IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY ARCHIVE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No. 11-0724 (GK)
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	
	)	

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Pending before the Court are the parties' cross-motions for summary judgment concerning the propriety of the decision of defendant Central Intelligence Agency ("CIA") to withhold, under Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), a 27-year-old document recounting the history of the Bay of Pigs Operation and its aftermath. As plaintiff National Security Archive ("the Archive") explained in its opening brief, 1) the CIA has failed to meet its burden of showing that disclosure of the disputed document would harm agency deliberations in a manner Exemption 5's deliberative process privilege seeks to prevent; and 2) the agency's reliance upon a 1989 decision of this Court in support of its withholding decision is misplaced. The CIA's response to the Archive's initial arguments adds little to the Court's consideration of the issues, but warrants a brief reply.

Argument

I. The CIA Has Not Shown That the Requisite Harm Would Result From Disclosure

As the Archive noted in its opening brief, the CIA has failed to provide the type of specific showing of harm to a "deliberative process" that the courts have long required when

assessing the applicability of the deliberative process privilege to withheld material. The agency responds with a citation to *Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007), in support of the unremarkable proposition that "a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made." Defendant's Memorandum in Opposition to Plaintiff's Cross-Motion for Partial Summary Judgment ("Def. Opp.") at 3, citing *Morley*, 508 F.3d at 1127. The CIA then proceeds to describe in a generic manner the "process" of producing "CIA histories" and points to the newly-proferred declaration of the agency's current Chief Historian, in which he expresses the view that "disclosure of [the withheld] document reasonably could be expected to seriously impair the current and future manuscript review process at the CIA." Declaration of David S. Robarge ("Robarge Decl."), ¶ 2.

Mr. Robarge's opinion appears to be based upon the kind of broad, generalized assumptions that have been found to lack the specificity required to support agency reliance upon Exemption 5. *See*, *e.g.*, *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) ("conclusory assertions of privilege will not suffice to carry the Government's burden of proof in defending FOIA cases"); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 1996 U.S. Dist. LEXIS 22470, *46 (D.D.C. Sept. 5, 1996) ("Generic, catch-all phrases are insufficient to invoke the deliberative process privilege."). Thus, Mr. Robarge states, in language the agency describes as its explanation of "how the disclosure of Volume V would harm legitimate agency interests," Def. Opp. at 5, that

> [t]he official public disclosure of *any* CIA draft history at any stage before its completion as an official CSI [Center for the Study of Intelligence] publication reasonably could be expected to (1) discourage open and frank deliberations among the History Staff and (2) lead to public confusion resulting from the release of an unfinished and potentially inaccurate draft history. . . . It would do enormous damage to the mission of CSI and the History Staff were my historians

> to believe that their initial thoughts and judgments regarding a particular matter – as reflected in an initial draft history, for example – might one day be released to the public through FOIA.

Robarge Decl., ¶¶ 9-10 (emphasis added).

Initially, the Archive notes that the second alleged harm that Mr. Robarge cites – "public confusion resulting from the release of an unfinished and potentially inaccurate draft history" – could easily be prevented by a disclaimer (as discussed below) clarifying the status of the document. More importantly, the principal harm at issue here – damage to the agency's deliberative process – must be established by much more than the mere assertion that "disclosure of *any* CIA draft history" would "discourage open and frank deliberations" within the agency. Indeed, as the Archive noted in its opening brief, the assumption that disclosure of *any* draft history would be detrimental is disproved on the record here, where the CIA did, in fact, disclose Volume IV ("The Taylor Committee Investigation of the Bay of Pigs") in draft form with the proviso that it be accompanied by the following disclaimer:

> This study has not been adopted as an official document of the Central Intelligence Agency. Its statements, analyses, conclusions and positions should not be construed as necessarily being those of the Director of Central Intelligence or of the Central Intelligence Agency.

Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment ("Pl. Mem.") at 11-12, quoting Supplemental Declaration of J. Kenneth McDonald, ¶ 26.[1]

Mr. Robarge does not assert that the earlier disclosure of Volume IV in draft form resulted in the kind of damage he attributes to disclosure of "*any* CIA draft history," although he

[1] The CIA mistakenly characterizes Volume IV as "a document not at issue in this litigation." Def. Opp. at 7. The record clearly shows, however, that the Archive requested release of Volume IV in one of the FOIA requests at issue in this lawsuit, Declaration of Martha Lutz, ¶ 10, and the agency released it in redacted form, *id*., ¶ 14. While the Archive has elected not to challenge the agency's redactions in the released version of Volume IV, it is clearly part of the Bay of Pigs history at issue here.

apparently attempts to address the prior disclosure by asserting, without elaboration, that "a simple disclaimer would not address the chilling effects" that would result from disclosure. Robarge Decl., ¶ 18.

