

ORAL ARGUMENT NOT YET SCHEDULED

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 12-5201  
(CA No. 11-724)

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NATIONAL SECURITY ARCHIVE,

Appellant

v.

CENTRAL INTELLIGENCE AGENCY,

Appellee

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**BRIEF FOR APPELLEE**

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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RONALD C. MACHEN JR.,  
United States Attorney.

R. CRAIG LAWRENCE,  
MITCHELL P. ZEFF,  
Assistant United States Attorneys.

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **Parties**

The Appellant is the National Security Archive, who was the Plaintiff in the District Court. The Appellee is the Central Intelligence Agency, who was the Defendant in the District Court. The *amicus curiae* is the National Coalition for History.

### **Rulings Under Review**

At issue in this appeal is the May 10, 2012 Memorandum Opinion and Order by the Honorable Gladys Kessler. The May 10, 2012 Order granted the Defendant-Appellee's motion for summary judgment and denied Plaintiff-Appellant's cross motion for partial summary judgment .

### **Related Cases**

This case has not previously been before this Court and there are no currently pending related cases.

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**\*Cases chiefly relied upon are marked with asterisks.**

**FEDERAL STATUTES**

5 U.S.C. §552(b)(5)

**RELEVANT STATUTES**

## 5 U.S.C. §552(b)(5)

This section does not apply to matters that are 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.

## **COUNTER-STATEMENT OF THE ISSUES PRESENTED**

- (1) Whether the District Court correctly held that a draft Volume V of the CIA's Official History of the Pay of Pigs Operation titled "Internal Investigation Report" is pre-decisional because it was prepared by a staff historian for inclusion in the final publication of the CIA's official history, but was ultimately rejected for inclusion by the CIA's chief historian.
- (2) Whether the District Court correctly held that Volume V is deliberative because it reflects the personal opinions of the writer as well as the give-and-take of the CIA's historical review process.
- (3) Whether the District Court correctly found that the passage of time has not undermined the CIA's rationale for withholding Volume V because the disclosure of Volume V would harm the Agency's interest in honest and frank communications amongst its historians and providing the public with unbiased, official accounts of the CIA's historical analysis.
- (4) Whether the District Court correctly ruled that the entirety of Volume V is covered by Exemption 5.

## STATEMENT OF JURISDICTION

Appellee, the Central Intelligence Agency (“CIA”), agrees with Appellant’s statement of jurisdiction.

## COUNTER-STATEMENT OF THE CASE

Appellant, the National Security Archive (“the Archive”), requested access under the Freedom of Information Act (“FOIA”) to Volumes I, II, IV, and V of the CIA’s Official History of the Bay of Pigs Operation. *See Nat’l Security Archive v. CIA*, Civil Action No. 11-724 (D.D.C.) (“*NSA I*”), A 95-109, at A98. Volume I is titled “Air Operations.” *NSA I*, Declaration of Martha Lutz, Information Review Officer, Director’s Area, Central Intelligence Agency (“Lutz Decl”) ¶ 8, at A3-4. Volume II is titled “Participation in the Conduct of Foreign Policy.” *Id.* ¶ 9, at A 4. Volume IV is titled “Taylor Committee Report,” and Volume V is titled “Internal Investigation Report.” *Id.* ¶ 10, at A 4. On July 25, 2011, the CIA released with minimal redactions Volumes I, II, and IV to the Archive, which totaled 1,174 pages, but withheld Volume V in full pursuant to Exemption 5 of the FOIA. *Id.* ¶ 14, at A 9. Although the CIA also invoked FOIA Exemptions 1 and 3 over portions of the material in Volume V, the District Court did not address the applicability of these exemptions because it ruled that Exemption 5 protected the entirety of Volume V from disclosure. *See NSA I*, at A 97, n.2 (“Because, for the



reasons given below, the entirety of Volume V is covered by Exemption 5, there is no need to address the applicability of Exemption 1 or 3").

On May 10, 2012, the District Court issued a Memorandum Opinion and Order granting the CIA's motion for summary judgment and denying the Archive's cross motion for partial summary judgment. A 95-109. The District Court held that the CIA had properly withheld Volume V in its entirety under Exemption 5 because the draft manuscript – which had never been published as the official Agency policy – was covered by the deliberative process privilege. *NSA I*, at A8, 12.

