

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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NATIONAL SECURITY ARCHIVE)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 11-00724 (GK)
)	
CENTRAL INTELLIGENCE AGENCY)	
)	
Defendant.)	
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**DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFF’S CROSS-MOTION FOR PARTIAL SUMMARY
JUDGMENT AND REPLY IN SUPPORT OF DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

Plaintiff’s Memorandum in Partial Opposition to Defendant’s Motion for Summary Judgment and in Support of Plaintiff’s Cross-Motion for Partial Summary Judgment (“Pl’s Motion”) acknowledges that the only issue before the Court is whether Defendant, the Central Intelligence Agency (“CIA”), properly asserted Exemption 5 to the Freedom of Information Act (“FOIA”) – which protects from disclosure an agency’s internal pre-decisional deliberations – in withholding a draft historical analysis of the CIA’s internal investigation of the Bay of Pigs Operation. *See* Pl’s Motion, ECF No. 9 at 1 (“[T]he only issue remaining is the propriety of the CIA’s withholding in full of the one undisclosed volume, which relates to the CIA’s internal investigation of the Bay of Pigs Operation”). Although Plaintiff contends that the CIA has provided the Court with no information regarding the deliberative process it seeks to protect, this Court has already determined previously that the CIA properly withheld the document at issue pursuant to Exemption 5. Moreover, contrary to Plaintiff’s assertions, the declaration of the

CIA's FOIA officer that is attached as Exhibit 1 to its motion for summary judgment (ECF No. 8) and the Declaration of David S. Robarge, Chief Historian, Center for the Study of Intelligence at the CIA ("Robarge Decl"), attached hereto as Exhibit 1, provide ample information as to why the withholding of Volume V continues to be proper. Specifically, the CIA has identified the author of Volume V – one of the CIA's staff historians – and has detailed the nature of the information contained in Volume V, which has not been approved for publication by either the staff historian's previous supervisor or the current Chief Historian of the CIA. The CIA has also explained why the passage of time since the Court's initial determination that the CIA properly withheld the document pursuant to Exemption 5 has not negated the applicability of Exemption 5 to this document. Finally, the CIA has explained why the release of Volume V would have a chilling effect on internal agency deliberations and confuse the public with inaccurate historical information. Because no issues of material fact are in dispute, therefore, Defendant is entitled to judgment as a matter of law.

ARGUMENT

I. THE COURT SHOULD RULE THAT THE CIA HAS PROPERLY WITHHELD VOLUME 5 UNDER EXEMPTION 5 AS IT DID IN THE PRIOR LITIGATION OVER THIS DOCUMENT.

A. Exemption 5 still applies to Volume V because the draft document is both pre-decisional and reflective of an intra agency deliberative process.

Both parties' motions for summary judgment rely on Morley v. CIA, 508 F.3d 1108, 1127 (D.C. Cir. 2007), in which this Circuit noted that the standard for review of agency claims under Exemption 5 is "to test whether . . . the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." (citing Costal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir.

1980)). In Morley, the D.C. Circuit ruled that the CIA's invocation of Exemption 5 over two documents it withheld was improper because the CIA provided only opaque assertions of why Exemption 5 applied to the documents, deleted the identities of the author and recipient of the document that was partially released, and gave the court "little indication about the nature of the records withheld." Morley, 508 F.3d at 1127. In so ruling, this Circuit made clear that "[i]n order for the court to determine if information is 'deliberative' it must 'reflect' the personal opinions of the writer rather than the policy of the agency." (quoting Costal States Gas Corp v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)). Additionally, "[t]o ascertain whether the documents at issue are pre-decisional, the court must first be able to pinpoint an agency decision or policy to which these documents contributed." Morely, 508 F.3d at 1127 (citations omitted). To that end, "a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made." Id. (quoting Coastal States, 617 F.2d at 868).

According to Plaintiff, "the CIA has not even attempted to identify the 'process' involved, let alone the 'role' the disputed document 'played in that process.'" Pl's Motion, ECF No. 9 at 6. "Because, as the Archive has noted, the CIA has offered *no* information concerning the 'process' it seeks to protect, even though 'the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process,' Significantly, there is no suggestion that there is any relevant 'process' that is ongoing." Pl's Motion, ECF No. 9 at 11 (emphasis in original).

