UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF JUSTICE, and DEPARTMENT OF STATE,

Defendants.

Oral Argument Requested

17 Civ. 3391 (PAE)

ECF CASE

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT DEPARTMENT OF STATE AND PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT DEPARTMENT OF DEFENSE, AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Within days of taking office, President Trump approved a raid in al Ghayil, Yemen (the "Raid"). The operation went awry, and the Raid turned deadly: one U.S. Navy SEAL died, other service members were wounded, and as many as ten children were killed. Nevertheless, the government heralded the Raid as a success, providing a public narrative of the approval process and outcome.

The ACLU filed a Freedom of Information Act ("FOIA") request to provide the public with full information about the Raid and its consequences. Yet the government has withheld almost all information from records responsive to the request, including even some information that was a crucial part of its public messaging. The government claims that releasing this information would endanger national security and compromise its decision-making process, but its overbroad reliance on narrow FOIA exemptions does not withstand scrutiny.

The ACLU challenges the government's withholdings in thirty documents based on the government's failure to establish that it can properly withhold the information it seeks to conceal. The ACLU also challenges as inadequate the government's search for one document that the government failed to locate. The ACLU respectfully requests that the Court deny the government's motion for summary judgment and order it to produce the withheld information.

STATEMENT OF FACTS

I. The Government's Account of the Raid

On January 29, 2017, the U.S. government carried out the Raid in Yemen, the first such operation approved by the Trump administration. Press Release, U.S. Central Command, U.S. Central Command Statement on Yemen Raid (Feb. 1, 2017), http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1068267/us-central-command-

statement-on-yemen-raid ("Feb. 1 Press Release") (attached as Diakun Decl., Ex. 1). After press reports revealed that the Raid had resulted in several deaths, the government faced criticism. The White House and the military defended the Raid by describing in detail the planning process, how the operation unfolded, and its aftermath. Former government officials and reporting by human rights organizations and journalists called this narrative into question, including especially the approval process and the number of civilian deaths. *See, e.g.*, Dan Lamothe, *The White House Says a Deadly Raid in Yemen Was Long Planned in Washington. Not True, Say Officials Who Served Obama*, Wash. Post, Feb. 2, 2017, https://wapo.st/2kxsQcQ?tid; Iona Craig, *Death in al Ghayil*, Intercept, Mar. 9, 2017, https://interc.pt/2mK3RF2.

The government's public disclosures provide a detailed official account of the Raid. Planning for the Raid began in 2016 during the Obama administration. Press Briefing, White House Off. of Press Sec'y, Press Briefing by Press Secretary Sean Spicer (Feb. 2, 2017), https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sean-spicer-020217 ("Spicer Feb. 2 Briefing") (attached as Diakun Decl., Ex. 2). It was designed as a "site exploitation operation" to target an alleged al-Qaida in the Arabian Peninsula ("AQAP") compound in al-Bayda, Yemen. Terri Moon Cronk, *U.S. Raid in Yemen Garners Intelligence*, U.S. Cent. Command (Jan. 30, 2017), http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1065112/us-raid-in-yemen-garners-intelligence (attached as Diakun Decl., Ex. 3) ("Jan. 30 CENTCOM Article").

On January 6, 2017, the Deputies Committee of the National Security Council convened to review the proposal and "recommended at that time that they go ahead." Spicer Feb. 2 Briefing. The plan was "easily approved," and the Committee decided "to hold for what they called a 'moonless night,'" which would not occur until President Trump took office. *Id.* On

January 25, President Trump convened a dinner meeting with top advisors "where the operation was laid out in great extent." *Id.* There, the president approved both a plan to support a United Arab Emirates–led coalition operation (the "UAE Shabwah Offensive") and the specific Raid as part of the larger plan. *See* JS/038-039 (attached as Diakun Decl., Ex. 4); JS/240-242 (attached as Diakun Decl., Ex. 30). The Deputies Committee met again the next morning, but this "was not a necessary step because they had previously recommended and also reaffirmed their support." Spicer Feb. 2 Briefing.

On January 29, U.S. personnel executed the Raid, causing between four and twelve civilian deaths, likely including children. *See Hearing to Receive Testimony on United States Central Command and United States Africa Command: Hearing Before the S. Comm. on Armed Servs*., 115th Cong. 89 (Mar. 9, 2017), https://www.armed-services.senate.gov/imo/media/doc/17-18_03-09-17.pdf (statement of Gen. Joseph Votel, Commander, U.S. Cent. Command) ("Mar. 9 Senate Hearing") (attached as Diakun Decl., Ex. 5); Feb. 1 Press Release. These victims were "potentially caught up in aerial gunfire that was called in to assist U.S. forces" who were "receiving fire from all sides to include houses and other buildings." Feb. 1 Press Release. "This complex situation included small arms fire, hand grenades and close air support fire." *Id.* Fourteen alleged AQAP members were also killed, including multiple "female fighters." Jan. 30 CENTCOM Article. Chief Petty Officer William "Ryan" Owens died in the Raid, and three other service members were wounded "when an Osprey MV-22 tilt-rotor aircraft made a hard landing during the operation." *Id.*; Feb. 1 Press Release. A U.S. airstrike intentionally destroyed the damaged aircraft. Jan. 30 CENTCOM Article.

The Department of Defense ("DOD") conducted three separate investigations into the Raid: one concerning the civilian casualties, one concerning the destruction of the Osprey, and

one concerning the death of Chief Petty Officer Owens. Mar. 9 Senate Hearing at 89.

DOD officials testified before Congress about the rules and policies in place at the time of the Raid. During a May 4, 2017 hearing before the Senate Committee on Armed Services, Senator Hirono asked about the "rules of engagement," referring to the "guidelines for the use of force [that] were established by President Obama in the 2013 Presidential Policy Guidance." *United States Special Operations Command: Hearing Before the S. Comm. on Armed Servs.*, 115th Cong. 33 (May 4, 2017), https://www.armed-services.senate.gov/imo/media/doc/17-41_05-04-17.pdf ("May 4 Senate Hearing") (attached as Diakun Decl., Ex. 6); *see also* Procedures for Approving Direct Action Against Terrorist Targets Located Outside of the United States and Areas of Active Hostilities ("PPG") (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download (attached as Diakun Decl., Ex. 7). Specifically, Senator Hirono asked whether the "rules of engagement requirement of near certainty that no civilian casualties will result [had] been modified for special ops missions," and whether those rules "applied in the Yemen case." May 4 Senate Hearing at 33–34. The officials testified that the "rules of engagement were not changed for the Yemen case," and that the military adhered to the law of armed conflict. *Id.*

II. The FOIA Request and Plaintiffs' Challenges

To provide the public with information about the Raid's legal and factual basis, the ACLU submitted a FOIA request (the "Request") on March 15, 2017, to DOD, its Office of Inspector General, the U.S. Central Command, the Department of State (the "State Department"), the Department of Justice, its Office of Legal Counsel, and the Central Intelligence Agency. *See* Request (attached as Diakun Decl., Ex. 8). The agencies failed to release responsive records, and the ACLU filed suit on May 8, 2017. *See* Complaint, ECF No. 1.