On June 20, 2012, the Archive appealed the District Court's decision to this Court. A4 (Notice of Appeal).

### **COUNTER-STATEMENT OF THE FACTS**

The core mission of the CIA's Center for the Study of Intelligence ("CSI"), 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. "In other words, these histories provide 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." *NSA I*,

Declaration of David S. Robarge, Chief Historian, Center for the Study of Intelligence, Central Intelligence Agency (“Robarge Decl”) ¶¶ 3-4, at A 86-87.

In the CSI, a staff historian like Dr. Pfeiffer prepares the first draft of a historical manuscript, which is then put through an iterative peer review process by various History Staff members. *See id.*, at A 88. The Chief Historian also conducts a substantive editorial review of the draft, which often involves multiple exchanges between the Chief Historian and the author. The draft will undergo many changes in form and substance during this peer review process. *Id.* Once the Chief Historian determines that the draft is ready for review by the Agency component or official who commissioned the work, he or she provides the draft to that component or official for comment. *Id.* The History Staff then incorporates comments from the commissioning component or officer, after which the Chief Historian reviews the draft again. *Id.* Once the Chief Historian is satisfied that the draft is ready for final approval and publication, the draft is sent to the Director and Deputy Director of CSI for comment and/or final approval for publication. *Id.*

Dr. Jack B. Pfeiffer, a former CIA staff historian, was assigned to prepare a classified history of the Bay of Pigs Operation in 1973. In 1981, two chapters from Dr. Pfeiffer’s draft fourth volume – one detailing the Inspector General’s report on the Bay of Pigs Operation and the other detailing the Directorate of Plans’ response

to that report – comprised the first draft of the CIA’s “Internal Investigation of the Bay of Pigs Operation,” which is referred to herein as Volume V. *NSA I*, Lutz Decl. ¶ 18, at A 11. In accordance with the CIA’s review protocol for staff historians, Dr. Pfeiffer submitted the initial draft of Volume V to his supervisor – the CIA’s then Chief Historian Dr. J. Kenneth McDonald. *Id.*

Indeed, when Dr. Pfeiffer worked for the CIA in the 1980s, a draft history needed an even higher level of authority for publication than the Director of CSI. Robarge Decl at fn. 1, A 89. In this case, however, then Chief Historian Dr. McDonald felt that Dr. Pfeiffer’s draft manuscript had serious deficiencies as a historical document and informed Dr. Pfeiffer that the document would not be forwarded for further review. *Id.* ¶¶ 7-8, at A 88.

Dr. Pfeiffer continued to revise Volume V until he retired from the CIA in 1984, but his draft never proceeded beyond the first stage of the CIA review process for historical studies because Dr. McDonald – Dr. Pfeiffer’s supervisor – determined that the deficiencies he informed Dr. Pfeiffer of in 1981 had not been remedied. *NSA I*, at A 107. More specifically, Dr. McDonald concluded that Volume V “is an uncritical defense of the CIA officers who planned and executed the Bay of Pigs Operation” and “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.”

*Id.* (quoting Robarge Decl. ¶ 13, at A 91).

In 1987, Dr. Pfeiffer himself brought the first challenge to the CIA’s withholding of Volume V when he submitted a FOIA request for access to his draft manuscript. In 1989, however, the District Court held that the CIA had properly withheld Volume V under Exemption 5. *See Pfeiffer v. CIA*, 721 F. Supp. 337 (D.D.C. 1989). As the District Court reasoned: “We are unpersuaded that the Internal Investigation Report that plaintiff seeks to have disclosed is a ‘final’ agency history, nor are we convinced that plaintiff had authority to unclassify the material. The subjective views of a staff member that the decision-making process is complete and ‘final’ when he submits his recommendation to a superior is of no consequence.” *Id.* at 340.

On April 14, 2011, the Archive brought a second action challenging the CIA’s withholding of Volume V. On July 25, 2011, the CIA released Volumes I, II, and IV to the Archive with minimal redactions. The release totaled 1,174 pages. *NSA I*, Lutz Decl. ¶ 14, at A 9.

