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REPLY BRIEF FOR APPELLANT (CORRECTED COPY)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

D.C. Cir. No. 10-5161

JEFFERSON MORLEY,

Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,

Appellee

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On appeal from the United States District Court for the District of Columbia, the Hon. Richard J. Leon, Judge

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REPLY BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

Executive Order 12958, as amended, was in effect when the Central Intelligence Agency ("CIA") reviewed the records responsive to the Freedom of Information Act ("FOIA") request of appellant Jefferson Morley ("Morley") for records on CIA case officer George Joannides ("Joannides").

That order provides that the need to protect classified information "may be outweighed by the public interest in disclosure." E.O. 12958, § 3.1(b).[1] The CIA protests that "[t]his is not an exceptional case under this provision or under Agency regulations." This is in line with the persistent efforts of the CIA throughout its brief to downplay the public interest in the information sought and belittle it as not pertinent to the assassination of President John F. Kennedy.

While they may not be "exceptional" in the CIA's view, the underlying circumstances are far from ordinary. They concern George Joannides, Chief of the CIA's Psywar Branch at its JMWAVE station in Miami, who was case officer for the DRE ("Directorio Revolucionario Estudantil"), a CIA-funded Cuban exile organization, when, in the months before Kennedy's murder, alleged assassin, Lee Harvey Oswald, was engaged in activities involving the DRE. Immediately after the ssassination, the DRE provided to the press a radio tape of a debate between Oswald and a DRE member in which Oswald was portrayed as a defector to the Soviet Union who was a pro-Castro Marxist. This became the basis for worldwide dissemination of the first or "Castro did it" conspiracy theory.

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[1] This provision is miscited as § 3.2(b) in both appellant's and appellee's briefs.

These facts raised questions which demanded answers from the Government. Yet until the Assassination Records Review Board ("ARRB") learned of Joannides in the waning days of its existence, "the CIA had never taken the positive step . . . of identifying to any government agency the role that Mr. Joannides held with regard to his activities in 1962-64, that pertain (directly or indirectly) to Lee Harvey Oswald, nor did the CIA proactively inform the [ARRB] that he was one and the same person who was a CIA liaison to the [HSCA]." Declaration of T. Jeremy Gunn ("Gunn Decl."), ¶ 10 [JA 43]. Gunn, who served as the ARRB's Executive Director, notes that the "CIA did not disclose this critical information about Mr. Joannides to the Warren Commission, the HSCA [House Select Committee on Assassinations], or the Review Board. . ." He adds, "this information is without any question an extremely important part of the larger story of the assassination. Records related to Mr. Joannides activities in 1962-1964 and 1978, unquestionably fall within the scope of the JFK Act as was consistently held by the Review Board that had statutory responsibility for interpreting the scope of the JFK Act." Id., ¶ 11 [JA 43-44].

Morley, in his quest for data on Joannides and the DRE, discovered that that Joannides had been pulled out of retirement to become the CIA's liaison with the HSCA in 1978. In that capacity he did not disclose to the

HSCA that he had been the DRE's case officer in 1962-64, and he rebuffed congressional efforts to obtain information about the Oswald/DRE relationship. And, as a result of this Court's remand requiring the CIA to search its operational files, Morley learned that Joannides was working in an undercover capacity when he was the CIA's liaison to the HSCA.

This led Prof. G. Robert Blakey, who served as Chief Counsel of the HSCA, to charge that the CIA's conduct in inserting Joannides "undercover" into the HSCA's investigation "constituted not only a breach of the written memorandum of understanding the HSCA in good faith entered into with the Agency, . . ., but a manifest, and hardly minor matter, a criminal violation of 18 U.S.C. § 1505", which proscribes conduct that "`impedes . . . the due and proper exercise of the power of inquiry . . . of any committee of either House'). . . ." 2009 Declaration of G. Robert Blakey. ¶ 9). [JA 1071b]

While the CIA may not consider these circumstances "exceptional, its response to Morley's lawsuit clearly is. It has withheld at least 295 documents in their entireties, citing multiple overlapping exemption claims to conceal information that pertains to bygone days and is the subject of deep public interest. The CIA mindset displayed by these facts must be kept centrally in mind in evaluating the credibility of its claims.

SUMMARY OF ARGUMENT

The records on former CIA case officer George Joannides are of substantial public interest and are relevant to Jefferson Morley's study of the assassination of President Kennedy, and, in particular, questions concerning alleged assassin Lee Harvey Oswald's relationship with a CIA-funded Cuban exile group in the months before the assassination. Records on this topic have been officially disclosed by the CIA under the JFK Act. Despite this authorized official release of this information, the CIA is withholding 295 records in their entirety under Exemptions 1, 3, 5 and 6. These exemption claims overlap to a degree which cannot be determined from the record.

As a result of a decision by the Supreme Court in Milner, the CIA has been forced to release one record, thereby showing the baseless of the claim in the first place. It is seeking to withhold a second document withheld only under Exemption 2 on the grounds that due to "administrative error" it forgot to claim Exemptions 1, 3, and 6 as well. This claim should be rejected.

The CIA also argues that it should not be compelled to reprocess the multitude of documents in which Exemption 2 has been claimed in tandem, but not necessarily coextensively with other exemptions. Because it cannot

be determined on this record that these claims are coextensive with Exemption 2, this case must be remanded for further proceedings.

