ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5201

NATIONAL SECURITY ARCHIVE,
Plaintiff-Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
No. 1:11-cv-00724-GK (Hon. Gladys Kessler)

BRIEF FOR APPELLANT NATIONAL SECURITY ARCHIVE

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January 22, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellant National Security Archive hereby certifies as follows:

A. Parties and Amici. National Security Archive was Plaintiff in the district court and is Appellant in this Court.

Central Intelligence Agency was Defendant in the district court and is Appellee in this Court.

There were no amici in the district court. The National Coalition for History is an amicus in this Court.

B. Ruling Under Review. The ruling under review is the district court's May 10, 2012 order, Doc. No. 15 (and incorporated memorandum opinion, Doc. No. 16), in *National Security Archive v. Central Intelligence Agency*, No. 1:11-cv-00724-GK (Hon. Gladys Kessler). The district court's order and opinion are reprinted at [A95-109] and available at 859 F. Supp. 2d 65.

C. Related Cases. This matter has not previously been before this Court. Counsel are aware of no related cases currently pending in this Court or in any other court within the meaning of D.C. Circuit Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, Appellant National Security Archive submits the following corporate disclosure statement.

Appellant National Security Archive is an independent 501(c)(3) non-profit research institute and library. The National Security Archive has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

This case is a challenge under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). The district court had jurisdiction under 28 U.S.C. § 1331. It entered judgment on May 10, 2012. Plaintiff-appellant filed a notice of appeal on June 20, 2012, within the 60 days allowed by Federal Rule of Appellate Procedure 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Under Exemption 5 to the Freedom of Information Act, 5 U.S.C. § 552(b)(5), an agency may invoke the "deliberative process privilege" to withhold agency documents that are both "predecisional" and "deliberative."

(1) Does a volume of an unpublished agency history qualify as "predecisional" if the agency does not identify any policy or policymaking process to which the document relates?

(2) Can an agency claim that a document is "deliberative" if disclosure of the document would not reveal anything about and would not interfere with the agency's internal decisionmaking processes?

(3) Would an agency's release of a 30-year-old volume of history, written about events that took place more than a half-century ago, harm the agency's deliberative process?

(4) If a district court concludes that a document may be withheld under Exemption 5, must the court consider whether the document contains non-exempt information that is reasonably segregable from exempt information?

STATUTES AND REGULATIONS

All relevant statutes and regulations are reproduced in the Addendum.

PRELIMINARY STATEMENT

More than fifty years ago, a paramilitary brigade of 1,500 Cuban exiles backed by the United States Government engaged in an unsuccessful attempt to overthrow Fidel Castro's communist regime. This failed operation—the so-called Bay of Pigs Invasion—has been the subject of scholarly analysis and debate ever since.

Between 1973 and 1984, a staff historian at the Central Intelligence Agency (the "Agency" or "CIA") named Dr. Jack Pfeiffer labored to create a historical study of the Invasion and the Agency's involvement in it. He ultimately drafted a multi-part survey, the last volume of which—here called "Volume V"—describes an internal investigation that the Agency undertook in 1961 in the wake of the operation's failure. The Agency has released the other four volumes of Dr. Pfeiffer's Bay of Pigs opus; it has even released the internal-investigation report on which Volume V was based. But the Agency has never released any portion of Volume V.

The National Security Archive (the "Archive") is an independent non-profit research institute and library that facilitates scholarship by placing declassified government documents into the public record. The Archive requested a copy of Volume V from the Agency under the Freedom of Information Act ("FOIA"). After more than five years passed without an

approval or denial, the Archive filed suit in the United States District Court seeking disclosure of Volume V.

In response, the Agency invoked FOIA Exemption 5, which permits an agency to withhold "inter-agency or intra-agency memorandums or letters which 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). Among the civil discovery privileges encompassed by Exemption 5 is a "deliberative process privilege," which protects documents if they are both "predecisional" and "deliberative." This exemption is designed to protect only those "materials [that] can reasonably be said to embody an agency's policy-informed or -informing judgmental process." *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir 1992). In this suit, the Agency has claimed—and the district court agreed—that Dr. Pfeiffer's Volume V qualifies under the deliberative process privilege because the document was never approved by his supervisors or endorsed by the Agency. For several reasons, this ruling was in error.

First, Volume V is not predecisional, because the Agency has not identified any policy, decision, or decisionmaking process to which the document relates. The Agency never considered taking action or adjusting its policy in light of Dr. Pfeiffer's historical study; the Agency never

intended to publish it. Yet the Agency now claims that all of its unpublished histories are *themselves* "agency policy," and that drafts of those histories are therefore "predecisional." Under the Agency's twisted logic, all of an agency's draft documents automatically qualify as predecisional merely because they play a role in the document-creation process itself. The Court should reject this novel and unsupported sleight-of-hand.

Second, Volume V is not deliberative, because its disclosure would reveal nothing about the Agency's internal deliberations or its decisionmaking processes. The Agency has already disclosed when Dr. Pfeiffer's work was rejected, by whom it was rejected, and why it was rejected. Volume V was halted at the first stage of review, and the Agency never completed Dr. Pfeiffer's work or adopted a final version. Thus, there are no later versions against which to compare the document; its release would reveal no editorial judgments made by the Agency. Simply put, disclosure of Volume V would disclose nothing currently unknown about the Agency's views about Dr. Pfeiffer's work or its views about the Bay of Pigs Invasion.

Moreover, release of Volume V would cause no harm to the deliberative process of the Agency's historians. Nearly thirty years have passed since Dr. Pfeiffer last worked on his Bay of Pigs history. A long line

of precedent establishes that an agency cannot indefinitely invoke the civil discovery privileges that Exemption 5 encompasses. Instead, such privileges "ha[ve] always been limited and subject to erosion over time," *Nixon v. Adm'r of Gen.* Servs., 433 U.S. 425, 451 (1977). Even the President's closest advisers receive a limited period of confidentiality for their deliberations, and the Agency offers no reason to think its staff historians require greater protection. The Agency categorically maintains that disclosure of "any CIA draft history at any stage before its completion" would destroy the deliberative process of its historians. But this blanket assertion is fatally undermined by the Agency's disclosure of Volume IV, another unapproved draft history written by Dr. Pfeiffer that is similar in all relevant respects to Volume V.

Third, even if Volume V qualified for withholding under Exemption 5 (which it does not), the district court committed clear error by failing to determine whether it contains any non-exempt information that is reasonably segregable from its exempt information. The court's error is particularly glaring given the Agency's disclosure of Volume IV.

STATEMENT OF FACTS

In April 1961, a brigade of 1,500 Cuban exiles landed at Playa Giron, Cuba. Backed by support from the CIA and U.S. military, their goal was to overthrow Fidel Castro's communist regime. Their attempt failed, leading to the death or capture of nearly all participants. Known as the Bay of Pigs Invasion, the debacle embarrassed the United States and set the stage for further Cold War confrontations.

A. In 1973, an Agency employee named Dr. Jack Pfeiffer began working on a monograph study of the Invasion and the CIA's involvement in the operation. Dr. Pfeiffer was a member of the Agency's History Staff, which "provides Agency leaders with needed perspective" by creating "an organized and shared institutional memory regarding historical events." [A87]; *see also* [A42-43]. In line with this mission, Dr. Pfeiffer's project was to create an "institutional history" of the Agency's role in the Bay of Pigs Invasion "in order to provide an accurate and accessible account of what it ha[d] done." [A44-45].

For the next decade, Dr. Pfeiffer continued to work on his monograph almost exclusively, poring over historical records and interviews with those involved—both within and outside the Agency. [A39, A68]. In October 1981, Dr. Pfeiffer submitted a memorandum to his supervisor announcing

that his project was nearly complete. Dr. Pfeiffer anticipated that the final monograph would comprise four volumes:

Volume I: Air Operations
Volume II: Participation in the Conduct of Foreign Policy
Volume III: Evolution of CIA's Anti-Castro Policies
Volume IV: Post-Mortems of the Bay of Pigs Operation

[A7-8, A54-56, A70-74]. In his memorandum, Dr. Pfeiffer recommended a schedule for review of his work and its possible declassification and publication. [A70-74]. But his supervisor, Dr. J. Kenneth McDonald, informed Dr. Pfeiffer that publication was not contemplated. [A54-55]. According to Dr. McDonald, "there was never any CIA or History Staff plan or commitment to declassify or publish the Bay of Pigs monograph assigned to Dr. Pfeiffer." [A39].