On May 10, 2012, the District Court rejected the Archive’s second challenge to the CIA’s withholding of Volume V. In doing so, the District Court found “no reason to depart from Judge Pratt’s sound conclusion” that Volume V is exempt

from disclosure because “Volume V was undoubtedly generated before the adoption of an agency policy and is therefore predecisional.” *NSA I*, at A 106. Importantly, the District Court found that “Volume V also reflects the give-and-take of the consultative process and is therefore deliberative.” A 107. Lastly, the District Court found that “the CIA has shown why, in this case, the passage of time has not affected the rationale for invoking Exemption 5: the CIA does not want to discourage disagreement, of which there was clearly much in this instance, among its historians.” A 108. The District Court concluded that: “In short, the CIA has satisfied its burden of demonstrating that Volume V is predecisional and deliberative, and that its release would harm the deliberative process . . . . Therefore, Volume V is covered by the deliberative process privilege and properly withheld under Exemption 5.” *Id.*

The Archive’s appeal to this Court is the third challenge in federal court to the CIA’s withholding of the draft “Internal Investigation Report” on the Bay of Pigs Operation pursuant to Exemption 5 of the FOIA, which protects from disclosure material covered by the deliberative process privilege.

### **SUMMARY OF ARGUMENT**

*First*, the District Court correctly held that Volume V was pre-decisional because it is a draft manuscript written by a staff historian, which reflects the

personal opinion of the author and was not selected by the Agency for inclusion in its official history of the Bay of Pigs Operation.

*Second*, the District Court correctly held that Volume V is deliberative because it contains the personal opinions of a subordinate staff historian regarding the Internal Investigation Report of the Operation and its exclusion from the CIA's official history reflects the give-and-take of the CIA's internal historical review process.

*Third*, the District Court correctly held that the disclosure of Volume V would harm the CIA's deliberative process by chilling candid communications amongst current CIA historians.

*Finally*, the District Court explicitly addressed the issue whether any non-exempt information could reasonably be segregated from Volume V, and even were this Court to conclude that the District Court did not conduct a proper segregability analysis, remand is unnecessary because no part of Volume V was improperly withheld.

## ARGUMENT

### **I. The District Court Correctly Held that Dr. Pfeiffer's Draft Internal Investigation Report of the Bay of Pigs Operation is Predecisional Because it was Generated Prior to, and in Preparation for, Inclusion in the CIA's Official History of the Bay of Pigs Operation.**

In *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007), this Court held

that “[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.” *Morley*, 508 F.3d at 1127 (citations omitted); *see also Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (“Material is predecisional if it was generated before the adoption of an agency policy”) (internal citation and quotation omitted). However, as the Supreme Court held in *N.L.R.B., et al. v. Sears Roebuck & Co.*, the “emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” 421 U.S. 132, 151, n.18 (1975). Additionally, this Court has found that “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.” *Morley*, 508 F.3d at 1127 (quoting *Costal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980)). Moreover, pre-decisional materials “reflect []

advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, [or] the personal opinions of the writer prior to the agency's adoptions of a policy." *Public Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2010) (quoting *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981)) (alterations in *Public Citizen*).

The Archive contends that "[i]n the present case, the Agency has failed to identify – much less ‘pinpoint’ – any policy or decision connected to its Bay of Pigs history." Archive Br. at 19; *see also id.* at 21 ("In the present case, the Agency has not claimed that Dr. Pfeiffer's Bay of Pigs monograph was crafted in contemplation of any further action by the Agency"). The Archive posits the following question in support of its argument that Volume V is not pre-decisional. "To successfully invoke Exemption 5, the Agency must the question: 'To what decision or policy does the creation of Volume V relate?' Its answer cannot be: 'The creation of Volume V.'" Archive Br. at 23. Yet the Archive concedes, as it must, that "[t]he district court below suggested that Volume V should be considered predecisional in that it was 'generated prior to and in preparation for completion of the CIA's official history, i.e. its final policy' . . . [A106]." *Id.* at



23.<sup>1</sup> Indeed, Volume V is nothing more than a manuscript drafted by a staff historian and submitted to the chief historian, which was never selected for inclusion in the Agency's final published history. A 106-107. The CIA's final history of the Bay of Pigs Operation is the agency policy to which Volume V relates. In fact, the Archive also admits that "Dr. Pfeiffer's project was to create an 'institutional history' of the Agency's role in the Bay of Pigs Invasion 'in order to provide an accurate and accessible account of what it ha[d] done.'" Archive Br. at 7 (citing A 44-45). By the Archive's own admission, therefore, Dr. Pfeiffer drafted Volume V in contemplation of its inclusion in the Agency's official history, which is precisely the Agency decision to which Volume V contributed.

