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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guidance is ñdeliberative.ò 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

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

Moreover, the CIAôs 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 supervisorôs summary of his officeôs involvement in the torture program ð in every case either ñformed an integral part of the decisionmaking processò or would ñbe revelatory of the deliberative process.ò Reply at 22. But the governmentôs conclusory arguments are in considerable tension with the longstanding requirement that the privilege applies only to the ñóopinionô or órecommendatoryô portion, not to factual information which is contained in the document.ò *t of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980); *see E.P.A. v. Mink*, 410 U.S. 73, 87ï88 (1973) (ñ[P]urely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery.ò).[1]

[1] The government accuses the ACLU of disregarding *n, Inc. v. Occupational Safety & Health Admin.*, 610 F.2d 70 (2d Cir. 1979). *See* Reply at 20. But the Second Circuitôs guidance in that case is quite clear: ñWe believe the proper rule . . . is this: If the factual materials are óinextricably intertwinedô with policy making recommendations so that their disclosure would ócompromise the confidentiality of deliberative information that is entitled to protection under Exemption 5,ô the factual materials themselves fall within the exemption.ò *n*, 610 F.2d at 85 (quoting *Mink*, 410 U.S. at 92). In , 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 ñmore than mere summaries,ò and were in fact produced by ñconsultants [who] were asked to draw inferences and weigh the evidenceò 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.ô Opp. Br. at 8ï9. In its reply, the government claims that quotations Plaintiffs have taken from the unredacted portions of the withheld documents represent mere ñspeculationò about or ñmischaracterizationò 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 Zubaydahôs torture. The government claims that these documents are

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 (ñCharacterizing these documents as ópredecisionalô simply because they play into an ongoing audit process would be a serious warping of the meaning of the word.ò). As the D.C. Circuit has explained, the explanation of past agency decisions may not be withheld even if described in ña memo written in contemplation of a change in that very policy.ò *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010). Otherwise, ñit 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.ò *Id.*; *see* Pls.ô 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 ñbecause the supervisor might make a decision based upon information provided by the employeeò).

The governmentôs 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. ñ[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.ò *Coastal States*, 617 F.2d at 868; *see also* *t of Army*, 435 F. Supp. 2d 81, 90 (D.D.C.) (rejecting invocation of deliberative process privilege where document ñwas not prepared to assist an agency in arriving at a decision,ò but instead ñto update another party on the current status of a decision already madeò).

Document 8 clearly instructs subordinates in the field *as to the decisions* made by headquarters, informing them that ñthe interrogation process takes precedence over preventative medical procedures,ò and that ñall major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life.ò Tulis Decl., Exh. D (Doc. 8) at 4-5. The agency claims that the document is nonetheless predecisional, because ñit provides preliminary input in advance of a final decision from Headquarters as to how to conduct the next phase. . . .ò Supp. Shiner Decl. ¶ 8. But as the court in *Am. Immigration Council v. t of Homeland Sec.*, 905 F. Supp. 2d 206, 220 (D.D.C. 2012) explained, ñóMore guidance soon,ô 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.ò Here too, the government has not shown that the guidance sent to subordinates was merely advisory, nor that the decisions it plainly describes remained predicisional because of the prospects of further decisions yet to come.

The governmentôs 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 ñany speculative language as to the legality of given activities or, more precisely, judgment calls as to their legality vis-¨-vis operational guidelines for this activity agreed upon and vetted at the most senior levels of the agency,ò Tulis Decl., Exh. G (Doc. 13) at 2, this and other redacted statements are merely ñrecommendations and represent interim stages of decisionmaking.ò 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 ñconsist of recommendations to OPA as to whether and how to present certain information about the detention and interrogation program to the public.ò *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 pr[illegible] therefore cannot be characterized as wholly predecisional, if predecisional at all. When one writer reports that ñOur Glomar figleaf is getting pretty thin,ò Tulis Decl., Exh. P (Doc. 44) at 2, and another observes that ñthis certainly v 0 thi i я s ʏ , ם yc ش ∩

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.ò *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 ñmere fact that a document is a draftò is not ñsufficient reason to automatically exempt it from disclosure.ò *N.Y. Times Co. v. t of Def.*, *499* F. Supp. 2d 501, 515 (S.D.N.Y. 2007); *see* Pls.ô Opp. Br. at 8 n.1. The government must still establish that the information it seeks to withhold is ñdeliberative in nature.ò *Arthur Andersen & Co. v. Internal Revenue Serv.*, 679 F.2d 254, 257ï58 (D.C. Cir. 1982). It has not done so here or even attempted to do so.

As explained in Plaintiffsô

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 workò).

