

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

**MEMORANDUM IN PARTIAL OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
PLAINTIFF’S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff National Security Archive (“the Archive”) initiated this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, on April 14, 2011, seeking the disclosure from defendant Central Intelligence Agency (“CIA”) of four volumes of an official history of the Bay of Pigs Operation. Subsequent to the filing of suit, the CIA released to the Archive, in substantial part, three of the four requested volumes, and withheld in full one volume entitled “Internal Investigation Report of the Bay of Pigs Operations.” The Archive does not challenge the agency’s redactions in the three volumes now disclosed. As such, the only issue remaining is the propriety of the CIA’s withholding in full of the one undisclosed volume, which relates to the CIA’s internal investigation of the Bay of Pigs Operation. The agency has withheld this volume on the ground that it is a “draft” subject to withholding under FOIA Exemption 5. As explained more fully below, the agency’s position cannot be sustained and the Archive is entitled to judgment and disclosure of the disputed document.¹

¹ Additionally, the agency represents that the document contains “a small amount” of classified information protected from disclosure by statute. Declaration of Martha Lutz, Information

Background

In 1973, CIA historian Dr. Jack Pfeiffer was assigned to prepare an internal study of the CIA's role in the Bay of Pigs Operation in 1960-61. Lutz Decl., ¶16. Between 1973 and 1979, Dr. Pfeiffer authored three volumes of the study, dealing with the preparation for the Bay of Pigs Operation. *Id.* In November 1981, Dr. Pfeiffer submitted a fourth volume of the study to his supervisor. *Id.* Two chapters in that volume – one discussing a CIA Inspector General's report on the Bay of Pigs and one discussing the Directorate of Plans' response to that report – became the "Internal Investigation Report of the Bay of Pigs Operations" at issue in this litigation and designated as "Volume V." *Id.*, ¶18. According to the agency, Dr. Pfeiffer continued working on Volume V until he retired from the CIA in 1984. *Id.*, ¶¶19-20.

By three letters sent to the CIA in August 2005, the Archive requested under the FOIA 1) "[t]he first volume of the *Official History of the Bay of Pigs Operation* entitled I – *Air Operations* by former CIA historian Jack B. Pfeiffer;" 2) "[t]he second volume of the *Official History of the Bay of Pigs Operation* entitled II – *Participation in the Conduct of Foreign Policy*;" and 3) "[t]he fourth and fifth volumes of the *Official History of the Bay of Pigs Operation* entitled IV – *Taylor Committee Report* and V – *Internal Investigation Report*." Exhibits A-C (attached to Lutz Decl.). In its FOIA requests, the Archive noted, *inter alia*, that "Volume III of the *Official History of the Bay of Pigs Operation* entitled *Evolution of CIA's Anti-Castro's Policies, 1959 – January 1961*, was declassified under the CIA Historical Review Program in 1998 pursuant to the President John F. Kennedy Assassination Records Collection Act of 1992." *Id.*

Review Officer, Director's Area, Central Intelligence Agency ("Lutz Decl."), ¶¶ 26, 41. In reliance upon the agency's representation that only a "small amount" of material is withheld on those grounds, the Archive does not challenge the withholdings.

By three letters to the Archive dated September 7, 2005, the CIA acknowledged receipt of the Archive's FOIA requests. Exhibit D (attached to Lutz Decl.). After the Archive's requests had been pending for more than five and a half years without a substantive response from the agency, the Archive initiated this action on April 14, 2011, to compel disclosure of the requested records. Docket No. 1. Subsequent to the filing of suit, the CIA released to the Archive three of the four requested documents (Volumes I, II and IV) with "minimal redactions based upon FOIA exemptions (b)(1) and (b)(3)." Lutz Decl., ¶14. The agency withheld Volume V in its entirety, relying upon Exemption 5. *Id.*

Argument

I. FOIA Establishes a Presumption of Disclosure and Requires the CIA to Make a Detailed and Specific Showing that the Withheld Document is Properly Exempt from Disclosure

