ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5201

NATIONAL SECURITY ARCHIVE,
Plaintiff-Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
No. 1:11-cv-00724-GK (Hon. Gladys Kessler)

REPLY BRIEF FOR APPELLANT NATIONAL SECURITY ARCHIVE

ALLON KEDEM
CLIFFORD M. SLOAN
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Counsel for National Security Archive

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INTRODUCTION AND SUMMARY OF ARGUMENT

Exemption 5 of the Freedom of Information Act ("FOIA") applies to documents only if they are "predecisional" and "deliberative." In seeking to withhold Volume V, the Central Intelligence Agency ("Agency" or "CIA") asks this Court to redefine both requirements.

The Agency proposes to treat its internal histories as agency "decisions," and the drafts of those histories as "predecisional." But in writing his Bay of Pigs opus, which the Agency never intended to publish or stand behind as an official expression of its views, Dr. Jack Pfeiffer was not helping the Agency formulate any "policy" or make any "decision." He was simply creating an internal reference document to memorialize the Agency's past conduct. Never before has this Court held that an unpublished administrative report qualifies as an agency policy—even though the report was not created in contemplation of any action or decision, provides no guidelines for agency employees, and has no operative effect. Indeed, such a ruling would fly in the face of FOIA's "strong congressional aversion to secret agency law." *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (quotation marks and brackets omitted).

The Agency also seeks an unprecedented holding that Volume V is "deliberative," even though its disclosure would reveal nothing currently

unknown about the history-drafting process or about the Agency's reasons for rejecting Dr. Pfeiffer's draft. To the contrary, the Agency has *itself* made public the reasons for and circumstances under which the draft was rejected. To release the document would provide no additional insight into the rejection—which is the supposed administrative decision at issue here.

Moreover, the Agency attempts to evade this Court's command that it "must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977). The Agency rests on a conclusory assertion that "disclosure of any CIA draft history at any stage before its completion" would deter candor among its History Staff. [A89]. But even the Agency concedes that the passage of time undermines this rationale for secrecy. And that is especially true here, given the age of the document (almost 30 years) and its subject matter (the Inspector General's 1961 report, which the Agency has already disclosed). Even the President's closest advisers operate under a substantially shorter period of confidentiality. Indeed, if anything might deter candor among its historians, it is *the Agency's* public disparagement of Dr. Pfeiffer's work as "an unprofessional piece of special pleading," [A45], without letting his work speak for itself. Finally, the Agency's release of Volume IV—without

any apparent chilling effect on its History Staff—gives the lie to the Agency's claim that disclosing "any CIA draft history at any stage before its completion" will cause harm.

The question in this case is not whether Exemption 5 can be read to permit withholding of Volume V. It is not whether the statute can be stretched to encompass the Agency's novel theories, or whether the Court can imagine a scenario that might validate the Agency's claims of possible harm. Rather, the question is whether, after Exemption 5 is "narrowly construed," *Mead Data*, 566 F.2d at 259, the Agency has supported its withholding request with specific and detailed proof. The National Security Archive ("Archive") respectfully submits that the Agency's showing has fallen far short of its burden.

ARGUMENT

I. An Unpublished History Is Not an Agency "Decision," and a Draft of that History Is Not "Predecisional"

The Freedom of Information Act "represents a strong congressional aversion to secret agency law and represents an affirmative congressional purpose to require disclosure of documents which have the force and effect of law." *Sears*, 421 U.S. at 153 (quotation marks, citation, and brackets omitted). The statute accordingly requires an agency to disclose its

"working law"—that is, the agency's "formal or informal policy on how it carries out its responsibilities." *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 875 (D.C. Cir. 2009); *see Renegotiation Bd. v. Grumman Aircraft Eng'g Corp*. 421 U.S. 168, 186 (1975) (agency policy "has real operative effect"). The recommendations that go into constructing that policy, by contrast, are "predecisional" and may qualify for withholding under Exemption 5. *See id.* at 184 (documents are predecisional if they were "prepared in order to assist an agency decisionmaker in arriving at his decision").

In this case, the Agency has abandoned any argument that its histories are predecisional because they are used to help its leaders formulate Agency policy. Instead, the Agency advances the novel argument that its histories are *themselves* the relevant administrative policy. Yet its histories are internal reference documents—the Agency's attempt "to provide an accurate and accessible account of what it has done." [A45]; *see* [A44] ("information, context and perspective"); [A87] ("shared institutional memory regarding historical events"). The histories do not set the Agency's "policy on how it carries out its responsibilities," *Pub. Citizen*, 598 F.3d at 875; nor do they "have operative and controlling effect," *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980); nor do they

"consist of positive rules that create definite standards for [Agency employees] to follow." *Jordan v. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978). Dr. Pfeiffer began working on his multi-part historical survey in 1973, twelve years after the Bay of Pigs invasion had ended. To say that he was helping formulate the Agency's "policy" is to distort the word's meaning beyond recognition.

