

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION and the
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE; DEPARTMENT OF
JUSTICE, including its components the OFFICE OF
LEGAL COUNSEL and OFFICE OF
INFORMATION POLICY; DEPARTMENT OF
STATE; and CENTRAL INTELLIGENCE AGENCY,

Defendants.

Case No. 15-cv-9317

**PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

The government originally sought summary judgment on the basis of conclusory, boilerplate descriptions, and sweeping and unjustified theories of privilege. The government's Reply and accompanying supplemental submissions cure none of the deficiencies present in its moving papers. Instead, the government has doubled down on its efforts to greatly expand the narrow exemptions to the Freedom of Information Act's disclosure requirements, while supplying none of the necessary details that were absent in the original Shiner Declaration and *Vaughn* Index. The motion for summary judgment should be denied.

ARGUMENT

I. THE GOVERNMENT HAS FAILED TO JUSTIFY ITS EXTRAORDINARILY BROAD INVOCATION OF THE DELIBERATIVE PROCESS PRIVILEGE.

The government's Reply, the Supplemental Shiner Declaration, and the revised *Vaughn* Index fail to correct the errors of the original submissions and cannot justify the agency's broad claims of deliberative process privilege. While the second Shiner Declaration adds minor detail, it remains almost entirely conclusory and largely fails to identify the role played by the documents it seeks to withhold in specific decisionmaking processes. And the government's new argumentation suffers from four key flaws: First, its expansive interpretation of the deliberative process privilege proves far too much, undermining the very purpose of FOIA by providing that every agency document may be kept secret as "predecisional" and "deliberative" unless it expressly sets out and communicates final agency policy. Second, the government attempts to cast past decisions and descriptions of their consequences as intermediate steps towards some final future decision and thus privileged. Third, the government does not justify the withholding of nondeliberative information contained in documents that are either marked "draft" or respond to drafts. And fourth, the government incorrectly asserts that final legal

guidance is “deliberative.” As set forth below, each of these contentions is wrong and should be rejected.

A. The CIA’s deliberative process theory is overbroad and contrary to law.

FOIA requires that agencies affirmatively disclose to the public, in the absence of any request, “statements of policy and interpretations which have been adopted by the agency.” 5 U.S.C. § 552(a)(2)(B). But agencies are not entitled to withhold as “deliberative” any records that do not constitute final statements of agency policy. The government nonetheless argues that the records here at issue may be withheld in their entirety because they variously do not “represent a final Agency determination,” (Doc. 19), are “not a final Agency decision on the matter,” (Doc. 29), “preceded DOJ’s final decision” (Doc. 37) “do[] not reflect a final decision” (Doc. 55), or are “not the Agency’s or OMS’s final official history, or assessment, of the program” (Doc. 66). Supplemental Declaration of Antionette Shiner (“Supp. Shiner Decl.”) (Dkt. No. 67) ¶¶ 15, 17, 18, 21, 22. But this formulation of the issue turns the burdens of proof and persuasion on its head.

As the Second Circuit has observed, “[t]he litigation posture of Exemption 5 cases . . . focuses on the government proving the applicability of an exemption rather than the plaintiff proving applicability of one of the affirmative provisions because the burden rests on the government to shield documents from disclosure otherwise to be disclosed under FOIA.” *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. Dep’t of Justice*, 697 F.3d 184, 195 n.7 (2d Cir. 2012). And because “the basic objective behind FOIA is disclosure, not secrecy, the nine exemptions are to be ‘narrowly construed.’” *N.Y. Pub. Interest Research Grp. v. E.P.A.*, 249 F. Supp. 2d 327, 331 (S.D.N.Y. 2003) (Hellerstein, J.) (quoting *FBI v. Abramson*, 456 U.S. 615, 630 (1982)).

The deliberative privilege, then, shields an agency record only if it forms “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975); *see also Petroleum Info. Corp. v. Dep’t of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) (stating that the deliberative process privilege “is centrally concerned with protecting the process by which policy is formulated”). In short, the agency must show that the information it seeks to withhold “formed an ‘essential link’ in the agency’s policy development.” *Grand Cent. P’ship v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999); *see* Pls.’ Opp. Br. (Dkt. No. 57) at 5–6. Neither the supplemental Shiner declaration nor the revised *Vaughn* index make the case that this standard is met with regard to the documents here.

Further, not only does the government urge an overbroad interpretation of the deliberative process privilege, but also argues that, in this case, the privilege extends to nondeliberative, factual material. According to the government, no factual material may be segregated from any deliberative “recommendations” or “opinions” in the documents here, because the CIA’s torture program presents a context in which all facts serve to further—or threaten to reveal—a perpetual decision-making process: “As explained by Ms. Shiner, during the course of the former interrogation program at issue in the documents, there was considerable back-and-forth among CIA personnel, in various roles, about handling different aspects of the interrogations.” Reply (Dkt. No. 68) at 22. The agency’s argument is that all facts included in these CIA documents “convey facts and situational assessments to decisionmakers for the purpose of receiving a final decision on outstanding matters.” *Id.* But courts have rejected this type of sweeping argument, because under this “expansive interpretation, virtually any e-mail exchange between an employee and a supervisor would be subject to Exemption 5 because the

supervisor might make a decision based upon information provided by the employee.” *Sakamoto v. E.P.A.*, 443 F. Supp. 2d 1182, 1200 (N.D. Cal. 2006).

