UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL SECURITY ARCHIVE FUND, INC.	)	
Plaintiff,	)	
	)	**Civil Action No. 04-1821 (RMC)**
THE CENTRAL INTELLIGENCE AGENCY,	)	
Defendant.	)	

REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR *IN CAMERA* JUDICIAL REVIEW

The Defendant, through counsel, the United States Attorney for the District of Columbia, respectfully files this reply memorandum in further support of its motion for summary judgment and in opposition to Plaintiff's motion for *in camera* review. The Central Intelligence Agency (CIA) has submitted a detailed declaration supporting its reliance on the claimed exemptions under the Freedom of Information Act (FOIA) that is sufficiently specific such that *in camera* review is unnecessary. Notwithstanding an extensive segragability review and analysis, no meaningful or intelligible segments of the 2004 Iraq NIE ("the Estimate") can be released. Plaintiff's analysis fails to accord the CIA's classified document review process the level of deference caselaw suggests it should receive.

Apart from Plaintiff's conclusory and speculative assertions that significant portions of the document have been released, Plaintiff has failed to satisfy its burden to show both that there was an "official" release and that what was released "precisely tracks" the information in the Estimate. Plaintiff's arguments that the CIA's declaration is insufficient run counter to its claimed basis for asserting that information in the document has previously been released. Plaintiff's arguments concerning Exemption (b)(5) are equally unavailing. Concerning the CIA's assertion of the deliberative process privilege, Plaintiff's demand for a

specific decision ignores the broad and critical role that the Estimate, like the CIA as a whole, occupies in high-level decisions of the Executive and Legislative Branches of the federal government, as well as case authority that is not so restrictive in defining the deliberative process.

ARGUMENT

I. Segregability

A. The CIA need not identify and thereby reveal specific portions of the Estimate

The CIA's declaration is sufficiently specific to allow this court to assess and plaintiff to intelligently challenge defendant's arguments for withholding. In an extensive declaration, numbering 25 pages and 54 paragraphs, Ms. Martha M. Lutz, the Information Review Officer for the CIA's Director of Central Intelligence Area, sets forth the CIA's basis for withholding the NIE in full under the FOIA. As stated by the Court in Defenders of Wildlife v. U.S. Dept of Agriculture, 311 F.Supp.2d 44, 56 (D.D.C. 2004), "[w]hile there is no set form for a *Vaughn* index, the agency should describe the documents with 'as much information as possible *without thwarting the exemption's purpose.*' " Id., quoting King v. Dept of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987) (emphasis added). Plaintiff 's argument would require the CIA to reveal the information withheld to justify the withholding, thus undermining the very purpose of the exemption. However, all the CIA must do is provide " 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.' " Id. at 56-57, quoting Mead Data Cent., Inc. v. Dept of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977). The Lutz Declaration, submitted on behalf of the CIA, has satisfied this standard.

It is well-accepted that creation of a Vaughn index *per se* is not necessary to justify the agency's reliance on claimed exemptions. Thus, the agency may rely on affidavits or declarations that are sufficiently detailed to allow the district court to determine whether the documents are agency records and whether

they are exempt from disclosure. Gallant v. NLRB, 26 F.3d 168, 173 (D.C. Cir. 1994). Moreover, the agency need not even justify its reliance on claimed exemptions on a document-by-document basis. It may do so based on categories of documents, so long as the descriptions used are " 'sufficiently distinct to allow a court to determine whether the specific claimed exemptions are properly applied.' " Id. (quoting Vaughn v. United States, 936 F.2d 862, 868 (6th Cir. 1991)); see also, Klunzinger v. IRS, 27 F.Supp.2d 1015 (W.D.Mich. 1998) (reliance on detailed declarations focusing on individual documents and providing a factual basis for withholding each document was sufficient).

The oft cited cases from this Circuit, Oglesby v. U.S. Dept of the Army, 79 F.3d 1172, 1178 (D.C. Cir. 1996) (detailed analysis in manageable segments required, not conclusory, generalized statements); Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979) (lack of correlation between document and claimed exemption); Coastal States Gas Corp. v. Dept of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980) (description of character of document and link to claimed exemption required); and King v. Dept of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987) (FBI Code symbols), do not require more. Here, given that the focus of Plaintiffs' FOIA request is one document, and that the CIA has set forth a 25-page description of the categories of withheld information, not much more detail can be provided without quoting the requested document itself.