In November 1981, Dr. Pfeiffer submitted for Dr. McDonald's review the final volume of his Bay of Pigs history. Entitled "Post-Mortems of the Bay of Pigs Operation," this volume addressed formal efforts that had been made within the Government to review the Invasion and the reasons for its failure. In particular, the volume contained chapters describing two such investigations undertaken in 1961 that had led to reports critical of the Agency: an inter-departmental committee chaired by General Maxwell Taylor; and an internal investigation conducted by the Agency's own

Inspector General. [A39-40, A66]. In this litigation, a chapter addressing the Taylor Committee has been referred to as Volume IV; and two chapters addressing the Internal Investigation have collectively been referred to as Volume V. This brief follows the same convention. Notably, however, all three chapters were originally part of the same volume, and Dr. Pfeiffer submitted them together for approval.[1] [A10-11].

Upon review of Dr. Pfeiffer's work, Dr. McDonald determined that Dr. Pfeiffer's account of the Agency's Internal Investigation "had serious deficiencies." [A40]. In particular, Dr. McDonald concluded that "Dr. Pfeiffer's account [was] an uncritical defense of the CIA officers who planned and executed the Bay of Pigs operation," and that it "offer[ed] a polemic of recriminations against CIA officers who later criticized the operation, and against those U.S. officials who Dr. Pfeiffer contends were responsible for its failure." [A45]. Dr. McDonald informed Dr. Pfeiffer that the document would not be considered further. [A40].

After Dr. Pfeiffer's retirement in 1984, Dr. McDonald reviewed a version of the Internal Investigation section (Volume V) that Dr. Pfeiffer had revised. But Dr. McDonald but concluded that its deficiencies had not been

[1] According to the Agency, Dr. Pfeiffer's history of the Inspector General investigation "was never referred to within the CIA as Volume V." [A8].

corrected. [A61-62]. Accordingly, he did not submit the document for further review, which would have been necessary for official approval or dissemination within the Agency. [A40-42]. In sum, Volume V "never got beyond the first stage of the CIA review process for historical studies." [A40].

B. Following his retirement, Dr. Pfeiffer sought to obtain copies of Volume IV and Volume V of his Bay of Pigs history. The Agency disclosed Volume IV to him with minimal redactions but withheld all of Volume V under FOIA Exemptions 1 and 3. In May 1987, Dr. Pfeiffer filed suit against the Agency, seeking to obtain a copy of Volume V and challenging the redactions to Volume IV. [A40-41, A62].

In response to Dr. Pfeiffer's suit, the Agency for the first time invoked Exemption 5 as a basis to withhold Volume V in its entirety. According to Dr. McDonald, the completion of a Bay of Pigs history remained "on the History Staff agenda." [A62]. In his view, disclosing the current version of Volume V to the public prior to its completion "would obviously impair any future CIA historian's effort to complete a Bay of Pigs history that differed significantly from Dr. Pfeiffer's interpretation." [A45-46]. Moreover, Dr. McDonald claimed that disclosure would "seriously damage the CIA's deliberative process" because "later drafts or the final form of this history

may be compared to Dr. Pfeiffer's version to determine what changes in evidence, argument and interpretation were made in completing this work." [A46-47]. Finally, Dr. McDonald stated that disclosure of Volume V might deter "all U.S. Government historians . . . from trying out innovative, unorthodox or unpopular interpretations in a draft manuscript." [A64].[2]

The district court ruled in the Agency's favor, finding that Volume V was properly withheld. *Pfeiffer v. CIA*, 721 F. Supp. 337 (D.D.C. 1989). In so ruling, the court relied on Dr. Pfeiffer's concession that "a preliminary draft of an unfinished agency history" automatically qualifies for Exemption 5. *Id.* at 339. Accordingly, the only remaining question was whether Volume V, as it then existed, was a "'final' agency history that represent[ed] the official position of the CIA." *Id.* Since it was not—it was only "a preliminary draft of an unfinished agency history, which, as of yet, represents merely the view of one staff historian and not the official view of

[2] Dr. McDonald gave three reasons to explain why the Agency had chosen to disclose Volume IV, even as it withheld Volume V: (1) "most of the Taylor Committee's records had already been properly declassified and released to the public"; (2) the Taylor Committee was an "external body" that had a "negligible influence" on Agency policy, such that "any future CIA history of the Bay of Pigs operation can be expected to deal with this investigation quite briefly"; and (3) Dr. Pfeiffer had promised that any publication of Volume IV would include a disclaimer stating that the Agency had not adopted or endorsed the manuscript or its views. [A62-63]. The record contains no evidence that Dr. Pfeiffer ever published Volume IV.

the Agency"—the court ruled that the Agency had properly invoked Exemption 5.[3] *Id.* at 341.

C. In August 2005, appellant National Security Archive wrote to the Agency requesting release of Volumes I, II, IV, and V of Dr. Pfeiffer's history of the Bay of Pigs operation. (Volume III had already been declassified in 1998 under the President John F. Kennedy Assassination Records Collection Act of 1992. [A23].) The Agency acknowledged receiving the Archive's FOIA requests on September 7, 2005. [A29-33]. But for the next five-and-a-half years, the Agency provided no further response—even though it had already disclosed Volume IV to Dr. Pfeiffer two decades earlier.

On April 14, 2011, the Archive filed this suit in the U.S. District Court for the District of Columbia seeking to compel disclosure of the requested records. Shortly thereafter, the Agency released Volumes I, II, and IV to the Archive "with minimal redactions based upon FOIA exemptions" 1 and 3.[4] [A9]. However, the Agency withheld Volume V in

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[3] The district court also held that Volume IV had been properly redacted under Exemption 3, rejecting Dr. Pfeiffer's claim that the Agency's "prior public disclosure of the redacted information" had rendered that exemption inapplicable. *Id.* at 342.

[4] As the district court observed, "[t]he CIA has offered no explanation as to why it failed to provide any materials to the [Archive] in the five years *(cont'd)*

its entirety under Exemption 5, despite the fact that the document's subject—the 1961 Inspector General report—had itself already been published.[5] The Agency also identified a "small amount of classified information" in the document that was subject to withholding under Exemptions 1 and 3. [A9].

In defending its withholding of Volume V, the Agency did not claim—as it had in the prior suit—that its History Staff still intended to complete the work that Dr. Pfeiffer had started. Nor did the Agency offer any further explanation as to why the other four volumes were suitable for disclosure but Volume V was not. Instead, the Agency claimed that disclosure "of any CIA draft history at any stage before its completion" would cause harm in two ways: "(1) discourag[ing] open and frank

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and seven months that elapsed between acknowledgment of the FOIA requests and the filing of this lawsuit, but was able to release extensive materials three months after this lawsuit was filed." *Nat'l Security Archive v. Cent. Intelligence Agency*, 859 F. Supp. 2d 65, 68 (D.D.C. 2012); [A98-99].

5 The Inspector General report, as well several internal critiques of the report by Agency personnel, were declassified in response to a FOIA request and are now available on the Archive's website. *See* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB341/IGrpt1.pdf. These and other, related documents were published in a book that has drawn substantial attention from historians and scholars. *See* Peter Kornbluh, *Bay of Pigs Declassified* (1998).

deliberations among the History Staff and (2) lead[ing] to public confusion." [A89]; *see also* [A89-90].

On cross motions for summary judgment, the district court agreed with the Agency that Volume V may be withheld under the deliberative process privilege of FOIA Exemption 5, holding that the document was "both predecisional and deliberative." *Nat'l Security Archive v. Cent. Intelligence Agency*, 859 F. Supp. 2d 65, 70 (D.D.C. 2012) (quotation marks omitted); [A102]. In finding Volume V to be "predecisional," the court stated that it was "generated prior to and in preparation for completion of the CIA's official history, i.e. its final policy, but was rejected for inclusion in the final publication and remained a draft."[6] 859 F. Supp. 2d at 71; [A106]. The court determined that Volume V was "deliberative" because it "reflects the personal opinions of the writer rather than the policy of the agency." 859 F. Supp. 2d at 71; [A106] (quotation marks and brackets omitted).

