APPELLANT'S PETITION FOR REHEARING OR PETITION FOR REHEARING *EN BANC*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. Cir. No. 18-5280

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ASSASSINATION ARCHIVES AND RESEARCH CENTER,

Appellant/Petitioner,

v.

CENTRAL INTELLIGENCE AGENCY,

Appellee/Defendant.

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On Appeal from the United States District Court for the
District of Columbia, Hon. Trevor N. McFadden, District Judge, Cv. no. 17-0160

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Dated: January 29, 2021

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and this Court's Circuit Rules, Appellant Assassination Archives and Research Center ("AARC" or "the Center") petitions the Court to rehear *en banc* and for panel rehearing of the Amended Judgment issued by two members of a merits panel on December 21, 2020 (Doc. #1876481), and the Order granting partial summary affirmance dated February 15, 2019 (Doc. #1773678), both attached hereto as Attachment A. As noted in the amended judgment, the late Senior Circuit Judge Williams participated in this case and the initial Judgment dated October 11, 2019. Judge Williams died in August 2020 and was not replaced on this panel. Death of a Judge who had considered a case constitutes grounds for rehearing with a newly appointed third member of the panel. Greenberg v. FDA, 803 F.2d 1213,1215 (D.C. Cir. 1986).

PRELIMINARY STATEMENT

The failure of the Judgment in this case to follow decisions of this court as set forth below creates an inconsistency in the case law, and the Court should rehear the matter *en banc*. This case involves questions of exceptional importance in regard to the provisions of the Freedom of Information Act, 5 U.S.C. § 552(b) related to new information concerning the circumstances surrounding the assassination of President Kennedy in 1963. This Court has properly recognized the high public interest in the subject of the Kennedy assassination, stating,

"(w)here that subject is the Kennedy assassination — an event with few rivals in national trauma and in the array of passionately held conflicting explanations — showing potential public value is relatively easy." Morley v. Central Intelligence Agency ("Morley IX"), 810 F.3d 841,844 (D.C.Cir. 2016). The documents at issue reflect events more than fifty years ago and the CIA claims deliberative process privilege even though the FOIA statute has been amended to bar such claims for material over twenty-five years old.

As a preliminary matter, Appellant AARC pointed out in its prior petition for rehearing or rehearing en banc (Doc. 1817365) that the second paragraph of the October 11, 2019 Judgment stated that this Court affirmed "the denial of the motion for summary judgment and grant of the cross-motion for summary judgment". As the docket entries in the district court demonstrate, the Central Intelligence Agency ("CIA") filed a dispositive motion for summary judgment (R.19), and AARC filed a cross-motion for summary judgment (R.21).[1] The October 11, 2019 Judgment by its language affirmed the granting of AARC's cross-motion for summary judgment and denial of CIA's motion. This result was contrary to the reasoning of the Judgment and reflected error in the Judgment, now confirmed by the Amended Judgment dated December 21, 2020. (Attachment A,

[1] "R." references the corresponding docket entry in the district court case docket, Civ. No. 17-0160.

Doc. 1876481)

Further, the Judgment on page 3 states that AARC did not challenge CIA's segregation efforts, however, AARC specifically argued segregability in its brief filed in this case (Doc. 1799186, p. 31 of 35), and reiterated segregability in its reply brief (Doc. 1799187, p. 22 of 27). In any event, this Court has held that a court must consider the segregability issue *sua sponte.* Morley v. CIA ("Morley II"), 508 F.3d 1108,1123 (D.C.Cir. 2007). The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). "[T]he District Court had an affirmative duty to consider the segregability issue *sua sponte*." Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022,1028 (D.C.Cir. 1999) Thus, "a district court clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability." PHE, Inc. v. Dep't. of Justice, 983 F.2d 248,252 (D.C.Cir. 1993). The district court's failure to fulfill this responsibility requires a remand. Morley II, 508 F.3d at 1123.

The failure of the Judgment in this case to follow Morley II as set forth above creates an inconsistency in the circuit law, and the Court should rehear the matter *en banc*.

Search of Records Released to the National Archives ("NARA").

Morley II also correctly holds that a search is inadequate because the CIA did not search records that had been transferred to NARA pursuant to the JFK Act, 44 U.S.C. § 2107 note. Morley II, 508 F.3d at 1119. The Supreme Court has held that "an agency has [] `withheld' a document under its control when, in denying an otherwise valid request, it directs the requester to a place outside of the agency where the document may be publicly available." U.S. Dep't. of Justice v. Tax Analysts, 492 U.S. 136,150 (1989).

The FOIA has a "settled policy" of "`full agency disclosure.'" Tax Analysts v. U.S. Dep't. of Justice, 845 F.2d 1060,1064 (D.C.Cir. 1988) (quoting S.Rep. No. 89-813, at 3 (1965)), *aff'd*, 492 U.S. 136. Congress has authorized only nine categories of exemption from this policy, and practical considerations that documents exist in another forum outside of the agency is not amongst them. "[A] categorical refusal to release documents that are in the agency's `custody' or `control' for any reason other than those set forth in the Act's enumerated exceptions would constitute `withholding.'" McGehee v. CIA, 697 F.2d 1095,1110 (D.C.Cir. 1983) (quoting Kissinger v. Reporter's Comm. For Freedom of the Press, 445 U.S. 136,150-51 (1980). Because the CIA did not deny that it had retained copies of the records transferred to NARA and conceded that some transferred

records were likely to be responsive, it was obligated to search those records in response to Morley's FOIA request. In this case, CIA must search records it transferred to the National Archives that its Chief Historian identified as a likely source for responsive records. Amended Judgment, December 21, 2020, Doc. 1876481, p. 2, Attachment A.

The panel decision conflicts with a decision of this Court on the issue of records transferred to the National Archives and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

As Judge Pillard observed at oral argument, the CIA's submissions in this case fall far short of the requirements of the case law in this court. Transcript of oral argument at p. 14, See Attachment B. Agency declarations must be detailed and specific and not boilerplate assertions. The ones submitted in this case do not meet the standard. In that respect as well, the Court's decision to affirm the district court's decision to grant summary judgment to the CIA conflicts with decisions of this court. Thus consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

Finally, as noted in the amended judgment, the late Senior Circuit Judge Williams participated in this case and the initial Judgment dated October 11, 2019. Judge Williams died in August 2020 and was not replaced on this panel. Death of

a Judge who had considered a case constitutes grounds for rehearing with a newly appointed third member of the panel. Greenberg v. FDA, 803 F.2d 1213,1215 (D.C. Cir. 1986).

BACKGROUND

Appellant AARC is a non-profit, non-stock corporation, organized in 1984 for the purposes of collecting, preserving and making available to the public research materials relating to political assassinations and related subjects, and conducting research in the field. As part of its research and public information functions, AARC uses government records made available to it under the Freedom of Information Act ("FOIA"). AARC's archive contains the largest collection of materials on the assassination of President John F. Kennedy in private hands.[2] R.1, p. 2.