The CIA's position here is remarkably similar to the circumstances present in *Army Times Publishing Co. v. Dep't of Air Force*, 998 F.2d 1067 (D.C. Cir. 1993), where the agency had disclosed some results of an opinion survey but sought to withhold others under the deliberative process privilege. The D.C. Circuit rejected the agency's "conclusory assertion that survey respondents would be more likely to temper their responses or refuse to participate if they knew that the aggregate results of the survey could be released to the public," noting that "the Air Force, on its own initiative, selectively releases aggregate survey results to the public from time to time." *Id*. at 1070. The court emphasized that the agency "has released information similar to that requested," and that the fact the released material "poses no threat to the agency's deliberative process suggests that other information in the surveys could also be released." *Id*. at 1071. "[T]he failure of the Air Force to offer some distinguishing feature of the withheld information strongly suggests that at least some of the information contained in the withheld surveys is similar to that already released, and also non-exempt." *Id*. at 1071-1072. Likewise, the CIA's failure to distinguish the draft version of Volume IV (which it disclosed) from the draft version of Volume V (which it seeks to withhold) "strongly suggests," notwithstanding Mr. Robarge's generic assertion that disclosure of "*any* CIA draft history" would be detrimental, that the latter document is improperly withheld.[2]

[2] In *Army Times*, the D.C. Circuit noted that, in the absence of proof that disclosure of the withheld material "would actually inhibit candor in the decision-making process if made available to the public," the agency's "withholding decision cannot withstand the requester's contention that the Air Force's selection of materials to be released is totally self-serving and unrelated to the purposes of Exemption 5." The court emphasized that "FOIA was designed to

Finally, even in the absence of the previous disclosure – without any apparent injury – of the draft version of Volume IV, the CIA's assertion of potential harm, generically presented as applying to the disclosure of *any* draft history, is clearly inadequate. Mr. Robarge states:

> It would do enormous damage to the mission of CSI and the History Staff were my historians to believe that their initial thoughts and judgments regarding a particular matter – as reflected in an initial draft history, for example – might one day be released to the public through FOIA.

Robarge Decl., ¶ 10. This assertion is almost identical to one made by the Justice Department, and rejected by this Court, in *Hall v. U.S. Dep't of Justice*, 552 F. Supp. 2d 23, 29 (D.D.C. 2008), where "DOJ argue[d] that the redacted documents were compiled by two [agency] employees, a special agent and an auditor, and that such individuals should be 'free of the fear that their thought processes, investigative strategies, and case evaluations will, at a later time, be made available to the public.'" Noting that an agency "must demonstrate that harm will result if the redacted documents are released" – specifically, how disclosure would work to "the *detriment of the decisionmaking process*" – the Court held that DOJ's "descriptions are too broad and do not constitute specific proof of the harm that would result from the disclosure of the documents." *Id*. (citations omitted; emphasis in original). As such, the agency did "not adequately demonstrate that disclosure would harm the decisionmaking process." *Id*. Likewise, the CIA's vague assertion here must also be rejected as "too broad" and non-specific.

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preclude a government agency from cherry-picking the materials to be made public. FOIA operates on the premise that government will function best if its warts as well as its wonders are available for public review." 998 F.2d at 1072. Here, it appears likely that the CIA's "cherry-picking" may be motivated by a desire to conceal some decades-old warts. As Mr. Robarge explains, the CIA considers Volume V to contain "an uncritical defense of the CIA officers who planned and executed the Bay of Pigs operation. . . . It offers a polemic of recriminations against CIA officers who later criticized the operation and against those U.S. officials who its author, Dr. Pfeiffer, contends were responsible for the failure of that operation." Robarge Decl., 13.

I. The CIA's Reliance Upon the 1989 *Pfeiffer* Decision is Misplaced

As the Archive has noted, Pl. Mem. at 6-8, the CIA's opening brief relied entirely upon this Court's 22-year-old decision in *Pfeiffer v. CIA*, 721 F. Supp. 337 (D.D.C. 1989), despite the fact that *Pfeiffer* arose under circumstances different than those present here and, obviously, must be reassessed as a result of the passage of time. In its response, the agency reiterates its reliance upon *Pfeiffer* but fails to address the reasons the Archive cited in support of its argument that the Court is not bound to reach the same conclusion as it did more than two decades ago. Def. Opp. at 6-7.