Moreover, the CIA’s attempt to withhold nondeliberative factual information is not limited to documents that flow from subordinates to decisionmakers. The agency maintains instead that even facts conveyed alongside commands from superiors to inferiors, or in a document setting forth a supervisor’s summary of his office’s involvement in the torture program—in every case either “formed an integral part of the decisionmaking process” or would “be revelatory of the deliberative process.” Reply at 22. But the government’s conclusory arguments are in considerable tension with the longstanding requirement that the privilege applies only to the “‘opinion’ or ‘recommendatory’ portion, not to factual information which is contained in the document.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980); see *E.P.A. v. Mink*, 410 U.S. 73, 87–88 (1973) (“[P]urely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery.”).¹

¹ The government accuses the ACLU of disregarding *Lead Indus. Ass’n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70 (2d Cir. 1979). See Reply at 20. But the Second Circuit’s guidance in that case is quite clear: “We believe the proper rule . . . is this: If the factual materials are ‘inextricably intertwined’ with policy making recommendations so that their disclosure would ‘compromise the confidentiality of deliberative information that is entitled to protection under Exemption 5,’ the factual materials themselves fall within the exemption.” *Lead Indus. Ass’n*, 610 F.2d at 85 (quoting *Mink*, 410 U.S. at 92). In *Lead Indus. Ass’n*, the Second Circuit did not suggest that factual information was generally withholdable, but found that information claimed to be a factual summary was actually deliberative because the documents were “more than mere summaries,” and were in fact produced by “consultants [who] were asked to draw inferences and weigh the evidence” to aid an ongoing rule-making process. *Id.* at 83. The government does not make a showing that that is the case here, certainly not for each document.

B. Descriptions of decisions that have already been made are not protected by the deliberative process privilege.

As Plaintiffs explained in their responding brief, the government has failed to justify the wholesale withholding of documents that appear to narrate decisions that have already been made. *See* Pls.' Opp. Br. at 8–9. In its reply, the government claims that quotations Plaintiffs have taken from the unredacted portions of the withheld documents represent mere “speculation” about or “mischaracterization” of the documents. But the government offers no substantiation for these claims aside from conclusory statements in the second Shiner declaration; it does not, for example, explain how this is so.

Documents 7, 14, and 15 are reports from the field describing the effects of various decisions about Abu Zubaydah's torture. The government claims that these documents are entirely predecisional and deliberative even though they report consequences of decisions already taken. For example, Documents 7 and 14 report on of the decision to withhold medical care from a Abu Zubaydah and destroy his body if he dies. *See* Tulis Decl., Exh. H (Doc. 14) at 1 (confirming that “We are currently providing absolute minimum wound care []as evidence by the steady deterioration of the wound”); Tulis Decl., Exh. C (Doc. 7) at 5 (“If subject dies, we plan on seeking [redacted] assistance for the cremation of subject.”). Document 15, written by Abu Zubaydah's torturers to report on the results of the CIA's decision to torture him for 17 days provides, by the government's own admission, “a summary of Abu Zubaydah's interrogation” and “an assessment of the situation.” Supp. Shiner Decl. ¶ 13; *see* Tulis Decl., Exh. I (Doc. 15) at 3 (“The aggressive interrogation began the morning of 4 August 2002. To date the phase has continued for 17 days. During this time psychological and physical pressures have been applied to induce complete helplessness, compliance and cooperation from the subject. Our goal was to reach the stage where we have broken any will or ability of the subject to resist . . .”).

The government argues that these factual descriptions may be withheld because decisionmakers might make future decisions based on the facts they receive from the field. But FOIA does not shield this type of reporting merely because it may someday be used to inform an indeterminate future decision. *See Coastal States*, 617 F.2d at 868 (“Characterizing these documents as ‘predecisional’ simply because they play into an ongoing audit process would be a serious warping of the meaning of the word.”). As the D.C. Circuit has explained, the explanation of past agency decisions may not be withheld even if described in “a memo written in contemplation of a change in that very policy.” *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010). Otherwise, “it would be hard to imagine any government policy document that would be sufficiently final to qualify as non-predecisional and thus subject to disclosure under FOIA.” *Id.*; *see* Pls.’ Opp. Br. at 9 n.2; *see also Sakamoto*, 443 F. Supp. 2d at 1200 (rejecting agency claim that emails between an employee and a supervisor could be withheld merely “because the supervisor might make a decision based upon information provided by the employee”).

The government’s arguments in favor of withholding Documents 8 and 13, which appear to provide instruction from CIA headquarters to employees in the field, are even less in line with the requirements of FOIA. “[A] document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made.” *Coastal States*, 617 F.2d at 868; *see also Judicial Watch, Inc. v. Dep’t of Army*, 435 F. Supp. 2d 81, 90 (D.D.C.) (rejecting invocation of deliberative process privilege where document “was not prepared to assist an agency in arriving at a decision,” but instead “to update another party on the current status of a decision already made”).