The Freedom of Information Act requests at issue in this case seek additional new information related to the events surrounding the assassination of President Kennedy on November 22, 1963. In 2012 Appellant AARC became aware of a formerly Top Secret document released under the President John F. Kennedy Assassination Records Collection Act, 44 U.S.C. § 2107 note, containing important new information. This document contains a memorandum of a briefing of the Joint

[2] AARC does not espouse or support any particular theory about the assassination of President Kennedy.

Chiefs of Staff by the head of CIA Cuban operations Desmond Fitzgerald on September 25, 1963. During this briefing, Mr. Fitzgerald informed the Joint Chiefs that CIA was attempting to recruit individuals in the Cuban military to join in an effort to overthrow the Castro regime. Mr. Fitzgerald stated that CIA saw a parallel in history, the plot to assassinate Adolf Hitler during World War II, and that the Hitler plot was being studied by CIA in detail to develop an approach to dealing with Castro. R. 1-1, page 7, para. 13.

Former CIA Director Allen Dulles wrote extensively about the July 20, 1944 plot to kill Hitler in Dulles' book *Germany's Underground, the Anti-Nazi Resistance,* 1947, 2000 Da Capo Press, pp. 1-11. Dulles was personally involved with the July 20 plotters from his post in Bern, Switzerland as a principal officer of the Office of Strategic Services ("OSS"), forerunner of the CIA. *Id.* at xi-xii.[3] Dulles served as CIA Director in the Kennedy administration until the failure of the Bay of Pigs invasion, at which time he was replaced by President Kennedy.

[3] The plot to assassinate Hitler was attempted unsuccessfully on July 20, 1944, and is known as the "July 20 plot" or "Valkyrie plot". Valkyrie was the codename for a Nazi Germany secret plan to suppress internal rebellion by foreign slave workers. The July 20 plot planners attempted to use the Valkyrie operation to overthrow Hitler's regime, however Hitler was only slightly wounded and quickly reasserted his authority. Dulles, Allen Welsh, *Germany's Underground*, Da Capo Press, (2000), p. 1; Casey, William, *The Secret War Against Hitler*, The Berkley Publishing Group, (1989), p. 138. As noted, Allen Dulles was a Director of the CIA and a member of the Warren Commission that investigated President Kennedy's assassination.

Dulles served as an active member of the Warren Commission that investigated President Kennedy's assassination.

Dulles had knowledge of the facts of CIA plots to assassinate Castro. Despite this knowledge, he withheld information on efforts to overthrow Castro from the Warren Commission. R. 8-5 (President Gerald Ford foreword). Although subsequent investigations of President Kennedy's assassination included plots to assassinate and overthrow Castro, the CIA's detailed study of the Hitler plot for use in operations against Castro was withheld. R. 8-3 (Church Committee excerpt); R.8-4 (CIA Inspector General's Report on plots to assassinate Castro); R. 26-1, *Politico* article on Castro plots; R.30-3 (Church Committee excerpt). Information about U.S. plots to assassinate Castro was believed significant because of the possibility of retaliation against U.S. leaders, or that these plots themselves may have been turned against President Kennedy.

To AARC's knowledge, this additional information about studying the 1944 plot to kill Hitler as a means to an approach to overthrow Castro is new information that has not been previously investigated by U.S. government agencies. Through its FOIA requests, AARC is attempting to find and reveal additional information about this episode that will help it to fill out the public record. This Court has properly recognized the high public interest in the subject of the Kennedy assassination, stating, "(w)here that subject is the Kennedy

assassination — an event with few rivals in national trauma and in the array of passionately held conflicting explanations — showing potential public value is relatively easy." Morley v. Central Intelligence Agency ("Morley IX"), 810 F.3d 841,844 (D.C.Cir. 2016). This case involves factual material at the heart of the unresolved issue as to whether the plots to assassinate Castro may have precipitated the assassination of the President.

ARGUMENT

I. THE AMENDED JUDGMENT IN THIS CASE CORRECTS AN ERROR IN THE OCTOBER 11, 2019 JUDGMENT POINTED OUT BY APPELLANT AARC IN ITS EARLIER PETITION FOR REHEARING OR REHEARING EN BANC (DOC. 1817365).

The second paragraph of the October 11, 2019 Judgment states that this Court affirms "the denial of the motion for summary judgment and grant of the cross-motion for summary judgment". As the docket entries in the district court make clear, the CIA filed a motion for summary judgment (R.19), and AARC filed a cross-motion for summary judgment (R.21). These filings were in accordance with page 4 of the district court's scheduling order filed September 9, 2017 (R.18). The October 11, 2019 Judgment in this case affirmed granting of the cross-motion for summary judgment, which was filed by AARC, and denial of the motion for summary judgment, which was filed by CIA. The Amended Judgment dated December 21, 2020 corrects the error. (Attachment A, Doc. 1876481).

As noted in the amended judgment, the late Senior Circuit Judge Williams participated in this case and the initial Judgment dated October 11, 2019. Judge Williams died in August 2020 and was not replaced on this panel. Death of a Judge who had considered a case constitutes grounds for rehearing with a newly appointed third member of the panel. Greenberg v. FDA, 803 F.2d 1213,1215 (D.C. Cir. 1986).

II. ON PAGE 3 THE JUDGMENT MISSTATES THE LAW ON SEGREGABILITY, WHICH REQUIRES A COURT TO CONSIDER THE ISSUE OF SEGREGABILITY *SUA SPONTE.*

This Court has held that a court must consider the segregability issue *sua sponte*. Morley v. CIA ("Morley II"), 508 F.3d 1108,1123 (D.C.Cir. 2007). The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). "[T]he District Court had an affirmative duty to consider the segregability issue *sua sponte*." Trans-Pac. Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022,1028 (D.C.Cir. 1999) Thus, "a district court clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability." PHE, Inc. v. Dep't. of Justice, 983 F.2d 248,252 (D.C.Cir. 1993). The district court's failure to fulfill this responsibility requires a remand. Morley II, 508 F.3d at 1123.

The failure of the Judgment in this case to follow Morley II as set forth above creates an inconsistency in the circuit law, and the Court should rehear the matter *en banc*.

Further, the Judgment on page 3 states that AARC did not challenge CIA's segregation efforts, however AARC specifically argued segregability in its brief filed in this case (Doc. 1799186, p. 31), and reiterated segregability in its reply brief (Doc. 1799187, p. 22). In any event, as noted, this Court has held that a court must consider the segregability issue *sua sponte*. Morley v. CIA ("Morley II"), 508 F.3d 1108,1123 (D.C.Cir. 2007).

III. SEARCH OF RECORDS RELEASED TO THE NATIONAL ARCHIVES.

Morley II also correctly holds that a search is inadequate where the CIA does not search records that had been transferred to the National Archives pursuant to the JFK Act, 44 U.S.C. § 2107 note. Morley II, 508 F.3d at 1119. The Supreme Court has held that "an agency has [] `withheld' a document under its control when, in denying an otherwise valid request, it directs the requester to a place outside of the agency where the document may be publicly available." U.S. Dep't. of Justice v. Tax Analysts, 492 U.S. 136,150 (1989). The Chief Historian of the CIA made such a direction in this case as noted in the Judgment on page 2 thereof.