First, because of the way in which the *Pfeiffer* litigation arose, there was "no dispute between the parties that a preliminary draft of an unfinished agency history is protected from disclosure in its entirety under the deliberative process privilege of Exemption 5." 721 F. Supp. at 339. As such, the Court did not have occasion to engage in the kind of analysis required when the status of a "draft" document under Exemption 5 is at issue. The CIA does not confront that distinction in its opposition, let alone address the factors that the Justice Department's government-wide guidance directs agencies to consider:

> [A] requested record might be a *draft*, or a memorandum containing a recommendation. Such records *might* be properly withheld under Exemption 5*, but that should not be the end of the review*. Rather, the content of *that particular draft* and that particular memorandum should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing *that particular document*, given its age, content, and character, would harm an interest protected by Exemption 5. In making these determinations, agencies should keep in mind that mere "speculative or abstract fears" are not a sufficient basis for withholding. Instead, the agency must reasonably foresee that disclosure would cause harm.

Department of Justice, Office of Information Policy Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines (April 17, 2009) ("OIP Guidance") (filed with Pl. Mem. as Exhibit A) (emphasis added).

Second, when the Court decided *Pfeiffer*, Volume V was less than five years old, and the CIA's Chief Historian represented in a 1988 declaration that "the completion of the history of the Bay of Pigs operation is on the History Staff agenda." Supp. McDonald Decl., ¶25. As such, the Court noted that it "must give considerable deference to the agency's explanation of its decisional process . . . *while the decisionmaking process is in progress*." 721 F. Supp. at 340 (emphasis added; citation omitted). Because it appeared likely that a final, "official" version of the document was forthcoming, the Court relied upon *Dudman Communications Corp. v. Dep't of the Air Force*, 815 F.2d 1565 (D.C. Cir. 1987), and *Russell v. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982), in support of the proposition that a comparison of a "draft" document with its final version would reveal (and harm) the agency's deliberative, editorial process. 721 F. Supp. at 339. Such a contingency is no longer a relevant consideration; as the CIA's current Chief Historian now concedes, "[a]lthough Dr. McDonald hoped that Volume V could be edited to a final version, these efforts were unsuccessful." Robarge Decl., ¶ 15. As such, the rationale of *Dudman* and *Russell*, which played a large part in the Court's analysis in *Pfeiffer*, is no longer applicable.

Finally, the Archive notes that one aspect of the *Pfeiffer* litigation *is*, in fact, relevant here. Because Dr. Pfeiffer, the author of the Bay of Pigs history, sought disclosure of his work, the case disproves Mr. Robarge's generic assumption that disclosure of "*any* CIA draft history," in all circumstances, would have a "chilling effect[]" on agency personnel by "discourag[ing] open and frank deliberations among the History Staff." Robarge Decl., ¶¶ 9, 18. Coupled with the fact that Volume V is now 27 years old, Dr. Pfeiffer's own actions demonstrate that disclosure of *this* draft history would in no way damage the agency's deliberative process in a manner that Exemption 5 is designed to prevent.

Conclusion

The CIA has presented no evidence in support of the odd proposition that disclosure of a draft document that has laid dormant for almost three decades will harm the deliberative process, especially where the agency previously disclosed a related draft document without any detrimental result. Upon *de novo* review of the CIA's decision to withhold Volume V under the deliberative process privilege, the agency's conclusory and non-specific assertions of potential harm are entitled to no deference. *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) ("In a FOIA action the district court . . . decides a claim of exemption *de novo*, and the agency's opinions carry no more weight than those of any other litigant in an adversarial contest before a court."); *Washington Post Co. v. U.S. Dep't of State*, 840 F.2d 26, 32 (D.C. Cir. 1988) ("the ultimate decision as to the propriety of the agency's action is made by the court"). In keeping with the D.C. Circuit's longstanding directive that Exemption 5 "is to be applied 'as narrowly as consistent with efficient Government operation,'" *Coastal States*, 617 F.2d at 868 (citation omitted), the Court should grant the Archive's motion for partial summary judgment and issue an order requiring disclosure of the disputed document.

Respectfully submitted,

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