UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.*, Plaintiffs, v. CENTRAL INTELLIGENCE AGENCY, *et al.*, Defendants.	No. 1:13-cv-01870 (JEB)

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF
THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The CIA's arguments supporting its withholding of the Panetta Report documents from the public in their entirety fail because the agency is unable to show that the documents are both "predecisional" and "deliberative." The agency's purported decision-making "process" is so vague and hypothetical that it does not satisfy the predecisional requirement under D.C. Circuit law. And because the CIA has not shown that the Panetta Report documents make recommendations or express opinions about legal or policy matters—indeed, the agency admits they are merely summaries of records the CIA provided to the Senate Select Intelligence Committee—they cannot be deliberative. Moreover, the CIA does not contest that the Panetta Report documents contain information that has been officially acknowledged, thus waiving any FOIA exemption-based reason for keeping them from the public in their entirety. Should the Court doubt any of these conclusions, it should review the Panetta Report *in camera* to reassure itself, especially in light of the CIA's record of bad faith, misrepresentations, and evasions regarding its torture program in general and the Panetta Report in particular. Plaintiffs and the public are entitled to these documents under FOIA.

ARGUMENT

I. The CIA has not met its burden of showing that the deliberative process privilege applies.

A. The CIA has not shown that the Panetta Report documents are "predecisional."

To be "predecisional," a document must either contribute to an agency decision, or contribute to a "definable decisionmaking process." *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (internal quotation marks omitted). Here, there is no question that the Panetta Report documents did not contribute to an agency decision. Instead, the dispute between the parties is whether the CIA's purported decision-making "process"—"how the CIA

could (and should) respond to issues arising in SSCI's study," Def. Opp. 3—is sufficiently specific to satisfy the predecisional requirement. *See, e.g., Access Reports,* 926 F.2d at 1196. Although courts have not established a definitive set of criteria to assess whether an agency's process is adequately defined, no case supports the extension of the deliberative process privilege to the inchoate "process" the CIA presents here. In essence, the CIA contends that from the time the SSCI began its investigation, an omnibus agency decision-making process existed. This process encompassed all possible issues or decisions that might, at some point, arise in the context of the SSCI's investigation. The process existed independently of any identified CIA decision or policy objective, and prior even to the consideration or identification of any actual decision or policy objective. The agency's assertion that this amorphous "process" is predecisional simply is not supported by law.

The CIA's specific contentions about the components of this purported process show its deficiencies. The agency contends that the Panetta Report documents provided summaries that senior CIA leaders "*could* consult to inform policy decisions in connection with the Committee's multi-year inquiry into the former detention and interrogation program." Lutz Decl. ¶ 8 (emphasis added); *see also id.* (the agency's leaders "*may* have to make a broad range of decisions" and the documents were "intended to inform CIA leaders' decision-making" (emphasis added)); *id.* ¶ 13 (senior CIA leaders "wished to be informed of noteworthy information from the produced documents in order to inform other policy decisions related to the Committee's study"); *id.* ¶ 15 ("The Special Review Team anticipated that it would eventually disseminate the Reviews to senior CIA leaders—and ultimately the Director—for their use in making policy decisions."); *id.* ¶ 17 (early drafting "attempt[ed] to identify for senior leaders

'significant issues' on which the SSCI might focus"); *id.* ¶ 22 (documents were created to help senior agency leaders "make policy decisions related to the SSCI's ongoing study").

Courts are clear that these vague and conclusory descriptions of a decision-making process cannot satisfy the predecisional requirement. *See, e.g.*, *Access Reports*, 926 F.2d at 1196; *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 264 (D.D.C. 2004) (agency assertion that documents concerned "actions taken or proposed in response to the discovery of anthrax in the mail" was insufficiently "specific" to satisfy predecisional requirement). The CIA's failure to identify a single one of its "policy decisions" or any "significant issues" it was considering is fatal to its assertion that the documents are predecisional. Moreover, the CIA presents no evidence that its process was intended to contribute to any discrete agency decision or policy objective. It is true that the deliberative process privilege may shield documents produced as part of a process that did not result in an *actual* agency decision. *See Access Reports*, 926 F.2d at 1196. However, the CIA cites no case law—and Plaintiffs have found none—in which a court has determined that a process so untethered from any agency decision or policy objective was predecisional.[1]