The FOIA has a "settled policy" of "`full agency disclosure.'" Tax Analysts v. U.S. Dep't. of Justice, 845 F.2d 1060,1064 (D.C.Cir. 1988) (quoting S.Rep. No. 89-813, at 3 (1965)), *aff'd*, 492 U.S. 136. Congress has authorized only nine categories of exemption from this policy, and practical considerations that documents exist in another forum outside of the agency is not amongst them. "[A] categorical refusal to release documents that are in the agency's `custody' or `control' for any reason other than those set forth in the Act's enumerated exceptions would constitute `withholding.'" McGehee v. CIA, 697 F.2d 1095,1110 (D.C.Cir. 1983) (quoting Kissinger v. Reporter's Comm. For Freedom of the Press, 445 U.S. 136,150-51 (1980). Because the CIA did not deny that it had retained copies of the records transferred to NARA and conceded that some transferred records were likely to be responsive, it was obligated to search those records in response to Morley's FOIA request. Morley II, 508 F.3d at 1119. Here, CIA must search records it transferred to the National Archives that its Chief Historian identified as the likely source for responsive records. Judgment, Oct. 11, 2019, Doc. 1810465, p. 2.

The panel decision conflicts with the circuit's decisions on the issue of records transferred to the National Archives and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

IV. CIA's SUBMISSIONS IN THIS CASE FALL FAR SHORT OF THE REQUIREMENTS OF THE CASE LAW OF THIS COURT.

As Judge Pillard observed at oral argument, the CIA's submissions in this case fall far short of the requirements of the case law in this court. Transcript, oral argument at p. 14 (Attachment B). Agency declarations must be detailed and specific and not boilerplate assertions, and the ones submitted in this case do not meet the standard. Rule 5(c)(4) of the Federal Rules of Civil Procedure requires that such declarations must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. As noted in King v. United States Department of Justice (King), 830 F.2d 210, 218 (D .C .Cir. 1987) "[t]he significance of agency affidavits in a FOIA case cannot be underestimated." The reason for this is that ordinarily the agency alone possesses knowledge of the precise content of documents withheld. Thus, "the FOIA requester and the court both must rely upon its representations for an understanding of the material sought to be protected." *Id* . The agency's assertions are critical because "'[t]his lack of knowledge by the party see[k]ing disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution,' with the result that '[a]n appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a lower court's factual

determination.'" *Id*., quoting Vaughn v. Rosen, 484 F.2d 820, 824-825 (D.C.Cir. 1973).

Agency affidavits regarding the search for responsive records are inadequate to support summary judgment where they "do not note which files were searched or by whom, do not reflect any systematic document location, and do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized." Weisberg v. *United States Dept. of Justice (Weisberg)*, 627 F.2d 365,371 (D.C.Cir.1980). This Court reviews the action of the district court in a Freedom of Information Act case *de novo*. This Court has held that it is well-understood law that "[w]e review orders granting summary judgment *de novo*." (citation omitted). This is so because in our review of decisions granting summary judgment we must decide the same question that was before the district court: "[t]hat is, we must determine whether there is on the record 'no genuine issue as to any material fact.' " Id. (quoting Fed.R.Civ.P. 56(c)). Summers v. *Dep't of Justice*, 140 F.3d 1077, 1079 (D.C. Cir. 1998).

This Court has recently strongly restated that decisions in this circuit have long held that agency declarations must describe in detail how searches were conducted, including search terms that were used, and results yielded in the search of each

component of an agency. Reporter's Committee for Freedom of the Press v. FBI (Reporter's Committee), 877 F.3d 399, 403-4 (D.C. Cir. 2017).

This Court emphasized that summary judgment is inappropriate if "a review of the record raises substantial doubt" as to the search's adequacy, "particularly in view of 'well defined requests and positive indications of overlooked materials.'" Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 326 (D.C. Cir. 1999)(quoting Founding Church of Scientology v. NSA, 610 F.2d 824, 837 (D.C. Cir. 1979)). "We review *de novo* the adequacy of the [agency's] search." DiBacco v. U.S. Army, 795F.3d 178, 188 (D.C. Cir. 2015). Reporter's Committee at 402. Agency actions under the FOIA are subject to *de novo* review. 5 U.S.C. § 552(a)(4)(B). "This requires the court to 'ascertain whether the agency has sustained its burden of demonstrating that the documents requested ... are exempt from disclosure under the FOIA."' MultiAg Media LLC v. Dept. of Agriculture, 515 F.3d 1224, 1227 (D.C.Cir.2008)(citations omitted).

In respect to the adequacy of CIA's submissions as well, the Court's decision to affirm the district court's decision to grant summary judgment to the CIA conflicts with decisions of this court and consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

CONCLUSION

This case involves important historical information related to events that occurred more than fifty years ago, yet significant information related to Allen Dulles is being withheld. J. App. at 300. Documentation of CIA's detailed study in the fall of 1963 of the plot to assassinate Hitler as a guide to removing Castro from power is simply missing. AARC does not waive its arguments in its briefs and the oral argument in this case. Considerations of space and time mean they cannot be repeated in full in this petition. For the foregoing reasons this Court should grant Appellant's Petition for Rehearing or Petition for Rehearing e*n banc*.

Respectfully submitted,

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Dated: January 29, 2021

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSASSINATION ARCHIVES AND RESEARCH CENTER, INC.

Appellant,

v. **Appeal No. 18- 5280**

CENTRAL INTELLIGENCE AGENCY

Appellee.

APPELLANT AARC'S CORPORATE DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1

Appellant Assassination Archives and Research Center ("AARC") hereby files its corporate disclosure statement in this case pursuant to Circuit Rule 35 and 32(a).

Corporate Disclosure Statement Pursuant to Circuit Rule 26.1

Appellant Assassination Archives and Research Center, Inc. is a non-stock, non-profit Virginia corporation dedicated to the collection and dissemination of materials related to political assassinations. AARC has no parent or subsidiary

entities. As noted, as a non-stock, non-profit entity, AARC does not issue stock or other form of ownership.

Respectfully submitted,

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Dated: January 29, 2021

CERTIFICATE OF PARTIES AND AMICI

Pursuant to Rule 28(a)(1)(A) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, we certify that the parties are Assassination Archives and Research Center, Appellant/Petitioner and Central Intelligence Agency, Appellee/Respondent. Petitioner is not aware of any amicus curiae having entered an appearance in this case.

Respectfully submitted,

/s/

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Respectfully submitted,

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Dated: January 29, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of January 2021 caused a copy of the foregoing Appellant's Petition for Rehearing or Petition for Rehearing En Banc to be served by the Court's ECF system on counsel for Appellee CIA.

Respectfully submitted,

/s/

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Dated: January 29, 2021

ATTACHMENT A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5280 **September Term, 2018**

1:17-cv-00160-TNM-GMH

Filed On: February 15, 2019

Assassination Archives and Research Center,

Appellant

v.

Central Intelligence Agency,

Appellee

BEFORE: Henderson*, Srinivasan, and Millett, Circuit Judges

O R D E R

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted in part and denied in part.

The district court correctly concluded that the Central Intelligence Agency's search for records in response to appellant's Freedom of Information Act ("FOIA") request was adequate, notwithstanding the fact that the Agency did not use the precise search terms suggested by appellant and did not locate several records that appellant expected would be located. See Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003) ("The adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.").

