IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S MOTION FOR *IN CAMERA* REVIEW

Pursuant to 5 U.S.C. § 552(a)(4)(B), Plaintiff respectfully moves for *in camera* review of the Estimate. In support of this motion, plaintiff submits a memorandum of points and authorities in support thereof, and an exhibit consisting of the Declaration of Meredith Fuchs with attachments.

Respectfully submitted,

Meredith Fuchs
D.C. Bar No. 450325
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The National Security Archive
Gelman Suite 701
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Counsel for Plaintiff

DATE: February 14, 2005

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PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR *IN CAMERA* JUDICIAL REVIEW

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking release of the 2004 Iraq National Intelligence Estimate (the "Estimate"). There has been widespread public, legislative and media interest in this document, including calls from members of the Senate Select Committee on Intelligence for the Central Intelligence Agency ("CIA") to release an unclassified version of the Estimate. The CIA refused to grant expedited processing to the FOIA request, thus prompting this lawsuit. The CIA has now denied the entire document on the basis of FOIA exemptions 1, 3 and 5. 5 U.S.C. §§ 552(b)(1), (3), and (5).

BACKGROUND

On September 16, 2004, the front page of the *New York Times* reported that:

> [a] classified National Intelligence Estimate prepared for President Bush in late July [2004] spells out a dark assessment of prospects for Iraq, government officials said Wednesday. The estimate outlines three possibilities for Iraq through the end of 2005, with the worst case being

> developments that could lead to civil war, the officials said. The most favorable outcome described is an Iraq whose stability would remain tenuous in political, economic and security terms."

"U.S. Intelligence Shows Pessimism on Iraq's Future," Douglas Jehl, *The New York Times*, Sept. 16, 2004, at A1. Declaration of Meredith Fuchs (attached as Exhibit 1) (hereinafter "Fuchs Decl."), Exh. A at 2. The disclosure of the Estimate was widely reported by news media throughout the country.

The Estimate was prepared by the National Intelligence Council ("NIC"), which reports to the Director of Central Intelligence. It was approved by the National Foreign Intelligence Board, which is the senior intelligence community advisory body to the Director of Central Intelligence on the substantive aspects of national intelligence. It was approved by then-Acting Director of Central Intelligence John E. McLaughlin. The existence of the Estimate has been confirmed by the communications director for the National Security Council Sean McCormack, members of Congress who have seen the Estimate, and the White House. Fuchs Decl. ¶ 4.

On September 16, 2004, Plaintiff wrote to Defendant CIA and requested under the FOIA: "[T]he National Intelligence Estimate (NIE) prepared in [] 2004 on Iraq." Plaintiff requested that the processing of its FOIA request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E). Fuchs Decl., Exh. A. Plaintiff supplemented this request on October 4, 2004. *Id.*, Exh. B. In support of expedited processing, plaintiff explained

> there exists a "compelling need" to review this document because the information is sought "by a person primarily engaged in disseminating information" and is "urgen[tly][needed] to inform the public concerning actual or alleged Federal Government activity."

Id. Plaintiff provided extensive evidence to support its assertion that there existed "an urgency to inform the public about an actual or alleged federal activity," including (1) the

"intense public interest in Iraq as a matter of policy debate [and] the concerns of the families of the over 100,000 American servicemen and servicewomen in Iraq today"; (2) the delivery of a CIA-approved speech on the topic by CIA National Intelligence Officer for the Near East and South Asia Paul R. Pillar; (3) the September 23, 2004 request of eight members of the Senate Select Committee on Intelligence asking the CIA to provide a declassified version of the Estimate; and (4) and the extensive news coverage of the Estimate, including over 1300 media sources reporting on the Estimate, according to a search on Google News.[1] Fuchs Decl. ¶¶ 7-18.

By telephone communication on October 5, 2004, Defendant CIA informed Plaintiff that it had sent a letter dated September 28, 2004, that denied the request for expedited processing and would send a response to Plaintiff's October 4, 2004 supplement to the request. Fuchs Decl. ¶ 19.

By letter received October 5, 2004, and dated September 28, 2004, Defendant CIA denied Plaintiff's request for expedited processing. Defendant explained:

> With regard to your request for expedited processing, I must inform you that all requests are handled in the order received on a 'first-in, first-out' basis. Exceptions to this rule will be made only when a compelling need is established to the satisfaction of the Agency. … Since your request does not demonstrate a 'compelling need' … we must decline your request to expedite processing.

Fuchs Decl., Exh. C.

By letter dated October 6, 2004, Defendant CIA confirmed its denial of the request for expedited processing. Fuchs Decl., Exh. D.

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[1] Google News presents information culled from approximately 4,500 news sources worldwide. It is updated continuously and covers only articles that appeared within the thirty days prior to the search. *See* "About Google News" < http://news.google.com/intl/en_us/about_google_news.html> (last viewed October 18, 2004).