As stated by the Court in Assassination Archives and Research Center v. C.I.A., 177 F.Supp.2d 1 (D.D.C. 2001), *aff'd on appeal*, 334 F.3d 55 (2003), for the Court to "require the CIA to produce ... the ... contents would defeat the purpose of the FOIA exemptions. ... The agency may file affidavits to meet its burden of demonstrating that documents were properly withheld from disclosure." Id. at 6, citing Hayden v. Nat'l Security Agency, 608 F.2d 1381, 1384, (D.C.Cir.1979) ("When the itemization and justification are themselves sensitive, however, to place them on public record could damage security in precisely the way that FOIA Exemption 1 is intended to prevent.").

B. The CIA's Declaration is Sufficiently Detailed to Permit Evaluation of Its Claimed Exemptions by the Court and Plaintiff.

Plaintiff asserts that "the generalized statements of harm relating to possible disclosure of confidential sources, intelligence activity and methods, and foreign relations and activities are too broad to be of use to the plaintiff in responding and the Court in evaluating the claimed exemptions." See Pltf's Opp at 16. In support of this conclusory statement, Plaintiff cites Campbell v. U.S. Dept. of Justice, 164 F.3d 20, 30 (D.C.Cir. 1998), as amended (Mar 03, 1999), *reh'g denied* (1999), and Goldberg v. Dept. of State, 818 F.2d 71, 76 (D.C. Cir. 1987). However, these cases are inapposite, as a comparison with the Lutz Declaration at issue will show.

First, turning to the 25-page declaration of Ms. Lutz, she begins her description of the Estimate at paragraph 13 by describing the body that authored the NIE, the National Intelligence Council (NIC). In the next paragraph, Ms. Lutz sets forth the purpose of the NIE, that is, "an assessment of Iraq's capabilities for internal stability and self-governance," and gives a brief description of its layout. Lutz Dec at ¶14. In paragraph 15, Ms. Lutz describes its basis and scope and a little more of its organizational structure. From paragraphs 16 through 41, Ms. Lutz sets forth the CIA's basis for asserting exemption 1, with major sections detailing specific categories of exempt information: intelligence activities (¶¶ 19-22), intelligence sources (¶¶ 23-29), intelligence methods (¶¶ 30-38) and foreign relations and activities (¶¶ 39-41). From paragraphs 42 through 45, Ms. Lutz details the CIA's basis for asserting exemption 3, with paragraphs discussing major topics relevant to the exemption: agency sources and methods (¶ 44) and agency-specific information (¶ 45). From paragraphs 46 through 52, Ms. Lutz discusses exemption 5. While Ms. Lutz has more extensive discussions of segregability in paragraphs 5, 6 and 53, she discusses the fact that the NIE contains exempt information throughout the declaration, in paragraphs 11, 14, 21, 30, 31, 39, 44, 45, 49

and 52. As we have discussed more extensively above, no greater amount of detail is required without undermining the very purposes of the FOIA exemptions.

Plaintiff's reliance on Campbell is misplaced because the Court there considered circumstances wholly different from those involved in this case. In Campbell, the Court found that the FBI affidavit was wholly insufficient in ways that the Lutz declaration clearly is not. The FBI declaration was nine years old at the time the case was heard. The Court also found that the declaration on its face was not even tailored to the specific documents in question and was wholly lacking in detail. See Campbell, 164 F.3d at 30-31. Moreover, the Campbell court specifically incorporates the case of Hayden v. National Sec. Agency, 608 F.2d 1381 (D.C.Cir.1979), in its ruling, which case holds that "the affidavits must show, with *reasonable specificity*, why the documents fall within the exemption." Id. at 1387 (emphasis added). The Court in Goldberg relies on essentially the same standard in holding as follows: "[A]n agency is entitled to summary judgment if its affidavits describe the withheld information and the justification for withholding with reasonable specificity, demonstrating a logical connection between the information and the claimed exemption, ... and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." 818 F.2d 71, 77-78. The CIA, accordingly, has satisfied the "reasonable specificity" standard.

C. CIA adequately explained that any non-exempt information would be meaningless.

The CIA, through the declaration of Ms. Lutz, has set forth an extensive explanation of the nature of the Estimate and the bases for asserting the claimed exemptions. Through this declaration, Ms. Lutz explained how, "[f]ollowing a careful review and consideration of the Estimate, as a whole, on a line-by-line basis, [she] determined that the Estimate must be protected from release in its entirety on the basis of FOIA exemptions (b)(1), (b)(3) and (b)(5), and that no reasonably segregable, non-exempt portion of the document exist." See Lutz Dec. at ¶ 6. Ms. Lutz also had explained that she described the Estimate "as

fully as [she] may on the public record." See id. at ¶ 5. In fully explicating her segregability findings, she concluded

> that there are no meaningful segments of information that reasonably can be segregated for release. All of the information in the Estimate is related to intelligence activities, sources and methods, foreign government information, foreign relations and activities, and/or the deliberative process. Any non-exempt information is so inextricably intertwined with exempt information that release of the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words.

