UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

15 Civ. 9317 (AKH)

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

MEMORANDUM OF LAW IN SUPPORT OF THE GOVERNMENT'S MOTION TO ALTER OR AMEND THE JUDGMENT AND TO RECONSIDER THE COURT'S SEPTEMBER 27, 2017 OPINION AND ORDER

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PRELIMINARY STATEMENT

Defendant the Central Intelligence Agency (the "CIA" or the "Government") respectfully submits this memorandum of law in support of its motion, 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) (the "September 27 Order" or "Order"). Specifically, the Government requests that the Court reconsider its rulings on Document No. 66, a draft document entitled "Summary and Reflections of Chief of Medical Services on OMS Participation in the RDI Program" ("Document 66"). *See* Order at 30-39.

Reconsideration is warranted to avoid clear error because the Court has ordered the disclosure of discrete classified and statutorily protected information in Document 66, including undisclosed details concerning CIA intelligence methods and activities. The Court appears to have assumed that disclosure of this information would not pose a risk to national security because aspects of the CIA's detention and interrogation program have been declassified. But the Court has overlooked evidence in the record demonstrating that the intelligence information at issue has not been declassified or disclosed. The Court should therefore reconsider its disclosure order and allow the Government to make a supplemental submission identifying the specific classified and statutorily protected information at issue and explaining why it remains properly classified and exempt from disclosure under Exemptions 1 and 3.

Moreover, the Court has overlooked facts in the record and binding Second Circuit law demonstrating that Document 66 is a privileged draft protected from disclosure by Exemption 5. Reconsideration is therefore warranted on that basis as well.

Lastly, the Government respectfully requests clarification with regard to the specific information that the Court has ordered disclosed from Document No. 8 ("Document 8").

ARGUMENT

"The standards governing a motion for reconsideration under Local Rule 6.3 are the same as those under Federal Rule of Civil Procedure 59(e)." *Abrahamson v. Bd. of Educ.*, 237 F. Supp. 2d 507, 510 (S.D.N.Y. 2002). Motions for reconsideration "should be granted only when the defendant identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013) (quotation marks and citations omitted); *see also Fireman's Fund Ins. Co. v. Great Am. Ins. Co.*, 10 F. Supp. 3d 460, 475 (S.D.N.Y. 2014) (same standard applies under Local Rule 6.3). The movant must "point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *accord Human Rights Watch v. DOJ Fed. Bur. of Prisons*, No. 13 Civ. 7360(JPO), 2016 WL 3541549, at * 1 (S.D.N.Y. June 23, 2016) (granting reconsideration in FOIA case).

I. Reconsideration Is Warranted Because the Court Has Ordered Disclosure of Properly Classified and Statutorily Protected Information

In its September 27 Order, the Court directed the Government to release nearly all of Document 66—an 89-page, single-spaced document consisting of "a detailed account of the CIA's detention and interrogation program from the perspective of the author." Order at 30, 39. The Court allowed the Government to make limited redactions to the document to protect information concerning foreign liaison services, locations of covert CIA installations and former detention centers, classified code words or pseudonyms, classification and dissemination control

markings, and the names of CIA personnel. Order at 37 n.4, 39. However, the Court ordered disclosure of the balance of the document, which includes discrete classified information regarding CIA intelligence methods and activities, including counterterrorism techniques. *Id.* at 37; *see* ECF No. 48 ("Shiner Decl.") ¶ 12.

With regard to Exemption 5, the Court found that the CIA's declarations provided insufficient "context" for the document, and thus failed to establish that it was deliberative, a necessary element of the deliberative process privilege. Order at 31. With regard to Exemptions 1 and 3, although the CIA identified and described the categories of classified and statutorily protected information contained in Document 66, *see* Shiner Decl. ¶¶ 12-20, the Court found this approach insufficient to sustain the Government's burden. Order at 37-39. The Court ruled that the Government should have identified the specific classified and statutorily protected information within Document 66, *id.* at 37, and explained why disclosure of that specific classified information would cause harm to national security, *id.* at 38. The Court surmised that, "[i]n 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." *Id.* at 38. Relying on the Second Circuit's decision in *New York Times Co. v. U.S. Department of Justice*, 756 F.3d 100, 120 (2d Cir. 2014), the Court appears to have concluded that release of information in the document regarding CIA intelligence methods and activities would pose no risk to national security. Order at 38.