The Freedom of Information Act safeguards American citizens' right to know "what their Government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). The central purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "[D]isclosure, not secrecy, is the dominant objective of [FOIA]." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

The statute requires disclosure of agency records when requested by the public unless the records fall within one of nine exemptions. *See* 5 U.S.C. § 552(b)(1) - (9). If requested information does not fit squarely into one of these enumerated categories, the law requires federal agencies to disclose the information. *NLRB v. Robbins*, 437 U.S. at 221 (1978). FOIA's exemptions "have been consistently given a narrow compass," and requested agency records that "do not fall within one of the exemptions are improperly withheld[.]" *Dep't of Justice v. Tax*

Analysts, 492 U.S. 136, 151 (1989) (internal quotation marks omitted). Of particular significance here, the D.C. Circuit has long emphasized that “[i]n light of the FOIA’s strong policy in favor of disclosure . . . Exemption 5 is to be construed “‘as narrowly as consistent with efficient Government operation.’” *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992), quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973); *see also Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (“We reemphasize the narrow scope of Exemption 5 and the strong policy of the FOIA that the public is entitled to know what its government is doing and why.”).

Disputes involving the propriety of agency withholdings are commonly resolved at the summary judgment stage in FOIA cases. *Harrison v. EOUSA*, 377 F. Supp. 2d 141, 145 (D.D.C. 2005). The Court reviews the government’s withholding of agency records *de novo*, and the government bears the burden of proving that a particular document falls within one of the nine narrow exemptions to FOIA’s broad mandate of disclosure. 5 U.S.C. § 552(a)(4)(B); *Reporters Comm.*, 489 U.S. at 755. “Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden ‘on the agency to sustain its action.’” *Id.* (quoting 5 U.S.C. § 552(a)(4)(B)).

To be entitled to summary judgment, an agency must prove that “each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act’s inspection requirements.” *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (internal citation and quotation omitted). When claiming one of FOIA’s exemptions, the agency bears the burden of providing a “‘relatively detailed justification’ for assertion of an exemption, and must demonstrate to a reviewing court that records are *clearly* exempt.” *Birch v. United States Postal Service*, 803 F.2d 1206, 1209 (D.C. Cir. 1986) (emphasis added) (citing *Mead Data*

Cent., Inc. v. Dep't of the Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977).

II. The Disputed Document Is Not Properly Withheld Under The Deliberative Process Privilege

In conducting a *de novo* review and deciding whether a document should be protected under the deliberative process privilege, courts “look to whether the document is ‘predecisional’ – whether it was generated before the adoption of an agency policy – and whether the document is ‘deliberative’ – whether it reflects the give-and-take of the consultative process.” *Nat’l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 217 (D.D.C. 2005), quoting *Coastal States*, 617 F.2d at 866 (internal quotation marks omitted). To establish that a document is predecisional, the agency must “establish what deliberative process is involved, and *the role . . . that the document[] at issue played in that process.*” *Id.* (emphasis added; citation omitted). *See also Formaldehyde Inst. v. Dep’t of Health & Human Serv.*, 889 F.2d 1118, 1123 (D.C. Cir. 1989) (“the pertinent element is the role, if any, that the document plays in the process of agency deliberations”) (citation and internal quotation marks omitted); *Senate of Puerto Rico ex rel. Judiciary Comm. v. U.S. Dep’t of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (“the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process”) (citation omitted). As this Court has explained, “because the applicability of the deliberative process privilege is dependent on the content of each document and the role it plays in the decisionmaking process, an agency’s affidavit describing the withheld documents *must be specific enough so that the elements of the privilege can be identified.*” *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 257 (D.D.C. 2004) (emphasis added; citations omitted); *see also id.* at 259 (“[t]he agency must identify the role of a contested

document in a specific deliberative process”) (citation omitted).²

Here, the CIA has not even attempted to identify the “process” involved, let alone the “role” the disputed document “played in that process.” Rather, the agency declarant’s explanation of the basis for the CIA’s “deliberative process” claim states, in its entirety, as follows:

. . . Volume V is an internal draft of a CIA history that was never approved for release or publication; accordingly, Volume V, “The CIA’s Internal Investigation of the Bay of Pigs Operation,” is both pre-decisional and deliberative and squarely protected from disclosure pursuant to FOIA exemption (b)(5). I have determined that this document must be withheld in full pursuant to FOIA exemption (b)(5).