See Lutz Dec. at ¶ 53. Moreover, notwithstanding the fact that the declaration of Ms. Lutz clearly starts with a segregability statement in paragraph 5 and ends with one in paragraph 53, and discusses the exempt nature of information found throughout the document, Plaintiff seeks to confine the segregability analysis to a one-paragraph statement. Such an argument clearly mischaracterizes the nature of the explanation offered by the CIA.

The Lutz Declaration here is akin to the declaration at issue in Assassination Archives. There, the Court concluded that the CIA declaration "clearly outlines the CIA's position that, were the document to be redacted to exclude protected information, the resulting information would be effectively meaningless . . .[, that] [t]he information . . . is not easily removed . . . [in view of its concern] that the names of the people profiled, the type of information provided about individuals, and the level of detail contained in the biographies will reveal methods of the agency's intelligence gathering." 177 F.Supp.2d at 9. The Assassination Archives Court, on this basis, went on to conclude that "[t]he necessary redaction would require the agency to commit significant time and resources to a task that would yield a product with little, if any, informational value. The Court will not ask the CIA to engage in such an undertaking." Id. The CIA submits that the same conclusion is appropriate here concerning the Estimate.[1]

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[1] The Lutz declaration satisfies the requirements of Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977) and Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973), inasmuch as it describes in as much detail as can be disclosed publicly what exempt information is dispersed throughout the document, not just a segment of it, and how this exempt information is inextricably intertwined with non-exempt information. Further, Plaintiff mischaracterizes the nature of the Mead

D. Plaintiff's Claim That the CIA Has Previously Released Portions of the NIE Are Speculative and Fails to Establish That There Has Been an Official Release That Would Justify Disclosure Here

Plaintiff contends that "A side-by-side comparison of the key judgments of the Estimate with these statements [(of the Iraqi Intelligence Service)] and other statements by the White House, National Security Council, Department of State and Department of Defense would likely demonstrate that much of the information in the Estimate already has been publicly aired by the government in officially authorized testimony, speeches, publications and the like." See Pltf's Opp. at 15. Plaintiff does not hide the speculative nature of this statement and refers to the applicable standard in a footnote. As stated by the Court in Assassination Archives,

> To succeed on such an argument, [plaintiff] must 'point ... to specific information in the public domain that appears to duplicate that being withheld.' [Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C.Cir. 1983)]. Fitzgibbon v. CIA sets out a three-part test, for which the burden of production lies with FOIA plaintiffs. 911 F.2d 755, 765 (D.C.Cir.1990). First, plaintiff must demonstrate that the 'information requested [is] as specific as the information previously released.' Id. at 767; see also Afshar, 702 F.2d at 1130. 'Second, the information requested must match the information previously disclosed,' and must have been formally released. Fitzgibbon, 911 F.2d at 767.

177 F.Supp.2d at 10. It is apparent that Plaintiff cannot establish either that the CIA made an official release of any part of the Estimate or that any information now requested matches any information previously requested. In fact, this bald assertion is not much different than the one characterized as a "guessing game" and rejected in Assassination Archives at 10. Accord Assassination Archives and Research Center v. C.I.A., 334 F.3d 55, 60-61& n.6 (D.C.Cir. 2003) (decision affirming district court holding).

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requirement by suggesting it "must" be done rather than "should" be done, which is the word the Mead Court actually uses. See Pltf's Opp. at 8-9.