Indeed, the "decisions" and "processes" the agency does identify are not only vague, but also hypothetical. *See* Lutz Decl. ¶¶ 13, 22 (senior leaders "could have" used the documents to "anticipate developments," "inform interactions," and "prepare for . . . discussions"); Def. Mot. Summ. J. 10 (Panetta Report could have aided the CIA's process of deciding how to respond to "various" policy issues that "might have" arisen). Again, an agency need not identify an

[1] Although *Access Reports* does not elaborate on the distinction between a process intended to further a particular "decision" and one intended to further a particular "objective," the D.C. Circuit's reasoning makes clear that, to be predecisional, a decision-making process must at least be designed to further a discrete policy objective. *See* 926 F.2d at 1196. Here, the CIA has failed to identify any specific policy objective comparable to DOJ's policy objective in *Access Reports*.

administratively final decision that ultimately resulted from a defined decision-making process. But the CIA cannot carry its burden without identifying an existing—as opposed to hypothetical—process. The "predecisional" test would be otherwise meaningless: any memorandum, no matter how unconnected to an existing agency objective, could theoretically contribute to a decision-making process that might someday arise.

Although the CIA relies heavily on *Access Reports,* that case illustrates precisely why the agency's process is inadequate. There, DOJ had a clearly defined objective: "to persuade Congress to pass amendments to the Freedom of Information Act." *Id.* at 1193. The agency had to decide how best to respond to critics of its proposed amendments, in particular by determining how to address a Congressional Research Service ("CRS") study that highlighted the potential negative impact of the agency's proposed amendments. *Id.* The agency's analysis of the CRS study was squarely aimed at determining "how to shepherd the FOIA bill through Congress," in part by serving as "ammunition," "advice on whether or when to duck," and "talking points" to defend the agency's proposed amendments. *Id.* By contrast, here, the CIA commissioned the Panetta Report with no identified policy objective in mind, and with no adequately defined decision-making process underway. If Director Panetta had sought advice, for example, about how to defend the CIA's use of torture, or how best to distance the agency from its prior unlawful practices, then this case would be closer to *Access Reports*. But the agency has identified no such objective, even at the broadest level.

In fact, the Lutz Declaration is evidence that the purpose of the Panetta Report documents was different: they were intended to keep Director Panetta "informed of noteworthy information from the produced documents." *See* Lutz Decl. ¶ 13; *see also id.* ¶¶ 11, 16 ("the CIA sought a means to efficiently keep track of significant information contained in the documents to inform

the Director"). As Plaintiffs have explained, Director Panetta's interest in being "informed" does not amount to a decision-making process. *See* Pls. Opp. 31.

The CIA's only response is that "all documents prepared for senior leadership are meant to 'inform' them." Def. Opp. 4. But in attempting to "differentiate between documents that are covered by the deliberative process privilege and those that are not," the agency further highlights the inadequacy of its showing. *Id.* The cases it cites, and the examples it gives of the kinds of memoranda courts accept as predecisional, are all tied to concrete decision-making processes: "informing" a senior official "of strengths and weakness of an agency's position, of analyses of different ways to proceed." *Id.* Here, the agency has identified no "agency position" it sought to evaluate, nor a policy objective towards which it considered "different ways to proceed." *See id.* Without evidence of this kind—or indeed, any kind—the CIA has failed to show that the Panetta Report documents are predecisional.

B. The CIA has not shown that the Panetta Report documents are "deliberative."

The CIA concedes that the documents do not "make[] recommendations" on legal or policy matters, Def. Opp. 5–6, quoting *Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 876 (D.C. Cir. 2009), nor "weigh[] the pros and cons of agency adoption of one viewpoint or another," *id*. at 6 n.3, quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Instead, the CIA acknowledges that the Panetta Report consists largely or entirely of factual "summaries of the documents being provided to the Senate Select Committee on Intelligence." Lutz Decl. ¶ 8. Courts do not typically find factual information to be deliberative. *See* Pl. Opp. 32.