The CIA Exemption 5 and Exemption 6 claims are without merit, as shown below. Because summary judgment is not appropriate for the Exemption 1 claims they, too, should be remanded to District Court for examination under the new Executive order. Because of different time provisions and the passage of time since the last classification review in 2008, many of the documents at issue will then be subject to review under more favorable disclosure standards.

ARGUMENT

I. THE CIA HAS FAILED TO MEETS ITS BURDEN OF PROOF AS TO ITS EXEMPTION 1 AND 3 CLAIMS

A. Exemption 1

"Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" ACLU v. U.S. Dep't of Def. 628 F.3d 612, 619 (D.C. Cir. 2011) (quoting Larson v. Dep't of State. 565 F.3d 857, 862 (D.C. Cir. 2009) (internal quotations omitted). Morley argued in his opening brief that the CIA's Exemption 1 claims were not "plausible" given the detailed evidence regarding the CIA's disclosure of

formerly classified records pertaining to Joannides, the DRE, and their activities. See Appellant's Br. at 50-53.

The CIA does not respond to this point. It can't, because its affiant, Delores Nelson's claim of damage to national security studiously ignores the extensive information detailing the relationship and activities of Joannides and the DRE which Morley adduced. See Sixth Morley Declaration [JA 819-1069]. The records he attached to his affidavit were formerly classified, but were subsequently declassified by the CIA under the JFK Act. This makes illogical and implausible the withholding of 295 documents in their entirety. To release them under the JFK Act, the CIA had to make a determination that their national security sensitivity was no longer present.

This withholding is implausible because it conflicts with its prior practice under the JFK Act. Under these circumstances the CIA's motion for summary judgment must be denied. See Center for International Environmental Law v. Office of the U.S. Trade Representative, et al., Civil Action No. 01-498 (Feb. 29, 2012), Mem. Op. at 10 (rejecting agency's Exemption 1 claim where its "various arguments do not present a logical or plausible explanation for its determination, and the record does not support a reasonable anticipation of harm from disclosure.").

Even if an agency's declaration is otherwise credible, ". . . affidavits that contain categorical or conclusory statements, or which are contradicted by other evidence in the record, will not pass muster." Id. at 9 (citations omitted). Nelson's Exemption 1 averments are almost universally highly generalized statements devoid of supporting evidentiary facts. In addition, Nelson's representations are contradicted by a large volume of evidence put forward by Morley. The CIA has plainly not taken this contrary evidence into account.

Instead, the CIA sets forth a list of nine categories of information which normally fall within the ambit of Exemption 1's protection. See Appellee's Br. at 31. But each of these categories of information is also revealed in the records which the CIA has officially disclosed. And the CIA does not allege, and has made no showing, that the release of these previously classified records has caused any damage to national security. Addendum 1 hereto is a list, culled from only a few of the many documents relating to Joannides and the DRE officially disclosed, of cryptonyms, CIA officers and operatives, codenames, pseudonyms, aliases, CIA filing systems, and special activities. The CIA has failed to meet its burden of proof to show that such officially disclosed information is in some

meaningful way distinguishable from the materials on this subject that are still being withheld.

The CIA does not respond to Morley's argument that there is a material issue of fact in dispute as to whether disclosure of the withheld material can reasonably be expected to cause identifiable damage to national security. Rather, it contends that "the legislative history of FOIA makes clear that 'courts must "recognize the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic] might occur as a result of public disclosure of a particular classified record."'" Appellee's Br. at 29, quoting Salisbury v. United States, 690 F.2d 966, 970 (D.C. Cir. 1982)(quoting S. Rep. No. 1200, 93rd Cong., 2d Sess. 12 (1974)). But the CIA does not address Morley's point that that legislative history indicates (1) the "substantial weight" to be accorded the national security declarations does not establish a presumption, and (2) "it was Congress' intent that the evidence of both parties be accorded equal weight commensurate with the degree of expertise, credibility, and persuasiveness underlying it." Appellant's Br. at 56, quoting "Freedom of Information: Judicial Review of Executive Security Classifications," XVIII University of Florida Law Review 551, 558 (1976)(footnote omitted). Here,

the credibility and persuasiveness of Nelson's declaration do not entitle her determinations to deference

Morley stated that "[e]vidence of agency bad faith is all-pervasive where the matters under consideration—Joannides, the DRE and Oswald's pre-assassination activities—are concerned." Appellant's Br. at 53 (emphasized words were omitted from Appellee's quotation of this passage at pp. 35-36 of its brief. Responding to the six instances of bad faith conduct listed by Morley, the CIA addresses only three of them "which concern CIA's handling of the underlying FOIA request at issue."

The first is Morley's contention that the CIA "initially failed to respond to Morley's FOIA request at all, seeking to foist it off on NARA." The CIA cites Iturralde v. Comptroller of Currency, F.3d 311, 315 (D.C.Cir. 2003) discounting a claim of bad faith in a case in which the agency conducted a search once the requester clarified his initial request. Here, the CIA did not conduct any search o fobbed the request off on NARA. It then delayed and avoided compliance by litigating the issue after he filed suit.

In the second instance, the CIA issued a "Glomar" denial, even though those operations had previously been officially acknowledged. The CIA dismisses this as baseless, saying that it issued a Glomar response to "that portion of Morley's request seeking records regarding Joannides'

participation in any covert project, operation or assignment, 'unless . . . previously acknowledged.'" Appellee's Br. at 36-37, quoting Nelson Decl., ¶ 58. The CIA asserts that in its "declarations "two assignments were previously acknowledged: his assignment to JMWAVE and as a liaison officer to the HSCA. These two assignments were acknowledged under the JFK Records Act and the records were publicly available at NARA; on remand, copies of such records were provided to Moreley." Appellee's Br. at 37.