The Government respectfully requests that the Court reconsider this ruling. District courts typically allow the Government to make supplemental submissions, rather than ordering disclosure, where they find the agency's submissions insufficiently detailed to justify application of a FOIA exemption. *See, e.g.*, *N.Y. Legal Assistance Grp. v. U.S. Dep't of Educ.*, No. 15 Civ.

3818(LGS), 2017 WL 2973976, at *7-8 (S.D.N.Y. July 12, 2017) (denying summary judgment as to certain documents, but allowing the agency to make supplemental submissions and then renew its motion); *ACLU v. U.S. DOJ*, 210 F. Supp. 3d 467, 485-86 (S.D.N.Y. 2016) (same); *N.Y. Times Co. v. U.S. DOJ*, 915 F. Supp. 2d 508, 545-46 (S.D.N.Y. 2013) (directing government to submit supplemental declaration where court found initial declaration "wholly conclusory"), *supplemented by* 2013 WL 238928 (S.D.N.Y. Jan. 22, 2013) (upholding deliberative process assertion based on supplemental declaration), *aff'd in relevant part, rev'd in part on other grounds*, 756 F.3d 100 (2d Cir. 2014). Indeed, this Court has done so in the related FOIA case brought by the ACLU. *See, e.g.*, *ACLU v. DOD*, 04 Civ. 4151(AKH), ECF No. 513 at 20 (Order dated Aug. 27, 2014); ECF No. 543 at 3 (Order dated Feb. 18, 2015). That cautious approach is particularly appropriate here, as the Government has invoked Exemption 1 to protect classified information—which by definition "reasonably could be expected to cause damage to the national security" if publicly disclosed. *See* Executive Order 13526 § 1.4, 75 Fed. Reg. 707 (Dec. 29, 2009).

The Court stated in the September 27 Order that "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.'" Order at 38-39. The Court appears to have overlooked that the CIA's declarant, Antoinette B. Shiner, explained in her initial declaration that Document 66 contains several categories of classified information, *see* Shiner Decl. ¶¶ 10-21, and she offered to provide additional information in a classified declaration if the Court required additional detail that could not be provided on the public record, *see id.* ¶ 12. The ACLU raised only one challenge to the Government's assertion of Exemptions 1 and 3 with regard to Document 66, concerning the

possible withholding of "medical details," ECF No. 57 at 31, which the CIA addressed in its supplemental declaration, ECF No. 67 ("Supp. Shiner Decl.") ¶ 22. The ACLU's sur-reply made no further argument regarding the Exemption 1 and 3 withholdings in Document 66. ECF No. 70.[1]

To the extent the Court concluded that disclosure of the information in Document 66 concerning intelligence methods and activities would pose no risk to national security because certain aspects of the CIA's detention and interrogation program have been declassified, Order at 38, the Court has overlooked the record evidence demonstrating otherwise. Ms. Shiner specifically addressed this in her initial declaration, stating:

> I note that, in conjunction with SSCI's study, the CIA declassified certain information related to the former detention and interrogation program. I have carefully considered the records at issue in this case in light of those declassifications and I have determined that, *notwithstanding those disclosures*, each of these documents contains certain details that remain exempt from disclosure pursuant to [Exemptions 1 and 3, among other exemptions].

Shiner Decl. ¶ 9 (emphasis added). Ms. Shiner then proceeded to describe the categories of still-classified information, among them "descriptions of specific intelligence methods and activities, including certain counterterrorism techniques. *Id.* ¶ 12. She explained that this category is not limited to the detention and interrogation program, but also includes "details that would disclose *other intelligence methods and activities* of the CIA." *Id.* ¶ 16 (emphasis added). "For example, the CIA protected *undisclosed details* about certain intelligence gathering techniques and

[1] During the *in camera* proceeding in March 2017, the Court asked about the classified information in Document 66, and counsel identified several categories of classified information in the document, which the Court agreed were subject to redaction. Tr. Mar. 29, 2017, at 37-38. The Court then stated, "[i]f you on further review want to make additional points, you may." *Id.* at 38. The Government understood this as an invitation to identify additional categories of classified information beyond those already addressed in the CIA's declaration, rather than a direction to provide a version of the document identifying the specific classified and statutorily protected information contained therein. If the Government misunderstood the Court's direction, we apologize for that misunderstanding and respectfully request that the Court afford the Government an opportunity to correct it.

