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.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This Freedom of Information Act ("FOIA") lawsuit concerns documents cited in the publicly released executive summary of the Senate Select Committee on Intelligence's *Committee Study of the CIA's Detention and Interrogation Program* (the "SSCI Report"). In response to plaintiffs' FOIA request and in other contexts, the defendant agencies (collectively, the "government") have released substantial information concerning the CIA's former detention and interrogation program. The government has withheld from disclosure discrete details of the program that remain currently and properly classified and protected from disclosure by statute. The government has also withheld certain privileged attorney-client communications, predecisional and deliberative communications and draft documents, and a presidential directive protected by the presidential communications privilege.

The government's declarations logically and plausibly establish that the 24 documents remaining at issue in this case are protected from disclosure, in whole or in part, because they are currently and properly classified, protected from disclosure by statute, and/or privileged, and thus exempt under FOIA Exemptions 1, 3 and/or 5, 5 U.S.C. § 552(b)(1), (3) and/or (5). Accordingly, the government is entitled to summary judgment dismissing the complaint.

BACKGROUND

This lawsuit concerns a FOIA request by plaintiffs (collectively, the "ACLU") dated August 14, 2015, which was submitted to the CIA, the Department of Defense ("DOD"), the State Department, and the Department of Justice's Office of Legal Counsel ("OLC") and Office of Information Policy ("OIP"). *See* ECF No. 1, ¶¶ 19, 23-28 & Exh. A. The FOIA request purported to seek 69 records or categories of records cited in the SSCI Report. *Id*. ¶ 19 & Exh. A.

In response to the ACLU's request, the CIA and other agencies located and processed the requested records, and released segregable, non-exempt records to the ACLU in a series of productions in June and September 2016. (Declaration of Antoinette B. Shiner dated October 14, 2016 ("Shiner Decl."), ¶ 8; Declaration of Tara M. La Morte dated October 14, 2016 ("La Morte Decl."), ¶¶ 3-4). These productions included the following documents, which were released either in full or with limited redactions:

- a 161-page CIA Inspector General report (with appendices) from 2004 regarding the operation of the former detention and interrogation program between September 2001 and October 2003, which includes detailed information about the development and design of the program and the development and application of enhanced interrogation techniques;

- documents concerning the use of interrogation techniques and the role of certain Intelligence Community psychologists and medical personnel;

- two lengthy reports—one from the CIA Inspector General and one from the CIA's Associate Deputy Director for Operations—regarding the death in November 2002 of detainee Gul Rahman;

- transcripts of the Combatant Status Review Tribunals conducted for six "high value detainees";

- a memorandum containing legal analysis of the participation of DOD personnel in interrogations at a CIA detention facility;

- six legal advice memoranda and three letters prepared by OLC concerning interrogation techniques and/or conditions of confinement;

- a letter from the State Department Legal Adviser providing comments on a draft OLC legal opinion concerning interrogation techniques; and

- a 267-page DOJ Office of Professional Responsibility ("OPR") report from 2009 concerning the investigation into OLC's memoranda concerning issues relating to the CIA's use of enhanced interrogation techniques on suspected terrorists, and a 69-page memorandum of decision from the Associate Deputy Attorney General regarding the objections to OPR's findings in its report.

La Morte Decl. ¶ 5 & Exhs. A-M.[1] These documents, together with other documents and information previously released by the government, provide the public with substantial information concerning the CIA's former detention and interrogation program, including detailed information about the conditions under which detainees were held and interrogation techniques to which they were subjected. (*See id*.).

While the government has produced substantial information in response to the ACLU's FOIA request, it has asserted FOIA Exemptions 1 and 3 to protect several discrete categories of classified and statutorily protected information – information about foreign liaison services; identities of covert personnel; locations of covert CIA installations and former detention centers located abroad; descriptions of specific intelligence methods and activities; code words and pseudonyms; and classification and dissemination control markings – as well as a Memorandum of Notification issued by President George W. Bush on September 17, 2001 (the "MON"). (Shiner Decl. ¶¶ 10-24; *see also id.* ¶ 29; Declaration of Paul P. Colborn dated October 14, 2016 ("Colborn Decl.") ¶¶ 25-27). The government also asserted Exemption 5 to protect various privileged documents and information, including documents protected by the deliberative process and/or attorney-client privileges and, with regard to the MON, the presidential communications privilege. (Shiner Decl. ¶¶ 25-29; Colborn Decl. ¶¶ 19-24).[2]

The parties have conferred on multiple occasions in an effort to narrow the documents and issues in dispute. (La Morte Decl. ¶ 6). A total of 24 documents remain in dispute; these

[1] The ACLU does not challenge the redactions made to these documents.