Contrary to the implication of this account, the CIA did not acknowledge these two assignments in the District Court or in this Court until after the remand. In this Court, appellee filed a brief which said: "Contrary to appellant's assertions (and for reasons discussed earlier), the JFK Act in no way affects the CIA's ability to refuse to confirm or deny the existence or nonexistence of certain records in this case. Morley v. C.I.A., D.C. Cir. No. 06-5372, Appellee's Br. at 32.

The CIA's third or "last[]" issue turns out not to be one of the six instances of bad faith listed by Morley, Instead. It relates to the provision in E.O. 12958, § 1.8(a)(2) against classifying information to avoid embarrassment. The argument seems to be that because information about the Joannides/DRE relationship has been released under the JFK Act and is

publicly available, there can be no embarrassment in further disclosures. But as most observers of the Washington scene know, the first embarrassing revelation on a given topic is usually not the full truth, and those that follow tend to be worse. A lot of information still remains withheld.

E. O. 12958, § 3.1(b) provides that in some instances the need to protect classified information may be outweighed by the "public interest" in disclosure. Aside from asserting that "this is not an exceptional case under this provision or Agency regulations," the CIA cites language stating that "[t]his provision does not . . . create any substantive or procedural rights subject to judicial review." Id. The CIA cites no authority for this proposition. Congress did enact FOIA Exemption 1, and it does provide that the courts have power to exempt information from disclosure if in compliance with the substantive and procedural provisions of the Executive order. Beyond that, even if the CIA is correct and it can take away with the left hand what the President has given by the right hand, a district court has the power to remand the issue to the CIA for consideration as to whether it will comply with the public interest provision.

32 C.F.R. § 1902.13(c) provides that the issue of whether the public interest favoring the continued protection of properly classified information

is outweighed by the public interest in disclosure exists only in circumstances where nondisclosure could reasonably be expected to

> (4) Impede the investigative or oversight functions of the Congress.
>
> (6) Deprive the public of information indispensa- to public decisions on issues of critical national importance. . . .

Both of these provisions apply in this case. See, e.g., Declaration of Anna Nelson, ¶ 7. [JA 38-40]

B. Exemption 3

In regard to Morley's argument regarding Exemption 3, the CIA notes that "Morley states that CIA has not established the need for suppression or the risk to national security" of disclosing the withheld information. The CIA asserts that "Morley offers no authority specific to Exemption 3 in this regard." Appellee's Br. at 43. To the contrary, Morley cited CIA v. Sims. 471 U.S.159 (1985) to the effect that Congress protected "all intelligence sources that provide or, are engaged to provide, information that the Agency needs to perform its statutory duties." Morley argues that the CIA has not shown that need here. 50 U.S.C. § 102A(i)(1) protects intelligence sources and methods against unauthorized disclosure of such information. As Morley has repeatedly noted, the CIA, acting pursuant to Congressional direction, has officially released mountains of information on the subject at

hand pursuant to the JFK Act. Thus, no risk is posed by the further disclosure of this information and there is no need to keep it secret any longer.

The CIA's application of the "intelligence sources and methods" concept is so all-encompassing that it includes materials withholdable not only under Exemption 1, which is understandable, but under Exemptions 2, 5 and 6 as well. It swallows the FOIA up whole. There is no way to engage in effective oversight of our most vital national decisions given this interpretation of what the law permits.

II. THIS COURT SHOULD REMAND THE CIA'S EXEMPTION 2 CLAIMS TO DISTRICT COURT

In Milner v. Dept. of Navy, 131 Supr. Ct. 1259 (2011), the CIA states that it "withdraws its assertions of exemption 2 in all instances for purposes of this matter only." Appellee's Brief at 61. In a footnote, it notes two documents were withheld on the basis of Exemption 2 only. It has now released one but claims that withholding the second only under Exemption 2 was an "administrative error: the information is withheld pursuant (sic) (b)(1), (b)(3) and (b)(6)." Id., n.4. Moreover, it does not believe that its withdrawal of all Exemption 2 claims requires a remand to the District Court "as all remaining documents at issue were withheld or partially withheld under other FOIA exemption statutes." Id.

But the release of Document 351 is an example of the CIA over-claiming exemptions. The Doc. 351 index sheet stated in part that it was being withheld under "low (b)(2)" because it "would reveal internal CIA personnel rules and practices, including, but not limited to, internal CIA rules and practices regarding security background investigations." [JA 512] None of this had any rational application to what the document contained, which was the words "OFFICE OF CENSORSHIP" followed underneath by "REC'D Jan. 12, 1959." See Addendum 2. There was no basis for this claim even prior to Milner. The CIA's declarant, Nelson, was simply stretching for any excuse possible to justify withholding. In view of this, the CIA's exemption claims must be viewed with more skepticism than usual.

The second "Exemption 2 only" document raises equally troubling questions. The CIA's claim that its failure to cite Exemptions 1, 3 and 6 for the Second Document was an "administrative error" seems to stretch the concept of "administrative error" considerably. There were multiple errors. The Vaughn index sheet for Doc. 359 [JA 517] indicates that it is a one-page form dated April 25, 1966 and that is "unclassified." Since the CIA now claims that Exemption 1 should have been claimed, an obvious question is whether it contains the classification markings required by Executive Order 12958. If so, then why was the Exemption 1 box not checked and

why did the "Document Description" not contain anything but the same "low Exemption 2" litany that the description of Doc. 351 also has? Did Nelson herself review this document, or did someone else do it for her?