II. Exemption (b)(5)

A. The Estimate is "Pre-decisional" For Purposes of Exemption (b)(5).

As addressed more fully below, Plaintiff has not been hindered in fashioning arguments and rationales supporting disclosure of the 2004 Iraq NIE. However, despite Plaintiff's ability to identify purposes and rationales clearly associating the Estimate specifically with U.S. policy in the aftermath of the War in Iraq, Plaintiff simultaneously expresses confusion about what decision-making process the Estimate relates to. This is perplexing, given that Plaintiff has cited newspaper articles, quotes from Congressional leaders, and numerous other governmental and non-governmental sources, all of which makes the relevant decision-making process obvious on its face. Plaintiff's quote from White House Press Secretary Scott McLellan with regards to the Estimate proves the point succinctly – "That's the role of the CIA, to look at those issues. The role of the decision-makers is to make sure that we work to address those challenges so that we accomplish our mission . . . ." See Pltf's Opp. at 22. Indeed, the CIA agrees that the Estimate has indisputably been formulated to advise and inform governmental leaders in the (still) ongoing decisionmaking process for the "mission" that Mr. McClellan refers to – U.S. post-war policy in Iraq.[2]

A specific decision is not necessary in claiming the privilege. As stated by the Court in Access Reports v. Department of Justice, 926 F.2d 1192 (D.C.Cir. 1991),

> Any requirement of a specific decision after the creation of the document would defeat the purpose of the exemption. At the time of writing the author could not know whether the decisionmaking process would lead to a clear decision, establishing the privilege, or fizzle, defeating it. Hedging his bets, he would be drawn into precisely the caution, or the Aesopian language, that the exemption seeks to render unnecessary . . . Thus it is no surprise that the Supreme Court, in Sears, noted that the exemption aimed at protecting the decisional process, that many processes might not "ripen into agency decisions", 421 U.S. at 151 n. 18, 95 S.Ct. at 1517 n. 18, and that the exemption does not "turn[ ] on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared." Id.

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[2] In any case, the specific decisions and decisionmaking processes made in this arena are themselves highly sensitive and classified.

Id. at 1196 (citations omitted); accord, Hunt v. U.S. Marine Corps, 935 F.Supp. 46, 51 (D.D.C. 1996) (Documents were predecisional notwithstanding that agency did not link them specifically to an agency final decision, so long as they were "part of the deliberative process.")

Moreover, the applicability of the (b)(5) Exemption even in the circumstance where the deliberative material is rejected by the ultimate decisionmaker is aptly shown in Bureau of National Affairs v. Dept. of Justice, 742 F.2d 1484 (D.C. Cir. 1984). The BNA Court found that the U.S. Environmental Protection Agency's budget proposals were protected by Exemption (b)(5), even though "EPA's budgetary recommendations were never adopted by the President." BNA, 742 F.2d at 1497. The court found that "[EPA's] budgetary 'decisions' constitute *advice and suggestions* for the President, albeit ones that are likely to frame the ultimate . . . choices made by him," and therefore qualified for the (b)(5) Exemption. Id. (emphasis added). The facts are analogous to the immediate situation, where the Estimate is produced by an agency with no decisionmaking authority itself (the NIC), but is designed to provide other Executive Branch agencies and decisionmakers with "advice and suggestions." Thus, even if it were true that, as Plaintiff suggests, various policymakers may discount or disregard the Estimate, that fact is irrelevant to the analysis of whether the NIE is predecisional and thus exempt under (b)(5).

Finally, the Court in Judicial Watch v. Clinton, 880 F.Supp. 1 (D.D.C. 1995), characterized the plaintiffs' restrictive focus on the question of whether a decision actually resulted from the document in question as effectively "exalting semantics over substance." Id. at 13. "[A]lthough 'many processes might not "ripen into agency decisions," ' that does not preclude application of the deliberative process privilege. Access Reports v. Department of Justice, 926 F.2d 1192, 1196 (D.C.Cir.1991) (citation omitted). '[T]he exemption does not "turn[ ] on the ability of the agency to identify a specific decision in connection with which a memorandum is prepared." ' Id. (citation omitted)." Judicial Watch, 880 F.Supp. at 13.

The Plaintiff also disputes the predecisional character of the Estimate, citing Petroleum Info. Corp. v. Dep't of the Interior, 976 F.2d 1429 (D.C. Cir. 1992), as well as Carter v. U.S. Dept of Commerce, 307 F.3d 1084, 1090 (9th Cir. 2002), and cases cited therein. Carter is distinguishable inasmuch as it involved an effort to characterize census data as predecisional. The Court in Carter recognized, consistent with the CIA's arguments here, that the critical inquiry is whether the disclosure requested would expose the agency's decision-making process. Id. at 1091. The Court recognizes "that numbers can constitute deliberative material where they represent opinions and subjective judgments created to assist in the decision-making process, or where they would otherwise so expose that process." Id. In any case, what Plaintiff here characterizes as non-policy related "information," is not at all like raw numbers or similar data as was at issue in Carter or Petroleum, in that it includes intelligence assessments, involving certain social, political and strategic judgments, in the choice of what substantive factual information on Iraq to report in the Estimate. Unlike numerical or other quantitative data, this material results from opinions and subjective judgments on exactly how to advise interested officials, both within and outside the agency, about the complex set of facts and circumstances describing the situation in Iraq.