Document 8 clearly instructs subordinates in the field *as to the decisions* made by headquarters, informing them that “the interrogation process takes precedence over preventative medical procedures,” and that “all major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life.” Tulis Decl., Exh. D (Doc. 8) at 4-5. The agency claims that the document is nonetheless predecisional, because “it provides preliminary input in advance of a final decision from Headquarters as to how to conduct the next phase. . . .” Supp. Shiner Decl. ¶ 8. But as the court in *Am. Immigration Council v. Dep’t of Homeland Sec.*, 905 F. Supp. 2d 206, 220 (D.D.C. 2012) explained, “‘More guidance soon,’ however, does not undercut the finality of the guidance already given. Although Charles Dickens published *David Copperfield* in monthly serialization, each installment fixed the chapters it published.” Here too, the government has not shown that the guidance sent to subordinates was merely advisory, nor that the decisions it plainly describes remained predecisional because of the prospects of further decisions yet to come.

The government’s argument for withholding Document 13 is no more persuasive. According to the government, although Document 13 admonishes subordinates in the field to refrain from committing to writing “any speculative language as to the legality of given activities or, more precisely, judgment calls as to their legality vis-à-vis operational guidelines for this activity agreed upon and vetted at the most senior levels of the agency,” Tulis Decl., Exh. G (Doc. 13) at 2, this and other redacted statements are merely “recommendations and represent interim stages of decisionmaking.” Supp. Shiner Decl. ¶ 11. The government provides no further explanation, suggesting again that it seeks to impermissibly recharacterize guidance already given as somehow tentative or predecisional, when it is evident that it is not.

The government contends that Documents 44, 45, and 46 “consist of recommendations to OPA as to whether and how to present certain information about the detention and interrogation program to the public.” *Id.* ¶ 20. Of course, it is not at all clear that these communications were in fact directed towards decisionmakers at OPA, rather than consisting of CIA attorneys discussing their views of, or how to present decisions already made and therefore cannot be characterized as wholly predecisional, if predecisional at all. When one writer reports that “Our Glomar figleaf is getting pretty thin,” Tulis Decl., Exh. P (Doc. 44) at 2, and another observes that “this certainly makes the declaration I just wrote about the secrecy of the interrogation program a work of fiction,” Tulis Decl., Exh. Q (Doc. 45) at 2, they are discussing decisions already made, rather than writing in service of future decisionmaking.

Finally, Document 55, while almost completely withheld, appears to describe the President’s reaction to the decisions previously made by the CIA as to how to torture detainees, including that “the President was concerned about the image of a detainee, chained to the ceiling, clothed in a diaper, and forced to go to the bathroom on themselves.” Tulis Decl., Exh. S (Doc. 55) at 2. That reaction was relayed to the Director of Central Intelligence, who relayed it to James Mitchell, a CIA contractor who helped devise and administer the torture program. The government maintains that it may withhold this document in full because it “shows interim discussions related to use of enhanced interrogation methods—it does not reflect a final decision by the Director about the use of those methods.” Supp. Shiner Decl. ¶ 21. But there is nothing interim about the methods the CIA was already using on prisoners; they had been proposed and were being deployed. And even if the Director was considering changing the already-existing torture program at that time (a fact which the government has not established), an agency may not “avail itself of Exemption 5 to shield existing policy from disclosure simply by describing

the policy in a document that as a whole is predecisional, such as a memo written in contemplation of a change in that very policy.” *Pub. Citizen*, 598 F.3d at 876.

C. The government has not justified its wholesale withholding of documents marked “draft.”

The government argues that Documents 6, 18, 28, 43 and 66 may be withheld as drafts. But the “mere fact that a document is a draft” is not “sufficient reason to automatically exempt it from disclosure.” *N.Y. Times Co. v. Dep’t of Def.*, 499 F. Supp. 2d 501, 515 (S.D.N.Y. 2007); *see* Pls.’ Opp. Br. at 8 n.1. The government must still establish that the information it seeks to withhold is “deliberative in nature.” *Arthur Andersen & Co. v. Internal Revenue Serv.*, 679 F.2d 254, 257–58 (D.C. Cir. 1982). It has not done so here or even attempted to do so.

As explained in Plaintiffs’ opposition brief, Document 66 consists of a non-deliberative factual recitation of years of CIA decisions, and may not be withheld. Pls.’ Opp. Br. at 10–11; *see also Fox News Network, LLC v. Dep’t of Treasury*, 911 F. Supp. 2d 261, 278–80 (S.D.N.Y. 2012) (Rejecting agency’s attempt to withhold document where “there is no indication that this recitation of past events relates in any way to a future policy decision”). The government maintains that the document may be withheld in full because it “is not the Agency’s or OMS’s final official history or assessment of the program,” relying on a series of D.C. Circuit cases concerning official agency histories to support its claim that the factual information in the document may be withheld. *See* Reply at 17–20. The government’s reliance on these “official history” cases is misplaced.

