie*, 473 F.3d at 419–20 (noting that distinction between legal and "business" advice, arising out of the context of "corporate in-house lawyers who also serve as business executives," is properly applied to government agencies claiming attorney-client privilege); *Fox News Network v. Dep't of Treasury*, 911 F. Supp. 2d 261, 271 (S.D.N.Y. 2012) (distinguishing legal from "business[] or policy advice" in analyzing Treasury Department's claim of attorney-client privilege in FOIA dispute). For example, Documents Nos. 9, 15, and 18 appear to be policy discussions with regard to the details of CIA torture. *See* Ladin Decl. Exh. 11 (Doc. 9) at 2 ("The waterboard technique remains the IC SERE psychologists' recommended, absolutely convincing technique

for the aggressive phase."); Ladin Decl. Exh. 10 (Doc. 15) at 2 ("The aggressive interrogation began the morning of 4 August 2002. To date the phase has continued for 17 days. During this time psychological and physical pressures have been applied to induce complete helplessness, compliance and cooperation from the subject. Our goal was to reach the stage where we have broken any will or ability of the subject to resist . . ."); Ladin Decl. Exh. 12 (Doc. 18) at 2 ("[W]e have serious reservations with the continued use of enhanced techniques with [detainee] Nashiri . . . To continue to use enhanced technique [*sic*] without clear indications that he is withholding important info is excessive and may cause him to cease cooperation on any level . . . . [Personnel] believe continued enhanced methods may push subject over the edge psychologically."). Because the government has not demonstrated, that such communications were made to solicit legal advice, these documents are not privileged, even though attorneys were involved. *See*, *e.g.*, *Fox News Network v. Dep't of the Treasury*, 739 F. Supp. 2d 515, 561 (S.D.N.Y. 2010) ("Although the email is between counsel and a client, the communication does not appear to be for the purpose of seeking or furnishing legal advice. . . . This email consequently must be disclosed."); *Urban Box Office*, 2006 WL 1004472, at *7–9 (requiring production of numerous exchanges between claimant and counsel that did not apparently seek or render legal advice); *TVT Records v. Island Def Jam Music Group*, 214 F.R.D. 143, 145–46 (S.D.N.Y. 2003) (finding numerous communications between attorney and client to be non-privileged because the communications "include no legal strategy or advice"); *Bernstein v. Mafcote, Inc.*, 43 F. Supp. 3d 109, 115–16 (D. Conn. 2014) ("The Court finds that defendant has not met its burden of showing that these documents are protected by the attorney-client privilege. Although these documents reflect [Claimant] forwarding chain emails to Attorney [], it is unclear whether he has sent such information to Attorney [] predominantly for the purpose

of *legal* advice.") (emphasis in original). And even if the communications contain some legal advice, the Second Circuit has emphasized that "[i]mportantly, redaction is available for documents which contain legal advice that is incidental to the nonlegal advice that is the predominant purpose of the communication." *Erie*, 473 F.3d at 421 n.8.

Other documents discuss only the public relations issues arising from the CIA's torture program. The unredacted portion of Document No. 44, for example—"email exchanges between CIA attorneys and CIA Office of Public Affairs personnel," *Vaughn* Index, ECF No. 48-1 at 16, titled "Re: Interrogation Program—Going Public Draft Talking Points"—reveals nothing more than a public relations note about how disclosures should be attributed so as to maintain plausible deniability in the future. *See* Ladin Decl. Exh. 4 (Doc. 44) at 1 ("This should be attributed to an 'official knowledgable' about the program (or some similar obfuscation), but should not be attributed to a CIA or intelligence official. Our Glomar figleaf is getting pretty thin."). The unredacted portion of Document No. 45—an email in the same chain as Document No. 44—is an attorney's lament that Public Affairs' planned disclosures contradicted the Agency's prior policy regarding the secrecy of the torture program. *See* Ladin Decl. Exh. 3 (Doc. 45) ("Well, this certainly makes the declaration I just wrote about the secrecy of the Interrogation program a work of fiction."). And Doc. 46—another email in this chain – continues in the same vein, noting the need to reconcile the "urgency about the 7th Floor to attempt to defend the CIA program in the public domain," which would "reveal the dam near the entire program," with prior Agency declarations that the underlying information was secret. *See* Ladin Decl. Exh. 2 (Doc. 46).

