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.	)	

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR *IN CAMERA* JUDICIAL REVIEW

In camera review is appropriate when government testimony and affidavits have failed to provide a sufficient basis for a decision. Here, the Central Intelligence Agency ("CIA" or "Agency") has failed to make an adequate showing, and therefore resorts to a plea for deference instead of making a true attempt to segregate information that legitimately can be released pursuant to Plaintiff's Freedom of Information Act ("FOIA") request. It is in just such circumstances that *in camera* review is critically necessary.

Further, the Agency's true purpose is revealed by its stunning suggestion that the activities of the "CIA as a whole," CIA Opp'n to Motion for *In Camera* Review at 2, are potentially entitled to broad protection under the deliberative process privilege. This is in direct contravention to the limits against foreign policymaking imposed on the Agency, Pl.'s Mem. in Opp'n to Summ. Judg. and Mot. for *In Camera* Review ("Mot. For *In Camera* Review") at 22-23, and would subsume virtually all agency materials into the deliberative process privilege. The CIA's position concerning the applicability of the

deliberative process privilege to the Estimate demonstrates that its real goal is to avoid any searching inquiry from outside the agency itself. It is the extremism of that position that demands, instead of increased deference, an independent *in camera* review of the one document at issue in this FOIA lawsuit.

ARGUMENT

When the Court must base its decision about the disclosability of a record withheld in full under FOIA, the initial task is to decide whether the story told in the government declaration makes reasonable logical sense in light of all the facts available to the Court. Here, the Lutz Declaration fails to stand up to that test.

First, the Declaration asserts that there is no information in the 2004 Iraq National Intelligence Estimate (the "Estimate") assessing the situation in Iraq that can be segregated and disclosed. Yet, the record shows that the CIA has made a number of detailed and specific statements about the state of affairs in Iraq, most recently just two days after Plaintiff's Opposition to Summary Judgment and Motion for *In Camera* Judicial Review were filed.[1] In arguing that there are no segregable portions of the Estimate that are disclosable, the CIA asks the Court to accept that the information shared with Congress in the Director of Central Intelligence's unclassified worldwide threat briefings to the Senate Select Committee on Intelligence and the information shared in the unclassified and publicly heralded and disseminated National Intelligence Council

[1] Director of Central Intelligence Porter Goss testified on February 16, 2005, before the Senate Select Committee on Intelligence, in testimony entitled "Global Intelligence Challenges 2005: Meeting Long-Term Challenges with a Long-Term Strategy." Testimony publicly available at http://www.cia.gov/cia/public_affairs/speeches/2004/Goss_testimony_02162005.html. (copy attached). That testimony includes a presumably candid assessment of the situation in Iraq, including discussion of the low voter turnout in some Sunni areas, the post-election resumption of insurgent attacks, the challenges faced by the Iraqi security forces, the threats to creating a stable representative government in Iraq, and the slow reconstruction and economic development efforts.

report entitled "Mapping the Global Future," is completely distinct from the information in the reportedly 50-page Estimate on the situation in Iraq. *See* Mot. For *In Camera* Review at 13-16 (describing CIA public statements and testimony). That assertion does not make logical sense.

On the one hand the CIA says that Estimates are intelligence products that "pool the judgments of the agencies making up the National Foreign Intelligence Board," Lutz Decl. at ¶ 13, and provide "the best, most clear and complete analysis and assessment from which to create and implement policy," *id*. at ¶ 49. On the other hand, the CIA contends that, despite the extensive public testimony and other statements issued by the CIA concerning the situation in and outlook for Iraq, see Motion for *In Camera* Review at 13-16, there is nothing in its Estimate of "Iraq's capabilities for internal stability and self-governance," Lutz Dec. at ¶ 14, that can be segregated and released. The CIA pointedly avoids saying that its statements to Congress and the public are not the same as what is in the Estimate. It is only logical that, unless the CIA is misrepresenting the situation to Congress and in the "Mapping the Global Future Report," the statements in the Estimate must, at least in part, be the same as those in the public domain and thus susceptible to selective release of segregable portions. For this reason, *in camera* review is necessary for the Court to evaluate the CIA's contention that there are no segregable portions of the Estimate that can be released. *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 262 n. 59 (*in camera* review conducted "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 complete as possible").