Lutz Decl., ¶ 24. The CIA’s meager (and inadequate) showing carries over to its legal argument in support of its “deliberative process” claim, to which the agency devotes less than one page of its brief. *See* Defendant’s Memorandum of Points and Authorities in Support of Motion for Summary Judgment (“Def. Mem.”) at 6-7. Indeed, the agency appears to rely entirely upon this Court’s 22-year-old decision in *Pfeiffer v. CIA*, 721 F. Supp. 337 (D.D.C. 1989). *See* Def. Mem. at 6 (“As this Court has previously concluded, Volume V is both deliberative and predecisional . . .”). For several reasons, however, that reliance is misplaced.

The litigation in *Pfeiffer* was framed largely as a personnel dispute between Dr. Pfeiffer

² The D.C. Circuit has observed that

the word “deliberative” as used in the law of Exemption 5 is considerably narrower than the colloquial meaning; as a consequence, the “deliberative” and “predecisional” requirements tend to merge. Both terms have come to apply only to documents that contribute to an ongoing deliberative process within an agency. . . . In *Senate of Puerto Rico*, we told the agency that it “must establish ‘what deliberative process is involved, and the role played by the documents in issue in the course of that process’” to fulfill the *deliberative* requirement, but we were quoting a portion of the *Coastal States* opinion discussing the *predecisional* label.

Access Reports v. Dep’t of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991) (emphasis in original; citation omitted).

and the agency. 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. Rather, Dr. Pfeiffer contended that the manuscript that he submitted to the agency in 1984 was not a “draft” because “a 1983 Settlement Agreement between the Agency and Plaintiff” granted him the “authority to create an unclassified official history,” and that Volume V was, in his opinion, a final “official” history. *Id.* at 340. The Court rejected Dr. Pfeiffer’s argument, finding that the settlement agreement “fail[ed] to confer upon plaintiff any authority to speak for the Agency as to when a history is official and final.” *Id.* at 341. Because of the manner in which the dispute in *Pfeiffer* was framed, the Court did not have occasion to engage in the kind of analysis required when the exempt status of a “draft” document is at issue.

In addition to the unique circumstances presented in Dr. Pfeiffer’s own litigation, the 22-year-old decision in that case is not dispositive because of the passage of time since it was rendered. The disputed document was less than five years old when the Court issued its decision, 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.” Supplemental Declaration of J. Kenneth McDonald (“Supp. McDonald Decl.”) (attached to Lutz Decl. as Exhibit H), ¶25. Indeed, 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).

In light of the fact that the agency’s “decisional process” appeared to be “in progress” in the late 1980s, the Court cited *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 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. *Dudman* and *Russell*, however, involved circumstances far different than those present here. In both cases, the FOIA requesters sought access to earlier, draft versions of official histories that had been published by the Air Force in final form. As such, the D.C. Circuit held that disclosure of the preliminary drafts would facilitate a “comparison” of the two versions and thus “disclose the alterations that the Air Force . . . made during the process of compiling the official history.” *Dudman*, 815 F.2d at 1569; *see also Russell*, 682 F.2d at 1049 (“[A] simple comparison between the pages sought and the official document . . . would reveal the Air Force’s deliberative process in creating the official . . . history.”).