By telephone conversation on October 20, 2004, Defendant CIA informed Plaintiff that it had considered the matters in Plaintiff's October 4, 2004 supplement to the FOIA request, that the October 4, 2004 communication was interpreted as a continuation of the original September 16, 2004 FOIA request, and that the request for expedited processing was still denied. Fuchs Decl. ¶ 21.

On October 20, 2004, Plaintiff filed this action, and also filed a motion requesting that the Court enter a temporary restraining order or preliminary injunction enjoining Defendant CIA from continuing to deny Plaintiff expedited processing. The Court scheduled a hearing for Monday October 25, 2004.

On the afternoon of October 21, 2004, plaintiff was informed by the Assistant United States Attorney representing the government that the CIA had not yet received its copy of the complaint and papers in this action, during which conversation he acknowledged that there is no location of which he is aware for hand-delivery of such papers. Accordingly, on or about 5:21 p.m., plaintiff e-mailed electronic copies of the papers to the Assistant United States Attorney for him to provide to the CIA. Fuchs Decl. ¶ 22.

On the afternoon of October 22, 2004, on or about 3:00 p.m., Plaintiff received a facsimile from Defendant CIA denying in its entirety the record requested by Plaintiff on the basis of FOIA exemptions (b)(1) and (b)(3). Fuchs Decl. ¶ 23; *id*., Exh. E.

The Court canceled the hearing scheduled for October 25, 2004, and plaintiff amended the complaint on November 3, 2004, to reflect the intervening events.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions on file and affidavits show that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

In a FOIA action, a federal agency is required to release all records that are responsive to a request for the production of the records. The Court is authorized under the FOIA "to enjoin [a federal] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

Agency decisions to withhold or disclose information under FOIA are reviewed *de novo* by this court. *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) (finding that the district court "decides a claim of exemption *de novo"*). FOIA places "the burden . . . on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). In other words, an agency bears the burden of proving that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (internal citation and quotation omitted); *see also Maydak v. United States DOJ*, 218 F.3d 760, 764 (D.C. Cir. 2000) (the government has the burden of proving each claimed FOIA exemption).

The agency may meet this burden by submitting affidavits or declarations that describe the withheld material in reasonable detail and explain why it falls within the claimed FOIA exemptions. *Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998). To counter the "asymmetrical distribution of knowledge that characterizes FOIA litigation," the agency affidavits "cannot support summary judgment if they are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *King v. Dep't of Justice*, 830 F.2d 210, 218, 219 (D.C. Cir. 1987) (internal quotation marks and citations omitted).

The Court's responsibility remains the same in cases involving FOIA's national security exemption (Exemption 1) and Exemption 3, which the CIA invokes principally to protect sources and methods and agency specific information. FOIA Exemption 1 allows federal agencies to withhold or redact materials that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). In cases involving national security exemptions, detailed declarations issued by agency officials merit "substantial weight," *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) (citing *King,* 830 F.2d at 217), however, such consideration "is not equivalent to acquiescence," and even declarations invoking national security must provide a basis for the FOIA requester to contest, and the court to decide, the validity of the withholding. *Id.* (citing *King,* 830 F.2d at 218). Thus, even when reviewing Exemption 1's applicability to materials classified in the interest of national security, no amount of deference can make up for

agency allegations that display, for example, a "lack of detail and specificity, bad faith, [or] failure to account for contrary record evidence." *Id.*

ARGUMENT

I. THE COURT SHOULD DENY SUMMARY JUDGMENT TO THE CIA AND CONDUCT AN *IN CAMERA* REVIEW OF THE ESTIMATE.

In this case, the CIA has done little more than file a conclusory declaration, broadly describing the withheld document and possible risk associated with disclosure, which states that the Estimate contains no segregable, non-exempt portions that can be disclosed. The CIA has wholly failed to meet its burden of providing sufficiently detailed information to permit the Court to assess this claim or the plaintiff effectively to challenge it. Critically, despite withholding in full what the news media has reported is a 50-page document, Fuchs Decl. Exh. A at 2, the CIA has failed to describe the length of the document, identify what portions of the Estimate fall within which exemptions, or acknowledge that the Estimate includes sections that differ in character from each other. There is only one document at issue, it is short in length, and the dispute largely centers on the contents of the document. Moreover, as explained below, the CIA's handling of this matter demonstrates a hostility to disclosure. On the record before the Court, this case presents an appropriate case for the Court to exercise its discretion to conduct an *in camera* review at least of the Estimate's key judgments, for which the CIA has failed to provide any sufficient justification for withholding.

a. The CIA Has Failed To Demonstrate That It Cannot Reasonably Segregate Any Portions Of The Estimate.