Second, the CIA's almost stunning assertions about the reach of Exemption 5 are far outside the trend of judicial precedent, thus casting doubt over the CIA's evaluation of the Estimate, and favoring *in camera* judicial review. Those cases in which courts arguably have blurred the fact/opinion distinction are easily distinguishable. For example, in *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68-71 (D.C. Cir. 1974), the document at issue was a summary of a 9,200 page administrative record that the Administrator of the Environmental Protection Agency requested to help him determine whether the pesticide DDT was injurious to the environment. The salient point in the application of Exemption 5 is that there is a policy decision being made that relies on the document requested under FOIA. *Mapother & Nevas v. Department of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993) ("the key to *Montrose Chemical* was [the relationship] between the summaries and the decision announced by the EPA Administrator."). [2] Similarly, while there are cases in which courts have held that the agency need not pinpoint a single decision in order to invoke Exemption 5, those are cases in which the content of the document at issue was a recommendation, proposal, suggestion, or draft that would have exposed subjective personal opinions of the writer rather than the policy of the agency. *See Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 866 (D.C. Cir. 1980).[3]

---

[2] *See Mapother & Nevas v. Department of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993) (protecting from disclosure the Waldheim Report (excluding chronology) because it was assembled "for the benefit of an official called upon to take discretionary action."); *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1437 (D.C. Cir. 1992) (a "salient characteristic" of information eligible for protection under deliberative process privilege is the "association with a significant *policy* decision") (emphasis in original).

[3] Thus, the documents in the cases cited by Defendant are distinguishable from the Estimate. *Access Reports v. Dep't of Justice*, 926 F.2d 1192 (D.C. Cir. 1991) (documents predecisional because they contained advice on how to handle reaction to policy and shepherd a FOIA bill through Congress); *Hunt v. U.S. Marine Corp.*, 935 F. Supp. 46, 51 (D.D.C. 1996) (documents predecisional because they are "drafts, recommendations, point papers or subjective memos written to formulate future agency policies.")

The CIA has not and, indeed, cannot describe the Estimate as reflecting the subjective personal opinions of the writer; NIEs are produced by an extensive process that involves approval by the National Foreign Intelligence Board, which is chaired by the DCI or Deputy DCI, and consists of the heads of the principal intelligence collection and analytic services in the US Government. Nor has the CIA pointed, even in general terms, to any opinions about policy that are contained within the Estimate itself. Because the CIA cannot point to any specific decisionmaking process (or decision) for which the Estimate was necessary, it tries instead to spread the mantle of deliberative process over all of its work. It artfully explains that the NIE "results from opinions and subjective judgments on exactly how to advise interested officials … about … the situation in Iraq." Opp'n to *In Camera* Review at 10. All documents require their authors to make editorial judgments, but that in itself does not make the document a piece of policy advice or a recommendation. The CIA seeks to lead the Court down a dangerous slippery slope, as many courts have recognized. *Assembly of California v. U.S. Dep't of Justice*, 968 F.2d 916, 921(9th Cir. 1992) ("Any memorandum always will be 'predecisional' if referenced to a decision that possibly will be made at some undisclosed time in the future."); *City of Virginia Beach v. U.S. Department of Commerce*, 995 F.2d 1247, 1255 (4th Cir. 1993) ("while the government need not anchor the documents to a single, discrete decision amidst ongoing deliberative processes, … an overly lax construction of the term 'predecisional' submerges the rule of disclosure under the exemption.") (internal citations omitted); *Coastal States*, 617 F.2d at 868 ("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.") (D.C. Cir.). To extend deliberative

process in the manner requested by the CIA would be a dramatic departure from judicial precedent, as it would shield virtually all government records from disclosure. The very argument demonstrates why independent inquiry through *in camera* review is necessary. When the Agency's evaluation of the document starts with the view that everything it does is inherently predecisional in character, then the Agency's evaluation of this Estimate merits an independent look.

Notably, the Agency's attempt to paint NIEs as protected deliberative documents is belied by the evidence on its own website. Over 1,100 NIE and other publications prepared by the National Intelligence Council, which reports to the Director of Central Intelligence, have been declassified and made publicly available through the CIA's website. *See* http://www.cia.gov/nic/NIC_foia_intro.html. Among the NIE's available through the CIA's website are 70 on China under Mao, a collection of those on the Soviet Union and International Communism, and 178 NIEs on Vietnam. The CIA also has declassified portions of the key findings of the 2002 Estimate "Iraq's Continuing Programs for Weapons of Mass Destruction" (NIE 2002-16HC, October 2002). These all have been released without any harm to the deliberative process because they are not predecisional, deliberative documents.