[2] The government also withheld certain personally identifying information pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), and, with regard to CIA personnel, Exemption 1 and Exemption 3 in conjunction with the National Security Act and Central Intelligence Agency Act. (Shiner Decl. ¶¶ 14, 18, 23-24, 30-31). The government understands that the ACLU is not challenging the withholding of identifying information, including names, titles and past positions (La Morte Decl. ¶ 8), and accordingly this memorandum does not address those withholdings.

documents are described in the CIA's *Vaughn* Index, attached to the Shiner Declaration. (La Morte Decl. ¶ 8; Shiner Decl. ¶ 8). The ACLU challenges the withholding in full of three documents: the MON (Doc. No. 1), a draft legal appendix containing legal advice concerning interrogation techniques (Doc. No. 2), and a draft legal advice memorandum prepared by OLC (Doc. No. 17). (La Morte Decl. ¶ 8; *see* Index Nos. 1, 2, 17). The ACLU also challenges the redactions made to 21 other documents. (La Morte Decl. ¶ 8; *see* Index Nos. 4, 6, 7, 8, 9, 10, 13, 14, 15, 18, 19, 28, 29, 37, 43, 44, 45, 46, 50, 55, 66).[3]

ARGUMENT

FOIA represents a balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). Thus, while FOIA generally requires disclosure of agency records, the statute recognizes "that public disclosure is not always in the public interest," *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982); *accord ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012), and mandates that records need not be disclosed if "the documents fall within [the] enumerated exemptions," *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001).

A motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 is the procedural vehicle by which FOIA cases are typically decided. *See, e.g.*, *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the

[3] All of the documents remaining at issue were produced by CIA, with the exception of document 17, which was produced by OLC. The remaining defendants – DOD, OIP and the State Department – should therefore be dismissed from this action.

movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden" on summary judgment. *Carney*, 19 F.3d at 812 (footnote omitted).[4] The agency's declarations in support of its determinations are "accorded a presumption of good faith." *Id*. (quotation marks omitted).

In the national security context, moreover, courts must accord "substantial weight" to agencies' declarations. *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009); *accord New York Times Co. v. DOJ*, 756 F.3d 100, 112 (2d Cir. 2014); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). In reviewing the agency's declarations regarding national security matters, "the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *see also ACLU*, 681 F.3d at 70-71 ("Recognizing the relative competencies of the executive and the judiciary, we believe that it is bad law and bad policy to second-guess the predictive judgments made by government's intelligence agencies regarding whether disclosure of the [withheld information] would pose a threat to national security." (quoting *Wilner*, 592 F.3d at 76) (internal quotation marks omitted)); *accord Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999); *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990). Rather, "an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or

[4] Because agency affidavits alone will support a grant of summary judgment in a FOIA case, Local Rule 56.1 statements are unnecessary. *See Ferguson v. FBI*, No. 89-5071, 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting "the general rule in this Circuit"), *aff'd*, 83 F.3d 41 (2d Cir. 1996); *see also, e.g.*, *New York Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012).

plausible." *Wilner*, 592 F.3d at 73 (internal quotation marks omitted; quoting *Larson*, 565 F.3d at 862); *accord ACLU*, 681 F.3d at 69; *Wolf*, 473 F.3d at 374-75.

Under this deferential standard, the government's declarations amply demonstrate that the withheld documents and information are exempt from disclosure under FOIA Exemptions 1, 3, and 5. The government is therefore entitled to summary judgment as to the withheld documents and information.

I. THE GOVERNMENT PROPERLY WITHHELD CLASSIFIED DOCUMENTS AND INFORMATION PURSUANT TO EXEMPTIONS 1 AND 3

A. The Withheld Documents and Information Remain Currently and Properly Classified, and Thus Protected from Disclosure by Exemption 1

Exemption 1 exempts from public disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). The current standard for classification is set forth in Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) ("E.O. 13,526"). Section 1.1 of the Executive Order lists four requirements for the classification of national security information: (1) an "original classification authority" must classify the information; (2) the information must be "owned by, produced by or for, or [] under the control of the United States Government;" (3) the information must fall within one or more of eight protected categories of information listed in section 1.4 of the Executive Order, including *inter alia* intelligence activities, sources or methods, and foreign relations or foreign activities of the United States; and (4) an original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and be "able to identify or describe the damage." E.O. 13,526 § 1.1(a)(1)-(4).