Not only does Document No. 359 not contain any description of the Exemption 1 material being withheld, neither does it contain any description of the Exemption 3 and Exemption 6 materials allegedly being withheld, so the "administrative error" was not just a failure to check off the appropriate boxes. Under these circumstances, a question arises as to whether the person who prepared the Vaughn index form is the same one who reviewed the now purportedly classified document. The CIA's claim at the end of the description for this document that it "could not segregate any meaningful information for release" is particularly suspect under these circumstances.

In any event, this is an attempt to create new exemption claims at least four years after this document was vetted for release to the public and after multiple briefings of the exemption claims. In another case, a court has ruled that an agency cannot assert new exemption claims to replace those invalidated by Milner. It noted that this Court has made it plain that "'as a general rule, [the Government] must assert all exemptions at the same time, in the original court proceedings.'" Fielding McGehee v. F.B.I., Civil Action No. 01-1872, August 5, 2011 Memorandum Opinion at 29-30, n.8,

quoting Maydak v. United States Dep't of Justice, 218 F.3d 760, 764 (D.C. Cir. 2000). It quoted this Court's observation that "'there may be circumstances in which withdrawal of an agency's prime exemption claim should preclude the agency's fresh assertion of additional exemptions.'" Id., quoting Senate of Puerto Rico of Puerto Rico v. U.S. Dept. of Justice ("Senate of P.R."), 823 F.2d 574, 580 (D.C.Cir. 1987); and citing as a "see also Ryan v. United States Dep't of Justice, 617 F.2d 781, 792 (D.C. Cir. 1980) (warning of the "danger of permitting the Government to raise its FOIA exemption claims one at a time, at different stages of a district court proceeding").

As a result, McGehee rejected the Government's "suggest[ion] that it will use its own withdrawal of Exemption 2 claims as an opportunity to drum up new exemptions[,]" stating that this "would undermine 'the interest in judicial finality and economy, which has "special force in the FOIA context, because the statutory goals—efficient, prompt, and full disclosure of information--can be frustrated by agency actions that operate to delay the ultimate resolution of the disclosure request."'" Id., quoting August v. Fed. Bureau of Investigation, 328 F.3d 697, 699 (D.C. Cir. 2003)(quoting Senate of P.R., at 580). This Court, too, should reject the CIA's effort to assert new exemption claims on appeal.

The CIA opposes a remand of the Exemption 2 claims based on its counsel's assertion in its brief that "as all remaining documents at issue were withheld or partially withheld under other FOIA exemption statutes." Appellee's Br. at 61, n.4. But elsewhere in its brief, the CIA is less certain about the degree of overlap, saying with respect to Exemptions 1 and 3, that " the information protected surely overlaps, perhaps completely." Appellee's Br. at 42 (emphasis added). In fact, because of the manner in which the Vaughn index has been done, it is impossible to tell the degree of overlap or which particular exemption claims overlap.

The Vaughn index is highly unusual. Although the CIA asserts that 295 documents have been withheld in their entirety, it is impossible to determine the number of pages withheld. Instead of listing the number of pages in each document, the number of pages is usually listed as "various." There being no correlation between particular pages in a document or series of documents and particular exemption claims, it is not possible to determine which exemption claims apply to which pages, let alone which particular parts of a document.

Examination of the CIA's Vaughn index does not support the CIA's assertion that the exemptions claimed apply to all the material in a cited document or documents. The index uniformly makes a statement declaring

that certain exemptions apply to an entirely withheld document, such as Vaughn index document 387's statement that "[t]he CIA withheld this document in its entirety pursuant to FOIA exemptions (b)(2), (b)(3), and (b)(6)." This gives the impression, but does not say, that each of these exemption claims applies to each and every portion of this document. Analysis of the CIA's description of the application of these claims makes clear that they do not completely overlap. For example, the descriptions of the Exemption 2 and Exemption 3 materials in Document 387 may appear to overlap, but they do not appear to be coterminous. Because it is impossible to tell the degree to which the exemption claims overlap on the present record, a remand is required.

The fact that Exemption 3 has been extensively applied in conjunction with all other exemption categories asserted, Exemptions 1, 2, 5 and 6, suggests that it was viewed as a catchall, a safety net of last resort, simply to be applied to prevent any possibility of release of any information. The fact that Exemption 3 was cited in tandem with all other exemption claims, including Exemption 2, raises a question as to whether the CIA made a careful, independent evaluation of Exemptions 2 or 3 but simply assumed that if both were cited, one of them would work. Again, a remand is required to clarify the relationship of these exemption claims.

III. THE CIA HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF AS TO ITS EXEMPTION FIVE CLAIMS

A. The Documents Vaughned in 2008

The CIA asserted Exemption 5 for two documents in its 2005 Vaughn index, one in its entirety and one in part. See Nelson Decl., ¶ 116. [JA 189-190] In addition to these two documents, "[t]he CIA also withheld nine documents (including duplicates) which are described in the Nelson Declaration and index at Exhibit C."