The district court also correctly concluded that portions of the Propagandist's Guide to Communist Dissensions were properly redacted pursuant to FOIA Exemption 1. See 5 U.S.C. § 552(b)(3) (exempting from disclosure materials that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order"). The government represents that, pursuant to a 2012

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5280 **September Term, 2018**

Declassification Guide, those portions were not automatically declassified due to their age. Appellant has provided no reason for this court to question that representation. See Morley v. CIA, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (noting that this court grants "special deference" to the government in matters of national security).

Finally, appellant does not refute the district court's conclusion that the portions of the remaining responsive records which contain personally identifying information were properly withheld pursuant to FOIA Exemption 3, by way of the CIA Act, 50 U.S.C. § 3507 (exempting the CIA from disclosing any records describing "the organization, functions, names, official titles, salaries, or numbers of personnel employed by the [CIA]"). Because the court has concluded that these redactions were justified under FOIA Exemption 3, it need not consider whether they were also justified under FOIA Exemption 6.

The merits of the parties' positions as to the foregoing issues are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

Summary affirmance is denied as to whether appellee correctly withheld portions of several intra-agency communications pursuant to FOIA Exemption 5. Because the court has determined that summary disposition is not in order with respect to this issue, the Clerk is instructed to calendar this case for presentation to a merits panel.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of this appeal.

Per Curiam

* Circuit Judge Henderson would grant the motion for summary affirmance in its entirety.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5280 **October Term, 2019**

FILED: OCTOBER 11, 2019

ASSASSINATION ARCHIVES AND RESEARCH CENTER,
APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-00160)

Before: PILLARD and RAO, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

JUDGMENT

This appeal was considered on the record and on the briefs and oral arguments of the parties. After according the issues full consideration, the Court is satisfied that appropriate disposition of the appeal does not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). For the reasons stated below, it is hereby

ORDERED and **ADJUDGED** that the denial of the motion for summary judgment and grant of the cross-motion for summary judgment be **AFFIRMED**.

In this Freedom of Information Act (FOIA) case, the Assassination Archives and Research Center (the Center) appeals an order of the district court denying the Center's motion for summary judgment and granting a cross-motion for summary judgment by the Central Intelligence Agency (CIA). At issue is whether, in response to FOIA requests by the Center, the CIA permissibly withheld pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), portions of intra-agency communications relating to the FOIA process itself.

On August 25, 2012, the Center submitted to the CIA a request for all records "pertaining to the CIA's study in 1963 of plots to assassinate Adolph Hitler" or "to communications by Allen

Dulles regarding plots to assassinate Adolph Hitler" during Dulles's service in the CIA and a related office. After the CIA returned a determination that it had no responsive records, the Center submitted a supplementary request. In addition to somewhat expanding the scope of the previous request, the Center's second letter requested "[a]ll index entries or other records reflecting the search for records responsive to this request in its original or amended form, including all search [terms] used with each of the components searched."

As set forth in declarations from CIA Information Review Officer Antoinette Shiner, who was involved in responding to the Center's amended FOIA request, CIA staff searched for responsive records in the files of eight different CIA sub-offices that the agency identified as "the locations reasonably expected to contain" the requested materials. Shiner Decl. (Jan. 19, 2018) at 2. Those offices were: "the Directorate of Analysis . . . ; Directorate of Operations . . . , including its operational files; the Office of the Director, the Director's Action Center, the Office of the General Counsel, the Office of Congressional Affairs, the Center for the Study of Intelligence (which is part of the CIA's Talent Center) and the CIA's history staff office." *Id*. at 2-3. Within each office, CIA staff searched "all relevant office databases, Agency share drives, and archival records." *Id*. at 3. In carrying out each search, CIA staff used a wide variety of terms, including but not limited to "Hitler Assassination," "Hitler Plot," "1963 assassination study," and "Dulles communication Hitler." *Id*. at 4-5; Shiner Decl. (Oct. 13, 2017) at 3. Each of those terms was searched both as a complete phrase and as separate terms. For example, a search for "Hitler Assassination" would have returned all documents containing that exact phrase as well as all documents containing both "Hitler" and "assassination" somewhere in its body. Shiner Decl. (Jan. 19, 2018) at 5. Staff then reviewed each document uncovered by the searches and determined whether it was responsive to the Center's particular request. *Id*.

In addition to directing those searches, Shiner also consulted with the CIA's Chief Historian, who is "very knowledgeable about the Agency's holdings with respect to" the subject matter at issue here. *Id*. at 3. The Chief Historian "personally conducted searches of history staff files for any reference to studies of anti-Hitler plots dating from the 1963 time frame," but did not uncover any additional responsive documents. *Id*. at 3-4. The Chief Historian advised that, "due to the age of the subject matter and narrow scope of [the] request focusing on anti-Hitler plots, there would not be many responsive documents and anything related to assassination studies would likely be found at the National Archives." *Id*. at 4. Based on our review of the redacted records, the declarations, and the CIA's *Vaughn* index, we granted summary affirmance to the CIA as to the adequacy of the CIA's search and the propriety of its application of FOIA Exemptions 1, 3, and 6, some of which were not contested. *Assassination Archives & Research Ctr. v. CIA*, No. 18-5280, 2019 WL 691517 (D.C. Cir. Feb. 15, 2019).

The only remaining issue is the permissibility of the Exemption 5 redactions to five records the CIA produced, which appear to be CIA internal forms used in processing the Center's FOIA requests and produced pursuant to the Center's request for records of the FOIA search process itself. The Center challenges the CIA's use of the deliberative privilege on the grounds that the information at issue is purely factual, reporting what the CIA found in its searches. Oral Arg. Rec. at 10:39-11:01; Appellant Br. 21-23. The CIA, in turn, argues that the withheld materials would

reveal the decision-making process behind its final response to the Center's FOIA request. Appellee Br. 7-17.

We now hold that the CIA has permissibly invoked Exemption 5. Under FOIA Exemption 5, agencies need not turn over "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5)—*e.g.*, records protected by the Executive's deliberative process privilege. *See EPA v. Mink*, 410 U.S. 73, 85-90 (1973). The privilege covers information that is both "predecisional" and "deliberative." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Documents are predecisional if they were "generated before the adoption of an agency policy," and deliberative if they "reflect[] the give-and-take of the consultative process." *Id*.

Here, the CIA invokes Exemption 5 to shield portions of the five internal FOIA task forms mentioned above. Specifically, the CIA has redacted from each form the substance of the intra-agency communication "[a]uthored by [the] Agency component employee tasked with the search" for the benefit of the agency official directing the CIA's internal records search. J.A. 217-219, 296-305.