The declaration of Antoinette Shiner, an original classification authority, amply demonstrates that these standards have been met with regard to the classified information withheld by the CIA under Exemption 1. All of the information withheld has been classified by an original classification authority; is owned by, produced by or for, or under the control of the U.S. Government; and pertains to intelligence activities, sources, or methods, and foreign relations or foreign activities of the United States within the meaning of sections 1.4 of the Executive Order. (Shiner Decl. ¶¶ 3, 11); *see* E.O. 13,526 §§ 1.4(a)(1)-(4), 1.4(c)-(d). In addition, as explained below, Ms. Shiner has determined that the unauthorized disclosure of each category of withheld information could reasonably be expected to result in damage to national security. (*See* Shiner Decl. ¶¶ 12-21).

First, the CIA properly withheld classified information about foreign liaison services. (*See* Shiner Decl. ¶ 13). As Ms. Shiner explains, foreign liaison services and foreign government officials, including those contained in the documents at issue, provide sensitive information to the agency in confidence; indeed, certain of the Agency's foreign relationships are so sensitive that the agency protects the mere fact of their existence. (*Id.*). It is thus logical to predict, as Shiner does, that disclosure "could damage the relations with the entities mentioned in the records and with other foreign partners working with the Agency, who may discount future assurances that information will be kept confidential." (*Id.*). Disclosure could also reasonably be expected to undermine intelligence sharing and cooperation with these foreign partners in other areas of importance. (*Id.*).

Because these judgments of national security harm logically and plausibly flow from the nature of the withheld information, they merit substantial deference from this Court. *See, e.g.*, *Unrow Human Rights Impact Litigation Clinic v. Dep't of State*, No. 13-1573 (KBJ), 2015 WL

5730606, at *6 (D.D.C. Sept. 29, 2015) (sustaining withholdings under Exemption 1 where affidavits explained the "chilling effect" disclosure of information "would have on U.S. relations with other countries and other sources of sensitive information," noting that "courts in this circuit have long recognized the legitimacy of this species of national security harm in the FOIA context," and citing cases).

Second, the CIA properly withheld classified information concerning the locations of covert CIA installations and former detention centers located abroad. The foreign locations where the CIA maintains a presence constitute intelligence methods (Shiner Decl. ¶ 15), as they are a means by which the CIA accomplishes its mission (*see id.* ¶ 16 (defining "intelligence methods")). Officially revealing that the CIA is operating in a particular country—or has operated in a country—may cause the country's government to take damaging countermeasures. For example, if the country's government knew of the CIA's presence, public pressure arising out of official disclosure may force the country's government to curtail cooperation with the agency. (*Id.* ¶ 15). If the country's government did not know of the CIA's presence within its borders, it could reasonably be expected to take action to eliminate or dispel the CIA from its territory. (*Id.*). Disclosing the location of live CIA facilities could cause adversaries to target the facility and persons associated it. (*Id.*). And in light of the "politically charged" nature of the CIA's former detention and interrogation program, officially acknowledging the locations of former facilities could reasonably be expected to harm this country's relationships with the foreign countries that housed those installations and thus impair the continued ability to obtain timely and accurate intelligence. *See, e.g.*, *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 & n.12 (D.C. Cir. 1983); *Marks v. CIA*, 426 F. Supp. 708, 712 (D.D.C. 1976) (upholding assertion of Exemption 1 over CIA covert field installations). Indeed, as the Shiner Declaration notes, these

details were redacted from the publicly released executive summary of the SSCI Report precisely because of the importance of protecting the Agency's foreign relationships. (Shiner Decl. ¶ 15); *Leopold v. CIA*, 106 F. Supp. 3d 51, 53-54 (D.D.C. 2015) (describing SSCI report declassification process).

Third, the CIA properly withheld classified descriptions of specific intelligence methods and activities, including certain counterterrorism techniques. (Shiner Decl. ¶¶ 16-17). Specifically, the Agency has protected undisclosed details about the practice of clandestine intelligence gathering and Agency tradecraft that continue to be used in connection with other types of CIA operations and activities. (*Id.* ¶ 17). Revealing this information would enable an adversary to better understand the "breadth, capabilities, and limitations" of the Agency's intelligence collection and activities, which would then assist the adversary in undermining their effectiveness. (*Id.*). Adversaries could, for example, develop ways to detect and counteract these methods, thereby undermining operational activities. (*Id.*). It is rational and plausible to predict that disclosing details concerning the practice of intelligence gathering and Agency tradecraft would undermine the usefulness of those methods, to the detriment of national security, and thus the Court should sustain the Agency's withholding of this information. *See, e.g.*, *ACLU v. CIA*, 892 F. Supp. 2d 234, 246 (D.D.C. 2012).