Agency tradecraft, which have been, and continue to be, used in [a] range of CIA operations and activities including current counterterrorism operations." *Id.* ¶ 17 (emphasis added). Ms. Shiner also described the harm to national security that is likely to result from disclosure of these "undisclosed details":

> Revealing this information would tend to show the breadth, capabilities, and limitations of the Agency's intelligence collection or activities. Such disclosures could provide adversaries with valuable insight into CIA operations that would damage their effectiveness. Adversaries could use this information to develop measures to detect and counteract the Agency's intelligence methods and the operational exercise of those methods.

Id. The Court did not discuss this evidence in the September 27 Order.

The Second Circuit's decision in *New York Times v. U.S. Department of Justice*, 756 F.3d 100 (2d Cir. 2014), does not support the Court's apparent conclusion that information in Document 66 concerning intelligence methods and activities would pose no risk to national security if disclosed. Order at 38. In *New York Times*, the Second Circuit held that, in light of the Department of Justice's official disclosure of a white paper outlining the legal basis for certain targeted lethal operations, the Department could no longer withhold "virtually parallel[]" legal analysis in an Office of Legal Counsel ("OLC") opinion on the same topic, particularly given that the Attorney General had publicly acknowledged a "close relationship" between the white paper and previous OLC advice. 756 F.3d at 116. The Circuit held, however, that "[t]he loss of protection for the legal analysis in the [OLC opinion] does not mean . . . that the entire document must be disclosed." *Id.* at 117. To the contrary, recognizing that "in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose those facts," the Court redacted the entire factual section of the OLC opinion. *Id.* at 119 ("we have redacted . . . the entire section of the [opinion] that contains any mention of intelligence gathering activities").

In this case, by contrast, the Court has ordered release not of legal analysis, but of undisclosed factual details about "certain intelligence gathering techniques and Agency tradecraft, which have been, and continue to be, used in [a] range of CIA operations and activities including current counterterrorism operations." Shiner Decl. ¶ 17; Order at 37-39. That is the same type of classified factual information that the Second Circuit protected in *New York Times* when it redacted "any mention of intelligence gathering activities." 756 F.3d at 119.

The record before the Court shows, moreover, that these details have not been declassified or disclosed. Shiner Decl. ¶ 17. There is therefore no factual basis on the present record to conclude, as the Second Circuit did in *New York Times*, that the information about intelligence methods and activities being withheld by the agency "virtually parallels" information that has been officially disclosed. 756 F.3d at 116. In order to make such a determination, the Court would need to apply the three-part test for official disclosure, and consider whether the withheld information about CIA intelligence methods and activities "is as specific as the information previously released" about the detention and interrogation program; "matches the information previously disclosed"; and "was made public through an official and documented disclosure." *Id.* at 120 (quoting *Wilson v CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (internal quotation marks and alterations omitted)); *see id.* at 120 & n.19 (noting that "*Wilson* remains the law of this Circuit"). The Court cannot make that evaluation without knowing the specific classified and statutorily protected information the CIA has withheld.

For all of these reasons, the Government respectfully requests that the Court reconsider its ruling and permit the Government to make a supplemental submission to identify and further justify the withholding of classified and statutorily protected information in Document 66 under Exemptions 1 and 3. The CIA has prepared a version of Document 66 that identifies the discrete

classified and statutorily protected information that has been ordered disclosed by virtue of the September 27 Order. The Government respectfully requests leave to submit that document for the Court's review *ex parte* and *in camera*, along with a supplemental declaration explaining why the information remains currently and properly classified and/or protected from disclosure by statute.

II. The Court's Exemption 5 Ruling Overlooked Facts in the Record and Binding Precedent

The Court should also reconsider its Exemption 5 ruling as to Document 66 because the Court overlooked facts in the record and binding precedent demonstrating that Document 66 is a predecisional and deliberative draft that is protected from disclosure by the deliberative process privilege and Exemption 5. The Government respectfully submits that these facts and authorities "might reasonably be expected to alter the conclusion reached by the court." *Shrader*, 70 F.3d at 257.