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b). This

Circuit has made clear that "[t]he 'segregability' requirement applies to all documents and all exemptions in the FOIA." *Center for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984). This comports with the policy of disclosure and prevents the withholding of entire documents, *see Billington v. United States DOJ*, 233 F.3d 581, 586 (D.C. Cir. 2000), unless the agency can demonstrate that the non-exempt portions of a document are "inextricably intertwined with exempt portions." *Trans-Pacific Policing Agreement v. United States Customs Serv.*, 177 F.3d 1022, 1027 (D.C. Cir. 1999) (quoting *Mead Data Central, Inc.*, 566 F.2d at 260). This Circuit requires explicit findings on the issue of segregability of non-exempt portions of documents. *Billington*, 233 F.3d at 586. Thus, the CIA's blanket invocation of Exemptions 1 and 3 to protect every word of the Estimate merits examination by the Court.[2]

Thus, an agency must perform a "segregability analysis" that distinguishes exempt from non-exempt material *within* each document. *See Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973) ("An entire document is not exempt merely because an isolated portion need not be disclosed. Thus the agency may not sweep a document under a general allegation of exemption, even if that general allegation is correct with regard to part of the information."). If an agency can show that certain material in a document is exempt but cannot be reasonably segregated from non-exempt information, that agency must also "describe what proportion of the information is non-exempt and how that material is dispersed throughout the document," such that "both litigants and judges will

[2] It is clear that Defendant CIA contends that Exemptions 1 and 3 are sufficient to withhold the entire Estimate because the Agency argues in its brief that the Court may reach a decision based solely on Exemptions 1 and 3 and need not reach a decision with respect to Exemption 5's applicability. *See* Mem. In Supp. of Summ. Judg. at 17, fn. 1.

be better positioned to test the validity of the agency's claim that the non-exempt material is not segregable." *Mead Data Cent., Inc.*, 566 F.2d at 261.

The CIA has made no effort here to segregate out non-exempt information in the Estimate. The CIA has released no portion of the document, not even its title. Nor has the CIA described its length or structure, or made any effort to explain which exemptions apply to which portions of the document. Nor has the CIA released non-sensitive information that typically appears in National Intelligence Estimates, such as a statement of which agencies participated in the preparation of the Estimate. Plaintiff does not dispute that the government has met its burden of demonstrating that the document contains some exempt material. The government has failed, however to meet its burden to allow the Court to determine, without examining the document, that all reasonably segregable portions have, in fact, been released and to allow plaintiff an opportunity to intelligently advocate for release of non-exempt portions of the withheld document.

The government's evidence concerning segregation is one paragraph in the Lutz Declaration that states that the Estimate must be protected from release in its entirety. Lutz Decl. ¶ 53. This evidence is plainly inadequate as it fails to provide sufficient details to support the government's claim -- particularly in light of the amount of information being withheld. "[T]he focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Central, Inc*., 566 F.2d at 260. As this Circuit has long recognized, "unless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and

reviewed by the courts." *Mead Data Cent., Inc.*, 566 F.2d at 261. The fact that the document concerns a matter of national security does not insulate the CIA from FOIA's segregability command or permit it to submit vague, nonspecific declarations about segregability.

More specifically, the government's conclusory statements regarding segregability do not provide enough information to allow the Court to conduct a *de novo* review of the accuracy of this claim. A district court that "simply approve[s] the withholding of an entire document without entering a finding on segregability, or the lack thereof," errs. *Powell v. U.S. Bureau of Prisons*, 927 F.2d 1239, 1242 n.4 (D.C. Cir. 1991) (internal quotation and citation omitted); *see Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (remanding case because NLRB had failed to "correlate[] the claimed exemptions to particular passages in the [exempt] memos."). But, because the only information before the district court is the government's conclusory statement that the government's reviewer believed that there were no segregable portions, the Court cannot make the necessary finding. To do so based solely on such conclusory statements would "constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review." *Allen v. CIA*, 636 F.2d 1287, 1293 (D.C. Cir. 1980).

A detailed justification for non-segregability also is necessary to a court's review because the plaintiff does not have access to the record and cannot effectively challenge conclusory assertions. *Vaughn*, 484 F.2d at 824 ("lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution"). The lack of any supporting explanation for the government's claims on segregation makes it difficult for plaintiff to present contrary evidence that segregable

portions of the text are not properly classified.

Here, the government's declaration fails to meet the standards established in this Circuit in at least four specific respects.

First, despite withholding every single word, including the title, of what the news media has described as a 50-page document, the government made no effort to explain its segregation claim for each segment or portion of the record withheld. In fact the government did not make any effort to explain the structure of the document or explain the differences in the sections of the document, aside from noting formatting of some items as "bullet points, boxed sidebar discussions, and graphics." Lutz Decl. ¶14. This Circuit has repeatedly stressed that the "the withholding agency must supply '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.'" *Krikorian v. Dep't of State*, 984 F.2d 461, 466-67 (D.C. Cir. 1993) (citing *Schiller v. NLRB*, 964 F.2d at 1210, quoting *King v. Dep't of Justice*, 830 F.2d at 224). The CIA's assertion of several FOIA exemptions without identifying the specific reason for withholding each portion of the document places an obvious obstacle to effective advocacy.