Fourth, the CIA properly withheld classified code words and pseudonyms contained in the records. (Shiner Decl. ¶ 18). The CIA and other federal agencies use code words in their internal and external communications to disguise actual names, identities, and programs of interest—such as an intelligence source or covert operation—in order to further protect intelligence sources, methods, and activities, and minimize the damage that would flow from an unauthorized disclosure of intelligence information. (*Id.* ¶¶ 18, 19). If code words and

pseudonyms are generally released, it could reasonably be expected that foreign intelligence services and other groups will deduce the identity or nature of the activity for which the code word or pseudonym stands, especially if such information is released in the aggregate and given the context of the release. (*Id.* ¶ 19). This, in turn, could compromise the intelligence activity or operation at issue, and/or risk the safety of an intelligence source or covert operative. For example, as the Shiner Declaration explains, a foreign intelligence service or group reading a message may better appreciate its contents and value if it is able to identify a source, covert operative, or intelligence activity by the associated code name or pseudonym. (*Id*. ¶ 19). Accordingly, the Agency properly withheld the code words and pseudonyms appearing in these records pursuant to Exemption 1. *See Schoenman v. FBI*, No. 04 Civ. 2202, 2009 WL 763065, at *20, *25 (D.D.C. Mar. 19, 2009) (upholding CIA's withholding of cryptonyms and pseudonyms pursuant to Exemption 1).

Fifth, the CIA properly withheld classification and dissemination control markings that appear on the memoranda, which denote the overall classification level of the memoranda, the classification of discrete portions of the memoranda, the presence of any compartmented information, and any limitations on disseminating the information. (Shiner Decl. ¶ 20). Ms. Shiner explains that these markings constitute intelligence methods used to control the dissemination of national security information and protect it from unauthorized disclosure. (*Id.*). Publicly revealing this information would expose the sensitivity and nature of the underlying intelligence, and thus "highlight areas of particular intelligence interest, sensitive collection sources or methods, foreign sensitivities, and procedures for gathering, protecting, and processing intelligence." (*Id.*). The Court should defer to the Agency's protection of this material. *See Larson v. Dep't of State*, No. 02-01937, 2005 WL 3276303, at *10 (D.D.C. Aug.

10, 2005) (holding that CIA properly withheld classification and dissemination control markings under Exemptions 1 and 3), *judgment aff'd*, 565 F.3d 857 (D.C. Cir. 2009); *see also Schoenman*, 2009 WL 763065, at *20, *25 (upholding CIA's withholding of dissemination control markings pursuant to Exemption 1).

Finally, the CIA has withheld the MON, identified as Document No. 1 on the CIA's *Vaughn* Index, in full under Exemption 1 (as well as Exemptions 3 and 5). The MON, issued on September 17, 2001, by President George W. Bush, made certain findings and authorized the CIA to capture and detain terrorists. (Shiner Decl. ¶ 29). Pursuant to the National Security Act, 50 U.S.C. § 3093, Congress was notified of the MON. (*Id.*). However, given the extraordinary sensitivity of the document, Congressional notification was strictly limited to certain members of Congress, as provided in 50 U.S.C. § 3093(c)(2), and the MON is otherwise closely held within the Executive Branch. (*Id.*).

In addition to the unclassified Shiner Declaration, the CIA has lodged a classified declaration, for the Court's review *ex parte* and *in camera*, to provide additional information that cannot be disclosed on the public record.[5] In its unclassified and classified declarations, the CIA has articulated logical and plausible reasons supporting its judgment that release of the MON and of the discrete categories of classified information withheld under Exemption 1 could reasonably be expected to harm national security, and has otherwise satisfied the requirements of Executive Order 13,526. These declarations are entitled to substantial deference, *see ACLU v. DOJ*, 681 F.3d at 71, 76, and accordingly the Court should grant summary judgment to the government with respect to its assertion of Exemption 1.

[5] As noted in the Notice of Classified Filing filed herewith, the CIA's classified declaration has been lodged with the Department of Justice's Classified Information Security Officer for secure transmission to the Court.