The record before the Court establishes that Document 66 is a draft document authored by the then-Chief of the CIA's Office of Medical Services ("OMS") purporting to "summarize and reflect" on OMS's participation in the CIA's detention and interrogation program. Supp. Shiner Decl. ¶ 22; Document 66 at 1 (title page). The document is not only expressly labeled a draft; it is a draft in substance. The document is not on letterhead; it is not signed; and it contains typographical errors and other indicia that the author had not completed the document. Supp. Shiner Decl. ¶ 22 (Document 66 is "remained a working draft and was never finalized"); *see, e.g.*, Document 66 at 85 (indication that text is to be added). In short, the document is not finished. Even the author had not completed the process of summarizing and reflecting.

The Second Circuit has recognized that such draft documents are, by their very nature, predecisional and deliberative. *See ACLU v. DOJ*, 844 F.3d 126, 133 (2d Cir. 2016) (draft

opinion editorial concerning legal basis for drone strikes). This is true even where a draft, like Document 66, is never finalized. This Court stated in the September 27 Order that "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." Order at 35. But the Court appears to have overlooked that the Second Circuit rejected this premise in *ACLU*, holding that the draft op-ed, which "was never published," nevertheless was protected by the deliberative process privilege. 844 F.3d at 133. The Circuit's reasoning was simple—"it is a draft and for that reason predecisional." *Id.*[2]

ACLU is not the only Second Circuit case establishing that draft documents of this sort are privileged. The Circuit has repeatedly instructed that the deliberative process "privilege protects . . . draft documents . . . and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (internal quotation marks omitted), *quoted in Tigue v. U.S. DOJ*, 312 F.3d 70, 80 (2d Cir. 2002). The record establishes that Document 66 is such a document. "[I]t is a selective, draft account of one Agency officer's impressions of the detention and interrogation program." Supp. Shiner Decl. ¶ 22. Document 66 does not represent OMS's or the CIA's assessment of the program. *Id.* At most, the document "reflects the personal opinions of the writer rather than the policy of the agency," and its release would therefore "inaccurately reflect or prematurely disclose the views of the agency." *Cuomo*, 166 F.3d at 482 (internal quotation marks omitted). In fact, because Document 66 was "a working draft" that "was never finalized," Supp. Shiner Decl. ¶ 22, it does not even reflect the final opinions of the

[2] This Court noted that the Second Circuit did not use the word "deliberative" in *ACLU*, *see* Order at 33, but in holding that the draft op-ed was protected by the deliberative process privilege, the Second Circuit necessarily found that it was both predecisional and deliberative, as both are required elements of the privilege.

author. These facts amply establish the deliberative character of the document under Second Circuit law. *See Cuomo*, 166 F.3d at 482; *Tigue*, 312 F.3d at 80.

The Court stated in the September 27 Order that "we do not know anything about the document other than what is apparent from the document itself." Order at 31. This overlooks the facts discussed above regarding the selective, draft, and subjective nature of the document. But it also overlooks that the deliberative nature of Document 66 is apparent from the document itself. According to its title, as well as its content, the document purports to summarize and reflect upon OMS's experiences in relation to the CIA's detention and interrogation program. The document itself represents a deliberative process—the author was attempting to summarize the facts that he believed were relevant and important to understanding and assessing OMS's role in the program, and he was making observations and drawing conclusions based on those pertinent facts. It represents the author's still-ongoing effort to deliberate and reflect upon past events in an effort to draw conclusions for purposes of future decisionmaking about OMS's role. Like Document 18, which the Court found deliberative, Order at 24-25, Document 66 on its face "reflects a desire to contribute to future deliberations" regarding the role of OMS in such counterterrorism programs. *Id.* at 24. The record, including the document itself, thus sufficiently demonstrates the "function and significance" of Document 66 to justify the application of the privilege. Order at 32 (quoting *N.Y. Times Co. v. U.S. DOD*, 499 F. Supp. 2d 501, 515 (S.D.N.Y. 2007)).

