

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AMERICAN CIVIL LIBERTIES	)	
UNION, <i>et al.</i> ,	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
v.	)	<b>Civil Action No. 10-123 (RMC)</b>
	)	
DEPARTMENT OF JUSTICE,	)	
	)	
<b>Defendant.</b>	)	
_____	)	

MEMORANDUM OPINION

Plaintiffs, American Civil Liberties Union and American Civil Liberties Union Foundation, filed this lawsuit against Defendant Department of Justice (“DOJ”), seeking “the immediate processing and release of agency records requested by Plaintiffs . . . from Defendant . . .,” Compl. [Dkt. #1] ¶ 1, under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Specifically, Plaintiffs seek a DOJ Office of Professional Responsibility report “concerning the role that certain Office of Legal Counsel (“OLC”) attorneys played in crafting and authorizing the Bush administration’s interrogation policies.” Compl. ¶ 2. Subsequent to the filing of this lawsuit, that report, titled “Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of ‘Enhanced Interrogation Techniques’ on Suspected Terrorists” (“Report”), was made available, in a redacted form. Plaintiffs now seek a substantially less redacted Report. Defendant moves for summary judgment, arguing that all of the redactions it has made are pursuant to proper exemptions under FOIA. Plaintiffs likewise move for partial summary judgment, arguing that Defendant has improperly invoked certain exemptions under FOIA to keep certain specified portions of the Report redacted, and accordingly those sections must be disclosed.

The Court will grant Defendant's motion for summary judgment, as Defendant has fully evaluated the Report, segregated what it could, and made redactions according to specific allowable exemptions under FOIA.

### I. FACTS

On December 4, 2009, Plaintiffs formally requested release under FOIA of a report by the DOJ's Office of Professional Responsibility on whether government attorneys in the DOJ's Office of Legal Counsel "breached professional or ethical obligations in authorizing the use of" enhanced interrogation techniques. Pls.' Mem. in Support of Pls.' Cross Mot. for Partial Summ. J. ("Pls.' Mem.") [Dkt. # 8] at 1. The information within the Report relates:

to how the CIA developed and conducted its counter-terrorism operations against al-Qa'ida and affiliated groups in the wake of September 11th. Among these counter-terrorism operations included the now discontinued CIA program designed to capture, detain, and interrogate terrorists ("detention and interrogation program" or "program"). The highly sensitive information in the OPR Report details how the CIA developed the detention and interrogation program; deliberated with various elements of the United States Government ("USG") regarding the creation and operation of the program; targeted, detained, and interrogated terrorists; worked with its foreign liaison partners; and developed intelligence to protect the United States from additional terrorist attacks.

*See* Def.'s Mem. in Support of DOJ's Mot. for Summ. J. ("Def.'s Mem.") [Dkt. # 7-1], Ex. 3 ("Payne Decl.") ¶ 11.

On January 22, 2010, Plaintiffs "filed this lawsuit to enforce their request and to compel release of the Report . . . ." Pls.' Mem. at 4. On February 19, 2010, "the DOJ provided a redacted copy of the Report to the U.S. House of Representatives Committee on the Judiciary, which posted the Report on its website." *Id.* The Report having been released, Plaintiffs then converted their FOIA

request from one seeking release of the Report itself, to one seeking release of certain redacted information within the Report. Def.'s Mem. at 4. By Order dated March 17, 2010, the Court required Defendant to provide Plaintiff with a preliminary *Vaughn* Index<sup>1</sup> that identified 153 redacted areas throughout the Report. *Id.* Defendant did so, and described every redaction using one or more of eleven different categories of reasoning to support each of the 153 redactions. Pls.' Mem. at 5.

Plaintiffs now limit their request to the disclosure of certain materials redacted under exemptions (b)(1), (3), (5) and (6) of FOIA. *See* 5 U.S.C. 552(b)(1), (3), (5), and (6). Of those materials redacted pursuant to exemptions (b)(1) and (3), Plaintiffs seek the disclosure of any "information concerning classified intelligence sources and methods and the functions of CIA personnel," specifically (1) the "actual and potential implementation" of "enhanced interrogation techniques," including "conditions of confinement" that functioned as part of the "enhanced interrogation techniques;" (2) the names of the detainees; and (3) the name of one interrogation technique that the CIA considered using ("mock burial"), which was declassified on page 174 of the December 22, 2008 draft of the Report. Pls.' Mem. at 7. Of those materials redacted pursuant to exemption (b)(5), Plaintiffs seek the disclosure of any: (1) "[i]nformation concerning inter- and/or intra-agency predecisional deliberations related to the CIA detention and interrogation program including preliminary evaluations, opinions, and recommendations related thereto; (2) "[i]nformation concerning confidential communications between attorneys and clients in connection with the provision of legal advice related to the CIA detention and interrogation program;" (3) "[i]nformation concerning legal analysis, opinion, and/or other information related to the CIA detention and