The district court also accepted the Agency's claim that disclosing Volume V would cause harm, both by deterring staff historians from reaching unpopular or unorthodox judgments and by potentially confusing the public. 859 F. Supp. 2d at 71; [A106-07]. Finally, the court rejected the

[6] Contrary to this statement, "there was never any CIA or History Staff plan or commitment to declassify or publish the Bay of Pigs monograph assigned to Dr. Pfeiffer." [A39]. *See supra* p. 8.

argument that "the passage of time should serve as a basis for disclosure," again citing the Agency's claims that disclosure might "discourage disagreement . . . among its historians." 859 F. Supp. 2d at 71-72; [A107].

The district court thus granted summary judgment for the Agency and against the Archive, permitting the Agency to withhold Volume V in its entirety. 859 F. Supp. 2d at 72; [A108-09]. The court did not address whether Volume V contained any releasable information that might be segregable from its exempt information. After the Archive timely appealed, the Agency moved for summary affirmance. This Court denied the motion. [A124].

STANDARD OF REVIEW

In FOIA cases, this Court reviews a "district court's summary judgment ruling *de novo*, remaining mindful that the burden is on the agency to show that requested material falls within a FOIA exemption." *Loving v. Dep't of Defense*, 550 F.3d 32, 37 (D.C. Cir. 2008) (quotation marks omitted).

SUMMARY OF ARGUMENT

I. Volume V is not "predecisional," because its creation was wholly unconnected to any policy decision or decisionmaking process. Dr. Pfeiffer's monograph was not created in contemplation of any further

Agency action; the Agency never intended to publish it. The district court found Volume V to be predecisional based on the notion that an unpublished agency history qualifies as the agency's "policy," and its drafts as "recommendations." This unprecedented conceit seriously warps the meaning of both terms. If accepted, it would mean that all draft documents are predecisional, simply because they play a role in the document-creation process itself. This Court has never before accepted such bootstrapping and should not do so now.

II.A. Volume V is not "deliberative," because its release would provide no new information about the Agency's decisionmaking processes. The Agency has already disclosed the reasons it rejected Dr. Pfeiffer's work, which was never circulated within the Agency or taken up by another History Staff employee. Release of the document would therefore reveal nothing currently unknown about the Agency's internal views or its deliberations.

B. The disclosure of Volume V also would not cause harm to the Agency's deliberative process. This Court has long recognized that civil discovery privileges, including those encompassed by Exemption 5, must yield over time as the justification for the privilege fades. Almost thirty years have passed since Dr. Pfeiffer last worked on Volume V; any risk that

public disclosure might chill internal deliberations among the History Staff has long since dissipated. The Agency categorical asserts that *any* release of *any* draft history would inhibit its History Staff, but this assertion is fatally undercut by the Agency's release of another draft volume of Dr. Pfeiffer's work without any evidence for its dire prediction.

III. Even if Volume V somehow qualified for withholding under Exemption 5—which it does not—the district court clearly erred by failing to rule on segregability. The court's error is particularly glaring in light of the Agency's disclosure of another, functionally identical volume of Dr. Pfeiffer's work.

ARGUMENT

FOIA Exemption 5 permits an agency to withhold "inter-agency or intra-agency memorandums or letters which 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). The Supreme Court has explained that this provision "exempt[s] those documents, and only those documents, normally privileged in the civil discovery context." *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Exemption 5 thus "incorporat[es] civil discovery privileges," shaped by "judicial standards that would govern litigation against the agency that holds [the privilege]." *Dep't of the Interior*

v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001); *see Fed. Trade Comm'n v. Grolier Inc.*, 462 U.S. 19, 26 (1983) ("The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance.").

One such privilege is the "deliberative process privilege," which is designed to shield an agency's internal decisionmaking processes from public view. This limited exception to FOIA's "general disclosure policy" is narrowly construed, and materials may qualify for withholding under this privilege only if they are "both predecisional and deliberative." *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 773-74 (D.C. Cir. 1988) (en banc). The history at issue here is neither.

I. Volume V Is Not Predecisional Because It Is Unconnected to Any Agency Decision or Decisionmaking Process

Exemption 5 applies only to documents that are "predecisional," meaning that they were "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). Although the "decision" at issue need not be a simple thumbs-up or thumbs-down, it must embody the agency's "process of working out its policy and determining what its law shall be." *Sears*, 421 U.S. at 153 (quotation marks omitted). "Accordingly, to approve exemption of a document as predecisional, a court must be able to pinpoint

an agency decision or policy to which the document contributed." *Senate of Puerto Rico v. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (quotation marks omitted). Thus, in every case in which this Court has found a requested document to be predecisional, the agency has been able to connect the document to a specific policy decision. *See, e.g.*, *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (labeling as "predecisional" a memorandum that assisted "the Department's study of how to shepherd [a] bill through Congress"); *Taxation with Representation Fund v. Internal Revenue Serv.*, 646 F.2d 666, 681-82 (D.C. Cir. 1981) (memoranda offering advice for tax determinations, proposed regulations, and pending cases); *see also Grumman*, 421 U.S. at 185-190 (reports advising whether the agency should seek reimbursement from contractors for "excessive profits"); *Sears*, 421 U.S. at 159-60 (memoranda advising the agency on its litigation strategy).

In the present case, the Agency has failed to identify—much less "pinpoint"—*any* policy or decision connected to its Bay of Pigs history. Instead, the Agency provides only the vaguest and most generic affirmation of the general utility of its histories. *See* [A44] ("We aim to write histories that will provide the CIA with information, context and perspective"); [A44] ("Whether consciously or not, all decision-makers draw on past experience,

and they do use history, even if only for advocacy and comfort."); [A87] ("histories provide [Agency staff] with access to an organized and shared institutional memory regarding historical events for use in current decision-making"); [A87] ("provides Agency leaders with needed perspective"). But *all* federal agency records are useful in this very general sense; otherwise there would be no reason for creating or retaining them. An agency cannot indiscriminately label all of its records as predecisional simply by stating that they may prove useful at some later date. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) ("[I]f documents are not part of a clear 'process' leading to a final decision on the issue, as they were in both the *Sears* and the *Grumman* cases, they are less likely to be properly characterized as predecisional; in such a case there is an additional burden on the agency to substantiate its claim of privilege."); *see also Senate of Puerto Rico*, 823 F.2d at 585 ("We search in vain through the supporting material submitted by the DOJ for any identification of the specific final decisions to which the advice or recommendations contained in the withheld documents contributed . . . .").

The need to identify a decision in connection with a requested document is illustrated by *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975), in which the U.S. Civil Service Commission sought to withhold personnel

reports that "evaluat[ed] the way the agencies' managers and supervisors are carrying out their personnel management responsibilities." *Id.* at 1139 (quotation marks omitted). The Government argued that the personnel reports fit into a "process of management appraisal, evaluation, and recommendations for improvement [that was] a seamless whole." *Id.* at 1145. But because the Civil Service Commission was unable to tie the reports to a specific decision or to a "true deliberative process usually leading up to final decisions," this Court held that Exemption 5 did not shield them. *Id.* at 1146. In the present case, the Agency has not claimed that Dr. Pfeiffer's Bay of Pigs monograph was crafted in contemplation of any further action by the Agency. At most, the Agency's histories "provide the raw data upon which decisions can be made; they are not themselves a part of the decisional process." *Id.* at 1145.

The cases cited by the Agency in its motion for summary affirmance further support this principle. *See* [A120].[7] In *Judicial Watch, Inc. v. Food*

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[7] In its summary affirmance briefs, the Agency relied primarily on the fact that Volume V was created by a subordinate official for submission to his superiors. *See* [A120] ("Volume V is predecisional because it reflects the personal opinions of the author—a subordinate staff historian—and does not represent a final Agency history because it was never forwarded beyond the initial stage of the CIA's review process by Dr. Pfeiffer's supervisor."). Such a categorical proposition has no support in the law. To be sure, "a document from a subordinate to a superior official is *more*

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& Drug Administration, 449 F.3d 141 (D.C. Cir. 2006), the FOIA requestor sought all documents regarding the agency's approval of the drug mifepristone, for which the drug's manufacturer had submitted an Investigational New Drug Application and a New Drug Application. The Court held that information relating to the manufacturer's Applications—which the agency had considered prior to approving mifepristone for use as an abortifacient—was properly characterized as predecisional. *Id.* at 151. The Court noted that information regarding potential off-label uses of the drug might also qualify as predecisional, insofar as the manufacturer "may later seek FDA approval" for such uses, "which would require further final action by the agency." *Id.* By contrast, in *Morley v. Central Intelligence Agency*, 508 F.3d 1108 (D.C. Cir. 2007), the Court rejected the CIA's attempt to shield records relating to a deceased officer, because the Agency had failed to connect the records to a policy or decision. The Court noted—

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likely to be predecisional." *Coastal States*, 617 F.2d at 868 (emphasis added). Yet this Court has squarely rejected the argument that the identity of the drafter or the recipient automatically renders a document predecisional: "[T]he privilege protects only communications between subordinates and superiors *that are actually [a]ntecedent to the adoption of an agency policy*." *Jordan v. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (emphasis added). The relevant question is not simply who created the document, but whether the agency can point to a specific decision or policy being contemplated to which the document relates.

in terms that would apply just as readily to this case—that "[t]he CIA has provided no hint of a final agency policy its 'predecisional' material preceded." *Id.* at 1127.