In this particular case, particular characteristics of the document at issue reinforce the conclusion that the CIA's generalized explanation for why no portions at all can be released is wholly inadequate as a basis for finding that no reasonably segregable portions exist. National Intelligence Estimates are generally comprised of key judgments, discussion of facts and conclusions, dissenting footnotes, if any, and, on some occasions, one or more annexes. Fuchs Decl. ¶ 24. The importance of the CIA

explaining its exemption claims at this level of specificity can be illustrated by the Agency's release on or about July 2003 and June 2004 of a heavily redacted 93-page National Intelligence Estimate entitled "Iraq's Continuing Programs for Weapons of Mass Destruction." Fuchs Decl., Exh. F, p. 5-9, 24-25, 74, 84, 92-93. In that case, 14 pages were released with text and, as is likely here, the CIA was able to release the key judgments of the document, while protecting the sources, methods, intelligence activities and other sensitive material contained in the underlying discussion section. Here, the government's segregability statement does not address each portion of the document but instead makes a generalized statement about the document as a whole. Thus, the government's non-segregability justification fails because it does not correlate the exemption and segregability claims to distinct portions of the document. *Schiller*, 964 F.2d at 1209. Notably, it does not even specifically allege any harm to national security from the release of the key judgments of the Estimate.

Second, the government has not provided any details on the amount or nature of the non-exempt information, and why it cannot be segregated. In order for the plaintiff and the Court to test the validity of the agency's claim that non-exempt material is not segregable, the agency must explain "what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document." *Mead Data Cent., Inc.*, 566 F.2d at 261.

Third, the government's assertions are in part based on risk to foreign relations or activities of the United States. Lutz Decl. ¶¶ 39-40 ("The Estimate contains candid descriptions, judgment, and analyses of various elements of the fledgling Iraqi government and institutions."; "Release of such information from the Estimate could,

when viewed through third party eyes, provoke resentment, anger or offense, thereby complicating U.S. Foreign Relations. In addition, release of such information from the Estimate could complicate relationships with our Coalition partners, and make it harder to further recruit allies to our cause.") Nonetheless, numerous statements have been made by government representatives including the CIA, the Secretary of State and the White House that are likely to be the same as the information in the Estimate. This undermines both the classification argument and the argument that segregable portions cannot be released. These include:

- Unclassified March 9, 2004 testimony by then-CIA Director George Tenet to the United States Senate Select Committee on Intelligence that describes the interference that violence is causing to the transition to democracy in Iraq, at pp. 6-7, the role of terrorists in attempting to inspire a religious insurgency that could halt the building of democratic institutions and governance in Iraq and inspire civil war, p. 7-8, the long-standing rivalries between Sunnis and Shiites, at pp. 8-10, the conflicts within the various groups, including the Shiites and the Sunnis, at pp. 8-9, the role of Iran in Iraq, at pp. 9, challenges to forming a federal political structure, at pp. 10, and the impact of continued attacks on oil pipelines and infrastructure, at pp. 10-11. Fuchs Decl. ¶ 25, Exh. G; *see also* Fuchs Decl. ¶ 26, Exh. H (Unclassified February 24, 2004 testimony by then-CIA Director George Tenet to the United States Senate Select Committee on Intelligence).
- The unclassified National Intelligence Council report entitled "Mapping the Global Future," explains that Iraq has replaced Afghanistan as the training ground

for the next generation of "professionalized" terrorists.[3] It explains that as instability in Iraq grew after the toppling of Saddam Hussein, and resentment toward the United States intensified in the Muslim world, hundreds of foreign terrorists flooded into Iraq across its unguarded borders. They found unprotected weapons caches that they are now using against U.S. troops. Foreign terrorists are believed to make up a large portion of today's suicide bombers, and these foreigners are forming tactical, ever-changing alliances with former Baathist fighters and other insurgents. "The al-Qa'ida membership that was distinguished by having trained in Afghanistan will gradually dissipate, to be replaced in part by the dispersion of the experienced survivors of the conflict in Iraq," the report says. "Pervasive Insecurity," at p. 2. According to the NIC report, Iraq has joined the list of conflicts – including the Israeli-Palestinian stalemate, and independence movements in Chechnya, Kashmir, Mindanao in the Philippines, and southern Thailand – that have deepened solidarity among Muslims and helped spread radical Islamic ideology. "Pervasive Insecurity," at p. 1. Fuchs Decl. ¶27, Exh. I.

- The Chairman of the National Intelligence Council, Robert L. Hutchings, in an April 8, 2003, speech entitled "The World After Iraq," candidly recognized the new era of conflict between former allies in NATO and EU, such as the impact of the Iraq war on German-French-British-Russian-U.S. relations and a likely "near-term spike in anti-American terrorist activity and an expansion of the recruitment

[3] According to news reports, at a NIC briefing to reporters on the report, NIC officials stated that Iraq is (1) "a training ground, a recruitment ground, the opportunity for enhancing technical skills" and "There is even, under the best scenario, over time, the likelihood that some of the jihadists who are not killed there will, in a sense, go home, wherever home is, and will therefore disperse to various other countries." (comments attributed to David B. Low, the national intelligence officer for transnational threats); and (2) "At the moment" Iraq "is a magnet for international terrorist activity." (comments attributed to NIC Chairman Robert L. Hutchings). Fuchs Decl. ¶ 27, Exh. I.

pool of extremist groups and would be terrorists" as a result of "regime change in Iraq" and the "U.S. military action and occupation." Pp. 3, 4-5. He recognized the "lack of political culture, weak civil society, and strong vested interests against reform" in Iraq. Pp. 5. He also spoke of the impact on Arab states such as Egypt, Jordan, Saudi Arabia, Syria and Iran. *Id*. Fuchs Decl. ¶29, Exh. J.