In accordance with a court-ordered processing schedule, the Departments of Defense, State, and Justice searched for records, produced hundreds of pages of heavily redacted documents, and withheld hundreds of pages in full. Pursuant to the Court's March 27, 2018 scheduling order, ECF No. 60, the ACLU provided a preliminary list of fifty-five documents it intended to challenge, pending receipt of Defendants' declarations and *Vaughn* indices.

After reviewing information submitted with Defendants' July 20, 2018 motion for summary judgment, *see* ECF No. 74, the ACLU now narrows its challenge to thirty documents: four State Department records (C06432239, C06432636, C06432854, and C06432231) (attached as Diakun Decl., Exs. 9–12) and twenty-six DOD records (CENTCOM/003-005, 020-026, 027-030, 036-038, 045-053, 164-166, 184-186, 246-268, 304-307, 330-334; JS/009-011, 022-023, 048-053, 054-056, 057-058, 059-062, 188-191, 240-242, 261-266, 273-278, 279-282, 330-336, 339-345; and STATE/034-035, 036-038, 039-044) (attached as Diakun Decl., Exs. 13–38). Plaintiffs challenge these agencies' Exemption 1 and 5 withholdings, but not Exemption 6 withholdings. Plaintiffs do not challenge the withholding of Department of Justice records. Plaintiffs also challenge the adequacy of DOD's search for CENTCOM/019 (attached as Diakun Decl., Ex. 39) and any attachments; they do not challenge the search for CENTCOM/272.

ARGUMENT

I. Legal Framework

Under FOIA, the government bears the burden of justifying the withholding of responsive records, and courts review the legality of any withholdings *de novo*. *See Bloomberg, L.P. v. Bd. of Governors of Fed. Reserve. Sys.*, 601 F.3d 143, 147 (2d Cir. 2010). Although FOIA exempts certain types of records, those "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," *Dep't of Air Force v. Rose*, 425

U.S. 352, 361 (1976). Courts "construe FOIA exemptions narrowly, resolving doubts in favor of disclosure." *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 173 (2d Cir. 2014).

In general, "an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Ctr. for Constitutional Rights v. CIA*, 765 F.3d 161, 166 (2d Cir. 2014) (citation omitted). Courts accord "substantial weight" to government declarations in FOIA cases, but that deference is due only when the government's declarations contain "reasonably detailed explanations" substantiating the exemptions it has invoked, *N.Y. Times Co. v. DOJ* (*N.Y. Times I*), 756 F.3d 100, 112 (2d Cir. 2014) (quotation marks omitted), and when they are not "controverted by contrary evidence in the record or by evidence of bad faith," *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009) (alteration and quotation marks omitted). "[C]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not . . . carry the government's burden." *Larson v. DOS*, 565 F.3d 857, 864 (D.C. Cir. 2009). Courts have broad discretion to review *in camera* any agency record that the government seeks to withhold to assess the validity of claimed exemptions. *See* 5 U.S.C. § 552(a)(4)(B).

Even if parts of a responsive record are properly exempt, the agency must "take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii)(II); *FBI v. Abramson*, 456 U.S. 615, 626 (1982) (agencies and courts must "differentiate among the contents of a document rather than to treat it as an indivisible 'record' for FOIA purposes"). "The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

II. The government has improperly withheld information from the public.

A. The government has likely improperly withheld information under Exemption 1.

The government invoked Exemption 1 to withhold in full or in part all thirty challenged documents, asserting that the information is classified and would harm national security if revealed. Defendants' invocation of Exemption 1 is likely improper for two reasons: first, the government cannot rely on Exemption 1 to withhold information that it has officially acknowledged; and second, it cannot rely on Exemption 1 to withhold pure legal analysis.

1. The government may have improperly withheld officially acknowledged information under Exemption 1.

Under FOIA Exemption 1, agencies are permitted to withhold information that is "properly classified" pursuant to an Executive Order. 5 U.S.C. § 552(b)(1). But if the government has "officially acknowledged" that information—that is, if it has officially and publicly disclosed the information—then the government waives the right to withhold it. *See N.Y. Times I*, 756 F.3d at 119–20. Given the extensive information the government has disclosed about the Raid, it is unlikely that its near-total redaction of the challenged documents is proper.

Courts apply a three-part test to determine whether the government has officially acknowledged information, determining if: (1) the information is "as specific as the information previously released," (2) it "match[es] the information previously disclosed," and (3) it was "made public through an official and documented disclosure." *Wilson v. CIA*, 586 F.3d 171, 186 (2d Cir. 2009) (citation omitted). "[T]he 'matching' aspect" of this test does not require "absolute identity" between the withheld and disclosed information because "such a requirement would make little sense." *N.Y. Times I*, 756 F.3d at 120 & n.19. As the Second Circuit has pointed out, "[a] FOIA requester would have little need for undisclosed information if it had to

match precisely information previously disclosed."[1] *Id.* Additionally, the government's public disclosure of certain information can render its withholding of other, related information no longer "logical" or "plausible." *Id.* at 120–21 (ordering the release of detailed legal analysis because disclosure "adds nothing to the risk").

The government has publicly disclosed a significant amount of information related to the Raid, including, for example, details like the fact that between four and twelve civilians were killed. Yet despite this fact's role in the public narrative about the Raid, it does not appear to be reflected in the unredacted portion of the production. If the government has withheld any such officially acknowledged facts on the basis that they are subject to Exemption 1, this is improper.