While the D.C. Circuit has allowed agencies to withhold in their entirety drafts of official agency histories, it has made clear that this is so only for the processes by which agencies deliberate over their official historical statements. As that court has explained, “the basic rule” is that “in most situations factual summaries prepared for informational purposes will not reveal

deliberative processes and hence should be disclosed.” *Paisley v. C.I.A.*, 712 F.2d 686, 699 (D.C. Cir. 1983), *opinion vacated in part*, 724 F.2d 201 (D.C. Cir. 1984). “Thus, notwithstanding its status as a ‘draft,’ a document that does not reflect the genuine evolution of an agency's decisionmaking process and instead merely recites ‘factual information which does not bear on [] policy formation,’ is not entitled to protection under the deliberative process privilege.” *Conservation Force v. Jewell*, 66 F. Supp. 3d 46, 60 (D.D.C. 2014) (quoting *Wilderness Soc’y. v. Dep’t of Interior*, 344 F. Supp. 2d 1, 14 (D.D.C. 2004)) (alteration in original).

Official agency histories, however, present a unique and inapposite context to justify such a withholding. Because “[a]n agency history constitutes the agency’s ‘official statement’ concerning the agency's prior actions,” the creation of “an agency's official history is a final agency decision.” *Nat’l Sec. Archive v. C.I.A.*, 752 F.3d 460, 463 (D.C. Cir. 2014). As a consequence, the D.C. Circuit has “held that a *draft* of an agency’s official history is pre-decisional and deliberative, and thus protected under the deliberative process privilege.” *Id.* The court took pains to explain that its decision that a factual recitation that was not finalized was a departure from the ordinary rule, and limited to “the narrow confines of this case, which involves a draft agency history.” *Id.* at 465; *see also Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (draft official history raised unique concerns because history “constitutes the Air Force’s official statement” and the agency “depends on this official statement to provide a basis for future military and public policy decisions” and “must stand by its history in the public forum”); *Dudman Commc’ns Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987) (“Release of Sunderland’s manuscript would disclose the alterations that the Air Force, in its entirety, made during the process of compiling the official history” and “the disclosure of

editorial judgments -for example, decisions to insert or delete material or to change a draft's focus or emphasis-would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work”).

Document 66, however, is not a draft official history. Its creation was not part of a deliberative process aimed at producing an official history, and the facts it discloses pose no risk of revealing a deliberative give-and-take. Nor was the document created for a supervisor in order to aid him or her in his or her decisionmaking process; instead, it was prepared by the Chief of the Office of Medical Services to describe the decisions his office made during the course of the broader CIA torture program. That the document is considered by the government to be a “working draft” that “was never finalized” and “does not appear on Agency letterhead,” Reply at 18, is entirely immaterial. The question is whether, and how, it played a role in the decisionmaking process. *See Fox News*, 911 F. Supp. 2d at 279–80 (rejecting agency’s attempt to withhold a chronicle of “past developments relevant to the executive compensation issue” that “explains and defends past actions taken by Treasury over the preceding several months” in the absence of evidence that the timeline was created for a decisionmaking process, because “while the timeline may later have been used to give Treasury officials a common understanding of the events that led to the payment of the AIG executive bonuses, Treasury has failed to specify how that played a role in the decisionmaking process”). But the government’s submissions shed no light on this.²

² *Am. Civil Liberties Union v. Dep’t of Justice*, 844 F.3d 126, 133 (2d Cir. 2016) is inapplicable. There, the Second Circuit addressed the decisionmaking process underlying decisions made about the government’s targeted killing program, and found that disclosure of the draft op-ed would reveal those deliberations. Here, the government has identified no deliberative process save the author’s own internal deliberations about how and when to finish his retrospective account of the Office of Medical Service’s involvement in the torture program.

The CIA's rationale for withholding Document 18 is similarly untethered to the nature of the document itself. The government maintains that Document 18 is predecisional and deliberative because it is a "draft cable submitted to the supervisor for review before finalizing." Supp. Shiner Decl. ¶ 14. But this bland description is belied by the document itself, which, as its author explains, "is a cable that I drafted which I don't expect to go anywhere but I want it entered for the record." Tulis Decl., Exh. J (Doc. 18) at 2. Far from an interim draft presented to a supervisor for review, it is clearly written as a final document to preserve for the record very serious concerns with decisions that had already been made with respect to the torture of a particular detainee.

Documents 28 and 43 consist of comments from the CIA's Office of Medical Services on draft documents created by the Office of Inspector General and the Department of Justice. The government argues that these documents may be withheld in full. But a fair reading of the documents make clear that far from merely providing recommendations for ongoing decisionmaking, these documents also set forth nondeliberative facts and accounts of previous decisions, which can and should be segregated and disclosed. *See Hopkins v. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 85 (2d Cir. 1991) (observing that "[t]he fact that the reports constitute part of the deliberative process does not end our inquiry," because any "factual observations" that "are 'reasonably segregable' from the opinions and recommendations" are "therefore subject to disclosure").

For example, Document 28 reported on troubling conflicts of interest that existed as a result of *previous* decisions made in the torture program, documenting that two independent contractors "applied an EIT which only they were approved to employ, judged both its effectiveness and detainee resilience, and implicitly proposed continued use of the technique – at

a daily compensation reported to be \$1800/day, or four times that of interrogators who could not use the technique.” Tulis Decl., Exh. L (Doc. 28) at 18. Similarly, Document 43 communicates a final position as to what the Office of Medical Services’s role would be in the torture program: “OMS is not in the business of saying what is acceptable in causing discomfort to other human beings, and will not take on that burden.” Tulis Decl., Exh. O (Doc. 43) at 3. The government has failed to contend that this was somehow a predecisional document, let alone to justify the withholding of these documents in full.