The district court below suggested that Volume V should be considered predecisional in that it was "generated prior to and in preparation for completion of the CIA's official history, i.e. its final policy." *Nat'l Security Archive*, 859 F. Supp. 2d at 71; [A106]. According to this logic, *all* draft documents would automatically qualify as predecisional merely because they play a role in the document-creation process itself. This Court has never endorsed such bootstrapping. *See Coastal States Gas*, 617 F.2d at 868 ("Characterizing these documents as 'predecisional' simply because they play into an ongoing audit process would be a serious warping of the meaning of the word. No 'decision' is being made or 'policy' being considered . . . ."); *see also Arthur Andersen & Co. v. Internal Revenue Serv.*, 679 F.2d 254, 257 (D.C. Cir. 1982) ("*Coastal States* forecloses the Agency's argument that any document identified as a 'draft' is per se exempt."). To successfully invoke Exemption 5, the Agency must answer the question: "To what decision or policy does the creation of Volume V relate?" Its answer cannot be: "The creation of Volume V."

Moreover, there is no support for the notion that an unpublished history qualifies as an agency's "policy" for purposes of Exemption 5. Since FOIA "represents a strong congressional aversion to secret agency law," it requires disclosure of an agency's policy decisions. *Sears*, 421 U.S. at 153 (quotation marks and parentheses omitted). The internal recommendations that go into making those decisions, by contrast, may be withheld by Exemption 5. *Id.* Here, the Agency proposes to treat its unpublished histories as its "policy decisions," and the drafts as "recommendations." This accurately describes neither. Unsurprisingly, this approach is novel: Although this Court has decided several Exemption 5 cases involving unpublished agency reports, no one suggested that the report was *itself* an agency policy.[8] *See, e.g.*, *Vaughn*, 523 F.2d at 1139 (personnel reports

[8] In *Russell v. Department of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982), the Court indicated that a draft history may qualify as predecisional if a later version of the history is ultimately published and adopted as a public statement of the agency's views. *See id.* at 1048 ("The 'Ranchland' history constitutes the Air Force's official statement concerning the history of herbicide use in the Vietnam conflict. . . . [The Air Force] must stand by its history in the public forum, and, in light of the possibility of Agent Orange disability litigation brought by Vietnam veterans, perhaps in the judicial forum as well."). In the present case, however, the Agency has made clear that it never planned to publicly endorse Dr. Pfeiffer's Bay of Pigs history as an official statement of the Agency's position. *See* [A39] ("[T]here was never any CIA or History Staff plan or commitment to declassify or publish the Bay of Pigs monograph assigned to Dr. Pfeiffer."); *see also* [A54-55].

evaluating how agency managers have performed); *Playboy Enters., Inc. v. Dep't of Justice*, 677 F.2d 931, 933 (D.C. Cir. 1982) (302-page Department of Justice report regarding the handling of an FBI informant). This Court should decline the Agency's unprecedented invitation to transform an unpublished history—unconnected to any agency decision—into agency "policy." *See Coastal States*, 617 F.2d at 867 (documents constitute agency policy where they "have operative and controlling effect").

II. Disclosure of Volume V Would Reveal Nothing About, and Have No Impact on, the Agency's Deliberative Process

"[P]re-decisional materials are not exempt merely because they are pre-decisional." *See Vaughn*, 523 F.2d at 1144. Rather, to successfully invoke Exemption 5, an agency must also show that the requested document is "deliberative," in that its disclosure would lay bare the agency's internal decisionmaking processes, thereby proving "injurious to the consultative functions of government." *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 87 (1973), *superseded by statute in unrelated part*, Pub. L. No. 93-502, § 2, 88 Stat. 1563 (1973) (quotation marks omitted). Volume V is not deliberative, because its disclosure would reveal nothing about the Agency's decisionmaking and policy-formation processes. Moreover, releasing the decades-old manuscript would in no way impair the functioning of the Agency's History Staff.

A. The Release of Volume V Would Reveal Nothing about the Agency's Deliberative Process

Exemption 5 is intended to protect only "materials [that] can reasonably be said to embody an agency's policy-informed or -informing judgmental process." *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir 1992). Accordingly, early court decisions drew a distinction between "materials reflecting deliberative or policy-making processes" (which are exempt) and materials reflecting "purely factual, investigative matters" (which are not). *Mink*, 410 U.S. at 89. The Supreme Court endorsed this approach, *see id.* at 89-91, and this Court has accordingly held that "[u]nder the deliberative process privilege, factual information generally must be disclosed." *Petroleum Info.*, 976 F.2d at 1434.

Here, the document at issue is a history produced by a staff historian three decades ago about half-century-old events. Dr. Pfeiffer's "mission [in creating the document] was to investigate the facts surrounding certain events." *Playboy Enters.*, 677 F.2d at 935. To be sure, Dr. Pfeiffer's creation of Volume V undoubtedly involved "the choice, weighing and analysis of facts." *Id.* But as this Court has explained:

> Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person

> making the report thinks material. If this were not so, every factual report would be protected as a part of the deliberative process.

Id. (quotation marks omitted).

Although factual summaries are generally disclosable, this Court has recognized that "[i]n some circumstances, even material that could be characterized as 'factual' would so expose the deliberative process that" it nevertheless falls within Exemption 5. *Wolfe*, 839 F.2d at 774. The Court has therefore permitted an agency to withhold factual information, but only where the requested document would provide insight into "the inner workings of the deliberative process itself." *Id.*

For instance, in *Russell v. Department of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982), the Court permitted withholding of an early draft of a historical survey that was later published as the agency's "official statement" on its use of herbicides in the Vietnam War. *Id.* at 1048. The Court concluded that disclosing the requested draft "would violate the integrity of the decision-making process" because the contrast between the draft and final versions would allow the requestor to identify, through reverse-engineering, which alterations the agency had made:

> [A] simple comparison between the pages sought and the official document would reveal what material supplied by subordinates senior officials judged appropriate for the history and what material they judged inappropriate.

Id. at 1049. Similarly, in *Dudman Communications v. Department of the Air Force*, 815 F.2d 1565 (D.C. Cir. 1987), the Court permitted withholding of a draft manuscript that was later published in a different form, because "[r]elease of [the] manuscript would disclose the alterations that the Air Force, in its entirety, made during the process of compiling the official history."[9] *Id.* at 1569.

In this case, by contrast, the release of Volume V would reveal nothing about the Agency's views about the document's subject matter. The Agency no longer claims that it intends to complete the work that Dr. Pfeiffer started (as it had claimed in response to his 1987 suit). Although the Agency's histories undergo a multi-step review process before being finalized, [A88-89], the Agency has already disclosed that Volume V did not proceed past the first step. Since Dr. Pfeiffer's document is the only version that was ever created, no contrast can be drawn with the Agency's official views. *Cf. Russell*, 682 F.2d at 1049; *Dudman*, 815 F.2d at 1569.

[9] An analogous example is provided by *Wolfe v. Department of Health & Human Services*, in which the plaintiffs sought documents that would have identified "which regulatory actions have been proposed by the FDA and . . . how long regulatory actions initiated by FDA are spending at each stopping point along the approval route from FDA to HHS to OMB and back to HHS." 839 F.2d at 770. The Court held that the documents were covered by Exemption 5 because their disclosure would have revealed "the inner workings of the deliberative process itself." *Id.* at 774.