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<sup>1</sup> *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Defendants provided Plaintiffs with an index that, with respect to each redaction or category of redactions, described the redacted material and indicated the FOIA exemption relied upon to justify the redaction.

interrogation program that was prepared by counsel in anticipation of criminal, civil, and administrative proceedings related to the program;” and (4) “[i]nformation concerning communications involving information or recommendations authored or solicited and received by the senior members of the President’s national security team in connection with presidential decisionmaking on national security policy.” *Id.* at 7–8. Lastly, of the materials redacted pursuant to exemption (b)(6), “information concerning the identity of certain DOJ personnel,” Plaintiffs seek the disclosure of the name of DOJ attorney Jennifer Koester whenever redacted. *Id.* at 8.

In support of Defendant’s motion for summary judgment, and ultimately in support of its decision to redact portions of the Report, Defendant submits Declarations of Jan M. Payne, Associate Information Review Officer for the Central Intelligence Agency, and David Margolis, Associate Deputy Attorney General for the Department of Justice. Def.’s Mem., Exs. 3 & 4 (“Payne Decl.” and “Margolis Decl.”).

## II. LEGAL STANDARDS

### A. Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment must be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Moreover, summary judgment is properly granted against a party who “after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In ruling on a motion

for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. FOIA cases are typically and appropriately decided on motions for summary judgment. *Rushford v. Civiletti*, 485 F. Supp. 477, 481 n.13 (D.D.C. 1980).

## **B. FOIA**

FOIA "calls for broad disclosure of Government records." *C.I.A. v. Sims*, 471 U.S. 159, 166 (1985). However, Congress has recognized that "public disclosure is not always in the public interest," *id.* at 167, as "legitimate governmental and private interests could be harmed by release of certain types of information . . . ." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). Recognizing this, Congress provided "nine specific exemptions under which disclosure could be refused." *Id.*; see 5 U.S.C. § 552(b). Because the mandate of FOIA calls for broad disclosure of Government records, these FOIA exemptions are narrowly construed. See *U. S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988).

When an agency refuses to disclose requested records, it bears the burden to prove the applicability of its claimed exemptions. See 5 U.S.C. § 552(a)(4)(B). "An agency that has withheld responsive documents pursuant to a FOIA exemption can carry its burden to prove the applicability of the claimed exemption by affidavit . . . ." *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). These affidavits or declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Services v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal citation and quotation omitted). "Summary judgment is warranted on the basis of agency affidavits when the affidavits

describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.” *Larson*, 565 F.3d at 862. “Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears ‘logical’ or ‘plausible.’” *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007) (quoting *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982), and *Hayden v. NSA*, 608 F.2d 1381, 1388 (D.C. Cir. 1979)).

### **C. Segregability**

FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.” 5 U.S.C. § 552(b). The D.C. Circuit has long recognized, however, that documents may be withheld in their entirety when nonexempt portions “are inextricably intertwined with exempt portions.” *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir.1977). A court may also rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated for this reason. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578 (D.C. Cir.1996).

## **III. ANALYSIS**

### **A. Exemptions (b)(1) and (3)**

FOIA provides an exemption from disclosure of materials when those materials are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). In this case, Defendant relies upon Executive Order 13526, “Classified National Security Information,” which states information may be classified if: (1) an original

classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the United States Government (“USG”); (3) the information falls within one or more of the categories of information listed in 1.4 of E.O. 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage. *See* 75 Fed. Reg. 707, 707 (Dec. 29, 2009) (“E.O. 13526”).