In support of its Humpty Dumpty interpretation of Exemption 5, the Agency relies on *Russell v. Department of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982), but the case offers no help. In *Russell*, the Court considered whether a draft history could qualify as predecisional. It answered yes, but only insofar as the agency chose to publish and adopt a final version of the history as a public statement of the agency's views:

> The "Ranchland" history . . . constitutes the Air Force's official statement concerning the history of herbicide use in the Vietnam conflict. . . . [The Air Force] must stand by its history in the public forum, and, in light of the possibility of Agent Orange disability litigation brought by Vietnam veterans, perhaps in the judicial forum as well.

Id. at 1048. In other words, "[t]he report itself [was] the agency action or decision" because "[t]he report was made public" and adopted as the Air Force's official stance on the use of Agent Orange during the Vietnam War. *Id.* at 1049 n.1; *see also Dudman Commc'n Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1566 (D.C. Cir. 1987) ("[The Air Force] decided to publish a

history of the role of the Air Force in South Vietnam between 1961 and 1964.").

Here, by contrast, the Agency made crystal clear from the outset that "there was never any CIA or History Staff plan or commitment to declassify or publish the Bay of Pigs monograph assigned to Dr. Pfeiffer." [A39]; *see also* [A54-55].[1] The Agency never intended to "stand by its history in the public forum" or any other forum. Thus, the key difference between this case and *Russell* is not that the Agency ultimately failed to publish a final version of Dr. Pfeiffer's draft; the key difference is that, from the start, the Agency *never intended* to publish or stand behind his Bay of Pigs history as an expression of its official views.[2]

The Agency asks this Court to hold—for the first time ever—that a document qualifies as administrative policy even if it has no operative effect inside or outside the agency, and even if the agency does not plan to make it

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[1] In its brief, the Agency repeatedly suggests that, had Dr. Pfeiffer's work been approved, it would have been "inclu[ded] in the final publication of the CIA's official history." Agency Br. at vi; *see also id.* at 2, 3, 4, 10. The Agency offers no support for this suggestion, which is belied by the record.

[2] The Agency has said that Volume V "contains a small amount of classified information." [A9]. If the Agency had wanted to publish an unclassified version of the document, it could have done so "with minimal redactions." [A9].

public. But the Agency cannot explain why *Russell* relied on the Air Force's intent to publish and "stand by its history in the public forum." 682 F.2d at 1048. Nor can the Agency explain how its proposed approach is consistent with FOIA's "strong congressional aversion to secret agency law." *Sears*, 421 U.S. at 153 (quotation marks and brackets omitted); *see Coastal States*, 617 F.2d at 867 ("A strong theme of our opinions has been that an agency will not be permitted to develop a body of 'secret law'"). Nor can the Agency explain why, in the numerous other Exemption 5 cases involving unpublished agency reports, no one suggested that the report was *itself* an agency policy. *See, e.g.*, *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1536 (D.C. Cir. 1993) (permitting withholding of 204-page internal report regarding the Austrian Prime Minister's cooperation with the Nazis, which was used to determine his immigration status); *Playboy Enters., Inc. v. Dep't of Justice*, 677 F.2d 931, 933 (D.C. Cir. 1982) (rejecting agency's blanket Exemption V claim regarding 302-page investigatory report on the handling of an FBI informant); *Vaughn v. Rosen*, 523 F.2d 1136, 1139 (D.C. Cir. 1975) (requiring agency to disclose the factual portions of its personnel reports, but permitting agency to withhold the portions that provided advice and recommendations on how to improve its personnel programs).

Indeed, to accept the Agency's interpretation—treating internal, unpublished agency reports as policy "decisions"—would mean that all draft reports are automatically predecisional because they are by nature preliminary and unofficial. Yet this Court has already rejected "the Agency's argument that any document identified as a 'draft' is per se exempt." *Arthur Andersen & Co. v. Internal Revenue Serv.*, 679 F.2d 254, 257 (D.C. Cir. 1982). The Agency asserts that it "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." Agency Br. at 12. But the Agency never states what those relevant "facts" are—or how they distinguish Volume V from the millions of agency documents that similarly "provide the raw data upon which decisions can be made" but "are not themselves a part of the decisional process." *Vaughn*, 523 F.2d at 1145.