The justification given by Nelson for withholding information under Exemption 5 in these nine documents is tersely stated in a single paragraph:

> As noted in the Vaughn index attached as Exhibit C, the CIA also asserted FOIA exemption (b)(5) to withhold exempt information from several of the 6 August 2008 DIF documents, For example, documents 0000320, 0000324, 0000400, and 0000407 contain recommendations to decision-makers regarding Joannides' employment and suitability as a CIA employee. The pre-decisional privilege and, thus, FOIA exemption (b)(5), exempt this information from disclosure.

Nelson Decl., ¶ 118. [JA 190-191]

In Morley, this Court quoted the standard for review of agency claims under the Exemption 5's deliberative process privilege: "'To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so

candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.'" Morley v. CIA, 508 F.3d 686 (D.C.Cir. 1983) quoting Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 866 (D.C.Cir.1980). Morley noted, however, that "the opacity of the CIA's explanation [in the case before it] does not permit the court to apply the test. '[I]t is enough to observe that where no factual support is provided for an *essential* element of the claimed privilege or shield, the label "conclusory" is surely apt.'" Id., quoting Senate of P.R. 823 F.2d at 585 (emphasis in original). The Nelson declaration and index are equally as opaque and unsupported by evidence as the CIA's declaration in the previous Morley case.

The few facts in the parsimonious index indicate that of the nine documents, all but one are for certain more than half a century old. The other is undated. Four of the documents (#s 321, 400, 401, and 404) are said to be unclassified. The rest are classified "Secret" (#s 320, 324, 399, 407, and 408). All nine appear to be blank or anonymous memoranda. No "from" or "to" or "subject" is provided.

Morley noted that "'[t]o ascertain whether the documents at issue are predecisional, the court must first be able to pinpoint an agency decision or policy to which these documents contributed.'" Id. at 1127, quoting Paisley

v. CIA, 712 F.2d 686, 698 (D.C.Cir.1983). Morley also noted: "'The identity of the parties to the memorandum is important; 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.'" Id., quoting Coastal States Gas, 617 F.2d at 868.

In general, in boilerplate-type remarks, Nelson characterizes the deliberative process privilege as "designed to protect and encourage open and candid policy discussions between subordinates and superiors." Nelson Decl., ¶ 114. She does not, however, directly assert that the advice given in documents is "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank discussion within the agency." Even had she stated this with respect to these nine documents, the evidence would be insufficient to sustain it. The possibility that disclosure will be "likely in the future to stifle honest and frank communications within the agency" depends on the identities of the author and recipient of the communication being disclosed. Here such damage cannot occur because the identities of the authors and recipients of these communications have been deleted. See Hoch v. C.I.A., 593 F.Supp. 675, 689 (D.D.C.1984)("given the anonymity of the document, [the CIA] has failed to show by specific and detailed proof

that disclosure of this document would defeat rather than further the purposes of FOIA"), citing Mead Data Central, Inc. v. Department of Air Force, 566 F.2d [242] at 258 [(D.C.Cir.1977)]. The CIA has failed to show how the disclosure of memoranda with anonymous authors and recipients is not "consistent with efficient Government operations. S.Rep.No. 813, 89th Cong., 1st Sess. 9 (1975).

The difficulty of making such a showing is increased by the fact that these documents are more than five decades old. The CIA asserts that this Court recently "rejected plaintiff's claim that a 'record is "deliberative" only if its disclosure would harm the agency's decision-making process.'" Appellee's Brief at 45, quoting McKinney v. Board of Governors of Federal Reserve System, 647 F.3d 331, 339 (D.C.Cir.2011), "Instead," the CIA says, "the D.C. Circuit found that, 'Congress enacted FOIA Exemption 5 precisely because it determined that disclosure of material that is both predecisional and deliberative does harm an agency's decision-making process." Id. quoting id.

But McKinley is inapposite. It dealt with documents only a few years old and thus well within the scope of a time period where agencies might be concerned that disclosure would mean they were "operating in a fish bowl" and would not be "'be able to express their opinions freely to agency

decision-makers without fear of publicity.'" McKinley at 339, quoting Ryan, supra, at 789-90.

This Circuit previously set forth a more detailed explanation of the purposes underlying the deliberative process privilege:

> The privilege has a number of purposes: it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Costal States Gas, 617 F.2d at 866, citing Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 772-774 (1978) (*en banc*). This clearly indicates a temporal limitation to the scope of Exemption 5's deliberative process privilege. The concern is to protect against inhibiting the exchange of views in the context that inhibition of that might affect policy or decision-making. This is in accord with the policy prescribed by Congress when it carefully narrowed the scope of Exemption 5, stating

> It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all government agencies were prematurely forced

> to "operate in a fishbowl."

S.Rep.No. 813, 89th Cong., 1st Sess. 9 (1975)(emphasis added). Thus, the concept of a temporal limitation on the scope of Exemption 5 is embedded in its creation. If there is no such limitation, then the public is forever denied access to such advise, and FOIA's accountability function ruinously undermined. This is patently in conflict with

> the narrow scope of Exemption 5 and the strong policy of the FOIA that the public is entitled to know what its government is doing and why. The exemption is to be applied "as narrowly as consistent with efficient Government operation." S.Rep.No. 813, 89th Cong., 1st Sess. 9 (1975).

Coastal States, at 868-69.