2. The government may have improperly withheld pure legal analysis under Exemption 1.

Under Exemption 1, the government cannot withhold "pure" legal analysis, meaning constitutional and statutory interpretation, discussion of precedent, and legal conclusions that can be segregated from properly classified or otherwise exempt facts. However, the absence of *any* legal analysis in the government's production suggests that it may have done just that.

The Second Circuit has recognized that "in some circumstances legal analysis could be so intertwined with facts entitled to protection that disclosure of the analysis would disclose such facts." *N.Y. Times I*, 756 F.3d at 119. Executive Order 13,526 sets out categories of facts entitled to protection and the basis for making withholding determinations. Exec. Order 13,526 §§ 1.4, 1.1 (original classification authority must determine that disclosure of facts in enumerated categories "reasonably could be expected to result in damage to the national security" and "is

[1] Moreover, requiring an exact match would undermine the interests FOIA is intended to protect. When Congress enacted FOIA, it was concerned about both government secrecy *and* selective disclosures. *See* Republican Policy Comm. Statement on Freedom of Information Legislation, S.1160, 112 Cong. Rec. 13020 (1966) ("In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear.").

able to identify or describe the damage"). But if the challenged documents contain legal analysis that does not reveal a properly classified fact—because the analysis can be segregated from facts or because the specific facts have been officially acknowledged—then disclosure of the legal analysis cannot reasonably harm national security, and the analysis must be disclosed unless properly protected by another privilege. *N.Y. Times I*, 756 F.3d at 119–20. While harm could result "in some circumstances, [when] the very fact that legal analysis was given concerning a planned operation would risk disclosure of the likelihood of that operation," *id.* at 119, that is not an issue here. The government has acknowledged both that the Raid occurred and that it contemplated subsequent operations. *See, e.g.*, Ex. 4 at JS/039. And if any analysis does contain properly protected facts, those specific facts should be redacted from the analysis, rather than redacting the analysis altogether. *See N.Y. Times I*, 756 F.3d at 119.

B. The government improperly withheld information under Exemption 5.

The government improperly relies on Exemption 5 to withhold in full or part twenty-seven challenged documents. Under this exemption, the government may withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The government relies on three Exemption 5 privileges: deliberative process, attorney–client, and presidential communications.

1. Deliberative Process Privilege

The government wrongly withheld all or part of twenty-one challenged documents under the deliberative process privilege. To establish that the privilege applies, an agency must show that the document is both "'predecisional,' *i.e.*, 'prepared in order to assist an agency decisionmaker in arriving at [their] decision,'" and "'deliberative,' *i.e.*, 'actually . . . related to the process by which policies are formulated.'" *Brennan Ctr. for Justice v. DOJ*, 697 F.3d 184,

194 (2d Cir. 2012) (citation omitted). Documents fall within this privilege if they "would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Critically, "even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Id.*

To meet its burden, the agency should, at a minimum, describe: (1) the roles of the author and recipient of each document; (2) the document's function and significance in a decision-making process; and (3) the document's subject matter and the nature of the deliberative opinion. *See Senate of P.R. v. DOJ*, 823 F.2d 574, 585 (D.C. Cir. 1987); *Coastal States*, 617 F.2d at 868; *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 811 F. Supp. 2d 713, 743 (S.D.N.Y. 2011). As detailed below, *infra* Part II.C., for some documents, Defendants have wrongly invoked the privilege to shield post-decisional records; for others, they have not adequately described why the privilege applies.

2. Attorney–Client Privilege

The government relied on the attorney–client privilege to withhold all or part of eight documents involving government attorneys. Of course, "[t]he fact that a person is a lawyer does not make all communications with that person privileged." *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). To properly invoke the privilege, the government must show that the communications are "(1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal assistance." *Brennan Ctr.*, 697 F.3d at 207. When courts determine if a communication was "for the purpose of obtaining or providing legal advice, as opposed to advice on policy" (which is not privileged),

they consider the "predominant purpose of the communication." *In re Cty. of Erie*, 473 F.3d 413, 419–20 (2d Cir. 2007). If the predominant purpose is not to solicit or convey legal advice, agencies have an alternative to withholding in full: they should redact any "legal advice that is incidental to the nonlegal advice." *Id.* at 421 n.8.

As explained below, *infra* Part II.C., Defendants have failed to justify the privilege.

3. Presidential Communications Privilege

The government withheld eleven challenged documents in full under the presidential communications privilege. This privilege is narrowly circumscribed to serve specific purposes: "the promotion of candor and effective presidential decision-making." *Ctr. for Effective Gov't v. DOS*, 7 F. Supp. 3d 16, 26 (D.D.C. 2013). It therefore only applies to "communications authored or solicited and received by" the president, the president's immediate White House advisers, and members of the advisers' staff "who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *In re Sealed Case*, 121 F.3d 729, 751–52 (D.C. Cir. 1997). "White House advisers" are those in the Office of the President, "comprised of such immediate advisers as the Chief of Staff and the White House Counsel." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1109 & n.1, 1112 (D.C. Cir. 2004). Critically, "the privilege should not extend to staff outside the White House in executive branch agencies." *Id.* at 1116, 1123 (citation omitted). "[I]nternal agency documents that are not 'solicited and received' by the President or his Office are instead protected against disclosure, if at all, by the deliberative process privilege." *Id.* at 1112.

Even if a document was "authored or solicited and received by" someone in this small group, *id.* at 1119, "the transmittal of a document to persons who are unlikely to be in a position to give advice to the President waives the privilege . . . ." *ACLU v. DOJ*, No. 15 Civ. 1954, 2016

WL 889739, at *4 (S.D.N.Y. Mar. 4, 2016); *see also id.* at *5 ("[W]idespread dissemination of documents, to persons well beyond the circle of close presidential advisors, will eviscerate" the privilege.). This is so because "documents distributed from the Office of the President for non-advisory purposes do not implicate the goals of candor, opinion-gathering, and effective decision-making that confidentiality under the privilege is meant to protect"—*even* if the document is distributed on a "need to know" basis. *See Ctr. for Effective Gov't*, 7 F. Supp. 3d at 26–27. To meet its burden, the government must show that communications (or records summarizing them) are kept confidential "for the purpose of the presidential communications privilege." *Id.* at 27.