The withheld communications indisputably precede the CIA's decision to release records to the Center. In addition, the redacted content "reflects the give-and-take" of a "consultative process" through which the agency sought to identify records within its possession potentially responsive to the Center's requests. *Id.* 189-90, 354, 357. We have previously held the privilege applicable to "factual material . . . assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action," *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993), and we have described a "recommendation to a supervisor on a matter pending before the supervisor" as "a classic example of a deliberative document," *Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 899 (D.C. Cir. 2015). Taken together, the entries in the agency's *Vaughn* index, the declarations, the forms themselves, and the context in which they are used make it sufficiently apparent that the redacted text describes the efforts of staff "in extracting pertinent material" and any issues they encountered along the way. In context, it is evident that the redacted matter amounted to predecisional communications from staff made for the purpose of informing the agency's ultimate decision as to what the law required of the Agency in response to the Center's FOIA request. *See* 5 U.S.C. § 552(a).

It suffices that the redactions on the FOIA forms reflect some predecisional agency give-and-take; the Center does not challenge the CIA's segregation efforts. *See* Appellant Br.; Appellee Mot. Summ. Affirmance 4 n.3. We therefore affirm the district court's grant of summary judgment to the CIA and denial of summary judgment to the Center on the issue of the CIA's withholdings under Exemption 5.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for hearing *en banc*. See Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5280 **September Term, 2020**

1:17-cv-00160-TNM-GMH

Filed On: December 21, 2020

Assassination Archives and Research Center,

Appellant

v.

Central Intelligence Agency,

Appellee

BEFORE: Pillard and Rao, Circuit Judges*

O R D E R

It is **ORDERED**, on the court's own motion, that the October 11, 2019 judgment be amended as follows:

(1) On page 1, second ¶, lines 1-2, delete:

"denial of the motion for summary judgment and grant of the cross-motion for summary judgment"

Insert in lieu thereof:

"grant of the motion for summary judgment and denial of the cross-motion for summary judgment".

* The late Senior Circuit Judge Williams was a member of the panel and participated in the disposition of the matter on October 11, 2019, before his death on August 7, 2020. Judges Pillard and Rao have acted as a quorum with respect to amending the judgment. *See* 28 U.S.C. § 46(d).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5280 **September Term, 2020**

(2) On page 1, third ¶, lines 3-4, delete:

"denying the Center's motion for summary judgment and granting a cross-motion for summary judgment by the Central Intelligence Agency (CIA)."

Insert in lieu thereof:

"granting the Central Intelligence Agency's (CIA) motion for summary judgment and denying the Center's cross-motion for summary judgment"

The Clerk is directed to issued the amended judgment. The Clerk is further directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5280 **October Term, 2019**

FILED: DECEMBER 21,2020

ASSASSINATION ARCHIVES AND RESEARCH CENTER,
APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-00160)

Before: PILLARD and RAO, *Circuit Judges*[*]

A M E N D E D J U D G M E N T

This appeal was considered on the record and on the briefs and oral arguments of the parties. After according the issues full consideration, the Court is satisfied that appropriate disposition of the appeal does not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). For the reasons stated below, it is hereby

ORDERED and **ADJUDGED** that the grant of the motion for summary judgment and denial of the cross-motion for summary judgment be **AFFIRMED**.

In this Freedom of Information Act (FOIA) case, the Assassination Archives and Research Center (the Center) appeals an order of the district court granting the Central Intelligence Agency's (CIA) motion for summary judgment and denying the Center's cross-motion for summary judgment. At issue is whether, in response to FOIA requests by the Center, the CIA permissibly withheld pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), portions of intra-agency

[*] The late Senior Circuit Judge Williams was a member of the panel and participated in the disposition of the matter on October 11, 2019, before his death on August 7, 2020. Judges Pillard and Rao have acted as a quorum with respect to the amended judgment. *See* 28 U.S.C. § 46(d).

communications relating to the FOIA process itself.

On August 25, 2012, the Center submitted to the CIA a request for all records "pertaining to the CIA's study in 1963 of plots to assassinate Adolph Hitler" or "to communications by Allen Dulles regarding plots to assassinate Adolph Hitler" during Dulles's service in the CIA and a related office. After the CIA returned a determination that it had no responsive records, the Center submitted a supplementary request. In addition to somewhat expanding the scope of the previous request, the Center's second letter requested "[a]ll index entries or other records reflecting the search for records responsive to this request in its original or amended form, including all search [terms] used with each of the components searched."

As set forth in declarations from CIA Information Review Officer Antoinette Shiner, who was involved in responding to the Center's amended FOIA request, CIA staff searched for responsive records in the files of eight different CIA sub-offices that the agency identified as "the locations reasonably expected to contain" the requested materials. Shiner Decl. (Jan. 19, 2018) at 2. Those offices were: "the Directorate of Analysis . . . ; Directorate of Operations . . . , including its operational files; the Office of the Director, the Director's Action Center, the Office of the General Counsel, the Office of Congressional Affairs, the Center for the Study of Intelligence (which is part of the CIA's Talent Center) and the CIA's history staff office." *Id*. at 2-3. Within each office, CIA staff searched "all relevant office databases, Agency share drives, and archival records." *Id*. at 3. In carrying out each search, CIA staff used a wide variety of terms, including but not limited to "Hitler Assassination," "Hitler Plot," "1963 assassination study," and "Dulles communication Hitler." *Id*. at 4-5; Shiner Decl. (Oct. 13, 2017) at 3. Each of those terms was searched both as a complete phrase and as separate terms. For example, a search for "Hitler Assassination" would have returned all documents containing that exact phrase as well as all documents containing both "Hitler" and "assassination" somewhere in its body. Shiner Decl. (Jan. 19, 2018) at 5. Staff then reviewed each document uncovered by the searches and determined whether it was responsive to the Center's particular request. *Id*.

In addition to directing those searches, Shiner also consulted with the CIA's Chief Historian, who is "very knowledgeable about the Agency's holdings with respect to" the subject matter at issue here. *Id*. at 3. The Chief Historian "personally conducted searches of history staff files for any reference to studies of anti-Hitler plots dating from the 1963 time frame," but did not uncover any additional responsive documents. *Id*. at 3-4. The Chief Historian advised that, "due to the age of the subject matter and narrow scope of [the] request focusing on anti-Hitler plots, there would not be many responsive documents and anything related to assassination studies would likely be found at the National Archives." *Id*. at 4. Based on our review of the redacted records, the declarations, and the CIA's *Vaughn* index, we granted summary affirmance to the CIA as to the adequacy of the CIA's search and the propriety of its application of FOIA Exemptions 1, 3, and 6, some of which were not contested. *Assassination Archives & Research Ctr. v. CIA*, No. 18-5280, 2019 WL 691517 (D.C. Cir. Feb. 15, 2019).

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requests and produced pursuant to the Center's request for records of the FOIA search process itself. The Center challenges the CIA's use of the deliberative privilege on the grounds that the information at issue is purely factual, reporting what the CIA found in its searches. Oral Arg. Rec. at 10:39-11:01; Appellant Br. 21-23. The CIA, in turn, argues that the withheld materials would reveal the decision-making process behind its final response to the Center's FOIA request. Appellee Br. 7-17.

We now hold that the CIA has permissibly invoked Exemption 5. Under FOIA Exemption 5, agencies need not turn over "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5)—*e.g.*, records protected by the Executive's deliberative process privilege. *See EPA v. Mink*, 410 U.S. 73, 85-90 (1973). The privilege covers information that is both "predecisional" and "deliberative." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Documents are predecisional if they were "generated before the adoption of an agency policy," and deliberative if they "reflect[] the give-and-take of the consultative process." *Id*.