Finally, Document 6 does not reflect deliberation but explains a conclusion already reached and seeks impunity for an already decided course of conduct. *See* Tulis Decl., Exh. B (Doc. 6) at 3 (seeking declination of prosecution because the “interrogation team . . . concluded . . . the use of more aggressive methods is required” and that “[t]hese methods include certain activities that normally would appear to be prohibited under the provisions of 18 U.S.C. §§2340-2340B.”). That the document is marked “draft” does not, as Plaintiffs have previously shown, automatically shield it from the public. *See* Pls.’ Opp. Br. at 8 n.1.

D. Legal interpretations are not deliberative.

Finally, the government argues broadly that legal interpretations are exempt from disclosure as predecisional and deliberative because “legal advice constitutes one consideration for final decisionmakers . . . but is not a final Agency decision on the matter.” Supp. Shiner Decl. ¶¶ 10, 17. This theory sweeps far too broadly, and would render virtually all agency interpretations of law “predecisional” and “deliberative” unless they also constituted an agency action. But this is not the law.

The government’s error is illustrated by its differing rationales for withholding legal interpretations. According to the government, Doc. No. 37, a memorandum for the record setting

forth agency lawyers' determination of the legality of specific torture methods, is predecisional and deliberative because "it reflects discussions that preceded DOJ's final decision regarding its assessments as to the lawfulness of certain proposed techniques." Supp. Shiner Decl. ¶ 18. Even if this is so, which the government does not establish, the finality of DOJ's assessments as to lawfulness would be irrelevant in light of the government's argument that even *final* legal decisions are necessarily predecisional and deliberative, because final legal interpretations merely "constitute[] one consideration for final decisionmakers . . . but [are] not a final Agency decision on the matter." Supp. Shiner Decl. ¶¶ 10, 17.

As the *Coastal States* court explained, in many cases legal interpretations are not "deliberative" because they "do not contain subjective, personal thoughts on a subject" or, more significantly, "discuss the wisdom or merits of a particular agency policy, or recommend new agency policy." 617 F.2d at 869. The court rejected the government's claim that agency "attorneys will be less 'candid' in the future" if their legal interpretations are disclosed because "there is little to be frank or honest about when explaining on what date a transaction occurs under 10 C.F.R. § 212.31 or whether 10 C.F.R. § 212.10 permits a buyer and seller to agree to a price higher than that set by the agency. . . . Nor does the general description of the remaining documents in the agency's index suggest that any 'candor' is likely to be found in these legal interpretations." *Id.* The government has shown nothing to suggest that the legal interpretations at issue here are properly withheld as "deliberative." As set forth below, they also did not fall within the attorney-client privilege.

II. THE GOVERNMENT HAS YET NOT MET ITS BURDEN OF ESTABLISHING THAT THE ATTORNEY-CLIENT PRIVILEGE PROTECTS ANY DOCUMENT AT ISSUE.

In Plaintiffs' Response to Defendant's Motion for Summary Judgment, Plaintiff argued that the attorney-client privilege does not apply to the documents at issue in this case because: (1) the government relies on a "*Vaughn* index [that] is vague and conclusory, . . . [with an] accompanying affidavit [that] does little to fill in the gaps," Pls.' Opp. Br. at 16–17 (citing *ACLU v. Dep't. of Justice*, 90 F. Supp. 3d 201, 215 (S.D.N.Y. 2015)); (2) the unredacted portions of Doc. Nos. 6-8, 9, 15, 18, and 44-46 suggest a predominant purpose of soliciting not legal but policy or business advice, *id.* at 17-21; (3) the crime-fraud exception applies to Doc. Nos. 6-8, *id.* at 21-22; and (4) disclosure of Doc. Nos. 4, and 44-46 would not reveal confidential information, *id.* at 22-23. Because the government's Reply fails with regard to each of these arguments, Defendants' motion for summary judgment based upon the attorney-client privilege should be denied.

A. The Government Again Fails to Make the Requisite Factual Showing.

In reply to Plaintiffs' argument that the government's initial *Vaughn* Index and supporting declaration are conclusory and insufficiently detailed, the government submits a new declaration and amended *Vaughn* Index. But the government's new filings are just as conclusory and insufficient as the prior ones. Thus, as Plaintiffs argued, the original Shiner Declaration (Dkt. No. 48) provided only "each document's issue date, its author and intended recipient, and the briefest of references to its subject matter," *Senate of P.R. v. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (holding such a bare bones description inadequate), and the original *Vaughn* Index (Dkt. No. 48 Exh. 1) offered only conclusory statements, *see* Pls.' Opp. Br. at 16. Unfortunately for the government, the new pleadings are no better. *See* Supp. Shiner Decl.