The agency nonetheless argues that the factual summaries "constitute [an] expression of opinion on policy matters" and "reflect a deliberative give and take" because "the very nature" of

the assignment was to "identify significant information." Def. Opp. 6. But the D.C. Circuit has made clear that, standing alone, an agency's selection and organization of facts does not justify the privilege. "If this were not so, every factual report would be protected as a part of the deliberative process." *Playboy Enters., Inc. v. Dep't of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982); *see also* Pls. Opp. 33 (collecting cases).

Although on rare occasions the D.C. Circuit has held that factual material is deliberative, the agency's argument for extending the narrow holdings of these cases here is unpersuasive. *See Paisley v. CIA*, 712 F.2d 686, 699 (D.C. Cir. 1983) (cautioning that exceptions "cannot be read so broadly as to undermine the basic rule" that factual information is not deliberative). In exceptional cases, factual material may be withheld in the context of either (i) a close relationship between a factual summary and a well-defined agency decision, or (ii) draft agency histories, which entail distinct policy concerns. *See* Pls. Opp. 33–35 & nn.17 &18. The Panetta Report belongs to neither category.[2]

Because the agency has identified no specific decision-making process beyond the "internal debate and policy decisions in connection with the SSCI inquiry into the CIA's former detention and interrogation program," Def. Opp. 9, the Panetta Review documents do not fall into the first category of exceptional cases. *Compare Playboy Enters.*, 677 F.2d at 936 (factual

[2] Disregarding these well-established standards, the CIA cites to *National Security Archive* for the proposition that a document is "deliberative" in a broader set of circumstances: when it is "intended to facilitate or assist development of the agency's final position on the relevant issue." Def. Opp. 5 (quoting *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014)). However, the court in *National Security Archive* limited its definition of "deliberative" to a specific context, which involved a draft agency history. *See* 752 F.3d at 463 ("The term 'deliberative' *in this context* means . . . ." (emphasis added)). As Plaintiffs have explained, cases analyzing draft agency histories are readily distinguishable. *See* Pls. Opp. 32–36; *see infra* 8–9.

The CIA also asserts, without citation, that it "cannot be a requirement" for a record to weigh the pros and cons of agency adoption of one viewpoint or another, because draft agency histories do not engage in this kind of weighing of viewpoints. *See* Def. Opp. 6 n.3. Because the agency history cases do not govern here, this argument is beside the point.

material not privileged where it was intended "to inform the Attorney General of facts which he in turn would make available to Congress"), *with Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (privilege applied to factual information prepared to aid decision whether to approve or deny import restriction requests), *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1536 (D.C. Cir. 1993) (privilege applied to factual information prepared to aid decision whether alleged war criminal's activities rendered him inadmissible), *and Elec. Privacy Info. Ctr. v. Transp. Sec. Admin.*, 928 F. Supp. 2d 156, 167, 169 (D.D.C. 2013) (privilege applied to factual material "critical" to "determining whether to implement" program and material intended to decide future of program).[3]

Nor, in spite of the CIA's continued reliance on the draft agency history cases, *see* Def. Opp. 7–8, 10, does this case fit in that category. The disclosure of draft official histories implicates policy concerns unique to that context, such as the risk of stifling the "creative thinking and candid exchange of ideas necessary to produce good historical work." *See* Pls. Opp. 34 n.17 (quoting *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987)); *see also* Pls. Opp. 32–36. Here, however, disclosure of the Panetta Report presents no risk of a chilling effect—let alone the heightened risk associated with the disclosure of draft agency histories—because the documents are summaries of information that the CIA had *already* provided to Congress. *See* Pls. Opp. 36. In these circumstances, it is simply not plausible that disclosure might lead CIA staff to "gloss over unfavorable facts," Def. Mot. Summ. J. 14, or "cause subordinate officials to think twice before committing their tentative thoughts to writing," Def. Opp. 6. *See Quarles v. Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) ("the prospect of