B. The Withheld Documents and Information Relate to Intelligence Sources and Methods, and Thus Are Protected from Disclosure by Exemption 3 in Conjunction with the National Security Act

The classified information withheld by the CIA is also protected from disclosure by FOIA Exemption 3, 5 U.S.C. § 552(b)(3), in conjunction with the National Security Act ("NSA"), as amended, 50 U.S.C. § 3024.

Under Exemption 3, matters "specifically exempted from disclosure" by certain statutes need not be disclosed. 5 U.S.C. § 552(b)(3). In examining an Exemption 3 claim, the Court need only examine whether the claimed statute is an exemption statute under FOIA and whether the withheld material satisfies the criteria for the exemption statute. *CIA v. Sims*, 471 U.S. 159, 167 (1985); *Wilner*, 592 F.3d at 72. As the Second Circuit has explained, "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Wilner*, 592 F.3d at 72 (internal quotation marks omitted); *see also Krikorian v. Dep't of State*, 984 F.2d 461, 465 (D.C. Cir. 1993) (court should "not closely scrutinize the contents of a withheld document; instead, [it should] determine only whether there is a relevant statute and whether the document falls within that statute"). Therefore, to support its claim that information may be withheld pursuant to Exemption 3, the government need not show that there would be harm to national security from disclosure, only that the withheld information logically or plausibly falls within the purview of the exemption statute. *Wilner*, 592 F.3d at 73; *accord Larson*, 565 F.3d at 868.

The National Security Act provides that "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). This statute vests the intelligence community with "'very broad authority to protect all sources of

intelligence information from disclosure.'" *ACLU*, 681 F.3d at 73 (quoting *Sims*, 471 U.S. at 168-69). It is well settled that the NSA is an exemption statute under Exemption 3. *See, e.g.*, *ACLU*, 681 F.3d at 76; *Larson*, 565 F.3d at 865; *Sims*, 471 U.S. at 168-69 (holding predecessor provision of NSA to qualify as an Exemption 3 statute). Exemption 3 and the National Security Act thus exempt from disclosure information that relates to an intelligence source or method. *ACLU*, 681 F.3d at 76.

Here, all of the classified information withheld under Exemption 1 is also protected from disclosure under Exemption 3 and the National Security Act because its release would disclose information relating to intelligence sources and methods, as discussed above. (Shiner Decl. ¶ 23). Numerous courts have found that information concerning the CIA's relationships and activities with foreign liaisons and foreign government officials, the location of covert field installations, techniques to gather foreign intelligence, code words and pseudonyms, and classification and dissemination control markings relate to the sources and/or methods by which the CIA accomplishes its mission to conduct foreign intelligence, and thus all fall squarely within the scope of the National Security Act. *See, e.g.*, *Schoenman v. FBI*, 841 F. Supp. 2d 69, 83-84 (D.D.C. 2012) (CIA covert installations, dissemination-control markings, and technical intelligence collection); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 503 (S.D.N.Y. 2010) (CIA foreign government liaisons, covert field installations abroad, clandestine intelligence collection operations, cryptonyms and pseudonyms, and dissemination control markings); *Schoenman*, 2009 WL 763065, at *24-25 (field installations, foreign liaison relationships, dissemination control markings, cryptonyms and pseudonyms).

Accordingly, Exemption 3 provides a separate and independent basis for granting the CIA summary judgment with respect to the withholding of national security information.

II. THE GOVERNMENT PROPERLY WITHHELD PRIVILEGED DOCUMENTS AND INFORMATION PURSUANT TO EXEMPTION 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5." *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (citation omitted).

As explained in the declarations provided by the CIA and OLC, many of the documents remaining at issue are protected, in whole or in part, by Exemption 5 and the deliberative process privilege, and in some cases also the attorney-client privilege.[6] Exemption 5 also protects the MON in full because that document is a privileged presidential communication.

[6] That these privileged documents were cited or discussed in the SSCI Report does not affect the privilege analysis. The SSCI Report was released by Congress, not the Executive Branch. *See ACLU v. CIA*, 823 F.3d 655, 659, 667-68 (D.C. Cir. 2016) (SSCI Report has always been a congressional document subject to full control of the Senate Committee). Nevertheless, where particular language in the documents was quoted or otherwise specifically disclosed in the SSCI Report, the CIA in many cases made discretionary releases of that language in the corresponding documents, while maintaining the applicable privilege(s) as to the remainder of the documents. *See, e.g.*, *Tigue*, 312 F.3d at 81 (publication of excerpt of report did not vitiate deliberative process privilege for remainder of document); *Bronx Defenders v. DHS*, No. 04 CV 8576 (HB), 2005 U.S. Dist. LEXIS 33364 (S.D.N.Y. Dec. 19, 2005) (memorandum protected by deliberative process privilege despite disclosure of its conclusion, general subject matter, and the context in which it was prepared).