Although these communications reference court filings, they do not suggest legal analysis or strategy based on confidential agency facts. That is, they do not involve seeking or providing

legal advice with regard to the propriety of disclosing secret CIA information about the torture program—but attempt to direct public relations strategy (or complain about a contrary strategy)—in light of prior legal positions. Communications of this sort, which reflect a conversation about "the message the agency wants to convey, rather than the formulation of the policy itself . . . are not privileged." *Nat'l Day Laborer*, 811 F. Supp. 2d at 759; *see also Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 78–79 (S.D.N.Y. 2010) (finding no attorney-client protection for communications between corporate counsel and communications department that concern "communications strategy relating to . . . litigations, but do not reflect litigation strategy, [or] the advice of counsel"); *In re Bisphenol-A Polycarbonate Plastic Products Liability Litigation*, 2011 WL 1136440, at *3 (W.D. Mo. 2011) (emails between counsel and lobbyists regarding a publicity/lobbying campaign proposal found not privileged); *Burroughs Wellcome Co. v. Barr Labs.*, 143 F.R.D. 611, 619 (E.D.N.C. 1992) (denying protection of attorney-client privilege in civil discovery as to certain documents because "handling publicity and dealing with the media are typically business concerns" and so "not privileged").

Still other documents suggest a purpose not of determining the legality of CIA interrogation methods, but of evading accountability for known torture. For example, Document No. 6 notes that the planned torture of detainee Abu Zubaydah "normally would appear to be prohibited under the provisions of 18 U.S.C. §§ 2340-2340B" and requests "a formal declination of prosecution, in advance." Relatedly, Documents Nos. 7 and 8 are correspondence in which Zubaydah's prospective interrogators sought and obtained assurances that their torture of Zubaydah would never be discovered. *See* Ladin Decl. Exh. 1 (Doc. 7) at 5 ("[I]n light of the planned psychological pressure techniques to be implemented, we need to get reasonable assurances that subject [Abu Zubaydah] will remain in isolation and incommunicado for the

remainder of his life."); Ladin Decl. Exh. 5 (Doc. 8) at 4 (responding, "[t]here is a fairly unanimous sentiment within HQs that [Abu Zubaydah] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released. . . . [A]ll major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life."). Indeed, Document No. 7 notes that CIA field operatives planned to make arrangements for regional "assistance for the cremation of subject [Zubaydah]" in the event of his death by torture. Ladin Decl. Exh. 1 (Doc. 7) at 5. Such communications do not serve the narrow purpose of the attorney-client privilege because they are not communications made "involv[ing] the judgment of a lawyer in his capacity as a lawyer," *Ball v. U.S. Fid. & Guar. Co.*, 1989 WL 135903, at *1 (S.D.N.Y. Nov. 8, 1989), or "which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403 (1976). They are, rather, strategic policy communications between Agency personnel, some of whom simply happened to be attorneys, pertaining to a strategy of concealment (or worse) in order to avoid legal liability.

Indeed, even if these communications were somehow determined to primarily be requests for or renderings of legal advice, based on secret facts, they would still lose their protection under the crime-fraud exception to the attorney-client privilege. *Clark v. United States*, 289 U.S. 1, 15 (1933) ("A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."). This exception derives from the fact that "advice in furtherance of such goals [of fraud or crime] is socially perverse, and the client's communications seeking such advice are not worthy of protection." *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032, 1038 (2d Cir. 1984). As CIA attorneys themselves acknowledged in Doc. 6, the torture of Zubaydah and others violated federal criminal law, 18 U.S.C. §§2340-2340B. Certainly, communications

seeking to conceal that conduct in order to avoid investigation or prosecution further the goals of the crime, and thus fall within this exception to the privilege. *See In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982) (communications "to cover up a crime" are not privileged). Indeed, Documents Nos. 7 and 8, which detail plans to avoid detection of illegal torture (maintaining Zubaydah *in communicado* for life) and conceal prospective evidence (cremation of Zubaydah's body), establish the requisite probable cause to invoke this exception. *See In re Grand Jury Subpoenas Dated March 2, 2015*, 628 Fed. Appx. 13, 15 (2d Cir. 2015) (upholding finding of crime-fraud exception where communications in question were "part of a strategy to further conceal" unlawful conduct); *In re Grand Jury Proceedings*, 102 F.3d 748, 751 (4th Cir. 1996) ("[T]he concealment or cover-up of its criminal or fraudulent activities by the client . . . controls the court's analysis[]."); *Duttle v. Bandler & Kass*, 127 F.R.D. 46, 54 (S.D.N.Y. 1989) (requiring disclosure under the crime-fraud exception of documents "germane to efforts to avoid discovery of the [unlawful] scheme").

