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 TO ALTER OR AMEND THE JUDGMENT AND TO RECONSIDER THE COURT'S SEPTEMBER 27, 2017 OPINION AND ORDER

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PROCEDURAL HISTORY

On August 14, 2015, the ACLU submitted a FOIA request seeking, among other documents, a retrospective account of the role of the CIA Office of Medical Services in the CIA torture program ("Document 66"). After receiving no documents for three months, the ACLU brought this action.

On October 14, 2016, the government moved for summary judgment, arguing that it was entitled to withhold Document 66 under Exemptions 1, 3, and 5. Along with its motion for summary judgment, the government submitted both *ex parte* and public declarations. The government's public filings provided only categorical and nonspecific claims about the information claimed as exempt in Document 66, and its *ex parte* declaration did not address Document 66 at all. The ACLU's opposition brief, filed November 18, 2017, pointed out that the government had failed to provide any detail as to the claimed withholdings in Document 66. *See* Pls. Opp. Br., ECF No. 57 at 7–8, 31.

In January 2017, with its reply brief, the government submitted a supplemental declaration that purported to further justify its withholding of Document 66. The government's supplemental description of Document 66 consisted of a single paragraph. *See* Supplemental Shiner Declaration, ECF No. 67 ¶ 22.

On March 29, 2017, the government was afforded yet another opportunity to specifically justify its claimed withholdings as to Document 66 in an *in camera* session. On September 27, 2017, the Court ruled that Defendants had failed to justify the withholding of Document 66. Twenty-eight days later, the government moved for reconsideration.

ARGUMENT

Reconsideration "under Local Rule 6.3 'is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.'" *Schoolcraft v. City of New York*, 248 F. Supp. 3d 506, 508 (S.D.N.Y. 2017) (quoting *Ferring B.V. v. Allergan, Inc.*, No. 12 Civ. 2650 (RWS), 2013 WL 4082930, at *1 (S.D.N.Y. Aug. 7, 2013)). Here, the government argues that reconsideration is required so that it may introduce additional *ex parte* evidence as to Exemptions 1 and 3. But as this Court recently explained, "[a] party moving for reconsideration 'is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then use such a motion to . . . adduce new evidence in response to the court's rulings.'" *Perdomo v. Decker*, No. 17 Civ. 3268 (AKH), 2017 WL 4280688, at *1 (S.D.N.Y. Sept. 20, 2017) (quoting *Polsby v. St. Martin's Press, Inc.*, 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (internal quotation marks and citation omitted)).

Belated introduction of evidence through reconsideration is particularly disfavored in FOIA cases. "[T]he interests of judicial finality and economy have special force in the FOIA context, because the statutory goals—efficient, prompt, and full disclosure of information—can be frustrated by agency actions that operate to delay the ultimate resolution of the disclosure request." *Senate of Puerto Rico on Behalf of Judiciary Comm. v. U.S. Dep't of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987) (citations and quotation marks omitted). As the Court has made clear in a related case, the delay imposed by government motions for reconsideration is particularly pernicious in the FOIA context, because "time is of the essence in a FOIA case." *Am. Civil Liberties Union v. Dep't of Def.*, 396 F. Supp. 2d 459, 463 (S.D.N.Y. 2005) (denying partial motion for reconsideration), *as amended* (Nov. 2, 2005); *see also Am. Civil Liberties Union v. Dep't of Def.*, 357 F. Supp. 2d 708, 712 (S.D.N.Y. 2005) ("Delay . . . is prejudicial, for FOIA

requires prompt disclosure of non-exempt information relevant to the public interest."); *Am. Civil Liberties Union v. Dep't of Def.*, 339 F. Supp. 2d 501, 505 (S.D.N.Y. 2004) ("To permit further delays in disclosure or providing justification for not disclosing would subvert the intent of FOIA."); *Id.* at 504 ("In amending FOIA, Congress evinced an increasing concern over the timeliness of disclosure, recognizing that delay in complying with FOIA requests may be 'tantamount to denial.'" (quoting H. Rep. No. 876, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N., 6267, 6271)). The government has had ample opportunity to adduce evidence justifying its claimed exemptions; it would frustrate FOIA's purpose to reward agency failure with further delay.

The government also argues that reconsideration is required because it disagrees with the Court's ruling on Exemption 5. But the government itself recognizes that "[m]otions 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.'" Gov. Br., ECF No. 80 at 2 (quoting *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013) (quotation marks and citations omitted). The government points to no intervening change in the law or previously unavailable evidence, nor does it argue that the Court's ruling results in manifest injustice. To prevail, therefore, the government must identify a clear error in the Court's order, specifically "controlling decisions or data that the court overlooked." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). The government has not done so. Its motion should be denied.