As explained below, *infra* Part II.C., Defendants have failed to establish that the documents they seek to withhold were in fact intended to be and actually kept confidential. It is clear some documents were widely distributed to individuals outside the White House in non-advisory roles. For other documents, Defendants have failed to establish that the privilege applies because they do not state to whom they distributed the documents and why.

4. Waiver

Just as official acknowledgment defeats Exemption 1, "[v]oluntary disclosures of all or part of a document may waive" Exemption 5 privileges. *N.Y. Times I*, 756 F.3d at 114 (citation omitted); *In re Sealed Case*, 121 F.3d at 742 (presidential communications privilege). Exemption 5 privileges are designed to ensure the integrity of government decision-making. *See Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1998) (en banc). But when the government itself has revealed confidential information, the rationale underpinning Exemption 5 evaporates, and the government may no longer rely on the secrecy of that information to justify its withholding. *See, e.g.*, *N.Y. Times I*, 756 F.3d at 116.

5. Working Law

Even if a document is otherwise properly protected by the deliberative process or attorney–client privileges, under the "working law" doctrine, agencies cannot rely on Exemption 5 to withhold the rules, interpretations, and opinions that embody their formal or informal law or policy. *Brennan Ctr.*, 697 F.3d at 195–96, 199–202, 208; *Tax Analysts v. IRS*, 117 F.3d 607, 619 (D.C. Cir. 1997). The Supreme Court explained the rationale in *NLRB v. Sears*: "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted"—and these reasons "constitute the 'working law' of the agency." 421 U.S. 132, 152–53 (1975). An agency's reliance on legal analysis as a basis for its policy or operational decisions transforms that analysis into working law. "[T]he question is not about a given document's label, but whether its reasoning or conclusions have become the agency's operative view of its legal duties." *ACLU v. DOJ*, 90 F. Supp. 3d 201, 218 (S.D.N.Y. 2015) (citation omitted).

As explained below, *infra* Part II.C., some of the challenged documents qualify as agency working law, and must be disclosed.

C. Defendants improperly withheld in full or in part each challenged document.

1. The State Department failed to justify withholding information from four challenged documents.

C06432239, C06432636, and C06432854. These documents are "identical copies of a three-page intra-agency email" providing "a readout of deliberations from an interagency meeting of the Deputies Committee held on January 6, 2017." Declaration of Eric F. Stein ("Stein Decl.") ¶ 45, ECF No. 78. The agency invokes Exemption 1, the deliberative process privilege, and the presidential communications privilege to prevent disclosure. *Id.* ¶¶ 46–48.

Exemption 1. If this email contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1.

Deliberative Process Privilege. The State Department invokes the deliberative process privilege, saying this email "summarizes interagency deliberations about a specific proposal." Stein Decl. ¶ 47. But the agency has not shown that the document is "predecisional," *Brennan Ctr.*, 697 F.3d at 194: it is *post*-decisional, at least in part. Mr. Spicer explained that the Deputies Committee made least two decisions on January 6: to "recommend[] at that time that they go ahead" with the Raid, and "to hold [the operation] for what they called a 'moonless night.'" Spicer Feb. 2 Briefing. It follows that a subsequent "readout" of the meeting would reflect those decisions and the rationales for them. Furthermore, Mr. Spicer publicly explained the outcome of this meeting and used it to justify the "very, very well thought-out and executed effort." *Id.* The agency may not now hide this information from the public. *See Coastal States*, 617 F.2d at 866 (A document can "lose" its predecisional status if it "is used by the agency in its dealings with the public."). Even if part of this document includes deliberative and predecisional discussion, any portion conveying post-decisional or publicly revealed information must be disclosed.

Presidential Communications Privilege. The State Department's invocation of the presidential communications privilege fails for three reasons. First, this email does not appear to be "authored or solicited and received by" any of President Trump's immediate White House advisers. *See Judicial Watch*, 365 F.3d at 1116. Instead, it appears to be purely internal to the Department, and was *created for* "staff outside the White House in executive branch agencies" to whom the privilege typically does not apply. *In re Sealed Case*, 121 F.3d at 752. Second, even if the communication had been privileged, the privilege was waived through the "transmittal . . . to persons who are unlikely to be in a position to give advice to the President." *ACLU*, 2016 WL 889739, at *4. The email was sent to at least nine individuals outside the White House, including foreign service officers, and the agency has not argued that they serve in the close advisory role

the privilege requires. *See* Ex. 9. Third, Mr. Spicer's official disclosures about the decisions to proceed with the Raid and to wait for a moonless night have at the very least waived Exemption 5 privileges over those portions of the email. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 742.

C06432231. Document C06432231 is a "two-page intra-agency email" providing "a readout of deliberations from an interagency meeting of the Deputies Committee held on January 26, 2017." Stein Decl. ¶ 39. The State Department withheld information under Exemption 1, the deliberative process privilege, and the presidential communications privilege. *Id.* ¶¶ 40–42.

Exemption 1. If this email contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1.

Deliberative Process Privilege. The State Department asserts it is withholding this email in part under the deliberative process privilege because it "summarizes interagency deliberations about a specific proposal." *Id.* ¶ 41. But based on Mr. Spicer's official narrative, much of this email should reflect post-decisional discussions, which cannot be withheld under the privilege. President Trump approved the proposal for the Raid at the dinner meeting on January 25. *See* Spicer Feb. 2 Briefing; Ex. 30 at JS/242. When the Deputies Committee met the following morning, "[i]t was not a necessary step because they had previously recommended and also reaffirmed their support." Spicer Feb. 2 Briefing. The purpose of the privilege—to protect government deliberations before a decision is made—is not served by protecting *post*-decisional communications. If this "readout" reflects decisions made and the rationales for them, it cannot be withheld under the deliberative process privilege. *See Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257 (D.C. Cir. 1982) ("'Communications made after the decision and designed to explain it' are not" privileged. (quoting *Sears*, 421 U.S. at 151–52)).

Presidential Communications Privilege. The State Department's invocation of the

presidential communications privilege fails for two reasons. First, this communication was not "authored or solicited and received by" any of President Trump's immediate White House advisers, *see Judicial Watch*, 365 F.3d at 1112; instead, this document appears to be purely internal to the State Department. Second, even if the communication had been privileged, the privilege was waived through "transmittal . . . to persons who are unlikely to be in a position to give advice to the President." *ACLU*, 2016 WL 889739, at *4. This email was distributed to at least seventeen individuals and an unknown number of others on two email lists. *See* Ex. 12. Surely country desk officers and individuals on the "CT_StaffAssistants" email list do not serve in the close presidential "advisory role" required for the privilege. *See ACLU*, 2016 WL 889739, at *5. Given this widespread dissemination, the agency has waived the privilege.