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It suffices that the redactions on the FOIA forms reflect some predecisional agency give-and-take; the Center does not challenge the CIA's segregation efforts. *See* Appellant Br.; Appellee Mot. Summ. Affirmance 4 n.3. We therefore affirm the district court's grant of summary judgment to the CIA and denial of summary judgment to the Center on the issue of the CIA's withholdings under Exemption 5.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to issue the mandate forthwith.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

ATTACHMENT B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ASSASSINATION ARCHIVES AND :
RESEARCH CENTER, :
:
Appellant, :
:
v. : No. 18-5280
:
CENTRAL INTELLIGENCE AGENCY, :
:
Appellee. :
:
- - - - - - - - - - - - - - - - - X

Thursday, September 12, 2019

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES PILLARD AND RAO, AND SENIOR CIRCUIT JUDGE WILLIAMS

APPEARANCES:

ON BEHALF OF THE APPELLANT:

DANIEL S. ALCORN, ESQ.

ON BEHALF OF THE APPELLEE:

DEREK HAMMOND (AUSA), ESQ.

C O N T E N T S

P R O C E E D I N G S

THE CLERK: Case number 18-5280, Assassination Archives and Research Center, Appellant v. Central Intelligence Agency. Mr. Alcorn for the Appellant; Mr. Hammond for the Appellee.

JUDGE PILLARD: Mr. Alcorn, whenever you're ready.

ORAL ARGUMENT OF DANIEL S. ALCORN, ESQ.

ON BEHALF OF THE APPELLANT

MR. ALCORN: Good morning, may it please the Court. My name is Daniel Alcorn, I'm here for the Appellant, the Assassination Archives and Research Center. I'm joined at counsel table by James H. Lesar, my co-counsel. Mr. Lesar is under doctor's orders to limit his activities, so we are particularly pleased that he's able to attend and join us today.

The issue before the Court are claims by the CIA to exempt records under the (b)(5) exemption, there are five records in particular they're exempting, and these five records relate to the search activities that were conducted when the CIA received and began to search for our request. We contend that these are factual materials, these in fact are at the heart of an FOIA case, the adequacy of search issue, and by the nature of the fact of what the request was shows that they are related to the search activities that the CIA conducted. I think the best way to see our concern

is to look at one of the documents which is at page 300 of the Joint Appendix, and by looking at it we can see what was released, what was not released. It's page 300, Joint Appendix. At the top is --

JUDGE PILLARD: A big empty box.

MR. ALCORN: Yes, and I would point out that the size of the type is actually very small on the rest of the document, so assuming the type size is the same that's a considerable amount of information that can fit in that block at that small type size.

JUDGE WILLIAMS: In applying Exemption 5 is it ever dependent upon the sort of gross quantity of material that gets exempted?

MR. ALCORN: No, it's the nature of the material, and --

JUDGE WILLIAMS: Yes.

MR. ALCORN: -- of course, exemptions must be narrowly construed, that's part of the case law, the Supreme Court has stated that again in the Milner case. And so, these exemptions are not to get broad application, and the concern originally with the (b)(5) exemption was it not be used to withhold factual type information. And if you look at this document it's a task information, which I think means a task order, something to be done. The instructions are please conduct a search for records on or pertaining to

communications by Allen Dulles regarding plots to assassinate Adolph Hitler. Well, that caused quite a reply, assuming we're right about the type size and the amount of the whiteout, you know, there's more to that than we don't have any records, which is the ultimate response that we were given.

JUDGE PILLARD: And in fact -- so, your position is that the box expands depending on what's typed into it, and then it also says page one of two, or is --

MR. ALCORN: Yes, there is --

JUDGE PILLARD: So --

MR. ALCORN: -- a second page, and there's actually the remainder of a sentence on the second page, the next page, which either was deliberately not whited out, or it could have been a mistake that it wasn't whited out. It seems to continue over on the next page, 300 to 301.

JUDGE PILLARD: Any relevant material. Please feel free to contact me if you have any questions.

MR. ALCORN: It looks to me more like a mistake that it got forgotten because it went over to the other side. But that's not particularly helpful to what we're trying to do. But --

JUDGE RAO: Mr. Alcorn?

MR. ALCORN: Yes.

JUDGE RAO: So, why, though, isn't this something

like the summary of a record evidence, which we've said we can, you know, in Montrose we said would be the same as probing the decision-making process?

MR. ALCORN: I think we're left, we don't really know what is behind the redactions, that's part of our problem in contesting them. But given the context of this information the tasking order with instructions to make a search, the response, it's logical to then believe that there's information here about the search, and that indicates whether records existed or did not exist. And so, we're taking what the context of this document is, which the CIA has provided to us, they also provided it in response to our request asking for information from the search activity, so they've already made a decision that this is relevant to the search.

In addition, their Vaughn index, which is on page 219 of the Joint Appendix, the Vaughn index for this document, and they're essentially identical for the other documents, state internal agency search information in response to Plaintiff's FOIA request, that's the beginning of the description in the Vaughn index to justify the withholding. And we would contend that's information, the (b)(5) exemption, the pre-decisional deliberative process privilege is designed for policy and legal discussions, and I don't see where this information is of a policy or legal

nature. There's really no mention of that. It's a tasking order to make a search and report back to us the results of your search.

And there are five documents that fit that category that are part of the withholding. I'm concerned that this information may relate because of the subject matter, Allen Dulles and the plots to assassinate Hitler, it may relate to the issue of the OSS records, which was the predecessor organization of the CIA, and there's an issue, the CIA has on a number of occasions referred us to the National Archives, that you have to go to the National Archives to get any information, and that has to do with a process by which the CIA kept the OSS records, and then because of the Nazi War Crimes Disclosure Act of 1998 they eventually had to transfer a lot of those records to the National Archives. But the issue becomes then did they keep copies? Because if the Agency kept a copy, the Morley case in 2007, the 2007 Morley case said that if the CIA has copies then they must account for those under FOIA because they are records in possession of the Agency. And that issue about whether there were copies maintained of these records is not addressed anywhere in the case by the submissions of the Government, they just don't mention the issue of the copies. And it concerns me that this whiteout may involve that issue. Of course, we don't know because we

don't have the information. But it may involve a discussion of whether to account for these copies.

So, we are asking for in-camera review of the withheld material, we think the issue is such, and the circumstances such that in-camera review would be appropriate in this case. We are also seeking --

JUDGE PILLARD: And that would involve remand to the District Court to do that?

MR. ALCORN: We would encourage this Court to do it if this Court is so inclined, or it could be done on a remand.

JUDGE PILLARD: Do we have authority to do that?

MR. ALCORN: It's in the statute, the FOIA statute provides for in-camera review. The standard of review at this --

JUDGE PILLARD: By the Court. Right.

MR. ALCORN: -- this Court is de novo review, and this Court undertakes a do novo review under the requirements of the FOIA, the statute, and applies the law. So, I would contend that under the de novo review that in-camera review is a possibility.

JUDGE RAO: Do we review the District Court's denial of in-camera review under a de novo standard, or under an abuse of discretion standard?