Indeed, since Volume V "was never circulated within the Agency or used by the CIA in its dealings with the public," [A92], its disclosure would reveal nothing whatsoever about the Agency's official views on the Bay of Pigs Invasion or the Inspector General report.[10]

Moreover, the Agency has already disclosed everything relevant about its decision to reject Volume V. Dr. McDonald, Dr. Pfeiffer's supervisor, rejected the document in December 1981. [A40]. He did so after concluding that "Dr. Pfeiffer's account is an uncritical defense of the CIA officers who planned and executed the Bay of Pigs operation" and that it "offers a polemic of recriminations against CIA officers who later criticized the operation, and against those U.S. officials who Dr. Pfeiffer contends were responsible for its failure." [A45]. The public thus already knows *when* Volume V was rejected, *by whom*, and *why*.[11] This Court has never permitted an agency to shield a historical report under such circumstances.

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[10] As noted at page 13 n.5, *supra*, the topic of Volume V—the Inspector General's report—has itself already been published, along with several internal Agency critiques of the report.

[11] If (contrary to the discussion in Part I, *supra*) this Court conceives of the relevant "agency decision" as whether or not to adopt Dr. Pfeiffer's draft, then the Agency has already disclosed its decision not to accept Volume V, along with its rationale for making that decision. If the relevant "policy position" under consideration was Dr. Pfeiffer's view of the Inspector General investigation, then the Agency has already made clear that it has rejected his interpretation and why it did so. Disclosure

(cont'd)

The district court's only argument for treating Volume V as deliberative was that it "represents an intermediate step in the CIA's intensive review process." *Nat'l Security Archive*, 859 F. Supp. 2d at 71; [A106]. But this Court has never permitted withholding of a document under Exemption 5 simply because its creation was part of a multi-step process. *See Arthur Andersen*, 679 F.2d at 257-58 ("The designation of the documents here as 'drafts' does not end the inquiry, however. . . . 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." (quotation marks omitted)). To the contrary, although the draft history requested in *Dudman* eventually went through "many layers of editorial review," 815 F.2d at 1567, the Court did not permit withholding on that basis. Instead, the Court relied on the fact that comparing the draft and final versions would reveal the agency's "editorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis." *Id.* No such editorial judgments are at issue here.

In sum, viewing Volume V will reveal nothing currently unknown about the Agency's internal views or its decisionmaking process. It

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of Volume V would reveal nothing further about the Agency's reasons for rejecting the document.

therefore must be disclosed. *See Paisley v. CIA*, 712 F.2d 686, 699 (D.C. Cir. 1981), *vacated in part on other grounds*, 724 F.2d 201 (1984) ("[T]his exception [*i.e.*, for factual material that would reveal the deliberative process] cannot be read so broadly as to undermine the basic rule; in most situations[,] factual summaries prepared for informational purposes will not reveal deliberative processes and hence should be disclosed.").

B. Release of the Decades-Old Document Would Not Harm the Deliberative Process

As the district court recognized and as the Agency has conceded, to successfully invoke Exemption 5, the Agency must do more than identify the requested document as "deliberative"; it "must make the additional showing that disclosure would cause injury to the decisionmaking process." *Nat'l Security Archive*, 859 F. Supp. 2d at 70; [A103, A119].[12] Indeed, the Agency "must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA." *Mead Data Cent.,*

[12] In *McKinley v. Board of Governors of the Federal Reserve System*, 647 F.3d 331 (D.C. Cir. 2011), the Court suggested in dicta that potential harm to an agency's deliberative process is best conceived of as being coextensive with the scope of the privilege, rather than as being a separate requirement. *Id.* at 339-40; *see id.* at 340 (concluding that disclosure would in fact harm the agency's deliberative process). Regardless of how harm to an agency's deliberative process is conceived, however, the following discussion makes clear that in this case, disclosure of Volume V would cause no such harm.

Inc. v. Dep't of the Air Force, 566 F.2d 242, 258 (D.C. Cir. 1977); *see also Wolfe*, 839 F.2d at 774-75 ("Exemption 5 is to be construed as narrowly as consistent with efficient Government operation." (quotation marks omitted)). In concluding that disclosure of Volume V would cause harm, the district court relied on two justifications offered by the Agency: (1) that disclosure of an unapproved draft history would cause confusion; and (2) that disclosure would interfere with the process by which such histories are created. *See Nat'l Security Archive*, 859 F. Supp. 2d at 71; [A106-07]. Neither rationale is persuasive.

First, the Agency's own actions and representations show that the release of Volume V would create no credible risk of confusion. When an agency releases a draft or unofficial document, the release is routinely accompanied by a disclaimer or notation explaining that the agency does not endorse the document or vouch for its accuracy. For instance, when the Agency disclosed a redacted version of Volume IV to Dr. Pfeiffer in 1987, he agreed that any publication would include the following disclaimer "in a prominent fashion along with the released document":

> 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.

[A63]. Similarly, when the Agency released Volume IV to the Archive

during the course of this litigation, the document came with a cover page that made clear its status as an unapproved draft. [A125] (as published on the Agency's website).[13] Other federal agencies have taken a similar approach. *E.g.*, [A84] (draft Department of Justice Report posted on agency's website prominently displaying the word "DRAFT"). Neither the district court nor the Agency has offered any reason to doubt that this approach has effectively eliminated any potential confusion over the release of Volume IV—nor any reason to doubt that the approach would work equally well for Volume V.

Second, the Agency alleges that disclosure of Volume V "reasonably could be expected to seriously impair the current and future historical manuscript review process at the CIA and compromise the utility of CIA histories as contributions to Agency decision making." [A86]. The Agency's argument seems to be that its historians might censor themselves if they think their work might one day become public. This argument ignores the obvious irony that the requested document's author, Dr. Pfeiffer, *himself* sought release of his manuscript almost immediately after leaving the Agency. *See Pfeiffer*, 721 F. Supp. at 338-39. The district court in this case

[13] For the Court's convenience, Volume IV has been reproduced as a separate volume of the Appendix. It is also available at http://www.foia.cia.gov/bay-of-pigs/bop-vol4.pdf.

echoed the Agency, stating that "the CIA does not want to discourage disagreement . . . among its historians." *Nat'l Security Archive*, 859 F. Supp. 2d at 72; [A107]. Yet this generic argument would apply just as readily to *any* draft document created by federal employees, and this Court has squarely rejected the argument. *See Arthur Andersen*, 679 F.2d at 257 ("*Coastal States* forecloses the Agency's argument that any document identified as a 'draft' is per se exempt.").

But even accepting the Agency's rationale at face value, it ignores the effect of the passage of time. As noted above, Exemption 5 encompasses civil discovery privileges "under judicial standards that would govern litigation against the agency that holds it." *Klamath Water Users*, 532 U.S. at 8. A long line of cases establishes that such privileges are not absolute, and must yield over time as the justification for the privilege fades.

In *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979), for instance, the Supreme Court considered whether the agency could withhold certain policy directives under Exemption 5 by invoking a civil discovery privilege for "confidential commercial information." *Id.* at 356. The Court observed that such a privilege was "long recognized" by federal courts, *id.* at 356, and that the requested agency documents could "fairly be described" as fitting within its scope, *id.* at 362. Nevertheless, "it d[id] not

necessarily follow" that the agency could shield the documents against disclosure. *Id.* Instead, the question was whether "immediate release of [the documents] would significantly harm the Government's monetary functions or commercial interests" enough to justify "a slight delay in the publication of" the documents. *Id.* at 363. The Court remanded for the district court to hear evidence of such harm. *Id.* at 364. As *Merrill* demonstrates, to successfully invoke Exemption 5 for even a temporary delay in disclosure, the agency must demonstrate that the delay is necessary to avoid "significant[] harm" to its interests.

The effect of time has also been recognized as a limitation on another privilege closely related to the deliberative process privilege—the "presidential communications privilege," which encompasses "documents or other materials that reflect presidential decision-making and deliberations." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F. 3d 1108, 1113 (D.C. Cir. 2004). The purpose of both privileges is the same: to ensure "the full and frank submissions of facts and opinions upon which effective discharge of [Executive] duties depends." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977); *see Nixon v. Freeman*, 670 F.2d 346, 355 (D.C. Cir. 1982) ("The [presidential communications] privilege flows from the recognition

that fear of disclosure may chill the candid advice and discussion necessary to effective decisionmaking.").