Finally, the government has not shown that even disclosure of those communications that *do* appear to solicit or render legal advice would encroach upon "the secrecy of the underlying facts." *Mead*, 566 F.2d at 254 n.28. That is, with regard to even these communications, the government has failed to meet its burden of "show[ing] with 'reasonable certainty . . . that the lawyer's communication rested in significant and inseparable part on the client's confidential disclosure.'" *Cobell v. Norton*, 226 F.R.D. 67, 88 (D.D.C. 2005) (quoting *In re Sealed Case*, 737 F.2d at 99). For example, Doc. 4 states, "if a detainee were granted POW status, and therefore is covered by the Geneva convention, there are few alternatives to simply asking questions." Ladin Decl. Exh. 13 (Doc. 4) at 1. This may constitute legal advice, but the government has provided no evidence that it was responsive to—let alone that its disclosure would reveal—properly secret

facts. Similarly, Documents Nos. 44, 45, and 46 describe CIA attorneys' concerns over the agency's decision to publicly "reveal the dam near the entire program." Ladin Decl. Exh. 2 (Doc. 46). These documents do not appear to reasonably risk the revelation of secret facts held confidential by a client because they discuss the very decision by the client, the CIA, to publicly "reveal" those facts. A decade after the CIA's revelation of "dam near the entire program," it is hard to see what secret facts would be revealed by disclosure of the communication.

The government's assertion of attorney-client privilege should be rejected and its motion for summary judgment on this basis denied.[6]

C. The government has not shown that the Memorandum of Notification may be withheld in full under the presidential-communications privilege.

The government's submissions do not justify withholding the Memorandum of Notification (Doc. 1) in full under the presidential-communications privilege because the government has not properly invoked the privilege and the privilege does not extend to documents that regulate executive agencies. Even if the privilege were properly invoked and applied, it has been waived as to at least part of the Memorandum of Notification (MON). The MON is the foundational document that gave rise to the CIA's network of secret prisons; its authorization of detention and purported authorization of interrogation have been widely disseminated both within and outside the CIA. The government has not demonstrated that the document may be withheld in full as a confidential presidential communication.

As a threshold matter, the government cannot withhold the MON on the basis of the presidential-communications privilege because only the President may personally invoke the privilege to shield particular communications, and he has not done so. . *See Ctr. on Corp.*

[6] In addition to Documents Nos. 4, 7, 8, 9, 15, 18, 44, 45, and 46, which are specifically discussed above, the government has failed to justify the attorney-client privilege as to Documents Nos. 2, 6, 10, 29, and 37.

Responsibility, Inc. v. Shultz, 368 F. Supp. 863, 872–73 (D.D.C. 1973) (holding that where the President sought to keep secret tapes of conversations "regarding the use of the IRS against White House 'enemies'. . . . The President, as head of the 'agency,' the White House, must make the formal claim"). Although the Second Circuit has not ruled on that question, there is good reason to require a personal invocation. In *United States v. Reynolds*, the Supreme Court held that the closely related state-secrets privilege may be lodged only by the "head of the department which has control over the matter." 345 U.S. 1, 7–8 (1953). It reasoned that this procedural requirement, which places the formal responsibility for invoking a weighty privilege in the hands of the individual best situated to ensure that the invocation is legitimate, was a crucial safeguard against the privilege being "lightly invoked." *Id.* at 7; *see also id.* at 8 n.20; *United States v. Burr*, 25 F. Cas. 187 (1807); *Dellums v. Powell*, 561 F.2d 242 (D.C. Cir. 1977). *Reynolds*'s logic applies just as forcefully here. Only the President is in a position to know what role any particular record played in the decision-making process that the privilege is meant to protect. *See Burr*, 25 F. Cas. at 192; *Dellums*, 561 F.2d at 247; *see also In re Sealed Case*, 121 F.3d 729, 744 n.16 (D.C. Cir. 1997) (reviewing personal invocations of the privilege by Presidents Nixon and Clinton). Because the government's declarations do not suggest that the President has personally invoked the privilege, the Court need not even consider the potential application of the presidential-communications privilege to the MON.[7]

The MON also cannot be withheld on the basis of the presidential-communications privilege because the privilege does not extend to documents that regulate executive agencies.