A. The Government Properly Withheld Documents and Information Pursuant to Exemption 5 and the Deliberative Process Privilege

In enacting Exemption 5, "[o]ne privilege that Congress specifically had in mind was the 'deliberative process' or 'executive' privilege." *Hopkins*, 929 F.2d at 84. An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Cent. P'ship*, 166 F.3d at 482; *accord Tigue*, 312 F.3d at 76–77; *Hopkins*, 929 F.2d at 84. A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975) (*quoted in Tigue*, 312 F.3d at 80; *Grand Cent. P'ship*, 166 F.3d at 482; *Hopkins*, 929 F.2d at 84). While a document is predecisional if it "precedes, in temporal sequence, the 'decision' to which it relates," *Grand Cent. P'ship*, 166 F.3d at 482, the government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record. *NLRB v. Sears*, 421 U.S. 132, 151 n.18 (1975); *accord Tigue*, 312 F.3d at 80. So long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is predecisional. *Tigue*, 312 F.3d at 80.

In determining whether a document is deliberative, courts inquire as to whether it "formed an important, if not essential, link in [the agency's] consultative process." *Grand Cent. P'ship*, 166 F.3d at 483. Predecisional deliberative documents include "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Hopkins*, 929 F.2d at 84–85 (quoting *Sears*, 421 U.S. at 150). Legal advice, no less than other types of advisory opinions, "fits exactly within the deliberative process rationale for Exemption 5." *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980); *accord Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356–57 (2d

Cir. 2005) (final OLC advice memorandum protected by deliberative process privilege absent express adoption).

Here, the CIA and OLC properly withheld information pursuant to Exemption 5 and the deliberative process privilege.[7]

First, the CIA properly invoked the deliberative process privilege, in conjunction with the attorney-client privilege, to protect certain communications between attorneys in the CIA's Office of General Counsel and Agency employees, and between DOJ attorneys and CIA officials, consisting of legal advice provided by attorneys to Agency clients or information gathered from Agency personnel in furtherance of providing legal advice. (Shiner Decl. ¶ 25; *see* Index Nos. 2, 4, 6-10, 15, 17, 18, 29, 37, and 43-46). The attorney's role, in these instances, was to provide legal counsel in conjunction with specific proposals. (Shiner Decl. ¶ 25). The communications reflect interim stages associated with given deliberations. (*Id.*) The legal advice represented one part of the decision-making process and did not constitute the Agency's final decision to undertake a particular action or operation. (*Id.*). Accordingly, this advice was both predecisional and deliberative, and was properly withheld pursuant to the deliberative process privilege and Exemption 5. *See, e.g.*, *New York Times Co. v. DOJ*, 806 F.3d 682, 685-87 (2d Cir. 2015) (OLC legal memorandum protected by Exemption 5); *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 8-9 (D.C. Cir. 2014) (same); *Murphy v. Dep't of Army*, 613 F.2d 1151, 1158 (D.C. Cir. 1979) (same for memorandum reflecting legal advice within government agency); *ACLU v. CIA*, 109 F. Supp. 3d 220, 238 (D.D.C. 2015) (CIA properly withheld legal memoranda under deliberative process, attorney-client, and presidential communication privileges).

[7] The deliberative process privilege is invoked to protect Document Nos. 2 and 17 in full, as well as portions of Document Nos. 4, 6, 7, 8, 9, 10, 13, 14, 15, 18, 19, 28, 29, 37, 43, 44, 45, 46, 50, 55, and 66. (Shiner Decl. ¶ 25-26 & Index; Colborn Decl. ¶¶ 21, 22, 28).