Here, however, the CIA has provided two declarations – both of which are entitled to a

presumption of good faith – detailing why Volume V remains subject to Exemption 5. See Harrison v. Federal Bureau of Prisons, 2010 WL 374529 at *3 (D.D.C. Feb. 3, 2010) (holding that agency’s affidavit in a FOIA action entitled to a presumption of good faith). As the declaration of the Chief Historian, Center for the Study of Intelligence at the CIA,¹ states: “Indeed, by objectively analyzing the CIA’s successes as well as its failures, the History Staff provides . . . the Agency’s current and future intelligence officers, managers and decision-makers with access to an organized and shared institutional memory regarding historical events for use in current decision-making.” Robarge Decl ¶ 4; see also id. ¶ 6 (“CIA histories are either conceived as part of CIA’s research program, which attempts to address topics of high-level interest to CIA managers and practitioners, or commissioned by specific CIA components for use in decision-making, training, and other internal purposes”).

Moreover, “Volume V is predecisional as it reflects the personal opinions of the author and does not incorporate information and perspectives that would arise from the internal review process. Specifically, the document suggests an Agency position that was at that time, and still now, the personal position of the author and does not take into account alternative views of other CIA historians or represent a final Agency history.” Robarge Decl ¶ 14. “Additionally, Volume V is deliberative insofar as it is a draft document reflective of the iterative review process of the CIA’s History Staff. It reflects the give-and-take of the consultative process. The passage of time does not mitigate the chilling effect that the release of this document would have upon

¹ The core mission of the CIA’s Center for the Study of Intelligence, which was founded in 1974, is “to capture the insights of the CIA’s institutional experience – both historical and recent – and to make those insights easily accessible and available to current intelligence officers facing similar challenges.” See Robarge Decl ¶ 3.

current and future CIA historians.” Robarge Decl ¶ 16. Regarding the information contained in Volume V, the CIA agrees with the CIA’s previous Chief Historian, who’s “assessment of Volume V concluded that it is an uncritical defense of the CIA officers who planned and executed the Bay of Pigs operation It offers a polemic of recriminations against CIA officers who later criticized the operation and against those U.S. officials who its author, Dr. Pfeiffer, contends were responsible for the failure of that operation.” Robarge Decl ¶ 13.

Lastly, the CIA has explained how the disclosure of Volume V would harm legitimate agency interests:

The official public disclosure of any CIA draft history at any stage before its completion as an official CSI publication reasonably could be expected to (1) discourage open and frank deliberations among the History Staff and (2) lead to public confusion resulting from the release of an unfinished and potentially inaccurate draft history It would do enormous damage to the mission of CSI and the History Staff were my historians to believe that their initial thoughts and judgments regarding a particular matter – as reflected in an initial draft history, for example – might one day be released to the public through FOIA. Even if those initial thoughts and judgments are proven incorrect or unsubstantiated through the peer review process, the mere possibility that an initial draft could be released to the public would undoubtedly chill open and frank deliberations. This, in turn, reasonably could be expected to diminish the quality and objectivity of CIA histories, depriving current and future CIA officers of the historical perspective and institutional memory they need to perform their duties Additionally, the release of an unfinished CIA history risks placing inaccurate or incomplete information into the public domain. This could cause scholars, journalists, and others interested in the subject at hand to reach an erroneous or distorted view of the Agency’s role in the events as described in a draft or otherwise lead to public confusion.

See Robarge Decl ¶¶ 9-11, 17-18. The CIA, therefore, has identified the author of the document – a subordinate staff historian writing a draft analysis that was never approved for publication by his supervisors (See Morely, 508 F.3d at 1127) – as well as the nature of the information contained in the document and why the document should remain subject to the deliberative process privilege. Under these circumstances, the CIA is entitled to judgment as a matter of law.

B. Plaintiff's attempts to distinguish this case from the Court's ruling in the Pfeiffer litigation are unavailing.

According to Plaintiff, “[t]he litigation in *Pfeiffer* was framed largely as a personnel dispute between Dr. Pfeiffer and the agency Because of the manner in which the dispute in *Pfeiffer* was framed, the Court did not have occasion to engage in the kind of analysis required when the exempt status of a ‘draft’ document is at issue.” Pl’s Motion, ECF No. 9, at 6-7. “Nor is there an agency representation, as there was in *Pfeiffer*, that ‘the completion of the history of the Bay of Pigs operation’ remains on the ‘agenda’ some 27 years after Dr. Pfeiffer submitted his manuscript. As such, there is simply no basis upon which the Court could conclude, as it did in 1989, that a relevant ‘decisionmaking process is in progress.’” *Id.* at 8.