Third, to the limited extent Ms. Lutz's Declaration moves beyond boilerplate statements to identify specific types of harms that could be caused by release of the requested Estimate, the very type of information release that she cites as dangerous has both been discussed publicly by the CIA and, indeed, is self evident from other U.S. government discussion of the situation in Iraq. For example, she discusses the "candid descriptions, judgment and analyses of various elements of the fledgling Iraqi

government and institutions" as being an item of concern and asserts that its disclosure could "provoke resentment, anger, or offense…." Lutz Declaration at ¶¶ 39, 40. Yet, this very same information was the subject of DCI Tenet's briefings to Congress and DCI Goss's February 16, 2005 briefing to Congress. *In camera* review is necessary to determine whether any of the information in the public record that is redundant of the CIA's public statements can be reasonably segregated and disclosed.

Fourth, there is no itemization of the particular pages or portions to which the individual exemptions apply. Instead, the Declaration suggests that each exemption applies to the entire 50-page document. The CIA's opposition memorandum mentions repeatedly that its sole declaration in support of summary judgment is 25 pages long. Opp'n at 2, 3, 4. Although extensive, the boilerplate recitation of generalized concerns cannot substitute for specific explanations of the risk posed by release of portions of the document that have been sanitized to protect legitimate withholdings, such as source and method information. Thus the CIA has failed to meet its burden to 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." *King v. DOJ*, 830 F.2d 210, 224 (D.C. Cir. 1987). When defendant fails to meet its burden to provide particularized descriptions of the context of redactions and detailed, non-conclusory justifications for each individual determination, then *in camera* review is appropriate. *King*, 830 F.2d at 225 (*in camera* review permits a "first-hand inspection" for the court to determine "whether the weakness of the affidavits is a result of poor draftsmanship or a flimsy exemption claim").

All these inconsistencies and flaws in the CIA's sole declaration raise questions about the CIA's conclusion that there is nothing in the Estimate that can be reasonably segregated and released. Accordingly, these are all reasons that support *in camera* review by the Court. While the Court has a number of tools to use to force the agency to make a proper decision on disclosability, *in camera* review is the one that ensures true independence of review.

In camera review is not uncommon in the district courts in cases involving invocation of exemptions 1, 3 and 5. It has commonly been used by judges in the United States District Court for the District of Columbia, either upon agreement of plaintiff and defendant, through assignment of cases to a magistrate judge for *in camera* review, and upon court order when the court has concerns about the correctness of the agency's disclosure determination. *E.g., Public Citizen v. Department of State*, 276 F.3d 634 (D.C. Cir. 2002) (District Court reviewed records *in camera* to determine applicability of Exemption 1; found some information meaningful and segregable); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20 (D.C. Cir. 1998) (instructing District Court to conduct *in camera* review or seek more detailed affidavits in dispute concerning applicability of Exemption 1); *Physicians Comm. for Responsible Med. v. NIH*, 326 F. Supp. 2d 19 (D.D.C. 2004) (*in camera* review of unredacted 66 page document to evaluate Exemption 4 and 5 assertions); *Madison Mech., Inc. v. NASA*, 2003 U.S. Dist. LEXIS 4110 (D.D.C. 2003) (Magistrate Judge recommending *in camera* inspection); *Billington v. United States DOJ*, 245 F. Supp. 2d 79 (D.D.C. 2003) (*in camera* review conducted pursuant to D.C. Circuit's directions on remand; conducted to evaluate segregability analysis); Washington Post v. Dep't of Defense, 766 F. Supp. 1 (D.D.C. 1991) (using a special

master to review classified records *in camera*). "*In camera* inspection does not depend on a finding or even a tentative finding of bad faith. A judge has discretion to order *in camera* inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination." *Ray v. Turner*, 587 F,2d 1187, 1195 (D.C. Cir. 1978) (per curiam).

CONCLUSION

For the foregoing reasons, and for the reasons stated in 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, and in the entire record in this matter, 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,

_____
Meredith Fuchs
D.C. Bar No. 450325
General Counsel
The National Security Archive
Gelman Suite 701
2130 H Street, NW
Washington, DC 20037
Counsel for Plaintiff

DATE: May 2, 2005