Second, the CIA properly invoked the deliberative process privilege with respect to draft documents, comments related to draft documents, proposals, and assessments of ongoing activities and recommendations for future steps. (Shiner Decl. ¶ 26; *see* Index Nos. 2, 13, 14, 19, 28, 50, 55, and 66). These documents reflect interim stages associated with given deliberations concerning how to handle different policies related to the former detention and interrogation program. (Shiner Decl. ¶ 26). These communications do not convey final Agency viewpoints on a particular matter, but rather reflect different considerations, opinions, options, and approaches that preceded an ultimate decision or were part of a policy-making process. (*Id.*); *see Hopkins*, 929 F.2d at 84–85 (privilege protects "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated'" (quoting *Sears*, 421 U.S. at 150)); *Krikorian*, 984 F.3d at 466 (draft letters proposing alternative replies to public inquiries protected by deliberative process privilege and Exemption 5); *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. DOJ*, 697 F.3d 184, 206-07 (2d Cir. 2012) (draft OLC memoranda protected by deliberative process privilege); *Lahr. v. NTSB*, 569 F.3d 964, 982-84 (9th Cir. 2009) (draft reports and analysis); *Abdelfattah v. DHS*, 488 F.3d 178, 183-84 (3d Cir. 2007) (draft report).

Similarly, CIA and OLC invoked the deliberative process privilege with respect to a draft OLC opinion containing legal advice that was prepared for the purpose of assisting the CIA, an Executive Branch client, in making policy decisions. (Shiner Decl. ¶¶ 25-26; Colborn Decl. ¶¶ 20-22; *see* Index No. 17). As explained in the Colborn Declaration, given the passage of time, changes in personnel at OLC, and the lack of information as to its use, OLC lacks definitive knowledge as to when and for what purpose the draft opinion was shared with the CIA. (Colborn Decl. ¶ 16). It may have been shared with the client for editing suggestions or other

comments as part of OLC's deliberative process in preparing the opinion, it may also have been shared in draft form in order to provide tentative or preliminary legal advice in a time-sensitive situation, or it may have been transmitted for some other purpose. (*Id*.). To the extent the draft opinion was provided to the CIA with the intention that it be relied on as tentative or preliminary OLC advice, it falls squarely within the protection of the deliberative process privilege because the document is both predecisional, *i.e.*, prepared in advance of Executive Branch decisionmaking, and deliberative, *i.e.*, containing legal advice from OLC to Executive Branch officials in connection with that decisionmaking. (*Id.* ¶ 22); *see New York Times*, 806 F.3d at 687 (upholding assertion of Exemption 5 to protect final OLC legal advice). Furthermore, as a draft, the OLC opinion at issue is quintessentially deliberative material, since it reflects the tentative thought processes and reasoning of OLC in a document containing draft legal analysis that was never finalized, regarding possible advice in connection with Executive Branch deliberations concerning detention. (Colborn Decl. ¶ 21). The document is also predecisional, since it was prepared in advance of finalizing OLC's advice on the subject as well as any potential Executive Branch policy decisions regarding detention. (*Id.*); *see Brennan Ctr.*, 697 F.3d at 206-07 (upholding assertion of Exemption 5 to protect draft OLC memoranda).

As explained in the CIA and OLC declarations, compelled disclosure of the predecisional, deliberative material withheld pursuant to Exemption 5 would undermine the deliberative processes of government, by chilling the candid and frank communications necessary for effective decisionmaking. (Shiner Decl. ¶ 27; Colborn Decl. ¶¶ 21-22, 32).

B. The Government Properly Withheld Documents and Information Pursuant to Exemption 5 and the Attorney-Client Privilege

"The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance. Its purpose is to

encourage attorneys and their clients to communicate fully and frankly and thereby to promote "'broader public interests in the observance of law and administration of justice.'" *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (quoting *Upjohn v. United States*, 449 U.S. 383, 389 (1981)). The privilege operates in the Government context as it does between private attorneys and their clients, "protect[ing] most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance." *Id.* Indeed, the Second Circuit has recognized that because "public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority . . . , their access to candid legal advice directly and significantly serves the public interest." *Id.* at 419. "Upholding the [attorney-client] privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business," and "[a]brogating the privilege undermines that culture and impairs the public interest." *Id.* (quoting *In re Grand Jury Investigation*, 399 F.3d 527, 534 (2d Cir. 2005) (internal quotation marks omitted)).