In sum, the Agency does not use its internal, unpublished histories to enact "agency law" or to make "policy." The histories themselves are not agency decisions, and the drafts of those histories do not qualify as "predecisional" within the meaning of Exemption 5.

II. Volume V Is Not Deliberative, and Its Disclosure Would Not Reveal or Undermine the Agency's Deliberative Process

"[T]he key question in Exemption 5 cases [is] whether the disclosure of materials would expose an agency's decisionmaking process in such a

way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Dudman*, 815 F.2d at 1568. This formulation underscores two main reasons that the Agency's position in this case is untenable: Disclosure of Volume V would not "expose [the] agency's decisionmaking process"; nor would it "discourage candid discussion within the agency" or "undermine the agency's ability to perform its functions."

A. Release of Volume V Would Not Expose the Agency's Decisionmaking Process

Exemption 5 aims to balance FOIA's preference for full disclosure against "the policy of protecting the decision making processes of government agencies." *Sears*, 421 U.S. at 150 (quotation marks omitted). In most cases, this balance can be accommodated by requiring agencies to disclose "factual material" describing past behavior, but permitting them to withhold "advice and recommendations" about future policies. *Mapother*, 3 F.3d at 1537 (quotation marks omitted). However, the focus is not on the type of document at issue, but on what the document's release would reveal about the agency's decisionmaking process: "[T]he privilege serves to protect the deliberative process itself, not merely documents containing deliberative material." *Id.*; *see Mead Data*, 566 F.2d at 256 n.40 ("There may . . . be circumstances in which what might easily be labeled

'deliberative' rather than 'factual' material must be disclosed because it would not reveal the deliberative process within the agency.").

Agencies have thus been permitted to withhold material under Exemption 5 only where disclosure would lay bare "the inner workings of the deliberative process itself." *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc); *see Montrose Chem. Corp. of Calif. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974) ("heart of the issue" is whether disclosure would "be an improper probing of the mental processes behind a decision of an agency"). For instance, in *Russell*, the Air Force was allowed to withhold a draft version of a historical survey that was later published in an official form. The Court explained that "a simple comparison" between the draft and final versions would expose the agency's editorial decisions. *Russell*, 682 F.2d at 1049. The draft history in *Dudman* was withheld for the same reason. 815 F.2d at 1569 (Exemption 5 protects against "the disclosure of editorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis"). The histories in *Russell* and *Dudman* fell within Exemption 5, therefore, not simply because they were drafts, but because their disclosure would have led to the "disrobing of an agency decision-maker's judgment." *Russell*, 682 F.2d at 1049; *see Petroleum Info. Corp. v. US Dep't of Interior*, 976 F.2d

1429, 1434 (D.C. Cir. 1992) ("In *Dudman Communications* and in *Russell*, this court held preliminary drafts of official military histories exempt on the ground that *revelation of editorial changes* threatened to stifle the creative thinking and candid exchange of ideas necessary to produce good historical work." (emphasis added, quotation marks and citations omitted)).[3]

In its opening brief, the Archive demonstrated that no such judgments are at issue in this case. Volume V is a staff historian's account of an internal investigation that the Agency's Inspector General conducted in 1961. [A39-40, A66]. Like other Agency histories, its purpose was to convey an "accurate and accessible account of what [the Agency] has done" in the past. [A45]. But even assuming that Volume V contains a fair number of Dr. Pfeiffer's opinions as well, that would not make withholding appropriate: "[M]aterials plausibly labeled 'deliberative'" are nevertheless subject to disclosure if they "reveal nothing about an agency's

[3] In finding Volume V to be deliberative, the district court relied heavily on its status as a draft. *See Nat'l Security Archive v. Cent. Intelligence Agency*, 859 F. Supp. 2d 65, 71 (D.D.C. 2012); [A106] (describing Volume V as "an intermediate step in the CIA's intensive review process"). The Agency has effectively abandoned that argument, and for good reason. *See Arthur Andersen*, 679 F.2d at 257-58 ("Even if a document is a draft of what will become a final document, the court must also ascertain whether the document is deliberative in nature." (quotation marks omitted)); *see also* Archive Opening Br. at 30.

decisionmaking process." *Dudman*, 815 F.2d at 1568; *see Mead Data*, 566 F.2d at 256 n.40 (similar).