Moreover, the Iraqi Intelligence Service Chief has made extremely detailed public statements as recently as January 2005 that give extensive detail about the situation in Iraq, including the estimated number of insurgents, the names of three individuals believed to be supervising the insurgency, the role of Syria in sheltering insurgents, and the result of military operations against insurgents. These statements were translated and made available to the American public by the United States Government's Foreign Broadcast Information Service, Fuchs Decl. ¶30, Exh. K, and are likely to be more current than the Estimate.

A side-by-side comparison of the key judgments of the Estimate with these statements 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. Critically, they undermine the CIA's limited evidence on segregability.[4]

[4] In *Afshar v. Dep't of State*, 702 F.2d 1125 (D.C. Cir. 1983), the D.C. Circuit held that although an agency bears the burden of proving that a FOIA exemption applies to a given document, a plaintiff may assert that information has been previously disclosed by pointing to specific information in the public domain that duplicates that being withheld. *Id*. at 1130. Here, plaintiffs are hindered from making such a showing because of the extreme generality of the Lutz Declaration. Nonetheless, the information described above regarding CIA authorized disclosures of information that the news media reported is in the Estimate is sufficient to challenge the CIA's failure to segregate out disclosable portions of the Estimate.

Fourth, the generalized statements of harm relating to possible disclosure of confidential sources, intelligence activities 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. This sort of "'categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.'" *Campbell*, 164 F.3d at 30. The Court should not be presumed to fill in the gaps based on speculation about what might be in the Estimate. Following *EPA v. Mink*, 410 U.S. 73 (1973), Congress amended FOIA to clarify its intent that "courts act as an independent check on challenged classification decisions." *Goldberg v. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987). The CIA has made authorized releases of numerous other studies that reach conclusions about Iraq similar to the ones that might be expected to be in the Estimate without harm to confidential sources, intelligence activities and methods, and foreign relations and activities. These include:

- The 14-pages of released text from the classified 93-page National Intelligence Estimate 2002-16HC, "Iraq's Continuing Programs for Weapons of Mass Destruction," (October 2002) (released July 2003 and June 1, 2004). Fuchs Decl., Exh. F;

- An unclassified 29-page document entitled "Iraq's Weapons of Mass Destruction Programs" (October 2002) (available at http://www.cia.gov/cia/reports/iraq_wmd/Iraq_Oct_2002.htm) (last viewed February 9, 2005). Fuchs Decl. ¶30, Exh. L; and

- The unclassified "Mapping the Global Future, Report of the National Intelligence Council's 2020 Project," NIC 2004-13 (December 2004). Fuchs Decl. ¶27, Exh. I.

The CIA has not made any real effort to correlate claimed FOIA exemptions with specific content in the Estimate, to explain the amount and distribution of exempt materials, or to justify its claim that every single word of the Estimate must be withheld.

Instead it relies on the deference generally afforded government affidavits and the assumption that matters concerning Iraq will be perceived as sensitive. This is not sufficient to justify summary judgment as it fails to provide the Court with sufficient information by which to judge the Agency's claims and denies plaintiff an opportunity to advocate for disclosure. Therefore, the Court should deny the CIA's motion for summary judgment with respect to Exemptions 1 and 3.

b. *In Camera* Review Is Necessary Because The CIA Has Wholly Failed To Justify Withholding The Entire Estimate.

Where, as here, the CIA has not released any part of the requested document and the government's declaration is inadequate to review the accuracy of its claims, "*in camera* inspection is needed in order to make a responsible *de novo* determination on the claims of exemption." *See Ray v. Turner*, 587 F.2d 1187, 1195-96 (D.C. Cir. 1978); *id*. at 1215, 1218 (Wright, J., concurring) (where exemption claim is not clearly proven by detailed affidavits and testimony, court may not sustain withholding without *in camera* review); *Mead Data Cent., Inc*., 566 F.2d at 262, n. 59 (suggesting selective *in camera* inspection in cases involving segregation challenges "to verify the agency's descriptions and provide assurances, beyond a presumption of administrative good faith, to FOIA plaintiffs that the descriptions are accurate and as complete as possible").

This is particularly true in a national security FOIA case involving the issue of segregability, as the United States Court of Appeals for the D.C. Circuit recognized when it remanded the *Krikorian* case to the district court with the instruction that the district court should determine "whether more detailed affidavits are appropriate or whether an alternative such as *in camera* review would better strike the balance between protecting

sensitive foreign relations information and disclosing non-exempt information as required by the FOIA." *Krikorian*, 984 F.2d at 467.