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 ñworking draftò that ñwas never finalizedò and ñdoes not appear on Agency letterhead,ò 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 279ï80 (rejecting agencyôs attempt to withhold a chronicle of ñpast developments relevant to the executive compensation issueò that ñexplains and defends past actions taken by Treasury over the preceding several monthsò in the

The CIAôs rationale for withholding Document 18 is similarly untethered to the nature of the document itself. The government maintains that Document 18 is predecisional and

a daily compensation reported to be $1800/day, or four times that

forth agency lawyersô determination of the legality of specific torture methods, is predecisional and deliberative because ñit reflects discussions that preceded DOJôs final decision regarding its assessments as to the lawfulness of

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

In Plaintiffsô Response to Defendantôs 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 ñ*Vaughn* index [that] is vague and conclusory, . . . [with an] accompanying affidavit [that] does little to fill in the gaps,ò Pls.ô Opp. Br. at 16ï17 (citing *ACLU* , 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 governmentôs Reply fails with regard to each of these arguments, Defendantsô 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 Plaintiffsô argument that the governmentôs initial *Vaughn* Index and supporting declaration are conclusory and insufficiently detailed, the government

(providing the same bare bones information regarding date, author and recipient, and substance of communication); Amended *Vaughn* Index (Dkt. No. 67,

provide a document-by-document justification for the agenciesô claim that each of the documents covered by these affidavits is exempt from FOIA disclosureò).

In sum, when the governmentôs submission of ñrevised index entries . . . contain the same, vague descriptions with respect to the attorney-client privilege that were in the original *Vaughn* index,ò such that the governmentôs argument is ñwholly devoid of any pertinent information that could assist the Court,ò withholding on the grounds of attorney-client privilege is improper ð no matter how many factual allegations and indexes the government submits. *Amnesty USA v. C.I.A.*, 728 F. Supp. 2d 479, 520 & n.11 (S.D.N.Y. 2010). That is the case here. The governmentôs 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 Plaintiffsô argument that the unredacted portions of Doc. Nos. 6-8, 9, 15, 18, and 44-

at 13. But the document itself gives no indication whatsoever that legal advice was ever sought;

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 ña formal declination of prosecutionò given that the ñinterrogation team . . . concluded . . . the use of more aggressive methods is requiredò and that ñ[t]hese methods include certain activities that normally would appear to be prohibited under the provisions of 18 U.S.C. §§2340-2340B.ò Tulis Decl., Exh. B (Doc. No. 6) at 3. The government clai

calculation of how best to avoid detection. Accordingly, the crime-fraud exception applies and the attorney-client privilege does not. The governmentôs 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 Plaintiffsô argument that Doc. Nos. 4, 44, 45, and 46 are not protected because their disclosure would not reveal confidential information, *see* Pls.ô Opp. Br. at 22-23, the government argues that ñ[t]he Second Circuit imposes no requirement that a party demonstrate that disclosure of confidential legal advice would reveal a clientôs confidential communication of particular facts for the attorney-client privilege to apply.ò Reply at 5. According to Defendant, Plaintiffsô error lies in ñcit[ing] only D.C. Circuit and D.C. district court casesò 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.ô Opp. Br. at 14 (citing *Mead Data Ctr. 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 Project of the Nat . Lawyers Guild v. Homeland Sec.*, 842 F. Supp. 2d 720, 728-29 (S.D.N.Y. 2012) (ñ[T]he Court further finds that no attorney client privilege attached. As noted above, this privilege attaches only where information ówas intended to be and was in fact kept confidential.ôò) (citing

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 (ñThe 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.ò (citing *Coastal States,* 617 F.2d

argued that the attorney-client privilege is not limited to the communication of confidential information, ñour dissenting brother structures his concern relative to the attorney-client

second Shiner Declaration, nor does the Reply provide any additional explanation ï or any explanation at all ï as to why the government could apparently provide a far more fulsome public description of this document ï and one that is much more substantive than the ñexcerpt of one sentenceò that the government portrays in its reply brief, see Reply at 28-29 ï nearly ten years ago, when the document had not yet been officially acknowledged. *See* Pls.ô Opp. Br. at 30 (noting that in this Court, nearly ten years ago, the CIA ñset forth the documentôs length; it confirmed the documentôs date; it revealed the documentôs author and the agency components to which the document was sent; it generally described the documentôs contents, and it provided details about the documentôs contents and genesisò). It is the governmentôs duty ñto create as full a *public* record as possible, concerning the nature of the documents and the justification for nondisclosure.ò *See N.Y. Times Co. v. D 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 ñare 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.ò Pls.ô Opp. Br. at 26. In response, the government offers not citations but the conclusory statement that ñ[t]he privilege would ring hollow if the President could not confidentially communicate with Executive Branch officials about activities that the President was directing.ò Reply at 27. But the MON is not a mere confidential communication *about* activities ð it instead constitutes the *authorization* for a range of agency activities involving

entire programs such as the CIAôs 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.ô Opp. Br. at 26ï27. 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 Plaintiffsô 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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