Such is the case here. The Agency did not create or adopt a final version of Dr. Pfeiffer's original draft, which "was never circulated within the Agency or used by the CIA in its dealings with the public." [A92]. Unlike in *Dudman* and *Russell*, therefore, no comparison between versions could be used to reverse-engineer the Agency's editorial views. *See* Archive Opening Br. at 28-29. If the "deliberation" at issue in this case was the Agency's "preparation for completion of [its] official history," *Nat'l Security Archive v. Cent. Intelligence Agency*, 859 F. Supp. 2d 65, 71 (D.D.C. 2012); [A106], then there is nothing further about that process to be revealed. Moreover, the Agency has already explained why Dr. Pfeiffer's draft was rejected, when it was rejected, and by whom it was rejected. *See* Archive Opening Br. at 29. If the relevant "decision" was whether to accept Dr. Pfeiffer's account of the 1961 investigation, the Agency has already provided a full and complete basis for its decision not to do so.

The Agency has no response for these points, and so it simply does not respond. It does not claim that disclosure of Volume V would reveal anything currently unknown about the history-drafting process—which is the supposed administrative "decision" at issue. Nor can the Agency explain

why *Russell* and *Dudman*—cases in which draft histories were sought—found the documents to be deliberative based on the editorial changes they would have exposed, rather than their status as drafts. *See Dudman*, 815 F.2d at 1567 (describing the "many levels of editorial review" through which the document passed). The Agency has essentially conceded that disclosure of Volume V would "reveal nothing about [the] agency's decisionmaking process." *Id.* at 1568. That concession is fatal to its attempt to invoke Exemption 5.

B. The Disclosure of Volume V Would Not Undermine the Agency's Ability to Perform Its Functions

Under Exemption 5, the Agency "must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA." *Mead Data*, 566 F.2d at 258. The Agency asserts that release of Volume V would undermine the History Staff's ability to produce high-quality work.[4] But it bases this assertion on nothing more than "conclusory allegations of possible harm," *id.*, and ignores several compelling reasons to believe that disclosure of Volume V would have no effect on its operations.

[4] The Agency has abandoned the district court's argument that disclosure of Volume V might cause confusion due to the "public release of inaccurate historical information." *Nat'l Security Archive*, 859 F. Supp. 2d at 71; [A107]. *See* Archive Opening Br. at 32-33 (explaining why "the release of Volume V would create no credible risk of confusion").

See Wolfe, 839 F.2d at 773-74 ("Exemption 5 is to be construed as narrowly as consistent with efficient Government operation." (quotation marks omitted)).

1. At several points, the Agency asserts that it need not establish that disclosure of Volume V would adversely affect its process of creating histories. Agency Br. at 13-14, 17-18. The Agency's position is riddled with contradictions, waived, and incorrect.

First, the Agency's position is hopelessly self-contradictory. On one hand, the Agency announces that "'*[t]he critical factor* in determining whether the [requested] material is deliberative in nature is whether disclosure of the information would discourage candid discussion within the agency." Agency Br. at 13 (quoting *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991) (emphasis added; first alteration in original)). Only a few sentences later, however, the Agency insists that a focus on harm to the decisionmaking process "is not supported by the law of this Circuit." *Id.* And yet, still later in the same brief, the Agency acknowledges that "the passage of time" should be considered "in determining whether a document is protected by Exemption 5." *Id.* at 19. How is the passage of time relevant, if not to mitigate any chilling effect that disclosure might produce on agency deliberations? *See Nixon v. Freeman*,

670 F.2d 346, 356 (D.C. Cir. 1982) (in response to argument that disclosure posed a "threat of chilling executive discussion," citing the passage of time among the "reasons for discounting its seriousness").

Second, the Agency has long since waived any potential argument that it need not show harm to the deliberative process in order to invoke Exemption 5. In asking this Court to summarily affirm the district court, the Agency could not have been clearer:

> In order to properly invoke Exemption 5, however, the CIA must make the additional showing that disclosure would cause harm to its decisionmaking process.

[A119]. This statement mirrors a similar statement made by the district court, *see* [A103] ("the agency must make the additional showing that disclosure would cause injury to the decisionmaking process"), which itself tracks the argument about harm that the Agency had made in its motion for summary judgment, *see* No. 11-cv-724, Dkt. 12, at 5 (D.D.C. Nov. 29, 2011) ("the CIA has explained how the disclosure of Volume V would harm legitimate agency interests"). The Agency may not now assert—for the first time in this litigation, and in contradiction to what it had previously argued—that there is no place in the Exemption 5 inquiry to consider whether disclosure would cause harm to its deliberative process.