I. The Court did not clearly err by ruling that the government had failed to justify its invocations of Exemptions 1 and 3 in Document 66 over the course of two public declarations, an *ex parte* declaration, and an *in camera* session.

Having repeatedly failed to make the showing Congress imposed for FOIA cases, the government now argues that it is clear error for the Court not to have provided it additional

opportunities, and that reconsideration should be granted for this purpose. Gov. Br. at 4 ("The Court appears to have overlooked that the CIA's declarant . . . offered to provide additional information . . . ."). But "[i]t is well-settled that Rule 59 is not a vehicle for . . . taking a 'second bite at the apple'. . . ." *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998); *see also Rafter v. Liddle*, 288 F. App'x 768, 769 (2d Cir. 2008) ("[W]e do not consider facts not in the record to be facts that the court 'overlooked.'"). The government has been afforded at least four opportunities to justify its claimed entitlement to withhold sections of Document 66, including two public declarations, a classified declaration, and an *in camera* session with the Court. It can hardly be clear error for the Court not to have offered the government a fifth bite.

As this Court correctly held, "FOIA requires the Government to 'supply the courts with sufficient information to allow us to make a reasoned determination that they were correct.'" 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 ("Order") at 37 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980)). It is Congress that imposed this burden, *see Wood v. F.B.I.*, 432 F.3d 78, 83 (2d Cir. 2005) ("The government bears the burden of establishing that any claimed exemption applies."), and Congress that required courts to hold the government to this standard even where the government asserts that information is classified, *see Halpern v. F.B.I.*, 181 F.3d 279, 291 (2d Cir. 1999) (Congress amended FOIA in 1974 to clarify "that de novo review should apply in all cases, and specifically extended the language of FOIA's provision for *in camera* inspection to encompass Exemption 1"). As the Second Circuit has explained, "blind deference is precisely what Congress rejected when it amended FOIA in 1974." *Halpern*, 181 F.3d at 293. Yet blind deference is what the government repeatedly demanded in this matter, having chosen not to supply the Court with

anything more than boilerplate language in support of its claimed Exemptions 1 and 3 withholdings in Document 66.

The government's repeated and longstanding failure to bear its burden is not something that the Court overlooked. Nearly a year ago, the ACLU pointed out that government's wholly conclusory submissions "provide insufficient detail to justify the redaction in Document No. 66 of 'CIA intelligence activities' and 'counterterrorism techniques.'" Pl. Opp. Br., ECF No. 57 at 31. Together with its reply, the government submitted a new declaration. *See* ECF No. 67. That supplemental declaration, however, added only eleven words as to the CIA's claimed withholdings under Exemption 1 and 3 in Document 66: "No medical details were withheld pursuant to Exemptions 1 and 3." ECF No. 67 ¶ 22. The government likewise provided no meaningful justification in response to the *in camera* opportunity the Court afforded it in March 2017. As a result, the Court concluded—and the record confirms—that over the course of its many opportunities, "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.[1]

The government is also mistaken in accusing the Court of having "overlooked that the CIA's declarant" provided general, categorical descriptions of categories of classified information. Gov. Br. at 4. In fact, the Court specifically addressed these categorical statements:

[1] The government incorrectly claims that 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.'" Gov. Br. 80 at 4–5 (quoting Pl. Opp. Br. at 31). In fact, the ACLU argued the government's submissions as to Document 66 were wholly insufficient. *See* Pl. Opp. Br. at 31 (pointing out that the government's submissions "provide insufficient detail," that "without more detail, neither the ACLU nor the Court can properly assess the appropriateness of the redaction," and that "it is impossible to gauge the extent of material improperly redacted under this conclusory assertion of Exemptions 1 and 3."). The ACLU provided "medical details" as just one example of the types of information that might have been improperly withheld under the government's vague and conclusory justifications. *Id.*

First it observed that most of the categories the government now claims were overlooked were not, in fact, disputed. *See* Order at 37 n.4 (noting that the ACLU "does not seek disclosure of information concerning 'foreign liaison services,' 'locations of covert CIA installations and former detention centers,' classified code words and pseudonyms,' or 'classification and dissemination control markings.'"). These categories were therefore neither overlooked nor even at issue. Second, as to the two remaining categories, the Court correctly held the government invoked them in "an opaque, imprecise manner," relying on wholly conclusory descriptions, thereby violating the requirement that an agency "justify its withholdings with 'reasonable specificity' and 'without resort to conclusory and generalized allegations of exemptions.'" Order at 38 (quoting *Halpern*, 181 F.3d at 290). The government may disagree with the Court, but it cannot satisfy the standard for reconsideration under Local Rule 6.3.