Notable for present purposes, the presidential communications privilege "has always been limited and subject to erosion over time."[14] *Adm'r of Gen. Servs.*, 433 U.S. at 451. In *Nixon v. Freeman*, for instance, former President Richard Nixon sought to prevent the disclosure of audio tape recordings that included discussions with his advisers, arguing that any abridgment of his presidential privilege would "chill[] executive discussion now and in the future." 670 F.2d at 356. President Nixon suggested a 25-year "blanket time restriction" on disclosure of the recordings, but this Court doubted that such a period "would represent enough additional protection to the privilege to justify the serious denial of public access that would result from the restriction." *Id.* at 358. Instead, the Court balanced "the importance of preserving an accurate and complete historical record" against a risk of chill that had diminished over time:

> Even more damaging to Mr. Nixon's claim is the fact . . . that the privilege he asserts is not a fixed and permanent one, but erodes with

[14] The passage of time has also been recognized as a limitation on another privilege encompassed by Exemption 5: the work-product doctrine. *See* Edna Selan Epstein, II *The Attorney-Client Privilege & the Work-Product Doctrine* 929 (5th ed. 2007) ("The mere lapse of time is in itself enough to justify the production of material otherwise protected as work product . . . ." (quotation marks omitted)).

> the passage of time. . . . Although there is no fixed number of years that can measure the duration of the privilege, it is significant that no public access will occur until at least eight years after the event disclosed.

Id. at 356 (quotation marks omitted). Therefore, the Court held, the presidential communications privilege would shield the recordings only upon a case-by-case demonstration that assertion of the privilege was still justified.[15] *Id.* at 359. For the same reasons, an agency cannot invoke the deliberative process privilege indefinitely, without acknowledging that the vitality of the privilege diminishes gradually.[16]

This common-sense proposition—that the need for confidentiality of deliberations erodes over time—is further confirmed by a closely analogous law. Similar to the deliberative process privilege, the Presidential Records Act permits a President to restrict access to "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers." 44 U.S.C. § 2204(a)(5); *see* H.R. Rep. 95-1487, at

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[15] The Court also made clear that the burden fell on those who would invoke the privilege, rejecting the argument that "would-be listeners must override [a] presumption [of privilege] with a showing of need." *Id.*

[16] Apparently the Government agrees: The Department of Justice's Office of Information Policy, which sets FOIA policy for all executive agencies, has issued guidelines indicating that "[f]or all records, the age of the document" is a "universal factor[] that need[s] to be evaluated in making a decision whether to make a discretionary release." [A80].

9 (1978) ("The statutory restrictions which the President might impose were modeled after the Freedom of Information Act's exemptions."). Crucially, however, the restriction is limited to a "duration[] not to exceed 12 years," 44 U.S.C. § 2204(a), after which the National Archives may not invoke Exemption 5. *Id.* § 2204(c)(1). Congress adopted the 12-year limitation to "balanc[e] ready availability of the records against the prospect that premature disclosure might have a 'chilling effect' on the Presidents and the frankness of advice they could expect from their staffs." H.R. Rep. 95-1487, at 9 (1978); *see also id.* ("16 of the 18 witnesses felt that a period of 10 years or less in which the President could assert some restrictions would be sufficient to accommodate these policy and legal concerns.").[17] Indeed, this Court pointed to the Presidential Records Act's 12-year limitation as an "instructive" comparison when holding in *Freeman* that the presidential communication privilege erodes over time. *See* 670 F.2d at 356 n.13. If a dozen years of confidentiality is enough to prevent a "chilling effect" for the

[17] In enacting the Presidential Records Act, Congress relied upon a report of the so-called Public Documents Commission, which had similarly recommended a limited period of confidentiality: "The Commission feels that the 'chilling effect,' on the one hand and the rights of citizens on the other, can be balanced by limiting to *a maximum of fifteen years* the period during which a President may restrict his Public Papers." Final Report, National Study Commission on Records & Documents of Federal Officials at 30 (Mar. 31, 1977) (emphasis added) (excerpt attached in the Addendum to this brief).

President's closest advisers, 30 years surely should be more than enough for historians writing about events that took place a half-century ago.[18]

Indeed, the case for disclosure is substantially stronger here: Unlike high-level White House officials, the Agency's staff historians do not make policy decisions; they merely "provide an accurate and accessible account of what [the Agency] has done." [A45]. To be sure, there are some interpretive choices involved in drafting an account of past events, *see Playboy Enters.*, 677 F.2d at 935, but those choices are unlikely to remain controversial decades into the future, especially as the events themselves recede even further into the past. Why should a historian's account of the Inspector General investigation remain hidden, when the very report on which it was based has *itself* been disclosed without any claimed damage to the Agency's decisionmaking processes? The Agency offers no reason to think that greater deliberative protection is required for those who write about history than for those who make it.

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[18] Yet another example confirms the point: The Federal Open Market Committee of the Federal Reserve, which sets monetary policy for the entire nation, publicly releases the transcripts of its regular and emergency meetings on a five-year delay. *See* http://www.federalreserve.gov/monetarypolicy/fomc_historical.htm. The Agency cannot plausibly claim that deliberations by its History Staff are more sensitive than those by policymakers fending off financial crises.

The Agency acknowledges the substantial time that has passed since Volume V was drafted only through a single *ipse dixit* assertion—that disclosure would cause harm "notwithstanding the fact that Volume V is now decades old." [A86]. This is precisely the sort of conclusory, blanket assertion of harm that this Court rejected in *Freeman*. 670 F.2d at 356. This Court has rightly required far more. *See Mead Data*, 566 F.2d at 258 ("An agency cannot meets its statutory burden of justification by conclusory allegations of possible harm.").

Moreover, the Agency's stated rationale for secrecy is fatally undermined by its disclosure of functionally identical information. As this Court has recognized, an agency's willingness to disclose some information undercuts its claim that release of similar information will threaten its deliberative process. *See Army Times Publ'g Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1068 (D.C. Cir. 1993) ("[T]he fact that some of the information in the surveys is completely harmless suggests that other information in the surveys also might be released without threatening the Air Force's deliberative process." (citation omitted)).

The Agency claims that "[t]he official public disclosure of *any* CIA draft history at *any* stage before its completion" would undermine the History Staff's deliberative process. [A89] (emphasis added). Yet the

Agency has already released four out of the five volumes of Dr. Pfeiffer's Bay of Pigs manuscript—including his draft of Volume IV.[19] *See* [A9, A23]. As noted above, Volumes IV and V were originally chapters from the same volume draft entitled "Post-Mortems of the Bay of Pigs Operation"; Dr. Pfeiffer submitted them together for approval. [A10-11]. The district court explained during Dr. Pfeiffer's original FOIA suit that "[t]he Taylor Report [*i.e.*, Vol. IV] was written and edited by plaintiff in an identical manner to the Internal Investigation Report [*i.e.*, Vol V]." *Pfeiffer*, 721 F. Supp. at 339. Yet the Agency ultimately released Volume IV with minimal redactions. *See id.* (disclosure to Dr. Pfeiffer); [A9] (disclosure to the Archive).

When the Agency provided Volume IV to Dr. Pfeiffer in 1987, it offered three reasons that Volume V should nevertheless remain undisclosed. First, "most of the Taylor Committee's records had already been properly declassified and released to the public." [A63]. Second, "[a]ny future CIA history of the Bay of Pigs operation can be expected to deal with [the Taylor Committee's] investigation quite briefly." [A63]. Third, Dr. Pfeiffer agreed that a disclaimer would accompany any

[19] The record does not indicate whether Dr. Pfeiffer's drafts of Volumes I, II, and III were ultimately approved by the Agency.

publication of the document. [A63]. The Agency has not reasserted these justifications in this litigation, and with good reason: The first has nothing to do with the Agency's purported reason for keeping Volume V confidential; the Inspector General Report has now been published; the Agency no longer claims that it intends to complete a Bay of Pigs history; and any release of Volume V could easily be accompanied by the same disclaimer used with Dr. Pfeiffer.

In sum, since Volumes IV and V were written concurrently, presented concurrently for review, and rejected concurrently, there is no reason to think—and the Agency provides none—that disclosure of Volume V will affect the deliberative process to any greater degree than disclosure of Volume IV did. *See id.* at 1071 ("Nothing in the index or Major Roomsburg's affidavits suggests that the withheld information is different in any relevant respect from that which has been released voluntarily."). Absent a reason in the record for treating Volumes IV and V differently, the Agency has not sustained its burden to provide "specific and detailed proof" that disclosing Volume V will undermine its deliberative process. *Mead Data*, 566 F.2d at 258; *see Army Times*, 998 F.2d at 1072 ("In order to succeed . . . , the Air Force must demonstrate, unlike the released poll results, the withheld poll results would actually inhibit candor in the

decision-making process if made available to the public.").