In this case – unlike *Dudman* and *Russell* – there is no final version of Volume V against which the disputed “draft” can be compared to “reveal the [agency’s] deliberative process.” Nor is there an agency representation, as there was in *Pfeiffer*, that “the completion of the history of the Bay of Pigs operation” remains on the “agenda” some 27 years after Dr. Pfeiffer submitted his manuscript. As such, there is simply no basis upon which the Court could conclude, as it did in 1989, that a relevant “decisionmaking process is in progress.” Given the significant distinctions between this case and Dr. Pfeiffer’s own litigation more than two decades ago, the Court’s earlier decision clearly is not, as the CIA suggests, dispositive.

Rather than relying upon its 1989 decision, the Court must evaluate the circumstances that exist today. As noted, the disputed document is now 27 years old and recounts events (the Bay of Pigs Operation) that occurred more than 50 years ago. As the D.C. Circuit recognizes,

“the Supreme Court has pointed out that the ‘expectation of the confidentiality of executive communications [] has always been limited and subject to erosion over time . . .’” *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 365 F.3d 1108, 1124 (D.C. Cir. 2004), quoting *Nixon v. Adm’r of General Servs.*, 433 U.S. 425, 451 (1977). Indeed, the Justice Department’s Office of Information Policy, which sets FOIA policy for all executive agencies, recently issued guidance addressing the appropriate circumstances under which Exemption 5 “deliberative process” claims may be invoked. The guidance provides, in relevant part:

[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.
 . . .

For all records, *the age of the document* and the sensitivity of its content are universal factors that need to be evaluated in making a decision whether to make a discretionary release.

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 herewith as Exhibit A) (emphasis added). Similarly, the Presidential Records Act takes the age of information into account, expressly providing that 12 years after a President leaves office, all presidential materials become available to the public in accordance with FOIA, and that Exemption 5 cannot be invoked by the National Archives to withhold such documents. 44 U.S.C. §§ 2204(a) & (c)(1).³

³ While this Court has rejected the suggestion that a “*blanket* 15-year statute of limitations on the . . . deliberative process privilege[] should be recognized under Exemption 5,” *Lardner v.*

While the age of the withheld document is clearly a factor that the Court must consider in assessing any potential harm to the agency's "deliberative process" that might result from disclosure, it is equally clear that the document's designation as a "draft" is not dispositive. As the Justice Department's recent guidance recognizes, "the content of [a] particular draft . . . 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." OIP Guidance. As this Court has held, "the defendants' designation of a document as a 'draft' does not automatically trigger proper withholding under Exemption 5." *Defenders of Wildlife v. U.S. Dep't of Agric.*, 311 F. Supp. 2d 44, 58 (D.D.C. 2004), citing *Arthur Andersen & Co. v. Internal Revenue Serv.*, 679 F.2d 254, 257 (D.C. Cir. 1982); *see also Citizens for Responsibility & Ethics v. U.S. Dep't of Homeland Sec.*, 648 F. Supp. 2d 152, 162 (D.D.C. 2009) ("the 'draft' status of . . . documents is insufficient, standing alone, to justify non-disclosure"). As the D.C. Circuit explained in *Arthur Andersen*,

Coastal States forecloses the Agency's argument that any document identified as a "draft" is *per se* exempt. Even if a document is a "draft of what will become a final document," the court must also ascertain "whether the document is deliberative in nature."

679 F.2d at 257-258 (citation omitted); *see also Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. at 265-266 (document designated as "draft" not properly withheld where agency "identifies nothing more specific about the content of this document [and] does not specify its place in a particular decisionmaking context").

U.S. Dep't of Justice, 2005 U.S. Dist. LEXIS 5465, *45 (D.D.C. Mar. 31, 2005) (emphasis added), it did not reject the notion that the age of a document may be taken into account when assessing the harm that might result from disclosure.

Because, as the Archive has noted, the CIA has offered *no* information concerning the “process” it seeks to protect, even though “the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process,” *Coastal States*, 617 at 867, the mere designation of Volume V as a “draft” is unavailing. Significantly, there is no suggestion that there is any relevant “process” that is ongoing. *See Access Reports*, 926 F.2d at 1195 (privilege applies “only to documents that contribute to an *ongoing* deliberative process within an agency”) (emphasis added); *Defenders of Wildlife*, 311 F. Supp. at 58 (“as long as a document is generated as part of . . . a *continuing process* of agency decision-making, the deliberative-process protections of Exemption 5 may be applicable.”) (emphasis added; citations omitted).