[7] Plaintiffs recognize that certain district court decisions have not required presidential invocation, *see, e.g.*, *Loving v. Dep't of Defense*, 496 F. Supp. 2d 101, 108 (D.D.C. 2007), *aff'd*, 550 F.3d 32 (D.C. Cir. 2008), *cited in* Gov. Br. at 21 n. 9, but Plaintiffs respectfully suggest that these cases were wrongly decided and inconsistent with the Supreme Court's admonition in *Reynolds*.

The presidential-communications privilege protects"[p]residential communications," but its protections are not absolute. *United States v. Nixon*, 418 U.S. 683, 708 (1974). It is intended to ensure the "expectation of a President to the confidentiality of his conversations and correspondence." *Id.* The privilege reflects "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.*; *see also Loving v. Dep't of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008) (explaining that the privilege "preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially"). Recognizing this purpose, courts construe the scope of the privilege "as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected." *In re Sealed Case*, 121 F.3d at 752; *see also Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004) (remarking upon the "dangers of expanding [the privilege] too far"); *Ctr. for Effective Gov't v. Dep't of State*, 7 F. Supp. 3d 16, 27 (D.D.C. 2013) (explaining that because the privilege does not apply to documents that "do not implicate the goals of candor, opinion-gathering, and effective decision-making that confidentiality under the privilege is meant to protect," it does not "extend to documents created by the President and widely transmitted to multiple agencies and their staffers who serve in *non-advisory* roles to the President").

Extending the presidential-communications privilege to the MON would require radically expanding a privilege that courts—including the Supreme Court—have been careful to cabin. Far from being a closely held document forming an integral part of a deliberative process between the President and his closest advisors, the MON regulates agency action—indeed, that is its very point. The government's own declarant asserts that the MON "authorized the CIA to capture and detain terrorists." Shiner Decl., ECF No. 48 at 17. Documents disclosed in this case

further reveal that the MON established the specific legal standard for CIA detention: the CIA could only "capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities." LaMorte Decl. Exh. L1, ECF No. 53-22 at 36. While the privilege shields closely held documents forming an integral part of a deliberative process between the President and his closest advisors, directives that have the legal effect of limiting or regulating agency conduct are of a very different character. Thus, Plaintiffs are not aware of any case holding that a final statement of law or policy or a document regulating agency conduct is protectable under this privilege, and the government cites none. *Compare, e.g.*, *Ctr. for Effective Gov't*, 7 F. Supp. 3d at 27 (rejecting application of the privilege to a presidential policy directive), *with, e.g.*, *Nixon*, 418 U.S. at 688 (applying the privilege to tapes and papers related to presidential meetings); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (similar); *Loving*, 550 F.3d at 39–40 (recommendations to the President concerning presidential review of a service member's capital sentence); *In re Sealed Case*, 121 F.3d at 752 (documents relating to the presidential appointment and removal power); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010) (communications of senior presidential advisors).

Finally, the government cites no authority whatsoever for withholding the entirety of the MON when specific language from the MON has been quoted and extensively distributed inside and outside the executive branch. The general rule that executive privileges are waived as to information that is not kept strictly confidential applies with equal force in the context of presidential communications. *See In re Sealed Case*, 121 F.3d at 741–42 (concluding that "the White House has waived its claims of privilege in regard to the specific documents that it voluntarily revealed to third parties outside the White House" and ordering release of waived

information, while permitting redaction of handwritten notations on the document that had not been waived). Yet the government simply ignores the wide dissemination of elements of the MON, including its title, widely-quoted language, and its length. Although the title of the MON was previously classified in *ACLU v. Dep't of Defense*, Docket No. 1:04-cv-04151-AKH, the related matter before this Court, the CIA has now declassified the document's title, along with the MON standard for capture and detention. The asserted legal standard for CIA detention in the MON has been circulated within multiple agencies in different branches of government, and appears to have been quoted in public reports by both the Department of Justice Office of Professional Responsibility, *see* LaMorte Decl. Exh. L1, ECF No. 53-22 at 36 (apparently quoting MON authorization) and the Senate Intelligence Committee, *see* Ladin Decl. Exh. 14 (same). The broad dissemination of at least this portion of the MON belies the government's claim that the entirety of the MON is secret and "closely held." Gov. Br. 21. At the very least, those parts of the MON as to which any privilege has been waived must be segregated and released. The government's failure to conduct a segregability analysis with respect to the issue of waiver requires that the government's motion for summary judgment be denied.