Many subjective decisions were involved in selecting and arranging this highly-situational "information" contained in the Estimate. Disclosure of the Estimate would so expose that process as to bring harm to it. Indeed, the Estimate represents and contains the candid thoughts, opinions, and recommendations of the NIC. Disclosure of this NIE would therefore likely diminish the candor of deliberations within the NIC when it comes to the authoring of future NIE's. See Hamilton Securities Group v. HHS, 106 F. Supp.2d 23, 29-33 (D.D.C. 2000), aff'd., 2001 WL 238162 (D.C. Cir. 2001); Gutman v. Dept. of Justice, 238 F. Supp.2d 284, 295-6 (D.D.C. 2003); Cf. Petroleum Information Corp. of Department of the Interior, 976 F.2d at 1435.

B. The Estimate is "Deliberative" Under FOIA Exemption (b)(5)

The Estimate consists of subjective analysis and projections directly relevant to the making of U.S. foreign policy decisions by executive branch policymakers, and the fact that the CIA is not authorized to make policy itself is not determinative. Plaintiff alleges that "any information the CIA includes in a National Intelligence Estimate is a *conclusion* that the agency has adopted and not in any sense a deliberation about policy." Pltf's Opp. at 23 (emphasis added). Again, in BNA, the Court considered whether the Environmental Protection Agency's ("EPA's") budget recommendations, which it had submitted in final form to the Office of Management and Budget ("OMB"), were predecisional, in considering a claim that the recommendations comprised a final decision (or "conclusion," as Plaintiff would have it). The Appeals Court explained how the trial court had misconceived what constitutes a "final decision" in the context of Exemption (b)(5). The Appeals Court found that EPA's final decision "was a decision to make a particular recommendation to another agency of the government that has the ultimate authority for developing the President's budget proposals. In Renegotiation Board v. Grumman Aircraft, 421 U.S. 168, (1975), the Supreme Court held that 'views submitted by one agency to a second agency that has final decisional authority are predecisional materials exempt from disclosure under FOIA.' " Id. at 1497.

Similarly, this Court, in Judicial Watch v. Dept. of Justice, 306 F.Supp.2d 58 (D.D.C. 2004), explained that:

> 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.

Id. at 69. Considering this standard, this Court concluded that Exemption (b)(5) " '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.' " Id., quoting Coastal States Gas

Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C.Cir.1980). Given the nature of the judgments involved in the production of the Estimate, the information contained therein is much more in the nature of opinions of the drafters that are exempt rather than raw statistical information or census data addressed in Carter, which was not exempt in that case. The NIE contains the subjective opinions of the authors as to what factors may influence future events in Iraq, what outcomes are likely and how those outcomes may be shaped by other events. Moreover, the factual material included in the Estimate also represents subjective choices as to what facts are relevant and what facts should be included or incorporated into analysis.

Finally, the observations of Author Harold P. Ford, who held senior positions in both the National Intelligence Council and the Directorate of Operations, also undercut Plaintiffs' view of the Estimate as a non-deliberative document. As stated by Mr. Ford,

> ... what estimators are paid for is to discern probable trends and contingent outcomes. **This both distinguishes Estimates from analysis, and provides the policymakers added wisdom** ... today's officers constructing an estimate must not settle for a text that merely wrings its hands about this or that possible threat. **A good estimate also provides the decisionmakers certain "handles" to assist them in their conduct of policy**–a contribution that senior officers in administration after administration have asked of estimators over the years.

Harold P. Ford, Estimative Intelligence: the Purposes and Problems of National Intelligence Estimating, pp. 77-78 (Defense Intelligence College) (1989) (emphasis added), *available at* http://www.cia.gov/nic/PDF_GIF_anal_meth/tradecraft/purpose_of_estimating.pdf (attached). The Estimate is clearly a deliberative document for purposes of Exemption (b)(5).

C. The fact/opinion distinction is not decisive in assessing whether the Estimate is a "deliberative" document.

Plaintiff contends that the fact-opinion distinction should lead to resolution of the Exemption (b)(5) claim in their favor ignores the well-developed line of case authority that focuses on the underlying purposes of the exemption to protect the deliberative process. The central inquiry is the process by which the information was produced and any effects on that process that disclosure would cause.