(providing the same bare bones information regarding date, author and recipient, and substance of communication); Amended *Vaughn* Index (Dkt. No. 67, Exh. 1) (employing identical conclusory statements). Indeed, the only pertinent change in the government's new filing is the addition of this paragraph:

I want to clarify that CIA attorneys provided legal advice to Agency clients throughout the duration of the former detention and interrogation program. Those lawyers were acting in their legal capacity and not as policymakers. Rather, Agency employees sought legal advice on a range of issues, including the lawfulness of day-to-day operations of the program, and CIA attorneys provided counsel as to the legality of the client's proposed courses of actions.

Supp. Shiner Decl. ¶ 3. Of course, this paragraph is itself entirely conclusory, simply insisting that Agency employees sought and CIA attorneys provided "legal advice" without providing any factual basis for that characterization. *ACLU v. Dep't of Justice*, – F. Supp. 3d —, 2016 WL 5394738, at *4 (S.D.N.Y. Sept. 27, 2016) (holding government "submissions are insufficient where 'the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping'") (internal citation omitted). Moreover, even if it were true that CIA attorneys *generally* "provided legal advice to Agency clients," and in this regard *generally* "were acting in their legal capacity and not as policymakers," that would fail to make the required showing. The government may not withhold documents based on the broad assertion that agency lawyers *generally* provided legal advice over the years of the former detention and interrogation program. Instead, the government must establish that lawyers "were acting in their legal capacity" for *each* document withheld on this basis. *See Am. Immigration Council v. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 240 (D.D.C. 2013) (denying withholding under Exemption 5 where agency justification "[did] not identify individual documents, but merely provide[d] broad-brush descriptions of their content"); *Reader's Digest Ass'n, Inc. v. F.B.I.*, 524 F. Supp. 591, 594 (S.D.N.Y. 1981) (withholding was not warranted where affidavits "[did] not

provide a document-by-document justification for the agencies' claim that each of the documents covered by these affidavits is exempt from FOIA disclosure").

In sum, when the government's submission of "revised index entries . . . contain the same, vague descriptions with respect to the attorney-client privilege that were in the original *Vaughn* index," such that the government's argument is "wholly devoid of any pertinent information that could assist the Court," withholding on the grounds of attorney-client privilege is improper—no matter how many factual allegations and indexes the government submits. *Amnesty Int'l USA v. C.I.A.*, 728 F. Supp. 2d 479, 520 & n.11 (S.D.N.Y. 2010). That is the case here. The government's motion should therefore be denied.

B. The Government Has Not Established a Purpose of Soliciting Legal, as Opposed to Business or Policy, Advice.

In response to Plaintiffs' argument that the unredacted portions of Doc. Nos. 6-8, 9, 15, 18, and 44-46 suggest that counsel was providing business or policy advice, rather than legal advice, taking these communications outside the protection of the attorney-client privilege, *see, e.g., Fox News*, 911 F. Supp. 2d at 271, the government argues that, "the ACLU's argument rests on mischaracterizations of passages that were released, unfounded speculation regarding the content of the withheld information, and misapplication of case law." Reply at 8. But the government provides no basis for this allegation—in fact, it is the government's Reply that appears to mischaracterize various unredacted passages. For example, Doc. No. 15 is by all accounts a description of "aggressive interrogation" of Abu Zubaydah, Tulis Decl., Exh. I (Doc. 15) at 3, "and a recommendation for a plan of action" based on that summary, Supp. Shiner Decl. ¶ 13. The government asserts that the attorney-client privilege attaches "because the communication is sent to CIA attorneys for their legal review of the proposed course of action," *id.*, calling Plaintiffs' characterization of this document as a policy discussion "baseless." Reply

at 13. But the document itself gives no indication whatsoever that legal advice was ever sought; to the contrary, the final page of the document states, “[t]he aggressive phase at [redacted] should be used as a template for future interrogation of high value captives.” Tulis Decl., Exh. I (Doc. 15) at 6. This is not the language of legal inquiry, but of policy determination.

The government seems to assume that because this statement was sent to CIA counsel, it may fairly be presumed to be a request for legal advice. The law, however, is to the contrary. *See, e.g., Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962) (holding that papers transmitted from client to counsel “have acquired no special protection from the simple fact of being turned over to an attorney”); *Urban Box Office Network, Inc. v. Interfase Mgrs., L.P.*, No. 01 Civ. 8854(LTS)(THK), 2006 WL 1004472, at *5 (S.D.N.Y. Apr. 17, 2006) (“[M]erely because a document is sent to an attorney does not render it a privileged attorney-client communication.”). And each of Doc. Nos. 6-8, 9, 18, and 44-46 follows this pattern, with the government offering no basis to refute Plaintiffs’ characterizations, all of which are supported by a plain reading of the documents. If that plain reading is wrong, the government must explain why, with particularity. Because it does not do so now, as it did not do so before, *see* Pls.’ Opp. Br. at 17–21, the government fails to establish that the relevant communications were for the purpose of soliciting or providing legal advice and their claim of attorney-client privilege accordingly fails.

C. The Crime-Fraud Exception Applies to Doc. Nos. 6-8.

The government argues that the crime-fraud exception does not apply to Doc. Nos. 6–8 — in the government’s words, “communications between CIA attorneys and clients in which the attorneys’ role was to provide counsel”—because “[t]he attorney-client privilege is strongest where a client seeks counsel’s advice to determine the legality of conduct before taking action.”