All of these conditions have been satisfied, as declared by the Associate Information Review Officer for the Central Intelligence Agency, Jan. M. Payne. *See* Payne Decl. ¶¶ 12–35. Review Officer Payne has original classification authority and has determined the “information is properly classified as TOP SECRET and/or SECRET,” thus satisfying condition (1). *See id.* ¶¶ 14–15. The information identified is “owned by, produced by or for, or is under the control” of the Defendant, thus satisfying condition (2). *See id.* ¶ 16 (“With respect to the information relating to CIA intelligence activities, sources, methods, and foreign relations and foreign activities . . . for which FOIA exemption (b)(1) is asserted in this case, that information is owned by the USG, was produced by the USG, and is under the control of the USG.”). The information falls within one or more of the categories of information listed in section 1.4 of E.O. 13526, which includes “intelligence activities,” “intelligence sources or methods,” and “foreign relations or foreign activities of the United States,” *see* E.O. 13526 § 1.4 (c) & (d), thus satisfying condition (3). *See* Payne Decl. ¶ 17 (“With respect to the CIA information for which FOIA Exemption (b)(1) is asserted in this case, that information falls within the following classification categories in the Executive Order: ‘information . . . concern[ing] . . . intelligence activities . . . [and] intelligence sources or methods’ [] and ‘foreign relations or foreign

activities of the United States.” (citing E.O. 13526 § 1.4 (c))). Lastly, the original classification authority, Review Officer Payne, determined that the unauthorized disclosure of the information “reasonably could be expected to result in damage to the national security,” thus satisfying condition (4). *See id.* ¶ 19. And given the specialized nature of such sensitive and privileged information, courts give great deference to such a determination by agency officials. *See Ctr. for Nat’l Sec. Studies v. United States DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003) (“[I]n the FOIA context, we have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review.”).

FOIA also provides a similar exemption from disclosure of materials when those materials are:

specifically exempted from disclosure by statute (other than section 552b of this title [5 U.S.C. § 552b]), if that statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld; and if enacted after the date of enactment of the OPEN FOIA Act of 2009 [enacted Oct. 28, 2009], specifically cites to this paragraph.

5 U.S.C. § 552(b)(3). Under exemption (b)(3), “the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute’s coverage.” *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978). Again, great deference is paid to the agency and its declarations in determining whether withheld material falls within the statute’s coverage. *See Fitzgibbon v. CIA*, 911 F.2d 755, 762 (D.C. Cir. 1990).

Defendant relies upon the National Security Act of 1947, 50 U.S.C. § 403-1, and the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403(g), as two statutes that specifically exempt from disclosure the classified information in the Report. The former requires the Director of National

Intelligence to “protect intelligence sources and methods from unauthorized disclosure,” 50 U.S.C. § 403-1(i)(1), and has previously been recognized as a legitimate source for an exemption under 5 U.S.C. § 552(b)(3). *See Larson*, 565 F.3d at 865. The latter provides that:

[i]n the interests of the security of the foreign intelligence activities of the United States and in order further to implement section 102A(i) of the National Security Act of 1947, that the Director of National Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from . . . the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.

50 U.S.C. § 403(g). Defendant argues that the “information withheld from the Report falls squarely within the collection function” of the CIA, including “details of functions of CIA personnel engaged in counter-terrorism operations.” Def.’s Mem. 16 (citing Payne Decl. ¶ 29).

Rather than arguing that exemptions (b)(1) and (3) are inapplicable under the Executive Order or the proffered statutes, Plaintiffs argue that the substance of the redactions: (1) the names of the detainees; and (2) the “actual and potential implementation” of “enhanced interrogation techniques,” including “conditions of confinement” that functioned as part of the “enhanced interrogation techniques,” are unlawful, and therefore fall outside the protection of “intelligence sources and methods” granted by those exemptions. Pls.’ Mem. at 11–24. But, as recently stated by the D.C. Circuit, the illegality of information is immaterial to the classification of such information under exemptions (b)(1) and (3) as intelligent sources or methods. *See ACLU v. United States DOD*, Civ. No. 09-5386, 2011 U.S. App. LEXIS 1271, \*19 (D.C. Cir. Jan. 18, 2011) (“To the extent that the ACLU’s claim rests on the ACLU’s belief that the enhanced interrogation techniques were illegal, there is no legal support for the conclusion that illegal activities cannot produce classified documents. In