2. DOD failed to justify withholding information from twenty-six challenged documents.

CENTCOM/003-005 and JS/240-242. These documents are two versions of the same email chain. DOD invokes Exemption 1, the deliberative process privilege, and attorney–client privilege to withhold parts of both documents. Revised *Vaughn* at 1, 4, ECF No. 81-1.

Exemption 1. If this email contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1.

Deliberative Process Privilege. The government invokes the deliberative process privilege, stating that the withheld information "[p]redates agency decision on the matters being discussed." Revised *Vaughn* at 1. But the document specifically refers to an "end-of-day informational update on some recent *Yemen-related decisions*." *See* Ex. 13 at CENTCOM/004 (emphasis added). If the document memorializes decisions that have already been made, and/or their rationales, the agency's withholding of at least this information is improper.

Attorney–Client Privilege. Plaintiffs do not challenge the withholding of the "key points

of lawyers' discussion" in "preparation for" the Deputies Committee meeting. *See* Ex. 30. But if the government invokes the privilege to shield any final government legal position or policy, this is improper both because it would not constitute "legal advice," *In re Cty. of Erie*, 473 F.3d at 419–20, and because it is working law. *Brennan Ctr.*, 697 F.3d at 196.

CENTCOM/020-026. This document is an "[e]mail thread discussing military options post-al Ghayil Raid," dating from January 30, 2017, to February 1. *See* Revised *Vaughn* at 1. DOD invokes Exemption 1 and the attorney–client privilege to withhold this document. *Id.*

Exemption 1. If this email contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1.

Attorney–Client Privilege. The agency states that information is withheld because it "constitutes legal advice provided by an attorney regarding a military operation, and is attorney client privileged." Revised *Vaughn* at 1. Although one email appears to convey such advice, *see* Ex. 14 at CENTCOM/023, later emails appear to *accept and incorporate* this advice. Any legal advice incorporated into final agency reasoning and decisions is the working law of the agency and cannot be withheld under the attorney–client privilege. *See Brennan Ctr.*, 697 F.3d at 195–96, 199–202. Further, information cannot be withheld if it has been officially disclosed, for example, in the PPG. *N.Y. Times I*, 756 F.3d at 114 ("[T]he attorney–client and deliberative privileges, in the context of Exemption 5, may be lost by disclosure[.]").

CENTCOM/027-030 and JS/057-058. These documents "provid[e] authorization for the operation." Revised *Vaughn* at 1, 3. DOD withheld them on the basis of Exemption 1 alone. *Id.*

Exemption 1. If the documents contain any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1.

CENTCOM/036-038. This document contains "[e]mail discussions extracted from an

Attorney's email account discussing legal issues relating to one aspect of the al Ghayil Raid, and providing analysis and opinions," which, the agency asserts, "predates agency decision on the matter being discussed." Revised *Vaughn* at 1. DOD withheld it under Exemption 1 and the attorney–client privilege. *Id.*

Exemption 1. If this email chain contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1.

Attorney–Client Privilege. The agency has not established all elements of the privilege.[2] First, although the government bears the burden of showing that protected communications "are intended to be, and in fact were, kept confidential," *Brennan Ctr.*, 697 F.3d at 207, the Ferrell Declaration is conclusory, stating only that "[t]he confidentiality of these communications has been maintained." Ferrell Decl. ¶ 25. But "[t]he test . . . is whether the agency is able to demonstrate that the documents, and therefore the confidential information contained therein, were circulated no further than among those members 'of the organization who are authorized to speak or act for the organization in relation to the subject matter of the communication.'" *Coastal States*, 617 F.2d at 863 (citation omitted). The agency has failed to make this showing.

Second, the emails' timing calls into question the agency's assertion that they "predate[] [the] agency decision on the matter being discussed." Revised *Vaughn* at 1. Both are dated January 26, the day *after* President Trump approved the Raid. The email on CENTCOM/036 is time-stamped 5:56 p.m.—hours after the Deputies Committee meeting concluded. *See* Ex. 16. This suggests that the emails reflect a post-decisional discussion of the law and policy of the agency, and that they were not generated for the purpose of providing legal assistance. *In re Cty.*

[2] It is unclear from the agency's filings whether it invokes the attorney–client privilege over the entire three-page document or just the last two pages. *Compare* Revised *Vaughn* at 1 *with* Declaration of Major Gen. Terry Ferrell ("Ferrell Decl.") ¶ 26, ECF No. 77.

of Erie, 473 F.3d at 419–21. Moreover, if the emails do reflect such a discussion, this could indicate that they contain agency working law and must be disclosed. *Sears*, 421 U.S. at 152–53.

CENTCOM/045-053, JS/009-011, JS/054-056, JS/279-282, STATE/034-035, and STATE/036-038. These documents are memoranda sent from the Secretary of Defense to the National Security Advisor "seeking approval for [a] detailed operational proposal." *See* Revised *Vaughn* at 1, 3, 4, 5. CENTCOM/045-053 also attaches the operational proposal itself. *See* Revised *Vaughn* at 1. Although the other documents appear to relate to the initial proposal, STATE/034-035 "sought an extension of a prior approval of military operations." Declaration of Rear Admiral James J. Malloy ("Malloy Decl.") ¶ 24, ECF No. 76. DOD withholds these documents under Exemption 1, the deliberative process privilege, and the presidential communication privilege. *See* Revised *Vaughn* at 1, 3, 4, 5.