The government's demand to now introduce yet another declaration thus runs directly contrary to the rule that reconsideration is to be granted only where evidence was "overlooked." *See Schoolcraft*, 248 F. Supp. 3d at 508 ("The reason for the rule confining reconsideration to matters that were 'overlooked' is to ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters."); *Cohn v. Metro. Life Ins., Co.*, No. 07-CV-0928 (HB), 2007 WL 2710393, at *1 (S.D.N.Y. Sept. 7, 2007) (same); *In re Rezulin Prod. Liab. Litig.*, 224 F.R.D. 346, 349 (S.D.N.Y. 2004) (same).

The government's positions in this case would turn the FOIA process into one in which the only consequence for an agency's failure to meet its statutory obligations is additional delay while it tries again. But as another court explained in denying a motion for reconsideration under FOIA, the requirements of the statute are that "information . . . be disclosed as a result of

[agency] failure to justify its asserted exemptions." *Piper v. U.S. Dep't of Justice*, 312 F. Supp. 2d 17, 23 (D.D.C. 2004), *as amended* (May 13, 2004). Thus, even in cases where the government could conceivably come up with better justifications after multiple attempts, courts have repeatedly admonished that they "will not allow an agency 'to play cat and mouse by withholding its most powerful cannon until after the District Court has decided the case and then springing it on surprised opponents and the judge.'" *Senate of Puerto Rico*, 823 F.2d at 580 (quoting *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 482 F.2d 710, 722 (D.C. Cir. 1973), *rev'd*, 421 U.S. 168 (1975)). That the Court did not reward the government's failures with additional delay and a fifth bite at the apple is not error, much less the type of clear error required for reconsideration.

II. The Court did not overlook relevant facts or law in finding that the government failed to establish that Document 66 qualifies for protection under the deliberative process privilege.

The government argues that the Court "overlooked" both record evidence that Document 66 is an unfinished, "selective, draft account of one Agency officer's impressions of the detention and interrogation program," as well as binding Second Circuit law that "such draft documents are, by their very nature, predecisional and deliberative." Gov. Br. at 8–9 (quotation marks omitted). But the Court clearly considered all the evidence and authorities cited in the present motion for reconsideration, and the Order explains precisely why the government's submissions fail to justify withholding Document 66 under the deliberative process privilege.

First, contrary to the government's claims, the Court did not overlook record evidence that Document 66 is a non-finalized draft setting forth an individual's account of past CIA actions. The Order makes clear that the Court carefully considered the entire record, specifically noting that Document 66 "does not appear on Agency letterhead," "is labeled as a draft," that it apparently was "never finalized," and that it "consists of a detailed account of the CIA's

detention and interrogation program from the perspective of the author." Order at 30–35. The Court also observed that the government's submissions as to Document 66 offered no information "about the document other than what is apparent from the document itself," Order at 31, which, far from having been overlooked, was fully considered.

The government argues that the Court overlooked the possibility that Document 66 "itself represents a deliberative process" because "the deliberative nature of Document 66 is apparent from the document itself," which "represents the author's still-ongoing effort to deliberate and reflect upon past events." Gov. Br. at 10. Not so. Although the government speculates that Document 66 was part of some undefined, ongoing process—perhaps entirely internal to the document's author—"to draw conclusions for purposes of future decisionmaking," *id.*, the Court specifically considered and clearly rejected this theory. Thus, the Court explained that "a government employee's 'impressions' of past events are not deliberative merely because they are unofficial or personal to the author, absent some non-peripheral connection to an as-of-yet-made policy decision." Order at 31–32. In spite of the government's bald assertion that the document must have been intended for some unidentified process of "making future decisions about OMS's role," Gov. Br. at 11, the fact remains that the CIA has presented no evidence identifying Document 66's connection to an actual—rather than speculative—decisionmaking process. In the absence of any showing as to "why this document was created," the Court correctly held that the government had failed to justify withholding under the deliberative process privilege. Order at 31; *see also 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.").

Second, the government identifies no binding authority that the Court overlooked. The government claims that the Court failed to account for the Second Circuit's decision in *American Civil Liberties Union v. United States Department of Justice*, 844 F.3d 126, 133 (2d Cir. 2016), and maintains that the case establishes that draft summaries and reflections "are, by their very nature, predecisional and deliberative." Gov. Br. at 8–9. But far from overlooking this decision, the Court painstakingly explained its scope—including that, contrary to the government's mischaracterization, the Second Circuit did not provide any guidance as to whether draft documents similar to Document 66 are "deliberative":