The Archive relies on *Russell v. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982), for the proposition that a draft history can only be considered pre-decisional if a later version of the history "is ultimately published and adopted as a public statement of the agency's views." See Archive Br. at 24, n. 8; see also *id.* at 27 ("For instance, in *Russell v. Dep't of the Air Force* . . . , the Court permitted

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<sup>1</sup> The Archive nearly concedes that Volume V is pre-decisional in arguing that "the public could not possibly be confused by adding *Dr. Pfeiffer's unofficial views to the mix or believe that those views represent the official view of the CIA.*" Archive Br. at 15. The CIA's official policy is embodied in its official history, so Dr. Pfeiffer's "unofficial views" contained in his draft Volume V most certainly renders Volume V pre-decisional.

withholding of an early draft of a historical survey that was later published as the agency's 'official statement' on its use of herbicides in the Vietnam War").

In *Russell*, the appellants sought the release of a draft historical manuscript, having already received the final history. *Russell*, 682 F.2d 1047. As this Court reasoned in *Russell*, however, "the draft represents one Air Force historian's view of the facts. Only after the manuscript completed the OAFH review process did it reflect the official Air Force view." *Id* at 1048-49 (internal quotations omitted). Importantly, this Court expressly rejected the very argument the Archive makes here. *See id.* at 1049, n.1 ("Appellants argue that without a specific and concrete agency decision to which the report can relate, the privilege does not apply . . . . The report was made public; certain draft portions of the report were withheld. The report itself is the agency action or decision. Thus, the draft document is indisputably pre-decisional"). Likewise, the District Court correctly held that Dr. Pfeiffer's draft Volume V represented only one staff historian's opinion (A 107), and the final history is the Agency action or policy to which Volume V relates. The fact that the Agency ultimately released Volumes I, II, and IV to the public, therefore, does not render Volume V any less pre-decisional.

Lastly, the Archive's argument that, if this Court affirms the District Court's holding, "it would mean that all draft documents are predecisional, simply because

they play a role in the document-creation process itself” (Archive Br. at 16), is baseless and inaccurate. The CIA is not arguing that all draft documents are *per se* pre-decisional; but rather, that Volume V is pre-decisional under the facts of this case. The District Court correctly examined the applicability of the privilege in light of the Agency’s actions with respect to the compilation of its history of the Bay of Pigs operation. A 106-107 (“Volume V was undoubtedly generated before the adoption of an agency policy and is therefore predecisional . . . . As both Declarants observe, Volume V represents an intermediate step in the CIA’s intensive review process . . . . Further, in the view of Dr. Pfeiffer’s superiors, Volume V contained significant problems, including ‘offer[ing] a polemic of recriminations against CIA officers who later criticized the operation,’ and was therefore unfit for publication . . . . Hence, Volume V ‘reflect[s] the personal opinions of the writer rather than the policy of the agency.’”). The pre-decisional nature of Volume V, therefore, as in *Russell*, is undoubtedly apparent under the facts of this case.

**II. The District Court Correctly Held that Volume V is Deliberative Because it Would Impact Candid Discussions Amongst the CIA’s Current History Staff.**

This Court has held that in deciding whether a document should be protected by Exemption 5 courts look to whether the document is “pre-decisional,” *i.e.*,

whether it was generated before the adoption of an agency policy, and whether the document is “deliberative,” *i.e.*, whether it reflects the give-and-take of the consultative process. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Moreover, “[t]he critical factor in determining whether the material is deliberative in nature is whether disclosure of the information would discourage candid discussion within the agency.” *Access Reports v. Dep’t of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991); *see also Morley*, 508 F.3d at 1127 (“To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves 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”) (internal quotations omitted). According to the Archive, “Volume V is not deliberative, because its disclosure would reveal nothing about the Agency’s decisionmaking and policy-formation processes. In addition, releasing the decades-old manuscript would in no way impair the functioning of the Agency’s History Staff.” Archive Br at 25.