II. The Government Has Not Justified its Invocations of Exemptions 1 and 3 as to Two Documents.

Plaintiffs' challenge to the government's invocation of Exemptions 1 and 3 is limited: Although the government spends much of its brief defending these categories of redactions, Plaintiffs are not seeking 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." *See* Gov. Br. at 7–11. But the government's conclusory defense of its redactions based on Exemptions 1 and 3 in two documents, the MON (Doc. 1) and the "Summary and Reflections of Chief of Medical Services"

(Doc. 66), which it asserts without explanation "reflect[] intelligence sources and methods," ECF No. 48-1 at 1, and "CIA intelligence activities" and "counterterrorism techniques" ECF No. 48-1 at 19, is insufficient.

Consistent with FOIA's "general, firm philosophy of full agency disclosure," it is the government's burden to prove that Exemption 1 or 3 applies. *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999). Because these exemptions are "narrowly construed," the government's justifications must meet "an exacting standard." *ACLU v. Dep't of Defense*, 389 F. Supp. 2d at 551 (alterations omitted). As the Second Circuit has explained, the government must justify its withholdings with "reasonable specificity" and "without resort to 'conclusory and generalized allegations of exemptions.'" *Halpern*, 181 F.3d at 290. The government's justification for invoking Exemptions 1 and 3 must be both "logical" and "plausible." *N.Y. Times Co. v. Dep't of Justice*, 756 F.3d 100, 119 (2d Cir. 2014). In *New York Times*, for example, the Second Circuit rejected as implausible and illogical the government's invocation of Exemption 1 to keep secret a legal memorandum when the government had already publicly disclosed much of what it sought to hide from the public. Significantly, the Second Circuit ordered disclosure of portions of the memorandum that the government had not previously disclosed, because—in light of what the government had already made public— "[t]he additional discussion" would "add[] nothing to the risk" of harm protected by FOIA's exemptions. *Id.* at 120; *see also ACLU v. CIA*, 710 F.3d 422, 429–430 (D.C. Cir. 2013) (holding that the CIA's assertion of harm to national security was neither logical nor plausible).

The government has failed to meet its burden of justifying its withholding of the MON with specificity and on the public record. At no point does the government provide anything beyond a conclusory public justification for maintaining the secrecy of material in the MON.

This is plainly inadequate. FOIA obligates the government to explain its claims in as much detail as possible on the public record. *See N.Y. Times Co. v. Dep't of Justice*, 758 F.3d 436, 439 (2d Cir. 2014) (explaining that it is the government's duty "to create as full a *public* record as possible, concerning the nature of documents and the justification for nondisclosure" (quotation marks omitted)); *accord Halpern*, 181 F.3d at 291, 295. Courts disfavor reliance on *in camera* affidavits because of their "negative impact on the effective functioning of the adversarial system." *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 580–81 (D.C. Cir. 1996); *ACLU v. DOD*, 389 F. Supp. 2d at 567. Trial courts must accordingly ensure, as this Court consistently does, that the use of *in camera* affidavits "is justified to the greatest extent possible on the public record and must then make available to the adverse party as much as possible of the in camera submission." *Lykins v. Dep't of Justice*, 725 F.2d 1455, 1465 (D.C. Cir. 1984) (citation omitted). This obligation applies equally in cases involving national security. *See Armstrong*, 97 F.3d at 581; *see also Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 75–76 (2d Cir. 2009). Without a public record of the government's arguments, requesters are denied a meaningful opportunity to challenge the government's grounds for withholding, courts are denied the benefit of an adversarial process and are forced to take on the very burdensome task of reviewing documents *in camera*, while the FOIA requester and the public are denied any explanation for government secrecy.

The insufficiency of the government's current justification is particularly striking when compared to the more fulsome public justification the government provided nine years ago in this Court. Then, the government described the document as a

> 14-page document [that] consists of a 12-page notification memorandum and an attached two-page cover memorandum. The 12-page notification memorandum is a memorandum from the President to the members of the NSC regarding a clandestine intelligence activity. The two-page cover memorandum is a transmittal memorandum from the

> Executive Secretary of the NSC to the Director of the CIA. The 12-page memorandum pertains to the CIA's authorization to detain terrorists. The memorandum discusses the approval of the clandestine intelligence activity and related analysis and description.