The Court in Wolfe v. Dept. of Health and Human Services, 839 F.2d 768 (D.C.Cir. 1988), gives the following more complete explanation of the interplay between the fact/opinion test and the focus on the deliberative process:

> It is not possible to resolve whether the information is deliberative by characterizing it, as plaintiffs do, as merely involving a factual request for dates and titles. Exemption 5 disputes can often be resolved by the simple test that factual material must be disclosed but advice and recommendations may be withheld. [Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977)]. Indeed the fact/opinion distinction 'offers a quick, clear, and predictable rule of decision,' for most cases. But 'courts must be careful not to become victims of their own semantics.' Id. In some circumstances, even material that could be characterized as 'factual' would so expose the deliberative process that it must be covered by the privilege. Id. **We know of no case in which a court has used the fact/opinion distinction to support disclosure of facts about the inner workings of the deliberative process itself**.
>
> The Supreme Court recognized this when it approved the fact/opinion distinction. In EPA v. Mink the Court required disclosure of 'purely factual material contained in deliberative memoranda' which was 'severable from its context[.]' Mink, [410 U.S. at 88]; Dudman Communications v. Department of Air Force, 815 F.2d 1565, 1568 (D.C.Cir.1987); see also 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'); accord Montrose Chem. Corp. v. Train, 491 F.2d 63, 68 (D.C.Cir.1974) (disclosure of factual summaries made in preparing final agency opinion 'would be the same as probing the decision-making process itself.'). These cases illustrate that this court **cannot mechanically apply the fact/opinion test. Instead, we must examine the information requested in light of the policies and goals that underlie the deliberative process privilege**.

Id. at 774 (emphasis added). Plaintiff is simply wrong in contending that the fact/opinion test controls the Court's decision on Exemption (b)(5); such a contention misinterprets the decision in Mink. Here, the authors of the NIE had their choice of what factual material to include in order to inform policymakers' considerations and decisions. Disclosure of this material would afford a window into and harm their deliberative process, which effect Exemption 5 is intended to protect.

III. *In Camera* Review Is Unnecessary and Without Justification in this Case

Defendant contends that the Lutz Declaration provides sufficient detail to justify its segregability analysis and its claimed FOIA Exemption (b)(5) in this case. The Court in Twist v. Ashcroft, 329

F.Supp.2d 50, 54-55 (D.D.C. 2004), offers a useful articulation of considerations used to determine whether *in camera* review is appropriate:

> *[I]n camera* review of the withheld documents (or of the portions withheld) is proper if the agency affidavits are insufficiently detailed to permit review of exemption claims or there is evidence of bad faith, the number of documents is relatively small, and the dispute turns on the contents of the withheld documents and not the parties' interpretation of them. Quinon v. FBI, 86 F.3d 1222, 1228 (D.C.Cir.1996). *In camera* review is certainly not to be done routinely because 'it can't hurt.' Id. (quoting Ray v. Turner, 587 F.2d 1187, 1195 (D.C.Cir.1978)). Such review consumes judicial resources, may have little precedential value, and creates a disincentive to preparing a detailed Vaughn index. Spirko v. U.S. Postal Service, 147 F.3d at 997 (1998). In this case the affidavits are detailed and clearly explain the exemptions claimed. While there are claims of bad faith, they are based on mere allegations and, most significantly, have nothing to do with the preparation of those affidavits. As I have noted, the notion that the authors of those affidavits have perjured themselves is not supported by anything besides plaintiff's imagination and hardly justifies *in camera* review of the documents themselves.

As is set forth in greater detail above, the Lutz declaration is detailed enough to justify the CIA's segregability analysis and claimed exemptions. Plaintiff's bald assertion of "gamesmanship" is also insufficient to meet its burden – there is no record evidence of bad faith. "In a case concerning questions of national security, such as this one, the D.C. Circuit has instructed district courts to give 'substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.' Assassination Archives, 177 F.Supp.2d at 5, quoting and citing Salisbury v. United States, 690 F.2d 966, 970 (D.C.Cir.1982); Taylor v. Dep't of the Army, 684 F.2d 99, 109 (D.C.Cir.1982) (requiring "utmost deference" to affidavits by military intelligence officers). Plaintiff has failed to provide any foundation for the Court not to afford the CIA declaration the same level of deference in this case.

CONCLUSION

WHEREFORE, Defendant respectfully submits that its motion for summary judgment should be granted and that Plaintiff's motion for *in camera* judicial review should be denied.

Respectfully submitted,

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