However, the Archive’s position is not supported by the law of this Circuit. In *McKinley v. Board of Governors of the Federal Reserve System*, this Court rejected the argument that a “record is deliberative only if its disclosure would harm the Agency’s process.” 647 F.3d 331, 339 (D.C. Cir. 2011). To the

contrary, this Court emphasized that “Congress enacted FOIA Exemption 5 . . . precisely because it determined that the disclosure of material is both predecisional and deliberative *does* harm an Agency’s decisionmaking process.” *Id.* (emphasis in original); *see also Ryan v. Dep’t of Justice*, 617 F.2d 781 (stating that Exemption 5 “was created to protect the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity”). Here, the CIA has explained that its History Staff’s decision not to adopt the manuscript at issue impairs the deliberative process involved in the Agency’s development of its institutional history. A 86.

Although no such showing is needed, the Archive’s conclusory statement releasing Volume V would “in no way impact the functioning of the Agency’s History Staff” (Archive Br. at 25) was specifically addressed by the CIA’s declarants. *See, e.g.*, A 107 (“As both Declarants observe, Volume V represents an intermediate step in the CIA’s intensive review process . . . . Further, in the view of Dr. Pfeiffer’s superiors, Volume V contained significant problems, including ‘offer[ing] a polemic of recriminations against CIA officers who later criticized the operation,’ and was therefore unfit for publication . . . . Hence, Volume V ‘reflect[s] the personal opinions of the writer rather than the policy of the

agency.”); A 107-108 (“Dr. Robarge has convincingly demonstrated that releasing a draft history may cause staff historians not ‘to reach – or even propose – judgments that may be critical of the Agency’s performance or otherwise unpopular within the Agency.”); *see also* Robarge Decl ¶ 2, at A 86 (disclosure of Volume V “reasonably could be expected to seriously impair the current and future historical manuscript review process at the CIA and compromise the utility of CIA histories as contributions to Agency decisionmaking”). As the District Court correctly noted, “[g]iven the fact that, as an agency, the CIA operates in secrecy and faces relatively little public scrutiny of its operations for that reason, and given the importance of the activities and operations it undertakes, it is particularly important that in-house historians – who do have the facts – feel free to present their views, theories, and critiques of the Agency’s actions.” A 109. Significantly, the Archive submitted no declarations that disputed the Lutz and Robarge declarations. Because the disclosure of Volume V would negatively impact the honest and frank communications of the CIA’s history staff, therefore, the District Court correctly found Volume V to be deliberative.

Lastly, the Archive claims that “since Volumes IV and V were written concurrently, presented concurrently for review, and rejected concurrently, there is no reason to think – and the Agency provides none – that disclosure of Volume V

will affect the deliberative process to any greater degree than disclosure of Volume IV did.” Archive Br. at 42. Leaving aside the obvious question of how the Archive could possibly know exactly what Volume V contains since it has never been released publicly, it is well established that an agency’s decision to make a discretionary release does not affect its ability to withhold other information. *See Nationwide Bldg. Maint., Inc v. Sampson*, 559 F.2d 704, 712 n. 34 (D.C. Cir. 1977) (concluding that “[t]he FOIA should not be construed so as to put the federal bureaucracy in a defensive or hostile position with respect to the Act’s spirit of open government and liberal disclosure of information”); *see also Mehl v. EPA*, 797 F. Supp. 43, 47 (D.D.C. 1992) (“A contrary rule would create an incentive against the voluntary disclosure of information”).

Additionally, the Archive’s assertions as to the similarities between Volume IV and Volume V is pure conjecture. Indeed, the Archive’s own description of Volume IV indicates that it contains different material than Volume V. “A review of Volume IV, which has been posted on the Agency’s website (and is reproduced in a separate volume of the Appendix for the Court’s convenience), reveals that it is predominantly a factual summary of the operations of the Taylor Committee: how and when the committee was constituted; who testified before the committee and what they said; what the committee reported and with whom the report was

shared.” Archive Br. at 43-44. Volume V, on the other hand, contains “a polemic of recriminations against CIA officers who later criticized the operation,’ and was therefore unfit for publication . . . . Hence, Volume V ‘reflect[s] the personal opinions of the writer rather than the policy of the agency.’”). A 106-107. The Archive’s entirely speculative claim that Volume V contains information that is “similar to that already released” (Archive Br. at 44) merely because the same person drafted both documents is of no moment, and in no way suggests that the *content of Volume IV and Volume V* is similar.