Third, the Agency's argument is simply mistaken. On numerous occasions, this Court has judged an Exemption 5 claim based on the potential harm that disclosure would do to the agency's decionmaking process. *See, e.g.*, *Petroleum Info.*, 976 F.2d at 1435 ("the 'key question'" is "whether disclosure would tend to diminish candor within an agency"); *Access Reports*, 926 F.2d at 1194 ("[t]he critical factor"); *Dudman*, 815 F.2d at 1568 ("the key question"); *Mead Data*, 566 F.2d at 256 ("A decision that certain information falls within exemption five should therefore rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency."). This focus on potential harm to the decisionmaking process makes eminent sense, since "the ultimate purpose of [the deliberative-process] privilege is to prevent injury to the quality of agency decisions." *Sears*, 421 U.S. at 151. It also accords with the intent underlying Exemption 5 to "incorporat[e] civil discovery privileges" under the "judicial standards that would govern litigation." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *see Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 363 (1979) ("the harm that would be inflicted upon the Government by premature disclosure . . . should continue

to serve as [a] relevant criteri[on] in determining the applicability of this Exemption 5 privilege").

In arguing that potential harm need not be shown, the Agency relies on *McKinley v. Board of Governors of the Federal Reserve System*, 647 F.3d 331 (D.C. Cir. 2011), in which the Court stated that "Congress enacted FOIA Exemption 5 precisely because it determined that disclosure of material that is both predecisional and deliberative *does* harm an agency's decisionmaking process." *Id.* at 339 (emphasis in original). Yet this passage does not indicate that potential harm is irrelevant to the Exemption 5 inquiry. The Court went on to show, in great detail, why "disclosure of the withheld material would discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* at 340 (quotation marks omitted); *see id.* (identifying specific ways in which the disclosed information could be exploited commercially, and explaining why those uses "would impair the [agency's] ability to obtain necessary information" (quotation marks omitted)). Indeed, the *McKinley* Court identified no basis for treating the requested documents as deliberative *other than* the potential harm that disclosure would cause.[5]

[5] The Agency asserts, in circular fashion, that "[t]his Court's holding in *McKinley* is not 'dicta.'" Agency Br. at 17. But this begs the very *(cont'd)*

The best reading of *McKinley* is that it proposes to treat harm to an agency's deliberative process as coextensive with the scope of the privilege, rather than as a separate requirement. In other words, if an agency can show that disclosure of a document would harm the process by which it makes decisions, then that fact supports an inference that the document is deliberative in nature. And by the same token, if disclosure would expose "the inner workings of the deliberative process itself," *Wolfe*, 839 F.2d at 774, then it likely would cause harm. This reading reconciles *McKinley* with the numerous cases in which Exemption 5 claims were accepted or rejected based on whether harm was shown. *See* cases cited *supra* at p. 16; *see also*, *e.g.*, *Army Times Publ'g Co. v. Dep't of the Air Force*, 998 F.2d 1067, 1072 (D.C. Cir. 1993) ("[T]he Air Force must demonstrate that . . . the withheld [information] would actually inhibit candor in the decision-making process if made available to the public."); *Formaldehyde Institute v. Dep't of Health & Human Servs.*, 889 F.2d 1118, 1123-24 (D.C. Cir. 1989), *overruled in part on other grounds by Dep't of Interior v. Klamath Water Users*

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question to be decided—namely, whether the outcome in *McKinley* rested on the Court's detailed finding that disclosure would "undermine the agency's ability to perform its functions." 647 F.3d at 340 (quotation marks omitted). Plainly it did, and the Agency offers no reason to think otherwise.

Protective Ass'n, 532 U.S. 1 (2001) ("The pertinent issue here is what harm, if any, the Review Letter's release would do to HHS' deliberative process.").

Regardless, this Court need not resolve the meaning of *McKinley* or decide whether a showing of harm is independently required. The Agency has expressly waived the point by stating that "the CIA must make the additional showing that disclosure would cause harm to its decisionmaking process." [A119]. As explained below, its failure to do so provides an independent basis for rejecting the Agency's Exemption 5 claim.