Indeed, this is just the type of case where *in camera* inspection is appropriate. *See Allen v. CIA*, 636 F.2d at 1298-99 (listing considerations supporting *in camera* inspection). The government's declaration does not provide the Court with sufficiently detailed justification to review its segregation claims and there is just one document for *in camera* review. *Id.* at 1298 ("when the requested documents are few in number and of short length, . . . [a]n examination of the documents themselves in those instance will typically involve far less time than would be expended in presentation and evaluation of further evidence"). In addition, when the dispute turns on the contents of the withheld documents, and not the parties' interpretations of those documents, *in camera* review may be more appropriate. *See Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987).

Moreover, the need for *in camera* review in this case is reinforced by the record of the government's handling of this matter. Plaintiff requested expedited processing of this matter on September 16, 2004, and supplemented the request on October 4, 2004. Plaintiff's request for expedition clearly met the statutory standard in that plaintiff demonstrated that it is principally engaged in the dissemination of information to the public and that the information is "urgen[tly][needed] to inform the public concerning actual or alleged Federal Government activity." As support for the assertion of public urgency, plaintiff advised the CIA that (1) the "intense public interest in Iraq as a matter of policy debate [and] the concerns of the families of the over 100,000 American servicemen and servicewomen in Iraq today"; (2) the delivery of a CIA-approved speech

on the topic by CIA National Intelligence Officer for the Near East and South Asia Paul R. Pillar; (3) the September 23, 2004 request of eight members of the Senate Select Committee on Intelligence asking the CIA to provide a declassified version of the Estimate; and (4) and the extensive news coverage of the National Intelligence Estimate, including over 1300 media sources reporting on the Iraq National Intelligence Estimate, according to a search on Google News. Fuchs Decl. ¶¶ 7-18. The CIA denied expedited processing despite this overwhelming record in support of expedition.

It was only when this lawsuit was filed to enforce the right to expedited processing and the Court scheduled a hearing on the matter that the CIA suddenly managed quickly to process the request and deny it in full.[5] The CIA's unusual handling of the matter and litigation gamesmanship should not be countenanced by the Court. *In camera* review is particularly appropriate where, as here, the agency's actions reflect an "inherent tendency to resist disclosure." *Ray v. Turner*, 587 F.2d at 1195.

Accordingly, the Court should deny the CIA's motion for summary judgment and grant plaintiff's motion for *in camera* review of the Estimate.

II. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF EXEMPTION 5 SHOULD BE DENIED

In an extensive, general discussion of the law of the deliberative process privilege under FOIA, followed by recital of boilerplate statements from the CIA about National Intelligence Estimates, Defendant for the first time contends that FOIA Exemption 5

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[5] The CIA's median processing time for a complex request in FY 2004 was reported as 63 days, although the FOIA requests among the 1150 FOIA and Privacy Act requests still pending at the end of FY 2004 had been pending for a median period of 349 days. The median processing time for a simple request in FY 2004 was reported as 7 days. Fuchs Decl. ¶ 32, Exh. Q. This request was processed in 26 business days, and two days after the lawsuit was filed seeking to enforce the right to expedited processing, while over 100 other requests filed by the National Security Archive before the Estimate request was filed continued to remain pending at the Agency. Fuchs Decl. ¶¶ 5, 22, 23, 32.

applies to the Estimate. Yet the Estimate fails to meet the requirements to be protected by the deliberative process privilege. It is not predecisional, in that it is not part of any agency decisionmaking process; and, it is not deliberative, in that it does not include give-and-take on policy issues. To accept what appears to be the CIA's argument that the Estimate is a protected deliberative document because it serves the purpose of informing policymakers would be to subsume all agency product into the deliberative process privilege. This clearly was not intended by Congress and is not the law of the Circuit or of the United States.

FOIA Exemption (b) (5) (hereinafter "Exemption 5") allows government agencies to shield "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b) (5). The Supreme Court has interpreted this section to "exempt those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975). The form of privilege asserted by the CIA here is the "deliberative process" privilege, which "shelters documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992).

Information is exempt only if it is both "predecisional" and "deliberative." *Id*. at 1434. "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.'" *Id*. Material is deliberative if it "'reflects the give-and-take of the consultative process.'" *Petroleum Info. Corp.*, 976 F.2d at 1434 (citations omitted). "The privilege is

designed to protect agency policy-oriented judgments and the processes by which policies are formulated, rather than 'purely factual, investigative matters.'" *National Ass'n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002) (citing *Environmental Protection Agency v. Mink*, 410 U.S. 73, 89 (1973)) (additional citations omitted). The Estimate fails both the predecisional and deliberative prongs of the test for Exemption 5 protection.