MR. ALCORN: I would say it's de novo, the merits

of the FOIA request is the de novo review.

JUDGE RAO: But the denial of in-camera review is also de novo? Do you have a case for that?

MR. ALCORN: I would -- the Summers case sets the standard of de novo review, not every issue, we know the attorney's fee issue is not, it's not an abuse of discretion, but the merits of the FOIA case, and the in-camera review doesn't involve the merits of the FOIA case because it's reviewing the material to see whether the exemption should apply.

JUDGE PILLARD: So, Mr. Alcorn, you're not making any argument here that the deliberative process privilege applies differently, or is inapplicable to the deliberations in complying with FOIA itself?

MR. ALCORN: No. No. We're, going back to the EPA v. Mink, the case law for the (b)(5) exemption, which is to construe it narrowly and avoid factual matters that could be separated out because of the concern that factual matters could then be slipped under a deliberative process privilege.

JUDGE PILLARD: Right.

MR. ALCORN: And so, that is our contention.

JUDGE PILLARD: Thank you.

MR. ALCORN: And I reserve two minutes for rebuttal. Thank you.

JUDGE PILLARD: Good morning, Mr. Hammond.

ORAL ARGUMENT OF DEREK HAMMOND, ESQ.

ON BEHALF OF THE APPELLEE

MR. HAMMOND: Good morning, Your Honors. May it please the Court, my name is Derek Hammond, I'm here today on behalf of the Appellee, the Central Intelligence Agency.

The issue here is a narrow one, it is whether the District Court correctly concluded that the material contained in five tasking documents qualified for the deliberative process privilege, and whether that material was properly withheld under Exemption 5 of the FOIA. In making that determination the Court had before it two CIA declarations, a Vaughn index, and five redacted versions of the documents themselves. Taken together these materials clearly demonstrate that the material is both pre-decisional and deliberative, and therefore qualify for the privilege. The material was pre-decisional because it was prepared by an Agency employee for the purpose of assisting the Agency responding to the Appellant's FOIA requests, and it did so prior to the final disposition of those requests. The material likewise is deliberative.

Indeed, the documents themselves call for an internal give and take among Agency personnel, and they call for, they, as Appellant pointed out there were instructions, and that prompted a response. And as the declarations

indicate we know what's behind the response, it's internal Agency discussion regarding the searches conducted, and as the declaration --

JUDGE PILLARD: Is that deliberative, or is that more ministerial? I'm having, I'm actually having trouble even hypothetically imagining what could be in this box that is deliberative. If somebody said well, wait a minute, we don't even have this, would they write that if they said actually, legally we don't think we have to turn it over, would they write that in the box? It's not lawyers sort of talking about the scope, it's somebody who's in charge of a file who's being asked to look through it, and they're going to say I looked, I did find something, I didn't find something? I'm just having trouble with the deliberation characterization even hypothetically --

MR. HAMMOND: Sure, Your Honor.

JUDGE PILLARD: -- so I wonder if you could help me out with that?

MR. HAMMOND: So, absolutely. So, first of all, I would note that the Agency employee is exercising some amount of judgment and discretion in actually conducting the search. The Agency has received a FOIA request that broadly seeks various kinds of documents, a class of documents, and now an Agency employee is being asked to exercise judgment in determining where those materials might be located in the

vast array of documents that any agency may have. It then calls for a response, and in your hypothetical it could be I don't, I, I conducted this search and it yielded these results. But as this Court has noted in Mead Data, the purpose of the privilege is to protect the deliberative process itself, and not merely documents that contain deliberative material.

So, as this Court held in Mead Data discussions among Agency personnel that form the raw materials by which the Agency goes about making its decision, even if that discussion may be characterized as factual in nature, still qualifies as deliberative material. And in this case the Agency employee exercises judgment to perform a search, and then in your hypothetical he reported what the search was, and how he did it, and that then goes to the deciding official at the Agency as to whether or not that qualifies as an adequate search for the FOIA request. The deciding official could very well say that's not adequate, we need additional information, we should conduct additional inquiries, or we should do additional search terms.

So, as is made clear throughout in the Vaughn index, and in the various declarations this was not a final determination about the search that was conducted. And so, for that reason, because this is essentially the employee's response, it's tantamount to a recommendation to the

deciding official as to what an appropriate response, or an appropriate search in a given FOIA, in the context of any given FOIA request would be.

JUDGE WILLIAMS: It seems to me to not answer, you embodied in the thought process that's reflected in the writing factual findings, but -- did I get that right?

MR. HAMMOND: I --

JUDGE WILLIAMS: In a sense I could see how that would almost be inevitable.

MR. HAMMOND: Yes. So, to the extent that there is factual material, it is part and parcel of the recommendation made by the employee as to what --

JUDGE WILLIAMS: Well, it is non-segregable?

MR. HAMMOND: Yes, Your Honor, because --

JUDGE WILLIAMS: Because --

MR. HAMMOND: -- because that is still material that the deciding official has to consider as part of his overall deliberations as to whether or not it's an adequate search. So, if an employee says I conducted this search and it yielded these results, the results, as well as the means and methods by which the employee went to go search are all part of the raw materials that the Agency is considering when determining whether the search it conducted was adequate, or inadequate, or whether additional searches may need to be conducted.

JUDGE PILLARD: So, the difficulty I think is it's the Government's burden to establish that the exemption applies, and plenty of our cases have said that cannot be done with a boilerplate recitation. Now, here what we have, as you mentioned, is a Vaughn index and two declarations, and the redacted documents themselves, which as far as I can tell, and I'm really not, you know, trying to be smart here, but it's boilerplate, the Vaughn index, pre-decisional intra-agency deliberations regarding the search results, not the Agency's final determination, that is a restatement of what the test is, right? Under the exemption. And then in the affidavits, disclosure of any of these documents would reveal the internal decision-making process the Agency employs in making its final determinations. That, too, seems to me like a statement of what, a generic statement, or a, you know, boilerplate statement of what the exemption covers. So, as a reviewing Court with empty boxes and that is it something about the context that is supposed to further inform our judgment? I'm just not sure what you're asking us to apply our judgment to.

MR. HAMMOND: Yes. So, I think the forms themselves demonstrate that there is a give and take among the Agency personnel, and the declarations indicate that that's, that what's in the black, what's in the box is a discussion of the search that was conducted, that's not

boilerplate, that's a description of what's in the box is a discussion of the search that's conducted. And given that the context in which the Agency is tasking an employee to conduct a search, and that employee is reporting up, and we know that that employee is not the deciding official, that's a discussion that is part of the deliberative process of the Agency as a whole in making its determination as to adequacy of the search.

JUDGE PILLARD: What's your position on whether this Court has authority to look in-camera at the unredacted versions, or unredacted insofar as the, as exemption, deliberative process exemption is concerned?

MR. HAMMOND: So, I believe that any court could conduct in-camera review, but I think it would be highly unusual for this Court to conduct in-camera review if the lower court did not, and has not found that the lower court abused its discretion in declining to conduct such review.

JUDGE PILLARD: Although there's, I mean, another side of it is I often don't want to conduct in-camera review, I don't want to see things that I don't have to see, and so, to force a judge who's not inclined to do something when we might be willing to take that responsibility is, I don't know, that's the counter-argument, I guess.