As an initial matter, the Pfeiffer litigation involved a FOIA request submitted by the author of Volume V for the same document at issue in this FOIA litigation. See Pfeiffer v. CIA, 721 F. Supp. 337 (D.D.C. 1989). Additionally, the Court in Pfeiffer directly addressed the sole issue present in this litigation: namely, the applicability of Exemption 5 to Volume V. See Pfeiffer v. CIA, 721 F. Supp. at 341; ECF No. 8, Lutz Decl ¶¶ 18-22, 24. In doing so, the Court had before it the declarations of the CIA’s previous Chief Historian, who’s “assessment of Volume V concluded that it is an uncritical defense of the CIA officers who planned and executed the Bay of Pigs operation It offers a polemic of recriminations against CIA officers who later criticized the operation and against those U.S. officials who its author, Dr. Pfeiffer, contends were responsible for the failure of that operation.” Robarge Decl ¶ 13. This Court, therefore, concluded that Volume V is both deliberative and pre-decisional because it consists entirely of a former CIA employee’s preliminary draft account of the investigation

report of the Bay of Pigs Operation that was never approved for publication, and therefore never represented the official views of the agency. See Pfeiffer, 721 F. Supp. at 341; Lutz Decl ¶¶ 18-22, 24.

In addition, the CIA has stated that the passage of time since the Pfeiffer litigation has not rendered the disclosure of Volume V any less harmful to the agency's interests in honest and frank communications among its historians and providing the public with truthful, accurate, official accounts of the agency's historical analysis. The current Chief Historian, for instance, reviewed Volume V, the declaration of the CIA's FOIA officer, and the declarations filed by its former Chief Historian in the Pfeiffer lawsuit. Robarge Decl ¶ 12. Taking into account the time that has elapsed since the Court's ruling in that action, he remains "convinced that disclosure of this document 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" and "[t]his is true notwithstanding the fact that Volume V is now decades old." Robarge Decl ¶ 2. Plaintiff's claim that Volume V is no longer subject to Exemption 5, therefore, fails as a matter of law.

C. Plaintiff's contention that the CIA released a draft document in another unrelated litigation is completely irrelevant to the outcome in this case.

Plaintiff cites the disclosure of a document not at issue in this litigation in support of its contention that "[i]t is thus clear, as demonstrated by the CIA's release of another 'draft' Bay of Pigs document the Archive sought here, that such material can be released without harming any legitimate agency interests." Pl's Motion, ECF No. 9 at 12-13. The release by the CIA of another draft document titled "OSI: Striving for Accountability in the Aftermath of the

Holocaust” (ECF No. 9 at 12) in response to one of Plaintiff’s *other* FOIA requests has absolutely no relevance to the present litigation. Here, moreover, there are legitimate agency interests implicated by the disclosure of Volume V. See Robarge Decl ¶¶ 9-11, 17-18. The Court, therefore, should deny Plaintiff’s cross motion for partial summary judgment and grant Defendant’s motion for summary judgment.

II. PLAINTIFF’S OWN STATEMENT OF MATERIAL FACTS NOT IN DISPUTE DEMONSTRATES THAT DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Defendant responds as follows to Plaintiff’s statement of material facts not in dispute:

1. Defendant agrees that the matters set forth in paragraphs 1, 4 and 5 of Plaintiff’s statement of material facts not in dispute (“SOMF”) are not in dispute.
2. Defendant disputes Plaintiff’s contention in paragraph 2 of its SOMF that paragraphs 5 and 8 of Defendant’s statement of facts not in dispute constitute legal conclusions. The factual record in this case supports Defendant’s statements.
3. Defendant disputes the statement in paragraph 3 of Plaintiff’s SOMF that “the matters set forth in ¶¶ 6 & 7 of defendant’s statement are not ‘material’ facts because the Archive is not challenging defendant’s decision to withhold information on the grounds addressed in those paragraphs.” That Plaintiff now concedes Defendant’s proper withholding of information in Volume V pursuant to Exemptions 1 and 3 does not render Defendant’s assertion of these exemptions non-material.
4. Defendant disputes paragraph 6 of Plaintiff’s SOMF because the matters set forth therein have no relevance to this litigation and, therefore, do not constitute “material” facts.