2. In its opening brief, the Archive demonstrated that the passage of time has long since mitigated any chilling effect that disclosure might have on the Agency's History Staff. It has now been almost 30 years since Dr. Pfeiffer last worked on his Bay of Pigs monograph. [A40-41]. This period is more than twice as long as the 12-year limitation that Congress imposed on the availability of Exemption 5 under the Presidential Records Act ("PRA"), which protects "confidential communications" involving the President's closest advisers. 44 U.S.C. § 2204(a)(5), (c)(1); *see also Freeman*, 670 F.2d at 356 (in rejecting President Nixon's chilling effect argument, finding it "significant that no public access will occur until at least eight years after the event disclosed"). The Agency's historians, who write

about Executive Branch decisionmaking, surely do not require a greater period of confidentiality than the decisionmakers themselves.

The Agency concedes, as it must, that the passage of time erodes the concern that disclosure will deter candid deliberations. Agency Br. at 19. But it argues that time has had no effect in this case for two reasons, neither of which is persuasive.[6]

(a) Primarily, the Agency simply reasserts, as an *ipse dixit*, that disclosure will cause a chilling effect among its historians. It quotes *Russell* for the proposition that agency historians "will be less inclined to state their own interpretations candidly" if they "are put on notice . . . that each and every difference of opinion will be revealed to the public." *Id.* at 20 (quoting 682 F.2d at 1048). Yet this passage speaks to the far different

[6] The Agency posits that the Archive "is really asking this Court to . . . find that the passage of time renders a document *per se* releasable in the FOIA context." Agency Br. at 21. This assertion is baseless. Exemption 5 encompasses civil discovery privileges that require courts to consider the specific characteristics of the document sought and the role it plays in the deliberative process. This is an inherently case-specific inquiry. *See Merrill*, 443 U.S. at 362 ("The courts have . . . in each case weighed [a] claim to privacy against the need for disclosure." (quotation marks omitted)); *Freeman*, 670 F.2d at 355 ("Any such impairment [to presidential deliberations] must be balanced against the adverse impact that recognition of the privilege would have on the legitimate congressional purposes furthered by the Act."). The Archive's position is that the balance in *this* case is clear: The requested document conveys no deliberative information, and any concerns about reducing candor have long since dissipated over the past three decades.

circumstances in *Russell*, where "a simple comparison between the pages sought and the official document would reveal what material supplied by subordinates senior officials judged appropriate for the history and what material they judged inappropriate." 682 F.2d at 1049. As explained above, because there are no drafts to compare, the release of Volume V would disclose no "difference[s] of opinion" between Dr. Pfeiffer and the Agency. *See supra* pp. 12-13.

Moreover, unlike in *Russell*, in this case it was *the Agency* that made public its disagreement with Dr. Pfeiffer, whose manuscript it has disparaged as "an unprofessional piece of special pleading." [A45]; *see also* [A45] ("a polemic of recriminations"). If anything might deter candor, it is the Agency's apparent position that it can publicly denigrate the work of its historians without permitting that work to be evaluated on its own merits.

Finally, *Russell* had nothing whatsoever to do with the passage of time, which was not at issue there. If the same draft Air Force history had been sought thirty years later, it is doubtful that the Court would have applied precisely the same calculus. To the contrary, in declining to order disclosure, the Court emphasized that the history was slated to be used in "future military and public policy decisions," including anticipated litigation. 682 F.2d at 1048; *see also id.* at 1049 n.1 ("intended for future

use in Air Force decisionmaking"). In this case, by contrast, the requested document has not had policy significance for several decades—if it ever did.

(b) The Agency also suggests that its historians actually need *greater* confidentiality than its policymakers: "the CIA Director speaks for the Agency when providing advice to the President, whereas a historian like Dr. Pfeiffer drafting manuscripts . . . does *not* represent the official views of the Agency." Agency Br. at 21-22 (emphasis in original). But the Agency's logic is backwards. The relative gravity and sensitivity of deliberations among high-level policymakers give them *more* reason to fear public scrutiny. And yet, despite the paramount need for "Presidents to obtain the confidential discussion and advice necessary to effective discharge of their duties," *Freeman*, 670 F.2d at 355, concerns about a chilling effect—even at the highest levels—yield over time, *id.* at 366.

In sum, having conceded that the passage of time affects the Exemption 5 calculus, the Agency provides no reason to doubt its effect here. Indeed, if ever time mattered, it would be in this case:

- The subject of Volume V, the 1961 Inspector General report, is more than a half-century old.
- The Inspector General report has itself been made public.
- Dr. Pfeiffer last worked on Volume V in 1984.
- The Agency does not claim that its History Staff intends to complete Dr. Pfeiffer's work.