III. The District Court Erred by Failing to Rule on Segregability

Finally, even if the Agency properly invoked Exemption 5, the district court committed clear error by failing to address whether Volume V contains any releasable information. FOIA requires disclosure of non-exempt information that is "reasonably segregable" from exempt information, 5 U.S.C. § 552(b), and it puts the burden on the agency to "show[] that no such segregable information exists." *Army Times*, 998 F.2d at 1071. A district court has "an affirmative duty to consider the segregability issue *sua sponte*" and "clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability." *Morley*, 508 F.3d at 1123 (quotation marks, citation omitted). Here, the district court never conducted a segregability analysis, and at a minimum, "[t]he district court's failure to fulfill [its] responsibility requires a remand." *Id.*

Indeed, the district court's failure is especially glaring given the Agency's disclosure of Volume IV, which is identical in all relevant respects to Volume V. As explained above, both were originally chapters in the same draft volume addressing the government's investigations into the Bay of Pigs operation. A review of Volume IV, which has been posted on the

Agency's website (and is reproduced in a separate volume of the Appendix for the Court's convenience), reveals that it is predominantly a factual summary of the operations of the Taylor Committee: how and when the committee was constituted; who testified before the committee and what they said; what the committee reported and with whom the report was shared. *See, e.g.*, [A153-165] (Chapter 2: "Organization and Procedures of the Committee"); [A166-319] (Chapter 3: "Testimony of the Witnesses"); [A320-364] (Chapter 4: "The Taylor Committee Report"). The historical narrative is punctuated with editorial asides—for instance, a memorandum from presidential adviser McGeorge Bundy is described and then criticized as a "classic example of a rear guard action to protect a President's rear." [A209]. But the majority of Volume IV consists of precisely the sort of quintessentially factual material that FOIA was intended to make available.

The predominantly factual nature of Volume IV "strongly suggests that at least some of the information [in Volume V] is similar to that already released, and also non-exempt." *Army Times*, 998 F.2d at 1071-72; *see id.* at 1071 ("By releasing certain poll results and withholding others, the Air Force itself has demonstrated that all the surveys, taken together, are not worthy of a blanket claim of privilege under Exemption 5."). Certainly the

Agency has not carried its burden to show that Volume V "contain[s] no separable, factual information." *Mink*, 410 U.S. at 93.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Dated this 22nd day of January, 2013.

Respectfully submitted,

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ADDENDUM

TABLE OF CONTENTS

HISTORICAL AND REVISION NOTES—CONTINUED

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
(2)–(13)	5 U.S.C. 1001 (less (a)).	Mar. 30, 1948, ch. 161, § 301, 62 Stat. 99. June 11, 1946, ch. 324, § 2 (less (a)), 60 Stat. 237.

In paragraph (1), the sentence ''Nothing in this Act shall be construed to repeal delegations of authority as provided by law,'' is omitted as surplusage since there is nothing in the Act which could reasonably be so construed.

In paragraph (1)(G), the words ''or naval'' are omitted as included in ''military''.

In paragraph (1)(H), the words ''functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947'' are omitted as executed. Reference to the ''Selective Training and Service Act of 1940'' is omitted as that Act expired Mar. 31, 1947. Reference to the ''Sugar Control Extension Act of 1947'' is omitted as that Act expired on Mar. 31, 1948. References to the ''Housing and Rent Act of 1947, as amended'' and the ''Veterans' Emergency Housing Act of 1946'' have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by § 111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87–256, 75 Stat. 538, since § 111(c) of the Act provides that a reference in other Acts to a provision of law repealed by § 111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87–256.

In paragraph (2), the words ''of any character'' are omitted as surplusage.

In paragraph (3), the words ''and a person or agency admitted by an agency as a party for limited purposes'' are substituted for ''but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes''.

In paragraph (9), a comma is supplied between the words ''limitation'' and ''amendment'' to correct an editorial error of omission.

In paragraph (10)(C), the words ''of any form'' are omitted as surplusage.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CODIFICATION

Section 551 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2242 of Title 7, Agriculture.

AMENDMENTS

2011—Par. (1)(H). Pub. L. 111–350 struck out ''chapter 2 of title 41;'' after ''title 12;''.

1994—Par. (1)(H). Pub. L. 103–272 substituted ''subchapter II of chapter 471 of title 49; or sections'' for ''or sections 1622,''.

1976—Par. (14). Pub. L. 94–409 added par. (14).

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94–409, set out as an Effective Date note under section 552b of this title.

STUDY AND REPORTS ON ADMINISTRATIVE SUBPOENAS

Pub. L. 106–544, § 7, Dec. 19, 2000, 114 Stat. 2719, provided that:

''(a) STUDY ON USE OF ADMINISTRATIVE SUBPOENAS.—Not later than December 31, 2001, the Attorney General, in consultation with the Secretary of the Treasury, shall complete a study on the use of administrative subpoena power by executive branch agencies or entities and shall report the findings to the Committees on the Judiciary of the Senate and the House of Representatives. Such report shall include—

''(1) a description of the sources of administrative subpoena power and the scope of such subpoena power within executive branch agencies;

''(2) a description of applicable subpoena enforcement mechanisms;

''(3) a description of any notification provisions and any other provisions relating to safeguarding privacy interests;

''(4) a description of the standards governing the issuance of administrative subpoenas; and

''(5) recommendations from the Attorney General regarding necessary steps to ensure that administrative subpoena power is used and enforced consistently and fairly by executive branch agencies.

''(b) REPORT ON FREQUENCY OF USE OF ADMINISTRATIVE SUBPOENAS.—

''(1) IN GENERAL.—The Attorney General and the Secretary of the Treasury shall report in January of each year to the Committees on the Judiciary of the Senate and the House of Representatives on the number of administrative subpoenas issued by them under this section and the identity of the agency or component of the Department of Justice or the Department of the Treasury issuing the subpoena and imposing the charges.

''(2) EXPIRATION.—The reporting requirement of this subsection shall terminate in 3 years after the date of the enactment of this section [Dec. 19, 2000].''

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term ''search'' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term ''a representative of the news media'' means any person or entity that

gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98–620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of

the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, ''unusual circumstances'' means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for

records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term ''exceptional circumstances'' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term ''compelling need'' means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency—

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) ''agency'' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) ''record'' and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(*l*) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90–23, §1, June 5, 1967, 81 Stat. 54; Pub. L. 93–502, §§1–3, Nov. 21, 1974, 88 Stat. 1561–1564; Pub. L. 94–409, §5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95–454, title IX, §906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub. L. 98–620, title IV, §402(2), Nov. 8, 1984, 98 Stat. 3357; Pub. L. 99–570, title I, §§1802, 1803, Oct. 27, 1986, 100 Stat. 3207–48, 3207–49; Pub. L. 104–231, §§3–11, Oct. 2, 1996, 110 Stat. 3049–3054; Pub. L. 107–306, title III, §312, Nov. 27, 2002, 116 Stat. 2390; Pub. L. 110–175, §§3, 4(a), 5, 6(a)(1), (b)(1), 7(a), 8–10(a), 12, Dec. 31, 2007, 121 Stat. 2525–2530; Pub. L. 111–83, title V, §564(b), Oct. 28, 2009, 123 Stat. 2184.)

HISTORICAL AND REVISION NOTES

1966 ACT

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1002.	June 11, 1946, ch. 324, §3, 60 Stat. 238.

In subsection (b)(3), the words ''formulated and'' are omitted as surplusage. In the last sentence of subsection (b), the words ''in any manner'' are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1967 ACT

Section 1 [of Pub. L. 90–23] amends section 552 of title 5, United States Code, to reflect Public Law 89–487.

In subsection (a)(1)(A), the words ''employees (and in the case of a uniformed service, the member)'' are substituted for ''officer'' to retain the coverage of Public Law 89–487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In the last sentence of subsection (a)(2), the words ''A final order * * * may be relied on * * * only if'' are substituted for ''No final order * * * may be relied upon * * * unless''; and the words ''a party other than an agency'' and ''the party'' are substituted for ''a private party'' and ''the private party'', respectively, on authority of the definition of ''private party'' in 5 App. U.S.C. 1002(g).