Eighth Decl. of Marilyn A. Dorn, CIA Info. Review Officer, *ACLU v. DOD*, No. 04 Civ. 4151 (S.D.N.Y. June 8, 2007), ECF No. 226 at ¶¶ 67–68. The CIA provided extensive detail about the MON in explaining the document's classification: It set forth the document's length; it confirmed the document's date; it revealed the document's author and the agency components to which the document was sent; it generally described the document's contents, and it provided details about the document's contents and genesis. *See id.* ¶¶ 66–79. The government provided that far more fulsome description even at a time when the government asserted that the very name of the memorandum was too secret to be released. In the intervening years, the MON has been officially acknowledged and some of its language released, *see supra*. The public should not now be entitled to *less* information about the MON.

The government asserts that "certain material" in the MON "reflects intelligence sources and methods," and maintains that the document must be withheld in full but provides no further detail. It is not clear whether the government means that every word of the MON—including those that have apparently been publicly distributed, *see* LaMorte Decl. Exh. L1, ECF No. 53-22 at 36 (quoting MON detention authorization)—would "reveal" rather than "reflect" protected sources and methods, because the government has not justified its withholdings on the public record. Even in the national security context, however, the government's declarations must "afford the FOIA requester a meaningful opportunity to contest" the withholding. *Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). The government's entirely conclusory justifications in this case deny Plaintiffs that opportunity. *See Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007) (the "[c]ategorical description of redacted material coupled with

categorical indication of anticipated consequences of disclosure is clearly inadequate."). And even if "certain material" indeed qualifies for protection, the government does not explain whether the rest of the document, like the apparently already-released language setting forth the detention authorization, can be segregated from any protected facts. *See, e.g.*, *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 505 F. Supp. 2d 150, 158 (D.D.C. 2007) ("Even if Exemption 1 is found to justify withholding the documents, [the government] may not automatically withhold the full document as categorically exempt without disclosing any segregable portions.").

The *Vaughn* index and Shiner declaration likewise provide insufficient detail to justify the redaction in Document No. 66 of "CIA intelligence activities" and "counterterrorism techniques." To the extent these vague descriptions pertain to medical details of the CIA's detention and abuse of persons suspected of terrorism, it is hard to see how these details could be properly classified in light of the extensive declassification of the CIA program. But without more detail, neither the ACLU nor the Court can properly assess the appropriateness of the redaction. Because the government has improperly invoked Exemption 5 to completely redact the document, *see supra* Section I.C, it is impossible to gauge the extent of material improperly redacted under this conclusory assertion of Exemptions 1 and 3.

III. The Government Appears to Have Improperly Withheld Information.

The government appears to have withheld the last page of Document No. 44 by marking it "NR." *See* Ladin Decl. Exh. 4 (Doc. 44) at 2. The government does not explain this marking in the *Vaughn* index. To the extent the CIA is withholding portions of a document as "non-responsive" to Plaintiffs' FOIA request, the government has not attempted to justify this

withholding. Nor could it, because the FOIA does not authorize the CIA to withhold documents on this basis.

As the D.C. Circuit recently made clear, there is no legal basis for agencies to redact information from documents disclosable under FOIA unless the information falls under one of FOIA's nine statutory exemptions. *See Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677–78 (D.C. Cir. 2016). The D.C. Circuit came to that conclusion about a record that is similar to the one before this Court: a chain of agency emails that appeared to address a range of topics. The court rejected the government's argument that, because "it is not unusual for an email chain to traverse a variety of topics having no relationship to the subject of a FOIA request," agencies should be permitted to withhold parts of the record as nonresponsive." *Id.* at 678. The court explained that the FOIA statute is clear: "Congress determined that the statutory exemptions sufficiently cover the types of information which it is appropriate for the government to redact from a responsive document." *Id.* Accordingly, "once an agency itself identifies a particular document or collection of material—such as a chain of emails—as a responsive 'record,' the only information the agency may redact from that record is that falling within one of the statutory exemptions." *Id.* at 678–79. The court acknowledged the agency's concerns, but observed that "insofar as they relate to the policy choices embedded in the scope of the statute's disclosure mandate, they are best directed to Congress." *Id.* at 678.

To the extent that the CIA has impermissibly redacted information as non-responsive, the government has not, and cannot, justify that departure from FOIA's mandate. The government's motion for summary judgment on this basis as well should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny summary judgment to defendants as to Documents Nos. 1, 2, 4, 6, 7, 8, 9, 10, 13, 14, 15, 18, 19, 28, 29, 37, 43, 44, 45, 46, 55, and 66, and order their release.

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Respectfully submitted,

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