- Volume V is not connected to any future policy decision or policymaking process.
- The deliberative information conveyed by Volume V is minimal at best, because no comparison to a final version is possible.
- The Agency has already disclosed the circumstances that led it to reject Dr. Pfeiffer's work.

In light of all of these factors, any minimal possibility that disclosure might undermine the Agency's decisionmaking process has surely evaporated over the past three decades.

3. As directly applicable case law demonstrates, the Agency has also undercut its own position by disclosing a functionally identical document—Volume IV—without any claimed damage to its deliberative process. In *Army Times Publishing Company v. Department of the Air Force*, 998 F.2d 1067 (D.C. Cir. 1993), the Air Force released some of the information it had collected through personnel surveys, but it refused to release other survey information. *Id.* at 1069. The Air Force justified its withholding in categorical terms:

> Parroting the case law, Major Roomsburg states in her first affidavit that "[a]ny disclosure of the information withheld would impair the deliberative process of the Air Force by inhibiting [the] full and frank exchange of views necessary with respect to such matters."

Id. at 1070 (first alteration in original); *see also id.* (disclosure "'would likely [cause Air Force personnel to] provide guarded responses or even alter their responses'"). When confronted with the fact that it had disclosed other

survey information, the Air Force claimed that those disclosures were "simply not relevant, because an agency does not waive its right to assert an exemption by releasing information that is only similar in nature to the requested material." *Id.* at 1071 (quotation marks omitted).

This Court disagreed, in terms that could just as easily be applied to the present case:

> While it is true that the Air Force has not "waived" its right to claim an exemption from disclosure simply because it has released information similar to that requested, the fact that some of the information in the surveys . . . poses no threat to the agency's deliberative process suggests that other information in the surveys could also be released.

Id. Because the Air Force did not demonstrate that the withheld information was "different in any relevant respect" from the disclosed information, the Court did not credit Major Roomsburg's "conclusory assertion" that any disclosure would cause harm. *Id.* at 1070-71.

In this case, the Agency relies on the following categorical claim from Dr. Robarge about potential harm:

> [P]ublic disclosure of *any* CIA draft history at *any* stage before its completion . . . reasonably could be expected to discourage open and frank deliberations among the History Staff.

[A89] (emphasis added). In addition to being conclusory, this statement is directly contradicted by the Agency's disclosure of Dr. Pfeiffer's draft of Volume IV, without any claim that such harm has actually resulted. As in

Army Times, this fact suggests that functionally identical information "also might be released without threatening the [Agency's] deliberative process." 998 F.2d at 1068.

The Agency's only response—beyond making the same "waiver" argument rejected in *Army Times*—is that "assertions as to the similarities between Volume IV and Volume V [are] pure conjecture." Agency Br. at 16. First of all, it is *the Agency's* burden to "demonstrate that, unlike the released [document], the withheld [document] would actually inhibit candor in the decision-making process if made available to the public." *Army Times*, 998 F.2d at 1072; *see Mead Data*, 566 F.2d at 254 ("FOIA places the burden on the Government to prove the applicability of a claimed privilege"). The Agency has not even tried to meet this burden.

Second, the Agency cannot and does not dispute that Volume IV is similar to Volume V in the only respect relevant to Dr. Robarge's declaration: Volume IV is undeniably a "CIA draft history" that was disclosed "at [a] stage before its completion." [A89]. And yet its pre-completion release has had no discernible effect. Therefore, Dr. Robarge's claim—that releasing "any" such draft would cause harm to the History Staff—simply cannot be true.

Third, the Agency ignores several additional reasons to think that Volumes IV and V are similar. They both were originally draft chapters from the same volume addressing a common subject, "Post-Mortems of the Bay of Pigs Operation." [A55-56]. They were "written and edited by [Dr. Pfeiffer] in an identical manner." *Pfeiffer v. Cent. Intelligence Agency*, 721 F. Supp. 337, 339 (D.D.C. 1989). Dr. Pfeiffer submitted them together for approval. [A55]. Volume IV was approximately three decades old when it was released to the Archive during this litigation, [A9], and Volume V is now even older. Given these similarities, there is every reason to expect that disclosing Volume V would have precisely the same effect on agency historians that disclosing Volume IV has had—namely, none.