First, it is not predecisional. Here, the NIE is an assessment of the situation in Iraq. While it may be informative to policymakers, defendant has not – and indeed cannot – point to any particular decisionmaking process that depends on the Estimate. Instead the Lutz Declaration speaks only generally of the "process." Lutz Decl. ¶ 49 ("The Estimate represents a quintessential example of a deliberative, predecisional process"). Exemption 5 does not permit information to be considered predecisional "based on the possibility that [it] might be considered for [other unspecified] purposes." *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1090 (9th Cir. 2002) (emphasis supplied by original text) (citing *Assembly of California v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) ("Characterizing these documents as predecisional simply because they play into an ongoing audit process would be a serious warping of the meaning of the word.") (quoting *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 866 (D.C. Cir. 1980) (internal quotation marks omitted)).

In fact, its minimal relevance in any particular decisionmaking process is highlighted by the response of key policymakers to its content. President Bush's first reaction on September 19, 2004, was that the Estimate is merely a "guess." He followed this up on September 21, 2004, by saying, "I used an unfortunate word, 'guess.' I should

have used 'estimate.'" He explained "[t]he CIA laid out several scenarios. It said that life could be lousy. Life could be okay. Life could be better." Fuchs Decl. ¶ 31, Exh. M.

His spokesman, Scott McLellan, reiterated these views, stating: "The NI[E] really states the obvious in what the President has said many times. … There are certain areas where there are ongoing difficulties and security threats. … [The Estimate] states the obvious, and it talks about the challenges and the different scenarios that we face. That's what intelligence reports are supposed to do. 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 because the mission in Iraq is critical for the world and for the American people." Fuchs Decl. ¶ 33, Exh. N at p. 4.

Secretary of State Colin Powell had a similar reaction, telling the *Washington Times* that the Estimate was "'a good piece of academic work,' and was not 'anything that would cause you to ring alarm bells.' … 'It wasn't, frankly, anything I didn't already know.'" Fuchs Decl. ¶ 34, Exh. O, at 2.

Second, the Estimate is not a deliberative document. To support an Exemption 5 claim to withhold the Estimate, the CIA would need to prove that the disclosure of material in the Estimate would reveal some form of give-and-take on particular policy issues. As the CIA concedes in its legal memorandum, "[d]eliberative documents frequently consist of 'advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Mem. In Supp. Of Summ. Judg. at 19-20 (citations omitted).[6] It is undisputed that the CIA is not authorized to perform policymaking activities. It provides an "independent source of

[6] In footnote 4, Mem. In Supp. Of Summ. Judg., the CIA quotes a number of cases that concern summaries and advice by staff concerning policy matters to be considered by superiors. These cases are inapposite because the Estimate is not policy advice.

analysis" outside of the policymaking process. Central Intelligence Agency, About the CIA, *at* http://www.cia.gov/cia/information/info.html (Oct. 26, 2004).

The NIC's Mission Statement explicitly explains, "The NIC's goal is to provide policymakers with the best, unvarnished, and unbiased information—regardless of whether analytic judgments conform to US policy." NIC Mission Statement, available at http://www.cia.gov/nic/NIC_about.html (last viewed February 11, 2005). This understanding of the CIA limited role – and more specifically the limited role of National Intelligence Estimates – is borne out by the statement of Stuart A. Cohen, Vice Chairman of the National Intelligence Counsel and acting-Chair of the NIC when the 2002 National Intelligence Estimate on Iraq's Weapons of Mass Destruction was published. Mr. Cohen explained that "Intelligence judgments, including NIEs, are policy neutral. We do not propose policies, and the Estimate in no way sought to sway policymakers toward a particular course of action." Fuchs Decl. ¶ 35, Exh. P, at p. 1.[7] Indeed, the Lutz Declaration concedes this point, describing the Estimate as a document designed to provide "the best, most clear and complete analysis and assessment." Lutz Decl. ¶ 72

As such, 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. The Lutz's Declaration states "[t]he specific facts contained in the Estimate were selected and highlighted out of a wide body of other potentially relevant factual and background

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[7] Indeed, this is consistent with longstanding practice in the preparation of NIEs. As former DCI Walter Bedell Smith explained in 1950, "A national intelligence estimate … should be compiled and assembled centrally by an agency whose objectivity and disinteredness are not open to question …." Quoted in Sherman Kent, *The Law and Custom of the National Intelligence Estimate*, available at http://www.cia.gov/csi/books/shermankent/5law.html (Last viewed on February 10, 2005).

material. The Estimate contains various factual descriptions …." Lutz Decl. ¶ 51.[8] This reasoning, taken to its logical conclusion, would shield virtually all government records from disclosure. Agency material is not transformed into part of the deliberative process "simply because it contains only those facts which the person making the report thinks material." *Playboy Enterprises, Inc. v. Dep't of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982).

In fact, the D.C. Circuit has drawn an explicit distinction "between factual information, which 'generally must be disclosed,' and 'materials embodying officials' opinions,' which are 'ordinarily exempt.'" *National Ass'n of Home Builders*, 309 F.3d at 39; *see Quarles v. Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (observing that "the prospect of disclosure is less likely to make an adviser omit or fudge raw facts, while it is quite likely to have just such an effect" on materials reflecting agency deliberations). There is no special exception to this rule because the information is produced by the CIA.