In subsection (a)(3), the words ''the responsible employee, and in the case of a uniformed service, the responsible member'' are substituted for ''the responsible officers'' to retain the coverage of Public Law 89–487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In subsection (a)(4), the words ''shall maintain and make available for public inspection a record'' are substituted for ''shall keep a record * * * and that record shall be available for public inspection''.

In subsection (b)(5) and (7), the words ''a party other than an agency'' are substituted for ''a private party'' on authority of the definition of ''private party'' in 5 App. U.S.C. 1002(g).

In subsection (c), the words ''This section does not authorize'' and ''This section is not authority'' are substituted for ''Nothing in this section authorizes'' and ''nor shall this section be authority'', respectively.

5 App. U.S.C. 1002(g), defining ''private party'' to mean a party other than an agency, is omitted since the words ''party other than an agency'' are substituted for the words ''private party'' wherever they appear in revised 5 U.S.C. 552.

5 App. U.S.C. 1002(h), prescribing the effective date, is omitted as unnecessary. That effective date is prescribed by section 4 of this bill.

REFERENCES IN TEXT

The date of enactment of the OPEN FOIA Act of 2009, referred to in subsec. (b)(3)(B), is the date of enactment of Pub. L. 111–83, which was approved Oct. 28, 2009.

CODIFICATION

Section 552 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2243 of Title 7, Agriculture.

AMENDMENTS

2009—Subsec. (b)(3). Pub. L. 111–83 added par. (3) and struck out former par. (3), which read as follows: ''spe-

FINAL REPORT

OF THE

NATIONAL STUDY COMMISSION ON RECORDS AND DOCUMENTS OF FEDERAL OFFICIALS

March 31, 1977

useful space. The Commission, therefore, concludes that disposition of these materials, in accordance with accepted archival standards, is appropriate.

The Commission is of the opinion that disposition of materials of no continuing value should be through a disposition schedule, approved by the Archivist, with at least sixty days notice given to the public and to Congress. This requirement of prior notice is in keeping with the fact that these materials are publicly owned, and that Congress has the final constitutional authority to dispose of property of the United States.

Recommendation 5:
At the conclusion of a President's term of office, he should transfer to the custody of the Archivist of the United States the Presidential Public Papers of his term. The Archivist should deposit these materials in an archival facility he operates and should be responsible for their custody and preservation. The Archivist should have authority to dispose of material which he finds lacks sufficient value to warrant permanent preservation by the Federal Government. A disposition schedule (including a description of such material) shall be published in the Federal Register *and notice provided to Congress at least sixty days in advance of any proposed disposition.*

Comment: Immediate transfer of Presidential Public Papers to the National Archives ensures unbroken Federal custody of them, and safeguards against the possibility of alienation or destruction of materials determined to be of enduring value. As in Recommendation 4, the Commission urges that provision be made for the disposal of materials which lack sufficient value to warrant permanent preservation. Provision for notice to the public and to Congress at least sixty days prior to any proposed disposal is included here for the reasons noted in the Comment for Recommendation 4.

Recommendation 6:
Because of the President's constitutional position, and his interest in the Presidential Public Papers accumulated during his term of office, and to encourage the President and his staff to maintain a candid historical record, the President or his designee, or in the absence of a designee, the incumbent President, should be empowered to place restrictions on the use of Presidential Public Papers for up to fifteen years after the conclusion of his term of office. However, upon written request to the former President from the Counsel to the President, succeeding administrations shall have access to those documents not otherwise available and that are required for the conduct of current official business of the Office of the President.

Comment: As a result of its study, the Commission has decided that it is essential to give the President an interval of control over his Public Papers in order to guarantee that he receives full and frank advice and to encourage him and his colleagues to create and preserve an adequate record of their activities and deliberations. That is, the Commission believes that to deprive the President of any ability to restrict access for a limited time will have a "chilling" effect both upon the quality of advice received by a President and upon the production of a full documentary record of his Administration.

In the Commission's view, there is a strong public interest in protecting the integrity of the Presidential decision-making process. When the President acts or speaks, he is seen as the symbol of the United States; the entire nation is his constituency. He is the preeminent focal point of the Government. Insofar as the fear of possible premature disclosure of Presidential Public Papers causes an aide or advisor to be less than fully candid in his communications with the President, it is to the detriment of both the President's ability to make fully informed decisions, and the completeness of an accurate documentary record. This fear, which is widely held among current and recent office holders and Presidential advisors, can, in the opinion of the Commission, best be neutralized by designating a specific closure period and thus providing predictable access.

At the same time the Commission also recognizes the public right, and need, to have access to Presidential Public Papers within a reasonable period of time. They are created in the course of doing the public's business, and, by the Commission's recommendations would be the property of the public. The Commission feels that the "chilling effect", on the one hand and the rights of citizens on the other, can be balanced by limiting to a maximum of fifteen years the period during which a President may restrict his Public Papers.

Since, according to the Commission's recommendations, Presidential Public Papers would be the property of the United States, the ultimate authority to regulate access to them would remain

with the Congress. The recommendation that incumbent Presidents have reasonable access to Presidential Public Papers for the conduct of ongoing business is based upon recent experience which shows that, on occasion, Presidents have required access to records of their predecessors that are less than fifteen years old. The Commission believes that the current needs of Government should take precedence over all other considerations in matters that relate to access to materials which are public property. If recent history is any guide to the future, it is not likely that this need will arise with great frequency. Thus, it is improbable that providing this right to incumbent administrations will have the "chilling effect" that would result were this right extended to the general public.

While it is intended that the President should have great latitude in imposing restrictions on access to material during the fifteen-year period of closure, he should also be encouraged to make materials available as quickly as possible, as have all recent Presidents. To this end, the Archivist should draft a model statement of guidelines that will aid the President in declaring his intentions.

Recommendation 7:
Materials defined as Presidential Public Papers are now outside the provisions of the Freedom of Information and Privacy Acts, and they should continue to be so. At the expiration of the fifteen-year restriction period, Presidential Public Papers shall be generally accessible subject only to such restrictions as are necessary in the interest of national security or to protect against a clearly unwarranted invasion of privacy. Judicial review should be available to persons denied access after the fifteen-year period.

Comment: The reasons in support of a closure period, not to exceed fifteen years, during which a President may restrict access to Presidential Public Papers were stated in the Comment for Recommendation 6, above.

The extension of the Freedom of Information and Privacy Acts to cover Presidential Public Papers would inject an element of uncertainty into all confidential communications and result in a significant change in the adminstrative operation of the White House and in the quality of the advice and counsel given to the President. It would appear that the exemptions from disclosure requirements contained in the Acts, for example those exempting state secrets (Exemption 1) and inter-agency or intra-agency memoranda (Exemption 5), plus claims of executive privilege, would prevent the release of most significant documentary material. However, the prospect of having to claim and defend exemptions on an item-by-item basis would in itself result in the kind of "chilling effect" discussed above. The Commission concluded that for those Presidential Public Papers not otherwise available, either through the termination of restrictions, or by Freedom of Information and Privacy Act requests to the various Federal agencies, the balance of interests weighs in a favor of the limited closure period.

At the conclusion of the closure period the Commission recommends that there should be public access to materials not yet released. This access should be subject only to restrictions necessary in the interests of national security, or to protect against disclosure which would constitute a clearly unwarranted invasion of privacy. Judicial review should be available if access is denied. The Commission wishes to emphasize the desirability of a legal right to access by publicly known standards, with judicial review available, to minimize the possibilities for arbitrary denials.

C. PERSONAL PAPERS

Recommendation 8:
The personal papers of the President should consist of all papers and other materials of a purely private or non-official character, including records relating to personal participation in party politics, that were neither received nor created in the course of conducting the constitutional or statutory duties of the Presidency. Personal papers of the President should be considered the President's private property and the President should be responsible for their control and disposition. However, because these materials will be of great value to those studying a President and his times, Presidents should be encouraged to make arrangements that will assure the preservation and availability of their personal papers.

Comment: It is the opinion of the Commission that every citizen, even that most public of figures, the President, is entitled to a sphere of personal privacy. Private, non-official materials should be outside the scope of any records management legislation. Because of their great historical value, every encouragement should be offered to the President to

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in proportionally spaced font typeface using Microsoft Word 2010 in 14-point Times New Roman font. The brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 9,850 words as counted by Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also hereby certify that I will have eight copies hand-delivered or sent via Federal Express overnight delivery to the Court within two business days.

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