[3] Even if the Panetta Report documents contain a marginally "more selective presentation of facts" than the Chronology in *Mapother*, Def. Opp. 5 n.2, the CIA has still failed to establish a close relationship between the Panetta Report summaries and a well-defined agency decision or decision-making process.

disclosure [of factual material] is less likely to make an advisor omit or fudge raw facts, while it is quite likely to have just such an effect" on deliberative materials).[4]

The agency's confusion about chilling effects is demonstrated by its argument that the privilege applies because "plaintiffs apparently seek the Draft Reviews to argue that the preliminary drafts prepared by individual staff members contradict the CIA's formal, fully vetted response to Congress," Def. Opp. 11. As the agency concedes, the Panetta Report formed no part of its decision-making process in crafting a formal response to the SSCI Report. *See* Def. Mot. Summ. J. 10 ("[I]t is not possible to isolate a single, discrete agency decision to which the Reviews contributed."). The Panetta Report is not rendered retroactively deliberative if a wholly separate decision-making process results in the decision to provide contradictory information to Congress.

Finally, the mere fact that the Panetta Report documents are labeled "drafts" cannot shield them from disclosure. *See* Pls. Opp. 37 (collecting cases). The CIA continues to argue—contrary to established law—that draft status automatically confers the deliberative process privilege. *See* Def. Opp. 7 (drafts "are by definition both preliminary . . . and also deliberative"); Def. Opp. 13 ("And to the extent that the identical information has already been publicly released, it does not matter here because the Draft Reviews are, in any case, drafts, and remain privileged in their entirety."). However, the law is clear: draft documents are not presumptively privileged. *See* Pls. Opp. 37.

[4] The CIA seeks to minimize the importance of "chill" in the official history cases. *See* Def. Opp. 10. But in both *Dudman*, 815 F.2d at 1569 and *National Security Archive*, 752 F.3d at 464, the D.C. Circuit expressly invoked the prospect of a chilling effect if draft official histories—even if never finalized—were subject to FOIA.

II. The "official acknowledgement" doctrine precludes the CIA from withholding the Panetta Report documents in their entirety.

Because the very purpose of the Panetta Report was to "highlight[] the most noteworthy information . . . made available to the SSCI," Lutz Decl. ¶ 8, it is inconceivable that none of the information in the Panetta Report documents was publicly disclosed in the SSCI's Executive Summary or the CIA's June 2013 response. The CIA's silence on this issue concedes as much. *See* Def. Opp. 12–13. Accordingly, if this Court holds that Exemptions 1, 3, or 5 apply, the official acknowledgement doctrine precludes the agency from withholding the Panetta Report documents in their entirety. *See* Pls. Opp. 38.

The parties seem to agree that, insofar as either Congress or the CIA has released the same information contained in the Panetta Report documents, this constitutes an official acknowledgment and results in the waiver of the deliberative process privilege. *See* Def. Opp. 12. They disagree, however, about whether the prior release of *similar* information effects a waiver. Regardless of the precise scope of the official acknowledgment doctrine, the CIA has failed to carry its ultimate burden of establishing that the Panetta Report documents are properly withheld. *See* Pls. Opp. 38.[5]

The CIA misstates the law in claiming that "Plaintiffs bear the burden of showing that such a waiver has occurred." Def. Opp. 12. Although "a plaintiff . . . must bear the initial burden of *pointing* to specific information in the public domain that appears to duplicate that being withheld.' The ultimate burden of persuasion, to be sure, remains with the government . . . ."

[5] The CIA does not contest the fact that disclosures by Congress can constitute an official acknowledgment and result in waiver of the privilege. *See* Pls. Opp. 39 n.22. While Plaintiffs maintain that the official acknowledgment doctrine applies where the same *or similar* information has been previously disclosed, *see* Pls. Opp. 38, the CIA argues that the official acknowledgment doctrine applies only where the *same* information has been previously released, *see* Def. Opp. 12. Specifically, the CIA relies on *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997), in which the court considered and rejected a broad "subject matter" waiver argument. *See id.* However, because Plaintiffs are not arguing for waiver with respect to, *e.g.*, any and all documents discussing torture, *In re Sealed Case* is inapposite.