fact, history teaches the opposite.”); *see also* *ACLU v. Dep't of Def.*, 723 F. Supp. 2d 621, 628–29 (S.D.N.Y. 2010) (finding that “to limit Exemption 3 to ‘lawful’ intelligence sources and methods, finds no basis in the statute” and that “[d]eclining to reach the legality of the underlying conduct is not . . . an abdication of . . . the Court’s responsibility . . . under the statutory structure[; i]t is the result commanded by the statute”); *see also* *Agee v. C.I.A.*, 524 F. Supp. 1290, 1292 (D.D.C. 1981) (“While some of the documents shed light on the legality or illegality of CIA's conduct, the (b)(1) or (b)(3) claims are not pretextual. Any possibility of illegal conduct on the part of the CIA does not defeat the validity of the exemptions claimed.”). Stated simply, Defendant has appropriately and logically detailed its rationales for redaction under exemptions (b)(1) and (3) for the “actual and potential implementation” of “enhanced interrogation techniques,” including “conditions of confinement” that functioned as part of the “enhanced interrogation techniques,” and the names of the detainees.

Plaintiffs next argue that the name of the interrogation technique that the CIA considered using, *i.e.* “mock burial,” has already been unclassified and thus should be disclosed. It is true that when the government has officially acknowledged information, a FOIA plaintiff may compel disclosure of that information even over an agency’s otherwise valid exemption claim. *See Wolf*, 473 F.3d at 378; *Fitzgibbon*, 911 F.2d at 765. For information to qualify as “officially acknowledged,” however, it must satisfy three criteria: (1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure. *Id.* After reviewing additional information *in camera*, the Court finds that the redacted information does not match the very broad information previously disclosed. Due to the specificity and context of the redacted information, coupled with the agency affidavit that

affirmatively states that: “notwithstanding these prior disclosures (which I took into account when reviewing the Report), many details of the detention and interrogation program and the intelligence activities undertaken in support of it remain classified,” Payne Decl. ¶ 28, the Court is satisfied that this redacted information has not been already “officially acknowledged,” and thus is appropriately redacted pursuant to exemptions (b)(1) and (3) as “intelligent sources or methods.”

Therefore, the classified information withheld pursuant to Executive Order 13526, and the National Security Act of 1947 and the Central Intelligence Agency Act of 1949, are properly withheld under 5 U.S.C. § 552(b)(1) and (3).<sup>2</sup>

### **B. Exemption 5**

FOIA provides another exemption from disclosure of materials involving “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). “Exemption [(b)(5)] incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant.” *Baker & Hostetler LLP v. United States DOC*, 473 F.3d 312, 321 (D.C. Cir. 2006). This includes the deliberative process privilege, the attorney-client privilege, the attorney work product privilege, and the presidential communications privilege. *Id.*; *see also Loving v. DOD*, 550 F.3d 32, 37 (D.C. Cir. 2008).

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<sup>2</sup> Attached to the Payne Declaration is a chart (“Exhibit A”) that identifies which exemptions have been invoked for which redactions. The redactions identified on Exhibit A for which “(b)(1)” is listed are Item Nos. 2, 12, 13, 15, 16, 17, 18, 20, 24, 29, 35, 38, 39, 46, 49, 50, 51, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 77, 78, 85, 86, 91, 93, 95, 96, 99, 100, 102, 103, 104, 106, 107, 108, 109, 111, 112, 113, 114, 118, 123, 133, 135, 137, 138, 141, 142, 143, 144, 146, and 147. Exemption (b)(3) contains the same Item Nos. that were withheld under exemption (b)(1), but also include Item Nos. 41, 42, 43, 53, 56, 57, 75, 79, 80, 82, 110, 116, and 140. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(1) and/or (3).

Of the materials redacted under exemption (b)(5), Plaintiffs seek the disclosure of what has been characterized by Defendant as: (1) “[i]nformation concerning inter- and/or intra-agency predecisional deliberations related to the CIA detention and interrogation program including preliminary evaluations, opinions, and recommendations related thereto,” *i.e.* deliberative process privilege material; (2) “[i]nformation concerning confidential communications between attorneys and clients in connection with the provision of legal advice related to the CIA detention and interrogation program,” *i.e.* attorney-client privilege material; (3) “[i]nformation concerning legal analysis, opinion, and/or other information related to the CIA detention and interrogation program that was prepared by counsel in anticipation of criminal, civil, and administrative proceedings related to the program,” *i.e.* attorney work-product privilege material; and (4) “[i]nformation concerning communications involving information or recommendations authored or solicited and received by the senior members of the President’s national security team in connection with presidential decisionmaking on national security policy,” *i.e.* presidential communications privilege material. Pls.’ Mem. at 7–8.