Reply at 9 (citing *United States v. Jacobs*, 117 F.3d 82, 88 (2d Cir. 1997)). The problem with this argument is, once again, that there is no indication from the documents themselves, and none otherwise provided by the government, of any purpose to solicit or render legal advice. For example, Doc. No. 6 is a draft request for “a formal declination of prosecution” given that the “interrogation team . . . concluded . . . the use of more aggressive methods is required” and that “[t]hese methods include certain activities that normally would appear to be prohibited under the provisions of 18 U.S.C. §§2340-2340B.” Tulis Decl., Exh. B (Doc. No. 6) at 3. The government claims that this language “does not represent a legal conclusion or acknowledgement [of torture under federal law],” and constitutes solicitation of legal advice as “an effort to confirm that the conduct in question could be undertaken without subjecting the interrogators to criminal liability.” Reply at 10. But this is simply incorrect. Indeed, the document speaks for itself: it is not a request for legal advice but for “a formal declination of prosecution, in advance,” for conduct that “normally would appear to be prohibited” by the federal torture statute. And beyond not seeking legal advice, in fact it is a request for assistance in evading accountability for what the document itself acknowledges to be a criminal act. This, of course, is a paradigmatic case for application of the crime-fraud exception. *See In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982) (soliciting the assistance of an attorney in order to “cover up” a crime is not protected by the attorney-client privilege). Similarly, as noted in Plaintiffs’ underlying Brief, Doc. Nos. 7 and 8 reveal alternative arrangements to conceal evidence of torture in the event of Zubaydah’s death, Tulis Decl., Exh. C (Doc. 7) at 6, (“we plan on seeking [redacted] assistance for the cremation of subject”), and survival, Tulis Decl., Exh. D (Doc. 8) at 5 (“All major players are in concurrence that AZ [Zubaydah] should remain incommunicado for the remainder of his life.”). There is no apparent legal question or answer in these communications – only a chilling

calculation of how best to avoid detection. Accordingly, the crime-fraud exception applies and the attorney-client privilege does not. The government's motion for summary judgment based on the attorney-client privilege should therefore be denied.

D. The Attorney-Client Privilege Only Covers Communication of Confidential Information in FOIA Matters.

Finally, in reply to Plaintiffs' argument that Doc. Nos. 4, 44, 45, and 46 are not protected because their disclosure would not reveal confidential information, *see* Pls.' Opp. Br. at 22-23, the government argues that "[t]he Second Circuit imposes no requirement that a party demonstrate that disclosure of confidential legal advice would reveal a client's confidential communication of particular facts for the attorney-client privilege to apply." Reply at 5. According to Defendant, Plaintiffs' error lies in "cit[ing] only D.C. Circuit and D.C. district court cases" for a proposition that is not applied in this jurisdiction. *Id.* at 5 n.4.

Defendant is incorrect. In numerous cases, citing the same D.C. Circuit decisions that Plaintiff cited in its initial brief, *see* Pls.' Opp. Br. at 14 (citing *Mead Data Ctr. v. Dep't of Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977), and *Coastal States*, 617 F.2d at 863, courts in this District have repeatedly recognized that, at least in the context of FOIA litigation, the attorney-client privilege extends to communications only insofar as disclosure would reveal confidential facts. *See, e.g., Nat'l Immigration Project of the Nat'l. Lawyers Guild v. Dep't of Homeland Sec.*, 842 F. Supp. 2d 720, 728-29 (S.D.N.Y. 2012) ("[T]he Court further finds that no attorney client privilege attached. As noted above, this privilege attaches only where information 'was intended to be and was in fact kept confidential.'") (citing *In re Cty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007)); *Nat'l Day Laborer Org. Network v. Immigration & Customs Enf't Agency*, 827 F.Supp.2d 242, 251 & n.54 (S.D.N.Y. 2011) ("The agency bears the burden of showing that the information exchanged was confidential.") (citing *Judicial Watch, Inc. v.*

United States Postal Serv., 297 F. Supp. 2d 252, 267 (D.D.C. 2004) (quoting *Mead Data*, 566 F.2d at 254)); *Families for Freedom v. Customs & Border Protection*, 797 F. Supp. 2d 375, 387 & n.61 (S.D.N.Y. 2011) (same); *Amnesty International*, 728 F. Supp. 2d at 519 (“The burden is on the agency to demonstrate that confidentiality was expected in the handling of these communications and that it was reasonably careful to keep this confidential information protected from general disclosure.” (citing *Coastal States*, 617 F.2d at 863)); *Lee v. F.D.I.C.*, 923 F. Supp. 451, 457 (S.D.N.Y. 1996) (holding that the attorney-client privilege does not apply where the relevant communications “do not contain private information concerning the agency” (citing *Coastal States*, 617 F.2d at 863)); *McErlean v. Dep’t of Justice*, No. 97 Civ. 7831(BSJ), 1999 WL 791680, *7 (S.D.N.Y. Sept. 30, 1999) (“[T]he privilege applies only if the communication is based on confidential information provided by the client.” (quoting *Mead Data*, 566 F.2d at 254)); *In re Pfizer Inc. Sec. Litig.*, No. 90 Civ. 1260 (SS), 1993 WL 561125, at *6 (S.D.N.Y. Dec. 23, 1993) (holding particular documents are “privileged assuming the information on which the documents were based was kept confidential by [Defendant]” (citing *Mead Data*, 566 F.2d at 254)).