Exemption 1. If these documents contain any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1. An additional official acknowledgment may be relevant for STATE/034-035: days after the extension request was approved, *see* Malloy Decl. ¶ 24, CENTCOM carried out another raid in Yemen "conducted under the same U.S. authorities as those granted in advance of the earlier, Jan. 28 raid, which included authorities for airstrikes and follow-on action." Terri Moon Cronk, *Pentagon Spokesman Describes U.S. Raid in Yemen*, U.S. Cent. Command, May 23, 2017, http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1191797/pentagon-spokesman-describes-us-raid-in-yemen (attached as Diakun Decl., Ex. 40). DOD publicly described that follow-up raid in detail. *See id.*

Deliberative Process Privilege. The agency has failed to meet its burden of demonstrating that the deliberative process privilege applies because it has not specified who received the

memoranda, for what purpose, and when. *See Senate of P.R.*, 823 F.2d at 585. This is critical because even if the documents were initially deliberative and predecisional, if the agency circulated and relied upon them after the approval date, the documents could lose their predecisional character, thus stripping them of the privilege. *See Coastal States*, 617 F.2d at 866. At least one of these documents was distributed widely among agency employees after President Trump approved the plan to support the UAE Shabwah Offensive and the Raid, indicating that the document was treated as final and thus lost its predecisional character. *See* Ex. 23; Revised *Vaughn* at 3, 5; JS/400-401 (attached as Diakun Decl., Ex. 41).

Presidential Communications Privilege. DOD has failed to establish that the presidential communications privilege applies because it has not demonstrated that the documents were kept confidential. *See ACLU*, 2016 WL 889739, at *5. Although the Malloy Declaration states that JS/009-011 "was closely held in that it was sent only to the National Security Advisor," Malloy Decl. ¶ 19, this is not true, based on the government's own disclosures. It was attached to JS/400-401 and distributed to three email lists of an undisclosed number of people, *see* Revised *Vaughn* at 3; Ex. 41, making it highly likely that it was transmitted "to staffers who serve in non-advisory roles to the President," thus "los[ing] any claim to the presidential communications privilege." *ACLU*, 2016 WL 889739, at *5. Similarly, because the State Department located one of these memoranda in its search, *see* Ex. 37; Revised *Vaughn* at 5, that version was circulated beyond the Secretary of Defense and the National Security Advisor as well. For each document, the government must demonstrate that confidentiality has been maintained. It has failed to do so.

CENTCOM/164-166 and CENTCOM/184-186. These documents are identical copies of a February 2, 2017 email chain "between staff judge advocates coordinating credibility assessments of civilian casualties pending approval, and discussing legal issues." *See* Revised

Vaughn at 2. They contain "operational details and post strike assessment techniques." *Id.* DOD withholds these records in part under Exemption 1 and the attorney–client privilege. *Id.*

Exemption 1. If this email chain contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1. Additional official acknowledgments about civilian casualty "assessment techniques" may also be relevant. In its FOIA production, the State Department disclosed the existence of an "established information sharing mechanism" used by the State Department and DOD to facilitate civilian casualty assessments. *See* C06395621 (attached as Diakun Decl., Ex. 42). The State Department email describing this mechanism was circulated the same day as one of the withheld CENTCOM emails. If the challenged CENTCOM emails concern the same mechanism, DOD may not withhold that information.

Additionally, the government has separately disclosed a July 1, 2016 Executive Order on United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force (attached as Diakun Decl., Ex. 43), which specifies considerations agencies must take into account in assessing civilian casualties. If the redacted information concerning post-strike casualty assessment "techniques" reflects or discusses this officially acknowledged information, it must also be disclosed.

Attorney–Client Privilege. Given the agency's description of the document, it does not appear that the attorney–client privilege properly applies to the entire document. The privilege only applies to communications "between a client and his or her attorney . . . for the purpose of obtaining or providing legal assistance," *Brennan Ctr.*, 697 F.3d at 207 (citation omitted), and the "predominant purpose" of the communication must be to solicit or convey advice in the context of an attorney–client relationship. *In re Cty. of Erie*, 473 F.3d at 419–20. It appears that

the "predominant purpose" of the communication is to coordinate a credibility assessment. If so, the attorney–client privilege does not justify the government's withholding of the document.

CENTCOM/246-268. This document, dated February 9, 2017, contains "backup slides" to the October 20, 2016 briefing and concerns the "rules of engagement." Revised *Vaughn* at 2. DOD withholds this document under Exemption 1 and the deliberative process privilege. *Id.*

Exemption 1. If this email contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1.

Deliberative Process Privilege. The agency has not provided adequate information to establish that the privilege applies. DOD asserts that the slides provided backup to an October 20, 2016 briefing, but the index also states this record was created on February 9, 2017, after the Raid was carried out. Revised *Vaughn* at 2. The agency has not adequately explained the function and treatment of the document, including to whom it was circulated and when. *See Senate of P.R.*, 823 F.2d at 585. Even if the briefing slides were previously covered by the privilege, if the agency circulated and treated them as final after their creation on February 9, they would no longer be subject to the privilege. *See Coastal States*, 617 F.2d at 866. This is especially so if the slides contain the legal basis for the raid and the agency's working law.

CENTCOM/304-307. This is an "[e]mail from [a] staff judge advocate to [a] lawyers group forwarding [a] post-operation report with detailed assessments, discussion of vulnerabilities, etc., and including analysis regarding a legal issue for future operations." Revised *Vaughn* at 2. DOD withheld this email under Exemption 1 and the attorney–client privilege. *Id.*

Exemption 1. If this email contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1.

Attorney–Client Privilege. If the agency invoked the attorney–client privilege to withhold

information from the January 29 email in the chain, this is improper. That email is between three military commanders and provides a "Post Op Review." *See* Ex. 21 at CENTCOM/305; Revised *Vaughn* at 2. That the email was later forwarded to attorneys does not render it protected by the attorney–client privilege. *See Brennan Ctr.*, 697 F.3d at 207 (communication must be authored "for the purpose of obtaining or providing legal assistance" to be covered by the privilege).

CENTCOM/330-334. This February 1, 2017 Memorandum for the Record is an assessment of the Raid's civilian casualties. *See* Revised *Vaughn* at 3; Ex. 22. This "[p]ost-operation memorandum to file outlines the operation in question and details an initial assessment by the task force commander reporting his own opinion that no further action is necessary." Revised *Vaughn* at 3. DOD has relied on Exemption 1 to redact the entire text. *Id.*; *see* Ex. 22.

Exemption 1. If this email contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1. It appears that CENTCOM officially acknowledged much of the information in this record in a press release about civilian casualties published *the same day*. *See* Feb. 1 Press Release. The withheld document appears to have served as the basis for the press release: it was written by the "Task Force 111 Commander," *see* Ex. 22, while the press release details the findings of a "team designated by the operational task force commander." *See* Feb. 1 Press Release.