### **1. Deliberative-process privilege**

“The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the ‘quality of agency decisions,’ by protecting open and frank discussion among those who make them within the Government.” *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975)). The deliberative process privilege “‘protects the decisionmaking processes of government agencies’ and ‘encourages the frank discussion of legal and policy issues’ by ensuring that agencies are not ‘forced to operate in a fishbowl.’” *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537 (D.C. Cir.

1993) (quoting *Wolfe v. Dep't of Health and Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988)).

To qualify for withholding under the deliberative process privilege, the redacted material must be both predecisional and deliberative. *See Wolfe*, 839 F.2d at 774.

A document is predecisional if it was prepared in order to assist an agency decisionmaker in arriving at his decision, rather than to support a decision already made. Material is deliberative if it reflects the give-and-take of the consultative process. [The D.C. Circuit's] recent decisions on the deliberativeness inquiry have focused on whether disclosure of the requested material would tend to discourage candid discussion within an agency.

*Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (citations and internal quotation marks omitted). This exemption “covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). However, predecisional and deliberative material can lose this protected status if the policy is officially adopted, formally or informally. *See id.* Further, “the privilege applies only to the ‘opinion’ or ‘recommendatory’ portion of the report, not to factual information which is contained in the document.” *Id.* at 867. Thus, all factual matters that can be segregated from the deliberative process should be disclosed. *See Ryan v. Dep't of Justice*, 617 F.2d 781, 791 (D.C. Cir. 1980) (requiring disclosure of facts only if they “do not reveal the deliberative process and are not intertwined with the policy-making process”)

Plaintiff objects to the redactions under exemption (b)(5) here because it claims that (1) Defendant has redacted purely factual matter, as opposed to the opinion portion of the Report; and (2) “it is likely that much of what the government has withheld as predecisional is either post-decisional or adopted as agency policy.” Pls.’ Mem. at 27–28. Based upon this speculation, Plaintiffs

request *in camera* review of the materials.

In this Circuit, “when the agency meets its burden by means of affidavits, *in camera* review is neither necessary nor appropriate.” *Hayden*, 608 F.2d at 1387. “If the agency’s affidavits ‘provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents.’” *Larson*, 565 F.3d at 870 (quoting *Hayden*, 608 F.2d at 1387). Plaintiffs’ speculation does not override Defendant’s uncontradicted and sufficiently detailed declaration, which explains:

[t]he information that was redacted from the OPR Report on deliberative process grounds includes pre-decisional discussions among Executive Branch officials regarding possible approaches to take with respect to these outstanding legal and policy issues; candid internal discussions and exchanges of opinion among CIA staff regarding these issues; and recommendations for actions to policymakers from staff members.

Payne Decl. ¶ 42. A declaration is entitled to a presumption of good faith, which can only be rebutted by evidence of bad-faith and not by purely speculative claims. *See SafeCard Services*, 926 F.2d at 1200. Here, Defendant conducted a “a line-by-line review of the OPR Report to identify and release all reasonably segregable, nonexempt portions from it,” Payne Decl. ¶ 53, and voluntarily disclosed additional material that was previously redacted on seven pages. Def.’s Mem. at 5. Because the declaration sufficiently details its rationale for redaction, the Court finds that Defendant has satisfied its burden as to its redactions pursuant to the deliberative process privilege under exemption (b)(5).<sup>3</sup>

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<sup>3</sup> The redactions identified on Exhibit A for which “(b)(5)” is listed pursuant to the deliberative process privilege are Item Nos. 14, 16, 18, 20, 24, 29, 35, 38, 39, 42, 46, 49, 50, 57, 61, 64, 65, 66, 70, 73, 75, 76, 77, 78, 80, 82, 86, 91, 93, 95, 96, 100, 102, 103, 106, 107, 110, 111, 112, 113, 114, 116, 123, 134, 135, 137, 138, 140, 141, 143, 144, 146, and 147. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(5). All of these redactions were also

## 2. Attorney-Client/Attorney Work Product Privilege

The attorney-client privilege exists “to assure that a client’s confidences to his or her attorney will be protected, and therefore encourage clients to be as open and honest as possible with attorneys.” *Coastal States Gas Corp.*, 617 F.2d at 862. “The privilege is not limited to communications made in the context of litigation or even a specific dispute, but extends to all situations in which an attorney’s counsel is sought on a legal matter.” *Id.* The attorney work-product privilege “provides a working attorney with a ‘zone of privacy’ within which to think, plan, weigh facts and evidence, candidly evaluate a client’s case, and prepare legal theories.” *Id.* at 864. But unlike the attorney-client privilege, the attorney work product is “limited to documents prepared in contemplation of litigation.” *Id.*