To invoke the attorney-client privilege, a party must demonstrate that there was: "(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *Id.* at 419. The materials withheld pursuant to Exemption 5 and the attorney-client privilege easily meet this standard.[8]

The CIA invoked the attorney-client privilege (in addition to the deliberative process privilege) with respect to confidential communications between CIA employees and attorneys

[8] The attorney-client privilege is invoked to protect Document Nos. 2 and 17 in full, as well as portions of Document Nos. 4, 6, 7, 8, 9, 10, 15, 18, 29, 37, 43, 44, 45, 46. (Shiner Decl. ¶ 28 & Index; Colborn Decl. ¶¶ 24, 28).

within CIA's Office of General Counsel, and between CIA officials and DOJ lawyers, consisting of factual information supplied by clients in connection with requests for legal advice, discussions between attorneys that reflect those facts, and legal analysis and advice provided to the clients. (Shiner Decl. ¶ 28; *see* Index Nos. 2, 4, 6-10, 15, 17, 18, 29, 37, and 43-46). These are quintessentially privileged attorney-client communications. *See Cnty. of Erie*, 473 F.3d at 418. As noted by Ms. Shiner, disclosure of this confidential information would inhibit open communication between CIA personnel and their attorneys, thereby depriving the Agency of full and frank legal counsel. (Shiner Decl. ¶ 28).

CIA and OLC similarly invoked the attorney-client privilege (in conjunction with the deliberative process privilege) with respect to the draft OLC opinion containing legal advice. (Colborn Decl. ¶¶ 23-24, 32; *see* Index No. 17). The document was properly withheld pursuant to the attorney-client privilege because it contains confidential legal analysis prepared for and provided in draft form to OLC's client, the CIA, and because it reflects confidential communications between OLC and its client made for the purpose of seeking and providing that legal advice. (Colborn Decl. ¶¶ 24, 32). As with disclosure of the confidential attorney-client communications withheld by the CIA, disclosure of this OLC advice would disrupt the relationship of trust that is critical when attorneys formulate legal advice for their clients, and inhibit open communication between OLC and its clients. (*Id.*).

C. The Government Properly Withheld the MON Pursuant to Exemption 5 and the Presidential Communications Privilege

The presidential communications privilege is "closely affiliated" with the deliberative process privilege. *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). However, unlike the deliberative process privilege, which applies to decisionmaking of executive officials generally, the presidential communications privilege applies specifically to decisionmaking of the

President. *Id.* at 745. In particular, it applies "to communications in performance of a President's responsibilities, . . . and made in the process of shaping policies and making decisions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (citation and internal quotation marks omitted).

Although the presidential communications privilege is in this sense narrower than the deliberative process privilege, the protection afforded by the presidential communications privilege is broader. Documents subject to the presidential communications privilege are shielded in their entirety. *See In re Sealed Case*, 121 F.3d at 745 ("Even though the presidential privilege is based on the need to preserve the President's access to candid advice, none of the cases suggest that it encompasses only the deliberative or advice portions of documents."). Moreover, the presidential communications privilege protects not only predecisional advice, but also closely-held presidential directives and decisional documents. *Sealed Case*, 121 F.3d at 745-46; *Amnesty*, 728 F. Supp. 2d at 522.

The CIA properly withheld the MON in full pursuant to Exemption 5 and the presidential communications privilege (as well as Exemptions 1 and 3). (Shiner Decl. ¶ 29).[9] The MON is a direct, confidential communication from the President to CIA officials on highly sensitive topics. (*Id.*). As noted above, given the extraordinary sensitivity of the MON, notice to Congress was strictly limited to certain members of Congress, as provided in the National Security Act, 50 U.S.C. § 3093(c)(2), and the MON has been closely held within the Executive Branch. (*Id.*). Disclosure of the MON would inhibit the President's ability to engage in effective

[9] In the FOIA context, the presidential communications privilege need not be invoked by the President himself, but may be asserted by the agency withholding the record in question. *See, e.g.*, *Loving v. DOD*, 496 F. Supp. 2d 101, 108 (D.D.C. 2007), *aff'd*, 550 F.3d 32 (D.C. Cir. 2008).

communications and decisionmaking. (*Id.*) It is accordingly privileged in its entirety and protected from disclosure by Exemption 5, in addition to Exemptions 1 and 3.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to defendants and dismiss the complaint in its entirety.

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PREET BHARARA
United States Attorney for the
Southern District of New York,
Attorney for Defendants

By: /s/
SARAH S. NORMAND
TARA M. La MORTE
ELIZABETH M. TULIS
Assistant United States Attorneys
86 Chambers Street, Third Floor
New York, New York 10007
Telephone Nos. (212) 637-2709/2746/2725
Facsimile Nos. (212) 637-2730
Email: Sarah.Normand@usdoj.gov
Email: Tara.Lamorte2@usdoj.gov
Email: Elizabeth.Tulis@usdoj.gov