Executive Order 13526 provides a bright-line, workable test for classified information that could be applied to Exemption 5 materials without adverse impact on the efficiency of agency operations. It specifies that 25 years after the date of origin, classified information is subject to automatic declassification. See E.O. 13526, § 3.3(a). If information that has been classified in the interest of national security can be disclosed after 25 years have passed, there is no logical reason why deliberative process information should continue to be withheld for any longer period of time without a particular justification for the extension.

B. The Two 2004 Vaughn Index Documents

The CIA's 2004 Vaughn withheld documents MORI 1153628 and MORI 1199978, pursuant to Exemption 5. Although the CIA states that they are both dated April 28, 1978, see Appellee's Brief at 46, citing Nelson Decl., ¶ 116 [JA 189-190], and the Nelson declaration does state this, MORI Document 1153628, which has been partially disclosed, gives the date as May 31, 1978, as does the index document pertaining to it. The index sheet for the document withheld in full indicates it is dated April 28, 1978, but since it is entirely withheld, it is not known whether this is also unreliable.

MORI 1153628 bears a handwritten "O.K." in the margin which Morley has suggested indicates approval of the recommendation which the CIA has said was made, thus depriving it of Exemption 5 protection. The CIA has ignored this issue on appeal, thus conceding it.

The Vaughn index sheet for this document fails to state that there are no segregable nonexempt portions. There are two substantial blocks of withheld information which would appear to pertain to Exemption 5 material and could easily have segregable portions. See Addendum 3. The part that has been released asks for a "recommendation... together with any information or comment which may be pertinent." This may indicate there is segregable factual material which can be released. With respect to

Document 1199978, the index simply makes a bald assertion that the document is withheld in its entirety "because no meaningful information can be segregated for release."

Nelson asserts that information withheld under Exemption 5 in both documents 1153628 and 1199978 is also subject to Exemption 3. Nelson Decl., ¶ 116, nn. 32, 33. [JA 190] She does not specify which Exemption 3 statute is invoked or whether reliance is placed on an intelligence source or an intelligence method. Since Exemption 1 is apparently not claimed with respect to the Exemption 5 material in either document, a logical question is what risk to national security warrants invocation of an Exemption 3 claim based on unauthorized disclosure of intelligence source and methods. And is the CIA conflating "administrative methods" with "intelligence methods?"

Morley also argued that the CIA waived its right to claim Exemption 3 for Documents 1153628 and 1199978 because these documents involve its placement of Joannides "in a covert relationship with the HSCA, a violation of criminal law, which he then used to undermine the congressional investigation into President Kennedy's murder." Brief for Appellant at 70. The CIA has not responded to this argument. It has therefore conceded it. Morley notes that one of these two documents is

dated in 1978, the period relevant to Joannides undercover work against the CIA.

IV. THE CIA DOES NOT DISPUTE THAT THE DISTRICT COURT USED THE WRONG EXEMPTION SIX LEGAL STANDARDS

Morley has withdrawn his Exemption 6 claims except for some of those pertaining to two documents which bear the 2004 Vaughn index #s 1153616 and 1214747. The CIA's response does not mention these specific documents and drones on for several pages about matters which Morley has withdrawn from consideration.

The CIA also does not address Morley's point that the District Court's Exemption 6 ruling must be reversed because it applied the wrong legal standard. Having failed to address this issue, the CIA has conceded it.

With respect to Document 1153616, Morley now seeks only "the names . . . for Joannides' supervisors, references. . . ." Nelson Decl. ¶ 124 [JA 193]. With respect to Document # 1214747, he challenges the with-holding of Joannides' "co-workers . . . and supervisors." Nelson Decl., ¶ 128 [JA 195]. Without specifically addressing these documents, the CIA's brief does assert that, "[t]he CIA employees who worked with and supervised Joannides also have a significant privacy interest." Brief for Appellees at 54. This is followed by a list of types of information which is

no longer within the scope of the request except to the extent that the names of his supervisors and co-workers would indicate "affiliation with Joannides [] or affiliation with the CIA." The CIA says that disclosing this information, including affiliation with Joannides or the CIA "would undoubtedly subject them to intensive questioning from a variety of sources, that is, the media, family, friends, neighbors, etc." Id., citing JA 130, Nelson Decl., ¶ 140. The CIA is, of course, principally concerned with the media. It does not, however, cite any authority showing that they are required to answer such inquiries, nor does it provide any plausible explanation showing that as a class they are too weak-willed to resist unwanted press inquiries. Nor does it explain how resisting Morley's right to obtain such information is consistent either with the First Amendment or the right of democratic accountability embodied in the FOIA.

The CIA also asserts that "[s]imilarly, the disclosure of this information could also place the CIA employees and their families in danger from individuals seeking retribution against Joannides directly and the CIA generally." Id. But this speculation is unsupported by an evidence of its likelihood. Under the President John F. Kennedy Assassination Records Collection Act of 1992 ("JFK Act"), the CIA has released at least 300,000 pages of records pertaining to the JFK assassination which contain this type

of information, but the CIA fails to point to any instances where that massive disclosure has produced the kind of retribution it speculates might occur.

As to the names of Joannides' supervisors and co-workers, the CIA has not even claimed that they are still living. In the absence of such a claim, alleged possible retribution is totally speculative and lacks any factual predicate. Given the passage of more than three decades since these officials and employees last worked for or with Joannides, it is likely they, like Joannides, are deceased.