Plaintiffs argue that the government fails to justify its withholding based upon these privileges because: (1) “many of the portions of the Report withheld under Exemption 5 appear to contain information that is segregable, purely factual, or adopted or incorporated as policy or into practice, and may not, therefore be withheld;” and (2) the Government has failed to show that the Report was prepared “in anticipation of litigation.” Pls.’ Mem. at 29. The key word in the former argument is “appear,” evincing the speculative nature of the Plaintiffs’ assertion.

The Court notes again that a declaration is entitled to a presumption of good faith, which can only be rebutted by evidence of bad-faith and not by purely speculative claims. *See SafeCard Services*, 926 F.2d at 1200. Review Officer Payne declares, contrary to Plaintiffs claims, that she:

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redacted under exemption (b)(1) and (3), with the lone exceptions of 14, 76, and 134. Item Nos. 14, 76, and 147 are also properly redacted under the attorney client privilege, *see* fn. 4 *infra*, and the attorney work product privilege, *see* fn. 5 *infra*.

conducted a line-by-line review of the OPR Report to identify and release all reasonably segregable, nonexempt portions from it. Based on this review, I have determined that the information released to the Plaintiffs has been released in segregable form while the remaining information is exempt from disclosure under the FOIA exemptions described above.

Payne Decl. ¶ 53. Without evidence of Defendant's bad-faith or contradictory evidence, Plaintiffs' speculative argument fails, and the Court shall credit the declaration of Review Officer Payne with the good faith presumption due to it.

In making its argument that the document was not created "in anticipation of litigation," which would only apply to the attorney work-product privilege, Plaintiffs admit "all of the OLC memos, which were the product of legal advice sought by the CIA, confirm that the purpose of the CIA's requests was to assure compliance with the law, not to prepare for litigation." *Id.* at 30. In doing so, Plaintiffs concede that the OLC memo is attorney-client privileged material because it is a "situation[] in which an attorney's counsel is sought on a legal matter." *Coastal States Gas Corp.*, 617 F.2d at 862. This is further cemented by the declaration of Review Officer Payne, which, again, is accorded a presumption of good faith:

The redactions identified on the attached chart for which the CIA has asserted the attorney-client privilege contain confidential communications between CIA staff and the CIA's legal advisors (including both attorneys within the CIA's Office of General Counsel and attorneys from the Department of Justice, acting in their capacity as legal advisors to the CIA), as well as communications among the CIA's legal advisors that reflect information provided by their client.

Payne Decl. ¶ 45. As such, Defendant has sufficiently stated its case supporting its withholding of information under the attorney-client privilege.<sup>4</sup>

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<sup>4</sup> The redactions identified on Exhibit A for which "(b)(5)" is listed pursuant to the attorney-client privilege are Item Nos. 14, 16, 18, 24, 29, 35, 38, 39, 42, 49, 57, 75, 76, 77, 78,

Regarding the attorney work-product privilege, Defendant, recognizing that the attorney work-product doctrine is only for the “anticipation of criminal, civil, or administrative proceedings,” *id.* at ¶ 46, declared that “[t]he CIA’s purpose in requesting advice from the Justice Department was the prospect of criminal, civil, or administrative litigation related to the program.” *Id.* at ¶ 47. Again, without evidence of bad-faith or contrary evidence, *see SafeCard Services*, 926 F.2d at 1200, the Court will credit the declaration and will find that it has sufficiently stated its case supporting its withholding of information under the attorney work-product privilege.<sup>5</sup>

### 3. Presidential communications privilege

The presidential communications privilege is a recognized privilege based on the necessity of candor from presidential advisers and to provide “[a] President and those who assist him . . . [with] freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.” *United States v. Nixon*, 418 U.S. 683, 708 (1974). This privilege extends to communications authored or received in response to a solicitation by members of a presidential adviser’s staff, since in many instances advisers must rely

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80, 86, 91, 93, 95, 96, 100, 103, 106, 112, 116, 118, 123, 134, 135, 137, 138, 140, 141, 143, 144, 146, and 147. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(5). All of these redactions were also properly redacted under exemption (b)(1) and (3), with the lone exceptions of Item Nos. 14, 76, and 134. Item Nos. 14, 76, and 147 are also properly redacted under the deliberative processing privilege, *see* fn. 3 *supra*, and the attorney work product privilege, *see* fn. 5 *infra*.