Finally, the Archive submits that it cannot reasonably be assumed that disclosure of a “draft” historical document (particularly one that has languished in an agency file cabinet for 27 years) will harm agency deliberations in a manner the deliberative process privilege seeks to prevent. *See, e.g., Petroleum Info. Corp.*, 976 F.2d at 1434 (“ultimate aim” of privilege is to “prevent injury to the quality of agency decisions”) (citation omitted); *James Madison Project v. CIA*, 607 F. Supp. 2d 109, 128 (D.D.C. 2009) (“The critical factor in determining whether the material is deliberative in nature is whether disclosure of the information would ‘discourage candid discussion within the agency.’”) (citation and internal quotation marks omitted). Indeed, the CIA’s actions with respect to Volume IV (“The Taylor Committee Investigation of the Bay of Pigs”) demonstrate that “draft” material can be disclosed without harm to the agency’s deliberative process.

As the agency declarant admits:

One of the draft chapters was revised into a manuscript entitled “The Taylor Committee Investigation of the Bay of Pigs.” The CIA used its discretionary

judgment to release this *draft document* in part to [Dr. Pfeiffer] pursuant to his FOIA request and subsequent litigation in 1987. A less redacted version of Volume IV has been released to [the Archive] pursuant to [its FOIA request].

Lutz Decl., ¶ 17 (emphasis added). In his 1988 declaration in Dr. Pfeiffer's lawsuit, Dr. McDonald, the CIA's Chief Historian, explained that the agency and Dr. Pfeiffer "stipulated and agreed that if he causes the Taylor Committee manuscript to be published," the following disclaimer would be included:

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.

Supp. McDonald Decl., ¶ 26. A similar approach is often taken when an agency discloses "draft" material of the kind at issue here. For example, the Justice Department earlier this year released to the Archive, under FOIA, a 624-page "draft" report documenting the history of the Office of Special Investigation ("OSI"). The agency's release letter contained the following language:

[T]his report is a draft that was never finalized by any Assistant Attorney General of the Criminal Division. This draft document contains numerous factual errors and omissions, and the Department cannot attest to its accuracy. Further, it does not represent the official position of the Department.

Letter from Department of Justice to the National Security Archive, January 21, 2011 (filed herewith as Exhibit B). The agency subsequently posted the report on its own website, designating it as "OSI: Striving for Accountability in the Aftermath of the Holocaust (DRAFT)," Exhibit C (filed herewith), and prominently displaying the word "DRAFT" on each page, *see, e.g.*, Exhibit D (filed herewith).

It is thus clear, as demonstrated by the CIA's release of another "draft" Bay of Pigs document the Archive sought here, that such material can be released without harming any

legitimate agency interests. Indeed, “[i]n light of the FOIA’s strong policy in favor of disclosure,” and the dictate that “Exemption 5 is to be construed ‘as narrowly as consistent with efficient Government operation,’” *Petroleum Info. Corp.*, 976 F.2d at 1434, the CIA is obligated to release Volume V in a similar manner, with an appropriate disclaimer if it deems such a condition necessary to clarify the status of the document.

Conclusion

For the foregoing reasons, the CIA’s motion for summary judgment should be granted in part and denied in part, and the Archive’s cross-motion for partial summary judgment should be granted. The Court should issue an order requiring disclosure of the document entitled “Internal Investigation Report of the Bay of Pigs Operations.”

Respectfully submitted,

/s/ **David L. Sobel**
DAVID L. SOBEL, D.C. Bar No. 360418
1818 N Street, N.W.
Suite 410
Washington, DC 20009
(202) 246-6180
sobel@att.net

Counsel for Plaintiff