The CIA tries to minimize the public interest in disclosure by arguing that Morley has mischaracterized the documents at issue in this case as "'pertaining to the assassination' and 'Cuban operations.'" Appellee's Brief at 55. This, the CIA says, "is neither correct nor sufficient." Id. It follows this by asserting that "there was no overriding public interest that requires the disclosure of, or identifying information about the third parties at issue[,]" id., citing JA 130, Nelson Decl. ¶¶ 119-141 [JA 191-199]

The public interest in the records at issue had repeatedly been called to the CIA's attention. Referring to the records on Joannides which are the subject of Morley's request, Prof. Anna Nelson, who served as a member of the Assassination Records Review Board ("ARRB"), stated:

> It is imperative that all additional information which bears upon the CIA's conduct regarding both the congressional investigation and the Kennedy assassination itself be made public as soon as possible so that Mr. Morley and others may continue to research these matters.

Anna Nelson Decl., ¶ 7. [JA 39-40] Similarly, Jeremy Gunn, who served at overlapping times as General Counsel, Director of Research, and Executive Director of the ARRB, stated:

> Prior to the time I received Ms. Combe's [March 3, 1998] memorandum, CIA had never taken the positive step, as far as I am aware, of identifying to any government agency the role that Mr. Joannides held with regard to his activeties in 1962-64, that pertained (directly or indirectly) to Lee Harvey Oswald, nor did CIA proactively inform the Review Board that he was one and the same person who was a CIA liaison to the House Select Committee on Assassinations (HSCA).

Declaration of T. Jeremy Gunn, ¶ 10. [JA 43].

Gunn continued:

> Although I have no information regarding . . . why CIA did not disclose this critical information about Mr. Joannides to the Warren Commission, the HSCA, or the Review Board, this information is without any question an extremely important part of the larger story of the assassination . Records related to Mr. Joannides' activities in 1962-64 and 1978, unquestionably fall within the scope of the JFK Act as was consistently held by the Review Board that had statutory responsibility for interpreting the scope of the JFK Act.

Id., ¶ 11 [JA 43-44]. The Chairman of the ARRB stressed the important public interest in the subject of Morley's request: "It is imperative that all additional information which bears upon the CIA's conduct regarding both the congressional investigation and the Kennedy assassination itself be made public as soon as possible so that Mr. Morley and others may continue to research these matters." Declaration of John R. Tunheim.¶ 7. [JA 48]

The CIA disregards all of this and says that "Morley has not demonstrated any public interest in this type of information or explain (sic) in any way how disclosure would shed light on government operations." Id., citing JA 130, Nelson Decl., ¶ 141 [JA 199]. The cited paragraph does not actually say this. Instead, referring to the information for which privacy claims have been made, Nelson simply states: "I am unaware of any legitimate public interest in this information."

The public interest in the names of Joannides' supervisors is self-evident. It identifies who is responsible for overseeing Joannides' work and holding him responsible for his actions. Identification of co-workers is particularly important for scholars, permitting evaluation of their competence, cohesion, experience and influence on activities, etc. All of this information enables the public to evaluate who was doing what and what roles they played in government operations.

This Court remanded the Exemption 6 issue because the CIA has failed even to articulate the privacy interest in the records, let alone demonstrate that such privacy interests meet the standard for an agency's withholding under Exemption 6. Morley, supra, at 1128. While the CIA has now articulated some privacy interests, they are speculative and implausible. The CIA fails to note that one's "status as a public official operates to reduce his cognizable interest in privacy as a general matter." Kimberlin v. Dep't of Justice, 139 F.3d 944, 949 (D.C. Cir. 1998). This Court stated in Wash. 0Post Co. v. U.S. Dep't of Health & Human Services, 690 F.2d 252, 261 (D.C.Cir.1982), that under Exemption 6 the presumption in favor of disclosure is as strong as anywhere in the Act." Given this standard and the failure of the CIA either to support its privacy claims with tangible evidence or to take into account the public interest in disclosure, it has failed to show that disclosure "would constitute a clearly unwarranted invasion of privacy.

V. THE CIA's SEARCH WAS INADEQUATE

Morley stated that a proper search needed to establish "not only which computer databases were searched, and which CIA components were searched, but also which operations or projects were searched." Appellant's Br. at 48. The CIA responds by confusing the issue, citing Nelson's

statements that three CIA Directorates were searched and stating that these three "components" were searched. Appellee's Br. at 15-16. But the CIA is very decentralized and has many different components which hold pertinent records. Unless all relevant components have been searched, the CIA has simply concealed the nature of the search under the three shells.

Morley also pointed to the testimony of a senior CIA officer who testified as to the method of searching operational files by going to the Central Registry or the appropriate CIA desk and obtaining the cryptonym of the agent and thus retrieving the relevant files. Appellant's Br. at 48. The CIA did not respond to this point. It seems to believe that all it had to do was punch in certain names on a computer in order to conduct an adequate search. But the cited testimony to the HSCA by this senior CIA officer suggests otherwise.

CONCLUSION

For the reasons set forth above, the District Court's decision should be reversed and the case remanded for further proceedings.

Respectfully submitted,

/s/

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Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of March, 2012, mailed a copy of the foregoing Appellant's Reply Brief to AUSA Benton Peterson, 555 4th Street, N.W., Washington, D.C. 20530.

/S/
JAMES H. LESAR

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Appellant complies with the type and volume limitations set for FRAP 32(a)(7)(B)(i). It does not contain in excess of 7,000 words.