<sup>5</sup> The redactions identified on Exhibit A for which “(b)(5)” is listed pursuant to the attorney work product privilege are Item Nos. 14, 16, 18, 24, 29, 35, 38, 39, 42, 49, 57, 75, 76, 77, 78, 80, 86, 91, 93, 95, 96, 100, 103, 106, 112, 116, 118, 123, 134, 135, 137, 138, 140, 141, 143, 144, 146, and 147. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(5). All of these redactions were also properly redacted under exemption (b)(1) and (3), with the lone exceptions of Item Nos. 14, 76, and 134. Item Nos. 14, 76, and 147 are also properly redacted under the deliberative processing privilege, *see* fn. 3 *supra*, and the attorney client privilege, *see* fn. 4 *supra*.

on their staff to investigate an issue and formulate the advice to be given to the President. *See In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir.1997).

Plaintiffs argue that the presidential communications privilege “is not applicable in this instance because there is no evidence that the withheld material was related to the presidential decisionmaking process.” Pls.’ Mem. at 31. This is not so. Despite Plaintiffs’ protests otherwise, Review Officer Payne’s declaration is sufficient evidence that the withheld material was related to the presidential decisionmaking process:

The passages over which the presidential communications privilege is being asserted contain information reflecting communications between senior presidential advisors and officials from the CIA and the Department of Justice. They describe meetings convened or attended by senior members of the President's national security team and briefings provided to them by Executive Branch officials; they also reflect opinions voiced or questions posed by these same senior presidential advisors. This withheld information memorializes communications between Executive Branch officials and senior presidential advisors, and among senior presidential advisors, that related to advice on presidential decision-making.

Payne Decl. ¶ 51. Absent a showing of bad faith or contradictory evidence, *see SafeCard Services*, 926 F.2d at 1200, the Court will again credit this declaration in regard to this asserted privilege.

Plaintiffs argue alternatively that, even if the privilege is applicable, it can be overcome by a showing of compelling need, *see Judicial Watch v. DOJ*, 365 F.3d 1108, 1114 (D.C. Cir. 2004), which they argue is the “public’s interest in disclosure of the discussions that resulted in the authorization of harsh and unlawful interrogation techniques.” Pls.’ Mem. at 32. While the Court recognizes the public’s interest, this interest does not overcome the need for frank discussions on serious issues that confront a President. Without a free and candid dialectic, the President cannot be properly armed with the tools required to make difficult decisions on consequential issues. Because

the declaration sufficiently details its rationale for redaction, and because the public's interest does not overcome the privilege in this case, the Court finds that Defendant has satisfied its burden as to the limited redactions withheld pursuant to the presidential communications privilege.<sup>6</sup>

### C. Exemption 6

FOIA provides an exemption from disclosure of materials involving personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552(b)(6). Under exemption (b)(6), the “presumption in favor of disclosure is as strong as can be found anywhere in the Act.” *Washington Post Co. v. United States Dep't of Health & Human Services*, 690 F.2d 252, 261 (D.C. Cir. 1982). To support such a redaction, an individual's privacy rights are balanced against the public's interest in disclosure, and only when the invasion of the privacy interest is clearly unwarranted will the redaction survive under the exemption. *See id.* One factor that may bear on the public interest is “the level of responsibility held by a federal employee.” *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984). Further, individuals “have a strong [privacy] interest in not being associated unwarrantedly with alleged criminal activity.” *Id.* at 91–92.

Plaintiffs seek the disclosure of any information related to one specific DOJ attorney, Jennifer Koester, the identity of whom Plaintiffs claim has been redacted under exemption (b)(6).

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<sup>6</sup> The redactions identified on Exhibit A for which “(b)(5)” is listed pursuant to the presidential communications privilege are Item Nos. 24, 29, 46, 49, 78, 85, 86, and 137. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(5). All of these redactions were also properly redacted under exemption (b)(1) and (3). With the exception of Item Nos. 46 and 85, all of the above Item Nos. are also properly redacted under the deliberative processing privilege, *see* fn. 3 *supra*, the attorney client privilege, *see* fn. 4 *supra*, and the attorney work product privilege, *see* fn. 5 *supra*. Item Nos. 46 and 85 are also properly redacted under the deliberative processing privilege, *see* fn. 3 *supra*.