JS/022-023. This is a "[m]emorandum from the National Security Advisor to the Secretary of Defense communicating the President's approval of a DoD operation," over which DOD invokes Exemption 1 and the presidential communications privilege. Revised *Vaughn* at 3.

Exemption 1. If this document contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1. Similarly, if this document contains the Raid's legal basis, and that analysis is not inextricably intertwined

with properly classified facts, the government must disclose it. *See N.Y. Times I*, 756 F.3d at 119.

Presidential Communications Privilege. DOD has failed to establish that the presidential communications privilege applies because it has not demonstrated that the documents were kept confidential among close presidential advisors. *See ACLU*, 2016 WL 889739, at *5. Although the *Vaughn* index says this memorandum "is closely held between the President's aide for national security and the Secretary of Defense," this is inaccurate. Revised *Vaughn* at 3. The document was attached to the email on JS/161-164 (attached as Diakun Decl., Ex. 44), which was circulated among three other individuals and an email list ("JS Pentagon DoM List LC Bridge"). Because DOD has not established that those individuals are in an advisory role to the president, the agency has failed to establish that the privilege applies. Moreover, at least one court has held that the privilege does not apply to documents that authorize action at all. *See* Appendix A of Order at 8, *ACLU v. DOD*, No. 15 Civ. 9317 (AKH), (S.D.N.Y. July 31, 2017), ECF No. 76. This authorization memorandum is thus not subject to the privilege.

JS/048-053, JS/261-266, JS/273-278, JS/330-336, JS/339-345, STATE/039-044. DOD describes these records as "operational proposal documents." Malloy Decl. ¶ 17. It invokes Exemption 1 and the deliberative process privilege. *See* Revised *Vaughn* at 3, 4, 5.

Exemption 1. If this email contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1. Similarly, if this document contains the Raid's legal basis, and that analysis is not inextricably intertwined with properly classified facts, the government must disclose it. *See N.Y. Times I*, 756 F.3d at 119.

Deliberative Process Privilege. The agency argues it can withhold these "operational proposals" under the deliberative process privilege. Malloy Decl. ¶ 18. However, at least one of these proposals was circulated among agency employees after President Trump approved the

broader plan to support the UAE Shabwah Offensive and the Raid that was a part of it. *See* Ex. 25 (attached to JS/240-242 and circulated by email on January 27, 2017); Revised *Vaughn* at 3. That suggests the document was no longer deliberative or predecisional, but rather represented the final plan adopted by the government. *See Coastal States*, 617 F.2d at 866. If so, it would no longer serve the purposes of the privilege to withhold the document. *See id.* The agency has failed to meet its burden of demonstrating that the privilege applies to the other documents because it has provided no information about whether, when, and to whom they were circulated. *See Senate of P.R.*, 823 F.2d at 585. If the other proposal documents were also circulated and relied upon after the approval date of the operation, this likewise suggests that they transformed from predecisional to post-decisional, and the privilege does not apply.

Moreover, if these proposals reflect the legal basis for the Raid or the plan to support the Shabwah Offensive, and these "reasoning or conclusions have become the agency's operative view of its legal duties," *ACLU v. DOJ*, 90 F. Supp. 3d at 218, this legal basis must be disclosed as working law. *Cf.* PPG, Ex. 7 at 3 (requiring "operational plan[s] for taking direct action against terrorist targets" to include "[t]he international legal basis for taking action").

JS/059-062. This document is a "[d]etailed briefing narrative regarding the planning of [a] DOD military operation." Revised *Vaughn* at 3. DOD withheld it under Exemption 1 and the deliberative process privilege. *Id.*

Exemption 1. If this email contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1.

Deliberative Process Privilege. The agency asserts that this document is privileged "because it sets forth information, options, and recommendations to be used in the governmental decision-making process regarding a proposed military operation." *Id.* However, the agency's

claim conflicts with evidence about the function and distribution of the document. Although the briefing narrative is undated, it was widely circulated by email as an attachment on January 30, 2017, and February 3, 2017—*after* the agency's proposal to support the UAE Shabwah Offensive had been approved by the President and *after* the Raid was executed. *See* Revised *Vaughn* at 3; Ex. 41; JS/204-207 (attached as Diakun Decl., Ex. 45). In general, "communications made after the decision and designed to explain it" may not be withheld under the deliberative process privilege. *See Sears*, 421 U.S. at 152.

Even if the government's justification for invoking the privilege is that the briefing narrative lays out guidelines for use in *future* operations, that argument would fail. The Supreme Court in *Sears* rejected the argument that the government could use the deliberative process privilege to withhold a final, post-decisional document that might "provid[e] guides for decisions of similar or analogous cases arising in the future." 421 U.S. at 152 n.19. Thus, even if the document could be considered "predecisional" with respect to future decisions, it cannot be withheld under the deliberative process privilege.

JS/188-191. This document is an email chain concerning the "USCENTCOM intent for Shabwah Kinetic Fires." *See* Revised *Vaughn* at 4. DOD withheld it under Exemption 1 and the deliberative process and attorney–client privileges. *Id.*

Exemption 1. If this email contains any officially acknowledged information, *supra* Statement of Facts, the government may not withhold it on the basis of Exemption 1.

Deliberative Process Privilege. Plaintiffs challenge the invocation of the deliberative process privilege because the emails in the chain lost their predecisional character. In this email chain, General Votel first conveys his plan "with respect to kinetic fires associated with the Shabwah operation." *See* Ex. 29 at JS/190. In response, Craig Faller, the Senior Military

Assistant to the Secretary of Defense, conveys the Secretary of Defense's approval of the plan. *See id.* at JS/189 ("The Secretary is aligned with your intent."). Even if General Votel's email could have been considered predecisional when he initially sent it, the chain is clear that the Secretary of Defense approved the proposal wholesale. *See id.* As a result, the purposes of the privilege are no longer served by keeping the email chain from the public, *see Coastal States*, 617 F.2d at 866, and the agency can no longer withhold it, *see id.* at 867.