> The Government further relies on *Am. Civil Liberties Union v. United States Dep't of Justice*, 844 F.3d 126 (2d Cir. 2016), in which the Second Circuit upheld the Government's withholding of a document under Exemption 5 on the ground that "it is a draft and for that reason predecisional." 844 F.3d at 133. That decision, however, contained no substantive analysis of the deliberative process privilege. In fact, the word "deliberative" does not appear in the opinion. The decision also does not cite or discuss the numerous prior decisions of the Second Circuit which make clear that a document must be deliberative, in addition to being pre-decisional, in order to qualify for the privilege. *See, e.g.*, *Local 3, Int'l Bhd. of Elec. Workers, AFL-CIO v. N.L.R.B.*, 845 F.2d 1177, 1180 (2d Cir. 1988) ("For this privilege to apply, an agency document must be (1) predecisional and (2) deliberative—that is, indicative of the agency's thought processes."); [*Nat'l Council of*] *La Raza* [*v. U.S. Dep't of Justice*], 411 F.3d [350,] 356 [(2d Cir. 2005)] (identifying "deliberative" as one of the elements of the deliberative process privilege).

Order at 33.[2]

[2] The government's additional argument that the Second Circuit "squarely rejected" an argument that "the deliberative process privilege does not protect deliberations concerning how to present government policies to the public," is entirely misplaced. Gov. Br. at 12. The government does not claim that Document 66 relates to a decisionmaking process as to how to publicize agency policies. By contrast, according to the government's own description, the draft op-ed document at issue in the Second Circuit decision was specifically prepared to assist agency decisionmakers who were contemporaneously engaged in deliberating "an agency decision about how best to explain an agency policy to the public"; the draft op-ed was "one of several options under consideration by [those] decisionmakers." Reply Br. for Defs.-Appellees-Cross-Appellants at 16–19, *Am. Civil Liberties Union v. U.S. Dep't of Justice*, No 15-3122 (XAP) (2d Cir. Aug. 5, 2016), ECF No. 109. No evidence of any such underlying consultative process is proffered here.

Nor did the Court overlook the Second Circuit's guidance in *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473 (2d Cir. 1999), and *Tigue v. United States Department of Justice*, 312 F.3d 70 (2d Cir. 2002), as to whether Document 66 is deliberative in nature. *Cf.* Gov. Br. at 9–10 (arguing that the Court overlooked that *Cuomo* and *Tigue* establish "the deliberative character of the document under Second Circuit law"). Instead, as the Court correctly held, both *Cuomo* and *Tigue* expressly require that an agency identify an actual decisionmaking process connected with a document it seeks to withhold as deliberative. *See* Order at 31 (explaining that under either *Cuomo or Tigue* there must be some showing that a document "formed an essential link in a specified consultative process," or "was prepared to assist the agency in the formulation of some specific decision" (quoting *Cuomo*, 166 F.3d at 482; *Tigue*, 312 F.3d at 80)). The government's failure to explain "why this document was created," or to identify the decisionmakers and decisionmaking process for which it was created is, then, fatal to its claim of privilege. *Id.*; *see also Tigue*, 312 F.3d at 80 (noting that "the privilege does not protect a document which is merely peripheral to actual policy formation" (quotation marks omitted)).

Finally, the Court did not overlook precedent establishing that factual material may be withheld under the deliberative process privilege if it is inextricably intertwined with protected deliberative information. *Cf.* Gov. Br. at 11–12 (claiming that "factual information selected for inclusion is bound up with the evaluative nature of the document," and citing *Tigue*, 312 F.3d at 82, and *Lead Indus. Ass'n*, 610 F.2d at 85). In fact, the Court cited both *Tigue* and *Lead Industries Association* on this point, and correctly stated that "where factual information is intertwined with deliberative policy discussions, disclosure may not be possible without revealing the protected deliberations." Order at 14. But in any event, the Court's ruling on Document 66 did not rest on the factual nature of the document. Instead, as the Court correctly

held, the government consistently failed to identify any policymaking process to which Document 66 related, nor any deliberations that would be revealed if Document 66 were disclosed.

As this Court previously instructed, "[a] motion for reconsideration is not an opportunity to reargue that which was previously decided." *Am. Civil Liberties Union v. Dep't of Def.*, 396 F. Supp. 2d at 461. Because "[t]here is nothing new or different in the government's papers in support of its motion for reconsideration," the motion should be denied. *Id.*

CONCLUSION

The government's motion for reconsideration should be denied.

November 3, 2017

Respectfully submitted,

/s/ Dror Ladin
Dror Ladin
Hina Shamsi
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Phone: 212-284-7303
dladin@aclu.org

Lawrence S. Lustberg
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
Phone: 973-596-4500
llustberg@gibbonslaw.com

Arthur Eisenberg
Beth Haroules
NEW YORK CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
Phone: 212-607-3300
aeisenberg@nyclu.org