/s/
JAMES H. LESAR

ADDENDA

Exhibit 4:	C/TFW CS Classification Stanley R. Zamka Dr. Meza Robert Q. Nelander Jesse Davega AMBARB-64 AMBARB-16 AMBARD-53 Pedro Yntrerian Garcia AMHINT-2 AMHINT-99 AMHINT-52 AMHINT-30 AMBAR-54
Exhibit 5:	Operational/GYROSE/KUWOLF
Exhibit 11:	DOB/SIT CA/PROP CI/OPS CI/IC 2 FI FI/3 FI/INT-2 IW-2 SR 6 AD/NE AD/SI GYROSE/KUWOLF
Exhibit 24:	SAS 10 SOD 6 CI/DA S/C 2 TYPIC SOD
Exhibit 36:	Chief, PW /s/ Robert K. Trouchard (signed in pseudo) /s/ Frederick J. Inghurst (signed in pseudo)
Exhibit 42	SAS Registry Sam Halpern CIO/SAS SAS/eob

Addendum 1

1a

OFFICE OF CENSORSHIP

REC'D Jan. 12, 1959

[redacted]

Addendum 2a

(302)

(b) (1)
(b) (2)
(b) (3)
(b) (5)
(b) (6)

CONFIDENTIAL

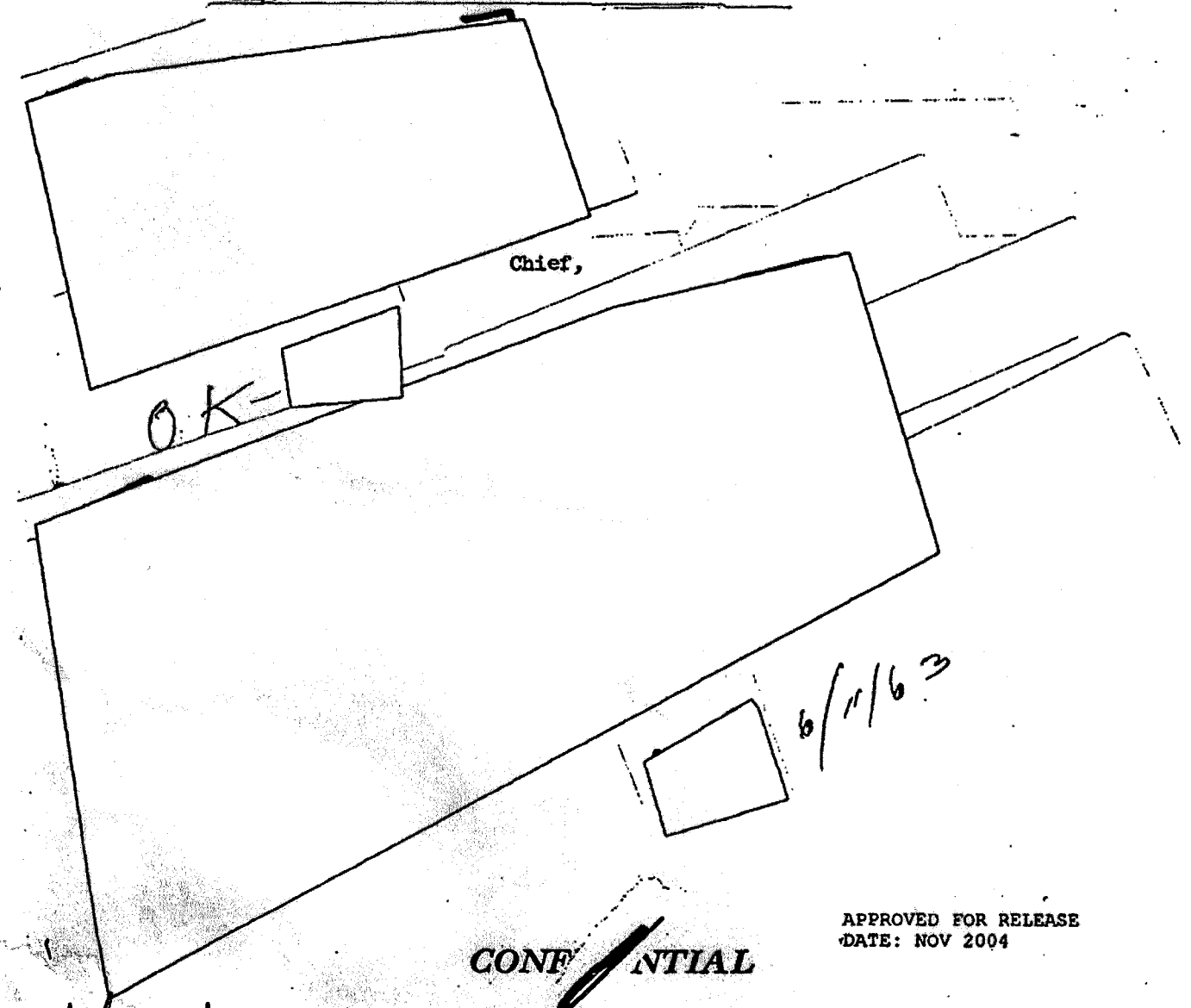
FILE

DATE: 31 May 1963

MEMORANDUM FOR: Chief, [redacted] OS

SUBJECT : JOANNIDES, George [redacted]

The above individual is under consideration for clearance for Special Intelligence. Your recommendation is requested concerning the granting of such clearance, together with any information or comment which may be pertinent.



CONFIDENTIAL

Addendum 3

3a

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