In holding that the Government failed to establish that Document 66 was actually relied upon by a decisionmaker in connection with a particular policy decision, Order at 31, the Court appears to have overlooked that the Second Circuit has explicitly rejected any such requirement. In *Tigue v. U.S. Department of Justice*, the Circuit held that "the fact that the government does

not point to a specific decision made by the [agency] in reliance on the [document at issue] does not alter the fact that the [document] was prepared to assist [agency] decisionmaking on a specific issue." 312 F.3d at 80. Document 66 was prepared to assist OMS and CIA in evaluating and learning from OMS's experiences in relation to the detention and interrogation program, for the purpose of making future decisions about OMS's role. As such, Document 66 "bear[s] on the formulation or exercise of policy-oriented judgment" and is "actually . . . related to the process by which policies are formulated," *Cuomo*, 166 F.3d at 482, whether or not it led to any specific decision.

Nor was the Government required to identify whether Document 66 "was circulated within OMS or the CIA" in order to establish the deliberative nature of the document. Order at 31. As the record demonstrates, the document was a work in progress. Whether or not it was circulated within OMS or CIA does not change its predecisional and deliberative status. If an evaluative and subjective document like Document 66 is predecisional and deliberative when it is circulated within an agency, then surely it is predecisional and deliberative at an earlier stage—before the author has even completed it.

The Court cited a number of cases for the proposition that the deliberative process privilege does not protect purely factual information. *See Paisley v. CIA*, 712 F.2d 686, 699 (D.C. Cir. 1983) (privilege does not protect "factual summaries prepared for informational purposes") (quoted in Order at 34); *see also Fox News Network LLC v. U.S. Dep't of Treas.*, 911 F. Supp. 2d 261, 278, 279 (S.D.N.Y. 2012) (privilege does not protect documents that merely "recit[e]" or "rehearse[] past events") (quoted in Order at 32); *Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 60 (D.D.C. 2014) (privilege does not protect document that "merely recites factual information"). The record shows, however, that Document 66 does not merely recite past

events; it purports to summarize and reflect upon those events. *See also* Supp. Shiner Decl. ¶ 22 (Document 66 deliberative because "it is a selective, draft account of one Agency officer's impressions of the detention and interrogation program"). Thus, in addition to being a draft, the factual information selected for inclusion is bound up with the evaluative nature of the document. *See Tigue*, 312 F.3d at 82 (rejecting argument that "even . . . factual material admittedly in the public domain" could be segregated from evaluative document); *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 85 (2d Cir. 1979) (factual materials entitled to protection under deliberative process privilege if inextricably intertwined with deliberative information).

The Court also relied on *NDLON v. U.S. Immigration and Customs Enforcement Agency*, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011), which stated that a draft is "not privileged if it reflects the personal opinions of a writer with respect to how to explain an *existing* policy or decision." But the Second Circuit rejected this premise in *ACLU*, which held that the deliberative process privilege protected a draft of a never-published op-ed "that suggested some ways of explaining the Government's legal reasoning in support of drone strikes." 844 F.3d at 133. Indeed, in its unsuccessful brief to the Second Circuit in that appeal, the ACLU cited *NDLON*, as well as *Fox News*, in arguing that "the deliberative process privilege does not protect deliberations concerning how to present government policies to the public." *ACLU v. U.S.DOJ*, No. 15-2956(L), ECF No. 118, at 18-19. Yet Second Circuit squarely rejected that argument, and thus *NDLON* and *Fox News* are not persuasive authority on that point.

III. Clarification Is Needed Regarding the Particular Information Ordered Disclosed from Document 8

The Court ordered the Government to disclose certain portions of Document 8 that it concluded were not covered by the attorney-client or deliberative process privileges. Order at 19-20. It is not clear to the Government, however, precisely which portions the Court has ordered redacted. Specifically, the Court ordered the Government to release "[t]he entirety of Section 4F on page 4," as well as "[t]he sentence that begins with the phrase 'As has been . . .' that appears at the bottom of page 4." *Id.* at 20. The identified sentence, however, appears to be included within Section 4F on page 4. Accordingly, the Government respectfully requests clarification with regard to the information the Court has ordered disclosed on page 4 of Document 8.

CONCLUSION

For the foregoing reasons, the Court should reconsider its September 27 Order insofar as it ordered the disclosure of Document 66, grant the Government leave to make a supplemental submission to further justify its withholdings, and clarify its ruling with regard to Document 8.

Dated: New York, New York
October 26, 2017

Respectfully submitted,

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