Attorney–Client Privilege. Plaintiffs challenge the invocation of the attorney–client privilege over portions of this document. The agency states that the document "*reflects* legal advice from the Office of General Counsel." Revised *Vaughn* at 4 (emphasis added). However, this document is not a communication "between a client and his or her attorney . . . for the purposes of obtaining or providing legal assistance." *See Brennan Ctr.*, 697 F.3d at 207 (citation omitted). Rather, it is a message from the Secretary of Defense conveying the agency's policy to General Votel, informing him of applicable standards. *See* Ex. 29 at JS/189 ("Below paragraph from OSD-GC applies."). The attorney–client privilege does not apply. And even if it did apply, the paragraph outlining the legal position of the agency constitutes working law and cannot be withheld. *See Brennan Ctr.*, 697 F.3d at 195–96, 199–202.

III. The government has failed to segregate and release all non-exempt information.

Even if parts of the challenged records are properly withheld, the agency must "take reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii)(II). At least some of the challenged records show that the government has not met this statutory obligation. For example, CENTCOM and the Pentagon Joint Staff separately processed and released the same email chain, *see* Ex. 13 (CENTCOM/003-005); Ex. 30 (JS/240-242). CENTCOM's redactions are extensive: it redacted the subject lines of the emails, the entire

body of the first and third emails, and the titles of the attachments to the emails—including information that has been officially acknowledged. *See* Ex. 13. The Joint Staff redacted none of this information. The Joint Staff also released three additional sentences from the body of the second email. *Compare* Ex. 30 *with* Ex. 13.

It is impossible for Plaintiffs to know whether the Joint Staff reasonably segregated and released all non-exempt information from this document. At the same time, it is clear that CENTCOM did not. CENTCOM's blatant over-redaction of this document shows it failed to satisfy its obligations under FOIA, and calls into question its approach to other records. DOD must reprocess all ten challenged CENTCOM records, and the Joint Staff and the State Department must also ensure they have segregated and released all non-exempt information.

IV. This Court should review the withheld documents *in camera.*

For the reasons explained above, Plaintiffs respectfully request that the Court hold that the government has failed to establish that the challenged documents are properly withheld under FOIA, and order it to release any information not properly subject to the claimed exemptions.

Should the Court have any doubt about the propriety of ordering the release of any record, Plaintiffs ask it to review the withheld document *in camera* to ensure the government's claimed exemptions apply. *See, e.g.*, *PHE, Inc. v. DOJ*, 983 F.2d 248, 252 (D.C. Cir. 1993) ("[*I*]*n camera* review is appropriate when agency affidavits are not sufficiently detailed to permit meaningful assessment of the exemption claims."). Under FOIA, judges have broad discretion to "examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions." 5 U.S.C. § 552(a)(4)(B). Courts "often . . . examine the document *in camera*" "in an effort to compensate" for the information imbalance between FOIA requestors and the government in FOIA litigation. *Vaughn v. Rosen*,

484 F.2d 820, 825 (D.C. Cir. 1973). Finally, *in camera* review is appropriate where "the number of records is relatively small." *ACLU v. DOJ*, No. 12-cv-7412 (WHP), 2014 WL 956303, at *3 (S.D.N.Y. Mar. 11, 2014). Out of hundreds of documents, the ACLU has narrowed its challenge to just thirty, most of which are just a few pages in length.

V. DOD has failed to establish that the search for CENTCOM/019 was reasonable.

Plaintiffs challenge the agency's search related to one record: CENTCOM/019 and any unproduced attachments.[3] To prevail on its motion for summary judgment, DOD bears the burden of establishing that its searches were adequate. *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). The Court may rely on agency affidavits to assess the adequacy of a search, but only if the affidavits are sufficiently detailed, nonconclusory, and submitted in good faith. *See Safeguard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). The agency must "identify the searched files[,] describe at least generally the structure of the agency's file system," establish that it "searched all custodians who were reasonably likely to possess responsive documents," and "set[] forth the search terms and the type of search performed." *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 877 F. Supp. 2d 87, 96 (S.D.N.Y. 2012) (citations omitted); *see also N.Y. Times Co. v. U.S. Dep't of Treasury*, No. 15-cv-5740, 2016 WL 4147223, at *5 (S.D.N.Y. Aug. 2, 2016). If a requester identifies a gap in the agency's search, for example by pointing to additional potential custodians, the agency must explain whether those sources "are likely to have responsive material, and, if so, whether there is any practical obstacle to searching for those materials." *Coffey v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1, 11 (D.D.C.

[3] CENTCOM's declarant states that he "understand[s] through counsel that Plaintiffs are not challenging CENTCOM's withholding of any information from CENTCOM/019 itself . . . ." Ferrell Decl. ¶ 8. At this time, Plaintiffs do not challenge the withholding of information from the page released to Plaintiffs, but if CENTCOM is able to locate the entirety of the email chain, Plaintiffs reserve the right to challenge specific withholdings in that record.

2017). With respect to CENTCOM/019, DOD fails to meet this burden.

CENTCOM/019 is a one-page document containing one full email and part of another. *See* Ex. 39. DOD asserts that it was "unable to retrieve the remainder of CENTCOM/019 from the Enterprise Vault system." Ferrell Decl. ¶ 8. DOD does not state, however, whether its archiving system contains only this copy of the email chain, or whether there are or should be unique files containing this email chain associated with each sender and recipient's archived email account. At least six individuals received the original email, which was then forwarded to two groups of email users ("CCJA Op Law" and "SJAOpLaw"), including an unknown number of individuals. *See* Ex. 39. In addition, although CENTCOM explains that users had "the opportunity to retrieve any vaulted emails" before the Enterprise Vault System was deleted, Ferrell Decl. ¶ 8, it does not state whether it asked any of the potential custodians if they had retrieved or saved a local copy. Because the declaration lacks details about the type of search performed, how email accounts are archived, and which potential custodians' files were searched, it fails to establish the adequacy of its search. *See, e.g.*, *Coffey*, 277 F. Supp. 3d at 11.

Further, through CENTCOM's declaration, Plaintiffs learned for the first time that there are unproduced attachments to CENTCOM/019. *See* Ferrell Decl. ¶ 8 (agency "successfully retrieve[d] one of the attachments to CENTCOM/019"). In light of this new disclosure, Plaintiffs also challenge DOD's search for attachments to CENTCOM/019 for the same reasons.

CONCLUSION

Plaintiffs respectfully ask the Court to reject the government's attempts to withhold the challenged documents and order the immediate release of information not properly subject to FOIA exemptions. The Court should also order the government to conduct a new search for CENTCOM/019 and all attachments, and to promptly process and release them.

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