MR. HAMMOND: Is that forcing -- I mean, it is a discretionary standard, the Judge below had discretion to

decide whether or not he wanted to view the documents in-camera, and he decided not to. It's only problematic if that discretion was abused.

JUDGE PILLARD: Now, does that mean that we can't unless we find he abused his discretion, or do we in our de novo review have a de novo authority to do our own in-camera review if we think that would aid our --

MR. HAMMOND: I believe this Court could conduct in-camera review if it deemed it necessary in its own discretion.

JUDGE PILLARD: And we wouldn't have to find that the District Court abused his discretion?

MR. HAMMOND: I think it would be unusual --

JUDGE PILLARD: I hear you.

MR. HAMMOND: -- for the Court to do that.

JUDGE PILLARD: I hear you. So, the Agency has produced everything it has, it's said what search terms it used. I think one of the concerns for the requesters is, and that makes it harder for them to just accept at face value the five forms, is the back and forth, and how hard it was for them to get this information that they requested it. They got a final determination saying no, we've got nothing, then they, they, I believe they appealed, and they got a determination, again, we have nothing. And then I probably have this wrong, but you know what I'm referring to, that

there, then there was oh, no, actually that was sent to you in error, we are looking. And then no, actually, we were right the first time, we've got nothing. And then they file suit, and, and move for summary judgment, and the Justice Department says wow, why are you so pushy, you haven't even called us and asked whether we are still processing. And their position I think is it's been quite a while, and you've already told us you've got nothing, you mean you're still processing? So, I think there's some concern on the requester's part with whether the search was done in full compliance with the Agency's obligations, and so, they're concerned that that might be reflected in these documents.

MR. HAMMOND: Well, Your Honor, adequacy of the search was decided below, and it's been summarily affirmed by this Court that the search was adequate. So, regardless of their concerns, that does not inform the decision about how we go about evaluating a deliberative process privilege. The purpose for which --

JUDGE PILLARD: But you don't dispute that if something were disclosed as a result of this lingering issue that might be subject to reconsideration, the adequacy, the search is not a closed book if it were shown that there were reason to think it wasn't adequate.

MR. HAMMOND: Right. But that's, that would be talking about the completed search. What we're talking

about here our documents reflect an interim step in conducting that completed search, and it's, these documents do not purport to encompass the entirety of the search that the Agency completed on behalf, in regards to these FOIA requests.

JUDGE PILLARD: The last one would, no?

MR. HAMMOND: Not necessarily, Your Honor. I mean, there could be discussions outside of these tasking forms that were conducted that were not recorded, and subject to the FOIA. Indeed, we know that they consulted with the CIA's Chief Historian about where documents might be. And so, you know, while the Appellant may have concerns about the search, this Court has decided it, and these documents are unlikely to shed any light on that, and in any regard, this Court has held, and the Supreme Court has suggested that the purpose for which a requester seeks documents is irrelevant in determining the applicability of any given FOIA exemption.

If the Court has no further questions, the Agency would request this Court to affirm. Thank you.

JUDGE PILLARD: Let me just ask you this. So, it's your view there's no segregable information, I think you might have said this in response to Judge Williams' question, everything is inextricably intertwined with information such that if actual information were revealed it

would impermissibly expose the Agency's deliberative process.

MR. HAMMOND: Right. And just -- and that goes to, I mean, this is material that was provided to the Agency decision-maker, and that Agency decision-maker had to consider in determining whether or not a given search was adequate or not, and that would -- so, providing any of the detail that was sent to that decision-maker would necessarily invade the deliberative process here.

JUDGE WILLIAMS: You seem to be coming close to arguing that if something is in a pre-decisional document it's ipso facto not segregable.

MR. HAMMOND: I don't mean to suggest that, Your Honor. I mean to suggest only that the raw material, discussion that forms the raw material by which an agency makes a decision qualifies for the privilege, and that was held in Mead Data. And I would also like -- I'm sorry, before I yield the rest of my time, that this Court found nearly identical types of documents subject to the privilege in Whitaker, and found that those documents were properly withheld under Exemption 5.

JUDGE PILLARD: Even there, though, we had a little more to go on in terms of the declaration, and what I'm curious about is why more description couldn't have been provided because if we're making a decision that's going to

be a precedent and it approves this level of rationale, of explanation, it's really unclear what, how we have sort of traction to do review in any case, other than just say you've mentioned the privilege and it's in a, something that makes sense that it was prior to a decision, and it just, it's not what I read the precedents to approve. They're pretty rigorous about --

MR. HAMMOND: Your Honor --

JUDGE PILLARD: -- not casting an invisibility cloak over the entire process.

MR. HAMMOND: Understood, Your Honor. I would just submit that taken together all of the documents, the records themselves in redacted form, the context in which they were requested, the Vaughn index, and the declaration submitted by the Agency, taken together they satisfy the burden under Exemption 5.

JUDGE PILLARD: Thank you.

MR. HAMMOND: Thank you, Your Honors.

JUDGE PILLARD: Mr. Alcorn, we'll give you two minutes in rebuttal.

ORAL REBUTTAL OF DANIEL S. ALCORN, ESQ.

ON BEHALF OF THE APPELLANT

MR. ALCORN: Thank you, Your Honor. Our concern is that the five documents that are withheld have a considerable amount of material in them, and we were told in

that administrative process that there were no records that were located. Our responses that we did get were no records responses. We did have this back and forth where they withdrew one of their responses, and said it was, one of the affidavits, the declarations in the record says it was an administrative error, and we've sought explanation of what was the administrative error, and we've gotten really no substantive explanation. So, a concern is that the amount of withheld information does not seem to comport with a no records response, and there must be something else going on.

JUDGE RAO: But Mr. Alcorn, does that argument go to the adequacy of the search, which is a question that's foreclosed by our earlier summary affirmance?

MR. ALCORN: Well, it potentially does, but the Government even in their brief says that if there's new evidence, new evidence is a reason to reopen a prior decision in the same case under law of the case. So, it's not foreclosed forever. And we would contend that if new information comes out as a result of these redactions that indicates that the search was not adequate that we would pursue that matter as a matter of new evidence affecting the prior decision.

JUDGE PILLARD: Thank you.

MR. ALCORN: Thank you, Your Honor.

JUDGE PILLARD: The case is submitted. And I just

wanted to note that the Court appreciates that Mr. Lesar, despite serious health implications, was able to be in court today.

(Whereupon, at 10:32 a.m., the proceedings were concluded.)

PLU

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Paula Underwood

October 28, 2019
Date

DEPOSITION SERVICES, INC.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSASSINATION ARCHIVES AND RESEARCH CENTER, INC.

Appellant,

v. **Appeal No. 18- 5280**

CENTRAL INTELLIGENCE AGENCY

Appellee.

ERRATUM FOR ORAL ARGUMENT TRANSCRIPT

The undersigned has reviewed the transcript of oral argument held September 12, 2019 and the court's audio recording of oral argument and has the following erratum for the transcript:

Page 9, Line 8- The word "doesn't" should be the word "does".

/s/

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