The government provides an extended seven-page discussion of the law of deliberative process under FOIA in which it appears to argue that the deliberative process privilege protects the "process" in general. It suggests that the Court should abandon the fact/opinion distinction and instead ask whether disclosure of the information at issue, be it fact or opinion, would disrupt the process even if it did not reveal the substance of predecisional recommendations. The Supreme Court and the D.C. Circuit have explicitly endorsed the fact/opinion distinction, making clear that the revelation of predecisional

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[8] To the extent Defendant is talking about the process involved in drafting the Estimate, that process is not revealed by its release. The document requested is the final published version of the Estimate, approved by the then acting Director of Central Intelligence, and described as "finished intelligence." Plaintiff is not requesting earlier drafts that might reveal editorial judgment. As noted above, there is no protection for a document simply because some judgment was involved in its drafting and editing. The protection of the deliberative process privilege is accorded to a document that provides policy give and take. Accepting a contrary view on this would protect almost all governmental records from disclosure.

recommendations is the touchstone for the application of the deliberative process privilege. *See Mink*, 410 U.S. at 89; *National Ass'n of Home Builders*, 309 F.3d 26 (confirming the continued vitality of the fact/opinion distinction in the D.C. Circuit).

None of the cases discussed by the government overrules the fact/opinion distinction or the rationale underlying it. Under the existing standard the Court already considers whether the deliberative process would be impaired by considering the purposes of the deliberative process privilege. There is no support in the cases cited by the government for a broadening of the accepted purposes of the deliberative process privilege. In *Wolfe*, 893 F.2d at 774, the court protected from exposure the routing path and dates of FDA recommendation because it would expose the entire deliberative process. Disclosure of the Estimate would not reveal the progress and process of a recommendation wending its way though a federal agency, and thus *Wolfe* is inapposite. Similarly, *Dudman Communications Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987), is not analogous because it protected factual material in early drafts of a document and thus sought to protect editorial judgment. The Estimate, by contrast is the final product of the editorial process. It does not reveal the process of arriving at the facts that are included. *Quarles*, is similarly distinguishable. There, the court applied the protection of the deliberative process privilege because the cost estimates at issue reflected "a complex set of judgments" and was part of a clear decisionmaking process to select a port for a battleship group. 893 F.2d at 392-93. In *Petroleum Info.*, 976 F.2d at 1437, which also is cited by Defendant, the court held that a data file fell outside the deliberative process privilege *even though the creation of the file involved the exercise of discretion concerning how to represent data* because the file was

essentially "technical and facilitive." This is just so with the Estimate, which captures facts about the situation in Iraq. None of these cases permit protection of a document under the deliberative process rubric simply because it informs policymakers or because some judgment was involved in choosing the content of the document; the privilege only applies to protect documents under FOIA if the document *exposes the deliberation*.

Even in *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114 (9th Cir. 1988), which the CIA sets forth as "an appropriate fit in resolving issues in this case," Mem. In Supp. Of Summ. Judg. at 23, the Ninth Circuit discussed the deliberative process exemption as applying to "recommendations on law or policy." *Id*. (quoting *National Wildlife Federation*, 861 F.2d at 1119).[9]

Because nearly everything an agency generates is somehow related to the deliberative process, careless expansion of the protection beyond that envisioned by Congress and articulated by the Supreme Court in *EPA v. Mink*, 410 U.S. at 88, would afford government agencies unrestrained discretion in deciding whether to release materials requested under FOIA

The CIA has failed to satisfy any part of its burden to sustain application of Exemption 5 to the Estimate. Accordingly, the Court should deny its motion for summary judgment.

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[9] Notably, the *National Wildlife Federation* decision refused to do a fact/opinion analysis, in contrast with long settled D.C. Circuit precedent. *See, e.g., National Ass'n of Home Builders*, 309 F.3d at 39. Even the Ninth Circuit has backed away from this rejection of the fact/opinion analysis. *See Assembly of the State of California*, 968 F.2d at 921 ("The factual/deliberative distinction survives, … as a useful rule-of-thumb favoring disclosure of factual documents, or the factual portions of deliberative documents where such separation is feasible.")

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendant's Motion for Summary Judgment be Denied and Plaintiff's Motion for *In Camera* Review of the Estimate's Key Judgments be granted.

Respectfully submitted,

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DATE: February 14, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

CONCISE STATEMENT OF GENUINE ISSUES

1. Defendant CIA has failed to correlate claimed exemptions with specific portions of the Estimate to which they apply.
2. Defendant CIA has failed to provide specific detailed evidence to support its segregability argument.
3. Defendant CIA has failed to demonstrate that the entire Estimate is protected from disclosure by FOIA exemptions 1 and 3.
4. Defendant CIA is not entitled to summary judgment with respect to the applicability of Exemptions 1 and 3 to the Estimate.
5. Defendant CIA has failed to establish that the Estimate is a predecisional document.
6. Defendant CIA has failed to establish that the Estimate is a deliberative document.
7. Defendant CIA is not entitled to summary judgment with respect to the applicability of Exemption 5 to the Estimate.

Respectfully submitted,

_____

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