Defendant cites two decisions for the contrary proposition, Reply at 5-6, but, critically, neither arose under FOIA. The first, *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982), concerned the disqualification of a criminal defense attorney who had previously represented a prosecution witness. *Id.* at 1073 n.8. The second, *GE v. United States*, No. 3:14-cv-190 (JAM), 2015 WL 5443479 (D. Conn. Sept. 15, 2015), was a tax refund petition. *Id.* at *1-2. But *Mead Data* was explicit that whether or not the attorney-client privilege is properly limited to the protection of confidential information in such other contexts, it certainly is in FOIA matters. As the *Mead Data* majority writes in response to a dissenting opinion, which

argued that the attorney-client privilege is not limited to the communication of confidential information, “our dissenting brother structures his concern relative to the attorney-client privilege in sound generalities which unfortunately disregard the basic fact that this case arises under the Freedom of Information Act.” 566 F.2d at 255 n.28. Suits under the FOIA, the Court of Appeals held, require a narrower attorney-client privilege in light of “the overall congressional intent of ensuring comprehensive public access to government records.” *Id.* And subsequent decisions applying *Mead Data* have recognized precisely this distinction. *See, e.g., In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 388 n.21 (D.D.C. 1978) (“[T]he court [in *Mead Data*] made clear that it was addressing the attorney-client privilege’s role in exemption five cases and not in any other context.”); *Zander v. Dep’t of Justice*, 885 F. Supp. 2d 1, 9-10 (D.D.C. 2012) (same). This case, of course, is a FOIA matter, and so the government’s contention that it is not required to demonstrate that disclosure of Doc. Nos. 4, 44, 45, and 46 would reveal confidential information is mistaken. And because it has made no showing that disclosure of these documents would in fact reveal confidential information, for this reason as well they are not protected by the attorney-client privilege. The government’s motion for summary judgment should be denied.

III. THE GOVERNMENT STILL HAS NOT JUSTIFIED THE TOTAL WITHHOLDING OF THE MEMORANDUM OF NOTIFICATION.

With regard to the Memorandum of Notification (MON), the government’s reply cures none of the insufficiencies in its previous submissions which Plaintiff has identified. For example, as to Exemptions 1 and 3, the paucity of the government’s public defense of its refusal to disclose the MON renders it impossible for Plaintiff to meaningfully participate in an adversarial process that would allow the Court to ascertain whether either or both of these exemptions apply. *See* Pls.’ Opp. Br. at 27–31. The government provides no further detail in the

second Shiner Declaration, nor does the Reply provide any additional explanation – or any explanation at all – as to why the government could apparently provide a far more fulsome public description of this document – and one that is much more substantive than the “excerpt of one sentence” that the government portrays in its reply brief, see Reply at 28-29 – nearly ten years ago, when the document had not yet been officially acknowledged. *See* Pls.’ Opp. Br. at 30 (noting that in this Court, nearly ten years ago, the CIA “set forth the document’s length; it confirmed the document’s date; it revealed the document’s author and the agency components to which the document was sent; it generally described the document’s contents, and it provided details about the document’s contents and genesis”). It is the government’s duty “to create as full a *public* record as possible, concerning the nature of the documents and the justification for nondisclosure.” *See N.Y. Times Co. v. Dep’t of Justice*, 758 F.3d 436, 439 (2d Cir. 2014) (quotation marks omitted). It simply refuses to do so here, even in the face of prior disclosures that make its current position nonsensical.

As to Exemption 5, the government has done nothing to justify its attempt to evade the strict limits that courts have imposed on the presidential communications privilege. As Plaintiffs stated in their Opposition, they “are not aware of any case holding that a final statement of law or policy or a document regulating agency conduct is protectable under this privilege, and the government cites none.” Pls.’ Opp. Br. at 26. In response, the government offers not citations but the conclusory statement that “[t]he privilege would ring hollow if the President could not confidentially communicate with Executive Branch officials about activities that the President was directing.” Reply at 27. But the MON is not a mere confidential communication *about* activities—it instead constitutes the *authorization* for a range of agency activities involving

entire programs such as the CIA's former detention program. No court has ever suggested that this type of document qualifies for the presidential communications privilege.

The government likewise offers no explanation as to why the document may be withheld in full under the presidential communications privilege when at least one of its commands has been quoted in multiple reports. Pls.' Opp. Br. at 26–27. There is no conceivable claim of secrecy or privilege for this officially disclosed and acknowledged statement. Even if the rest of the document must be redacted, at the very least, previously-published and disseminated portions must be disclosed.

CONCLUSION

For the foregoing reasons and those in Plaintiffs' Opposition, the Court should deny summary judgment to defendants as to Documents Nos. 1, 2, 4, 6, 7, 8, 9, 10, 13, 14, 15, 18, 19, 28, 29, 37, 43, 44, 45, 46, 55, and 66, and order their release.

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