The Agency does not claim, in its declarations or its briefs, that the content of Volume IV is different in any meaningful way from the content of Volume V. Instead, the Agency points to *the Archive's* description of Volume IV as "predominantly a factual summary." Agency Br. at 16 (quoting Archive Opening Br. at 44). Yet the Archive also noted that Volume IV is "punctuated with editorial asides." Archive Opening Br. at 44. Those editorial asides in Volume IV closely mirror Dr. McDonald's description of Volume V as being "an uncritical defense of the CIA officers who planned and executed the Bay of Pigs operations" and being filled with

"recriminations against CIA officers who later criticized the operation." [A45]. *See, e.g.*, [A161] (CIA Director Dulles "was responsible for errors of fact which were inexcusable"); [A183] (criticizing "CIA representatives who were either in ignorance of the facts, or hesitant to risk their reputations by being forthright"); [A192] ("CIA became the whipping boy for the failure of others at the Bay of Pigs"); [A244] ("there was a positive effort . . . to hang the albatross of failure at Playa Giron about the necks of . . . the CIA"). Given that the Taylor Committee (the subject of Volume IV) and the Agency's Inspector General (the subject of Volume V) both investigated the Bay of Pigs operation and produced reports critical of the Agency in 1961, it is not surprising that Dr. Pfeiffer wrote about them in similar ways.

Like the Air Force in *Army Times*, the Agency attempts to rely on "conclusory" assertions of possible harm by "[p]arroting the case law." 998 F.2d at 1070. But those assertions are contradicted by the uneventful release of Volume IV, another pre-completion draft. This strongly "suggests that [Volume V] also might be released without threatening the [Agency's] deliberative process." *Id.* at 1068. Certainly the Agency has not carried its burden to "show by specific and detailed proof that disclosure would" undermine its ability to function. *Mead Data*, 566 F.2d at 258.

III. The District Clearly Erred by Failing to Rule on Segregability

A district court "clearly errs" when it fails to "mak[e] an express finding on segregability." *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1123 (D.C. Cir. 2007) (quotation marks omitted). In this case, the district court's opinion does not even mention segregability, much less expressly rule on it.

The Agency argues otherwise, pointing to two statements that plainly say nothing at all about whether Volume V contains nonexempt information:

> 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.

Agency Br. at 22-23 (quoting *Nat'l Security Archive*, 859 F. Supp. 2d at 72; [A108] (emphasis omitted)).

> 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.

Agency Br. at 23 (quoting *Nat'l Security Archive*, 859 F. Supp. 2d at 68 n.2; [A99 n.2] (emphasis omitted)). The first of these statements just sums up the court's general conclusion that Exemption 5 applies to Volume V; it was not a ruling on segregability. In the second statement, the court declines to address the Agency's argument that "portions of Volume V are exempt under Exemptions 1 and 3," given the court's ultimate conclusion about

Exemption 5. *Nat'l Security Archive*, 859 F. Supp. 2d at 68 n.2; [A99 n.2]. The court was simply stating that any dispute about Exemptions 1 and 3 was moot, not ruling on segregability.

The Agency argues in the alternative that, notwithstanding the district court's clear error, this Court should rely on its declarations to find that Volume V contains no reasonably segregable information. In support, the Agency points to the following statement from one of its officials:

> I have reviewed the entirety of this document and determined that it contains no reasonably segregable information since the entire document is a draft.

[A14]. This kind of cavalier, "trust us" attitude illustrates why Congress thought it necessary to place the burden on agencies to demonstrate that a withheld document contains no "reasonably segregable" information. 5 U.S.C. § 552(b). Rather than satisfy its burden, the Agency's declarant simply announces a legal conclusion—and an erroneous one at that. This Court has never before accepted such a meager showing and should not do so here. *See, e.g.*, *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 252 (D.C. Cir. 1993) (rejecting agency's segregability argument where its supporting affidavit was "too vague and conclusory"). *Cf. Juarez v. Dep't of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008) (upholding decision not to segregate based on detailed declarations about the agency's "page-by-page review" of

relevant records, the impossibility of "redact[ing] sensitive portions," and the harm that disclosure would cause to an ongoing investigation, including by revealing the "identity of cooperating sources").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Dated this 25th day of April, 2013.

Respectfully submitted,

/s/ Allon Kedem
Allon Kedem
Clifford M. Sloan
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
allon.kedem@skadden.com
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in proportionally spaced font typeface using Microsoft Word 2010 in 14-point Times New Roman font. The brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 6,748 words as counted by Microsoft Word 2010.

/s/ Allon Kedem
Allon Kedem
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
allon.kedem@skadden.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also hereby certify that I will have eight copies hand-delivered or sent via Federal Express overnight delivery to the Court within two business days.

/s/ Allon Kedem
Allon Kedem
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
allon.kedem@skadden.com
Counsel for Appellant