



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

June 1, 2017

BY ECF & HAND DELIVERY

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:

We write respectfully on behalf of Defendants (the “government”) to provide the Court with supplemental authority concerning the government’s assertion of Exemption 5 with respect to document no. 66, one of the documents at issue in the government’s pending motion for summary judgment in the above-referenced Freedom of Information Act (“FOIA”) case.

As noted by the parties during the oral argument on March 29, 2017, certain documents sought by the plaintiffs in this case have also been the subject of a discovery dispute in connection with *Salim v. Mitchell*, No. CV-15-0286-JLQ (E.D. Wash.), a *Bivens* case pending in the United States District Court for the Eastern District of Washington. The plaintiffs in *Salim* are represented by the ACLU, the plaintiff in this case. The documents at issue in both cases include a draft document titled “Summary and Reflections of the Chief of Medical Services on OMS Participation in the RDI Program,” one of the records on which this Court has reserved decision. That document is designated document no. 66 in this case, and is designated document no. 46 in the *Salim* case. In this case, the government withheld the document in part under Exemption 5 on the basis that the information withheld is protected by the deliberative process privilege and thus “would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). In response to a discovery demand by the defendants in the *Salim* case, the government withheld this same information pursuant to the deliberative process privilege.

In a decision on the *Salim* defendants’ motion to compel issued yesterday, attached hereto as Exhibit A, the *Salim* court concluded that the government properly withheld the unreleased portions of the “Summary and Reflections of the Chief of Medical Services” (document no. 46) pursuant to the deliberative process privilege. *See* Exhibit A at 12. The government respectfully submits that this decision is new and relevant authority that further supports the government’s Exemption 5 assertion in this case.

Thank you for your consideration of this matter.

Respectfully,

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Attorney for Defendants

By: /s/
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Encl.

cc: Counsel of record