Defendants state that the redactions pursuant to exemption (b)(6) “consist[] of names of lower-level Department employees and other identifying information (e.g. educational background, marital status, non-federal employment background).” Margolis Decl. ¶ 12. Mr. Margolis also declares that these individuals were not decisionmakers, and that the Report “did not conclude that any of these low-level employees committed professional or other misconduct in connection with their role in that work.” *Id.* Lastly, Mr. Margolis declares there is little to no public interest in the “disclosure of the identities of lower-level Department personnel who were not responsible for the Department decision in the development of the CIA’s detention and interrogation program.” *Id.* ¶ 14. Plaintiffs disagree and argue that the public’s interest in knowing only Jennifer Koester’s involvement in the Report outstrips her privacy interest, thereby failing to reach the requisite “clearly unwarranted” level of invasion of her privacy.

The Court finds the Defendant’s argument more persuasive, based upon the particular facts in this case. First, the redacted individuals, who may or may not include Ms. Koester, are minor players, and as such, the public’s interest in their involvement is diminished. Of note, all of the major decisionmakers are disclosed within the Report. *See generally* Pls.’ Mem., Exs. 4–9. Second, the redacted individuals have a privacy right in “not being associated unwarrantedly with alleged criminal activity.” *Stern*, 737 F.2d at 91–92. While the redacted individuals have never been charged criminally, Plaintiffs essentially allege that any individual involved in the policy decisions concerning “enhanced interrogation techniques” violated the law. This is especially troublesome here, where the low-level individuals were not decisionmakers, have not been found to have “committed professional or other misconduct in connection with their role in that work,” Margolis Decl. ¶ 12, yet would undoubtedly be linked to those decisionmakers who were found to have committed misconduct. Third,

the Court finds the public's interest is minimally served by knowing the personal information of low-level individuals who worked under those decisionmakers, including Ms. Koester.<sup>7</sup> After balancing these competing interests, the Court finds Defendant has satisfied its burden of showing that the disclosure of redacted materials under exemption (b)(6) would constitute a clearly unwarranted invasion of personal privacy.<sup>8</sup>

#### **D. Segregability**

FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.” 5 U.S.C. § 552(b). This is established by the good-faith declaration of Review Officer Payne:

I have conducted a line-by-line review of the OPR Report to identify and release all reasonably segregable, nonexempt portions from it. Based on this review, I have determined that the information released

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<sup>7</sup> Further, it is of no moment that Ms. Koester's name has appeared unredacted in the Report. First, just because Ms. Koester has been named in a single footnote, see Pls.' Mem., Ex. 5, at 50 n.53, does not mean that she has lost all privacy rights. *See Canaday v. United States Citizenship & Immigration Servs.*, 545 F. Supp. 2d 113, 117 (D.D.C. 2008) (finding that there “is a privacy interest in the identifying information of the Federal employees even though the information may have been public at one time”); *see also Halpern v. FBI*, 181 F.3d 279 (2d Cir.1999) (“Confidentiality interests cannot be waived through prior public disclosure or the passage of time.”). Second, this lone disclosure of her name does not make reference back to any other redactions, thus it is readily distinguishable from *Hall v. United States DOJ*, 552 F. Supp. 2d 23, 31 (D.D.C. 2008), wherein the Court ordered disclosure of redacted statements that were unredacted in other portions of the document. Lastly, Defendant may have waived any ability to redact the lone redaction of Ms. Koester's name within the footnote, but it has not waived its ability to invoke exemption (b)(6) throughout the rest of the Report as to any other material where disclosure would constitute a clearly unwarranted invasion of personal privacy, including material related to Ms. Koester's name.

<sup>8</sup> The redactions identified on Exhibit A for which “(b)(6)” is listed are Item Nos. 3-7, 9-11, 21-28, 30-34, 37, 40-45, 47-49, 52-56, 58, 69, 73, 78-80, 82, 88-89, 92, 94, 115, 117, 119-22, 124-33, 136, 138-39, and 148-52. All of these Item Nos. are properly withheld under 5 U.S.C. § 552(b)(6). A substantial number of these redactions are also redacted under exemptions (b)(1), (3), and (5).