### **III. The District Court Correctly Held that the Passage of Time Has Not Alleviated the Harm to the CIA’s Deliberative Process Because the Release of Volume V would Chill the Deliberations of Current CIA Historians.**

The Archive’s argument that the CIA’s deliberative processes would not be harmed due to the age of Volume V is misplaced. As an initial matter, the Archive acknowledges that “[i]n *McKinley v. Board of Governors of the Federal Reserve System*, 647 F.3d 331 (D.C. Cir. 2011), the Court suggested in dicta that potential harm to an agency’s deliberative process is best conceived of as being coextensive with the scope of the privilege, rather than as being a separate requirement.”

Archive Br. at 31, n. 12. This Court’s holding in *McKinley* is not “dicta,” as the Archive claims. As discussed previously, the Agency has demonstrated that the



predecisional and deliberative elements of the privilege have been met in this case and, as such, an additional showing of harm is not required. *McKinley*, 647 F.3d at 331.

In any event, however, the CIA has demonstrated that the release of Volume V would undermine the ability of its current historians to engage in frank and honest communications – including those that are highly critical of the Agency – which is essential to producing an official, unbiased account of the CIA’s actions for use by current and future CIA agents. *See* A 107-108 (“[T]he CIA has made a strong and specific showing that disclosure of Volume V would harm the deliberative process . . . . Dr. Robarge has convincingly demonstrated that releasing a draft history may cause staff historians not ‘to reach – or even propose – judgments that may be critical of the Agency’s performance or otherwise unpopular within the Agency’”).

According to the Archive, “[t]he Agency’s argument seems to be that its historians might censor themselves if they think their work might one day become public. This argument ignores the obvious irony that the requested document’s author, Dr. Pfeiffer, *himself* sought release of his manuscript almost immediately after leaving the Agency.” Archive Br. at 33. Yet the fact that Dr. Pfeiffer – one former staff historian – sought release of Volume V after he retired does not negate

the chilling effect the disclosure of Volume V would have on *current* historians and other Agency personnel. Moreover, the Archive argues that “even accepting the Agency’s rationale at face value, it ignores the effect of the passage of time.” *Id.* at 34.

The CIA is not arguing, and has never argued, that a court should never consider the passage of time in determining whether a document is protected by Exemption 5. Rather, the CIA has demonstrated that the disclosure of Volume V would harm the Agency’s deliberative processes *in this case*. As the District Court correctly ruled: “The NSA argues that the passage of time should serve as basis for disclosure . . . . The NSA does not, however, cite any case supporting the notion that a document becomes less predecisional or deliberative over time. More importantly, the CIA has shown why, in this case, the passage of time has not affected the rationale for invoking Exemption 5: the CIA does not want to discourage disagreement, of which there was clearly much in this instance, among its historians.” A 108.

Similarly, the *amicus curae* brief of the National Coalition for History (“Coalition) focuses almost entirely on the effect of the passage of time on Volume V. *See* Coalition Br. at 1 (“The CIA’s argument “suffers from one fundamental and overarching flaw: the passage of time, measured in decades, has eradicated any

possible harm from disclosure”). In support of its argument, the Coalition (and the Archive as well) cites the passage of time as a limiting principle “in other contexts” (Coalition Br. at 4) that are wholly inapposite to this case. The Coalition also argues that “[g]iven the nature of their jobs, government officials likely presume that their work-related actions and advice will someday become public.” *Id.*

Yet this view finds no support in the law. To the contrary, in *Russell*, upon which the Archive relies, this Court acknowledged the importance of protecting the honest communications of government historians working on official histories of controversial events like the Bay of Pigs Operation:

We believe, as the Air Force maintains, that individual authors assigned to draft interpretive histories of complex and controversial events should be encouraged to provide the best, most honest, and scholarly products they are capable of producing. The OAFH historians are aware that a long and arduous review will be given to their work products, and that other historians and policy makers may not agree with their interpretations. If the authors are put on notice, however, that each and every difference of opinion will be revealed to the public, with possible adverse consequences to the Air Force, they will be less inclined to state their own interpretations candidly where they perceive the possibility of differences from the opinions held by the reviewing authorities. Stated otherwise, they will be more inclined to draft what they perceive the ‘official line’ will be.