Davis v. Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (emphasis added and internal citation omitted); *see also Elec. Frontier Found. v. Dep't of Justice*, 890 F. Supp. 2d 35, 46–47 (D.D.C. 2012) (plaintiff carries the burden of producing "at least some evidence" that the deliberative process privilege has been waived). Here, Plaintiffs have satisfied their initial burden of pointing to information in the public domain that appears to duplicate information being withheld: the SSCI's Executive Summary and the CIA's June 2013 response report. *See* Pls. Opp. 5, 8–10. The agency, by contrast, has not even attempted to show that the Panetta Review documents do not duplicate this publicly available information.

In a last-ditch effort, the CIA argues that the Panetta Report documents' draft status somehow trumps any waiver effected by official acknowledgement. *See* Def. Opp. 12–13. This is not the law. Official acknowledgment of information waives the privilege as to that information. *See Davis*, 968 F.2d at 1279 ("[T]he government cannot rely on an otherwise valid exemption claim to justify withholding information that has been 'officially acknowledged' or is in the 'public domain.'").[6]

III. This Court should review the Panetta Report documents *in camera*.

The CIA fails to rebut the important factors counseling in favor of *in camera* review here: the Lutz Declaration is too vague and conclusory to support the application of Exemptions 1, 3, or 5; and the record in this case is replete with indications of bad faith on the part of the CIA. *See Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987); *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 252–53 (D.C. Cir. 1993); Pls. Opp. 2–13, 39–40.

[6] The CIA's confusion likely results from its misreading of *National Security Archives*, 752 F.3d at 463–65. In that case, the court held that the CIA's release of certain information about the Bay of Pigs operation did not waive the privilege as to the draft agency history, which was not released to the public. *See id.* For reasons specific to the agency history context, the court declined to evaluate whether material in the draft was segregable. *See id.* at 465. In this narrow context, the court did not find it necessary to consider the applicability of the official acknowledgment doctrine. *See id.*

Among other indications of bad faith, *see* Pls. Opp. 2–13, Senator Mark Udall has described the Panetta Report as a "smoking gun" that "acknowledges significant problems and errors made in the CIA's detention and interrogation program;" that "found that the CIA repeatedly provided inaccurate information to the Congress, the President, and the public on the efficacy of its coercive techniques;" and that is—contrary to the CIA's characterizations—"much more than a 'summary' and 'incomplete drafts,'" 160 Cong. Rec. S6476 (daily ed. Dec. 10, 2014) (statement of Sen. Mark Udall), Gorski Decl., Ex. A. Notably, the CIA has declined to counter Senator Udall's characterizations of the Panetta Report documents, nor has it explained that the Panetta Report documents contain analysis. Under these circumstances, *in camera* review is warranted.

Finally, to the extent that Exemptions 1, 3, or 5 apply at all, the CIA has failed to show that no portions of the Panetta Report documents are reasonably segregable from exempt information. Accordingly, this Court should review the Panetta Report documents *in camera* to assess the segregability of non-exempt material, including material that has been officially acknowledged, or that constitutes the agency's past or present working law. *See, e.g.*, *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007) ("a district court clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability" (internal quotation marks and citation omitted)).

CONCLUSION

For the foregoing reasons, the Court should (i) deny the CIA's motion for summary judgment as to the Panetta Report; (ii) grant the ACLU's cross-motion for partial summary judgment on the grounds that the Panetta Report may not be withheld pursuant to Exemption 5;

and (iii) direct Defendants to produce the Panetta Report documents, together with *Vaughn* indices for any withheld portions of those documents, within 45 days of the Court's order.

Plaintiffs respectfully request oral argument.

Respectfully submitted,

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Dated: March 18, 2015