*See also* A 109 (“Given the fact that, as an agency, the CIA operates in secrecy and faces relatively little public scrutiny of its operations for that reason, and given the importance of the activities and operations it undertakes, it is particularly important that in-house historians – who do have the facts – feel free to present their views,

theories, and critiques of the Agency's actions"); *Morley*, 508 F.3d at 1127.

Additionally, the Coalition's brief reveals that what it – and the Archive, which is one of its member organizations – is really asking this Court to do is find that the passage of time renders a document *per se* releasable in the FOIA context. *See* Coalition Br. at 10 (“Given this structure, there is no conceivable justification for the judge-made deliberative process privilege to endure decades beyond the time limit imposed by Congress for the presidential communications privilege. If the Director of Central Intelligence, in advising the President about a sensitive national-security crisis, is entitled to have his advice remain confidential for only twelve years (absent classification issues not presented here), it is unfathomable that an Agency staff historian, writing about the same crisis some two decades later should be entitled to have his views (assuming they constitute advice at all) remain confidential for some two decades longer”).

Yet not surprisingly, this view finds no support in the law, and this Court should decline the Coalition's invitation to drastically alter the application of the deliberative process privilege in the FOIA context. Significantly, in response to the Coalition's hypothetical, it is not unfathomable for the Director of the CIA to have his advice to the President released after a period of time, because the CIA Director speaks for the Agency when providing advice to the President, whereas a

staff historian like Dr. Pfeiffer drafting manuscripts for review by his superiors for inclusion in the Agency's final history does *not* represent the official views of the Agency, as the Archive readily admits. Archive Br. at 15 (“the public could not possibly be confused by adding *Dr. Pfeiffer’s unofficial views to the mix or believe that those views represent the official view of the CIA.*”) (emphasis added).

This Court should affirm the District Court's holding, therefore, because the CIA has demonstrated that the passage of time would harm its deliberative process. *See* A 109 (“In short, the CIA has satisfied its burden of demonstrating that Volume V is predecisional and deliberative, and that its release would harm the deliberative process. Therefore, Volume V is covered by the deliberative process privilege and properly withheld under Exemption 5”).

#### **IV. The District Court Correctly Ruled that the CIA Properly Withheld Volume V in its Entirety.**

The Archive insists that the District Court did not “address whether Volume V contained any releasable information that might be segregable from its exempt information.” Archive Br. at 15. As an initial matter, the District Court in fact addressed whether any segregable material in Volume V could be released. *See* A 109 (“In short, the CIA has satisfied its burden of demonstrating that Volume V is predecisional and deliberative, and that its release would harm the deliberative

process. Therefore, *Volume V is covered by the deliberative process privilege and properly withheld under Exemption 5*) (emphasis added); A 100, n. 2 (“Because, for the reasons given below, *the entirety of Volume V is covered by Exemption 5*, there is no need to address the applicability of Exemption 1 or 3”) (emphasis added).

Even had the District Court not specifically addressed the issue whether any material in Volume V could be reasonably segregated from the material covered by Exemption 5, however, this Court is not obligated to remand the case for a segregability analysis. *See Juarez v. Dep’t of Justice*, 518 F.3d 54, 60 (D.C. Cir. 2008) (holding that even though district court’s failure to address segregability was “reversible error,” no remand was necessary because “no part of the requested documents was improperly withheld” based upon the Court’s review of agency affidavits). Here, the CIA’s declarant reviewed the entire manuscript and determined that the document did not contain any non-exempt, reasonably segregable material. A 13-14. This Court, therefore, need not remand the case to the District Court to conduct a segregability analysis when the CIA properly withheld Volume V under Exemption 5, because the CIA’s declarations demonstrate that all of Volume V was subject to Exemption 5 and properly withheld.

## CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court affirm the District Court's Order of May 10, 2012.

RONALD C. MACHEN JR.  
United States Attorney

R. CRAIG LAWRENCE  
Assistant United States Attorney

/s/ Mitchell P. Zeff  
MITCHELL P. ZEFF  
Assistant United States Attorney  
555 4<sup>th</sup> Street, N.W.  
Washington, D.C. 20530  
(202) 514-7352

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION**

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) and contains 5,415 words.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, this 28<sup>th</sup> day of March 2013, I caused copies of the foregoing Brief for Appellee to be served on all counsel via the Court's ECF system.

*/s/ Mitchell P. Zeff* \_\_\_\_\_

MITCHELL P. ZEFF  
Assistant United States Attorney