UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY AND CHARLIE SAVAGE, Plaintiffs, v. THE UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	ECF CASE 14 CIV. 03777 (JPO)

THE UNITED STATES DEPARTMENT OF JUSTICE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for the United States Department of Justice
86 Chambers Street – 3d Floor
New York, NY 10007
Telephone: (212) 637-2678
Facsimile: (212) 637-2686
E-mail: jeannette.vargas@usdoj.gov
E-mail: Tara.Lamorte2@usdoj.gov

Jeannette A. Vargas
Tara M. LaMorte
Assistant United States Attorneys
-Of Counsel-

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PRELIMINARY STATEMENT

Defendant the United States Department of Justice ("DOJ" or the "Government") respectfully submits this memorandum of law in support of its motion for summary judgment and in opposition to the motion for partial summary judgment brought by plaintiffs, the New York Times Company and Charlie Savage, in this action brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

In January 2008, Attorney General Michael Mukasey assigned John Durham ("Durham") to lead a criminal investigation into the destruction of videotapes documenting interrogations conducted overseas by the Central Intelligence Agency ("CIA"). In August 2009, Attorney General Holder expanded Durham's mandate to include a preliminary review of whether federal laws were violated in connection with the CIA's interrogation of detainees at overseas locations. DOJ ultimately did not bring criminal charges in these matters.

Plaintiffs brought this FOIA action, seeking public disclosure of confidential prosecution memoranda that detail Durham's internal legal analysis and mental impressions as to whether full criminal investigations should be undertaken and whether criminal prosecutions should be brought with respect to these matters. Plaintiffs also sought the disclosure of all FD-302s memorializing the interviews conducted by criminal prosecutors and agents of the Federal Bureau of Investigation ("FBI") in the course of those criminal investigations. DOJ properly withheld all of the responsive documents in their entirety, as they are exempt from disclosure pursuant to, *inter alia*, FOIA Exemption 5, 5 U.S.C. § 552(b)(5), which protects from compelled disclosure under FOIA documents that would ordinarily not be subject to discovery in civil

litigation. The documents are protected by the attorney work product privilege. In addition, two of the memoranda are protected by the deliberative process privilege. [1]

BACKGROUND

A. The Tape Destruction Criminal Investigation

On January 2, 2008, Attorney General Michael Mukasey appointed Durham to investigate the destruction of certain videotaped interrogations of detainees by the CIA (the "Tape Destruction Investigation"). (Declaration of John Durham, dated December 8, 2014 ("Durham Decl."), ¶ 5). While Durham reported directly to the Attorney General and Deputy Attorney General, he was given complete autonomy and independence with respect to the conduct of this criminal investigation. (*Id.* ¶ 7). In conducting this investigation, he directed and supervised a team of attorneys and FBI Special Agents. (*Id.* ¶ 5).

Durham's criminal investigation sought to ascertain, among other things, whether there was the requisite criminal intent in connection with the destruction of the tapes to warrant filing federal criminal charges against any particular individuals. (*Id.* ¶ 8). In the course of this investigation, the team conducted a series of interviews of potential witnesses as part of the process of determining whether criminal prosecutions were warranted. (*Id.* ¶ 12). These interviews, which were conducted by both FBI Special Agents and career federal prosecutors, were conducted under Durham's supervision and at his direction. (*Id.* ¶ 12; *see also* Declaration of Douglas Hibbard, dated December 9, 2014 ("Hibbard Decl."), Ex. D (statement from Attorney General Holder, announcing that he had "directed the FBI to conduct the investigation under Mr.

[1] Although plaintiffs have moved for partial summary judgment, were the Court to conclude that any of the responsive documents are not exempt from disclosure under Exemption 5 of FOIA, summary judgment should not be entered in plaintiffs' favor, as the documents are additionally protected by other FOIA exemptions. Pursuant to the Stipulation and Order Regarding Procedures for Adjudicating Summary Judgment Motions, entered on September 24, 2014, the Government reserves the right to raise additional exemptions with respect to the documents.

Durham's direction")). Government prosecutors selected many of the witnesses to interview, attended the overwhelming majority of the interviews and actively participated in questioning the witnesses. (Durham Decl. ¶ 12). For each interview, an FBI Special Agent prepared an FD-302. (*Id.*). An FD-302 is a form that memorializes the statements made by a potential witness in the course of an interview conducted by FBI agents. (*Id.*). Durham edited a portion of the resulting FD-302s relating to interviews in which he participated. (*Id.*).

The prosecution team prepared two substantive reports in connection with the Tape Destruction Investigation. (*Id.* ¶ 9). Specifically, the team prepared a 1037-page report that memorialized the prosecutors' analyses and thought processes concerning whether to initiate any criminal prosecutions and their ultimate conclusion not to file charges (the "Tape Destruction Report"). (*Id.*). The decision that charges would not be brought for the destruction of the tapes was announced on November 9, 2010, in a brief DOJ press release ("November 2010 Press Release"). (*Id.*; Hibbard Decl. Ex. E-1). However, at that time, the team was still investigating whether there had been any chargeable instances of false statements or grand jury perjury in the course of their criminal investigation. (Durham Decl. ¶ 9). The team's evaluation of those open issues was subsequently memorialized in a separate memorandum, which was provided to the Deputy Attorney General in 2012 (the "Obstruction Memorandum"). (*Id.*). The prosecution decision regarding these separate obstruction issues was never the subject of any press release by DOJ. (Hibbard Decl. ¶ 20 n.7).

B. The Interrogation Investigations

On August 24, 2009, Attorney General Eric H. Holder expanded Durham's mandate to include a preliminary review into whether federal laws were violated in connection with the interrogation of certain detainees at overseas locations, and to recommend to the Attorney

General whether a full criminal investigation should be opened with respect to any of these incidents (the "Interrogation Investigations"). (Durham Decl. ¶ 6). Durham likewise directed and supervised a team of attorneys and FBI agents in connection with this review. (*Id.* ¶ 6).

Durham's team generated two interim reports recommending to the Attorney General and Deputy Attorney General whether a full criminal investigation should be commenced with respect to the treatment of each of the 101 detainee cases examined, and ultimately provided a final recommendation report dated May 26, 2011 (collectively, the "Preliminary Review Reports"). (*Id.* ¶ 14). On December 14, 2010, and May 26, 2011, Durham submitted two supplemental reports that provided additional detail to support his recommendation that full criminal investigations be opened to further examine the circumstances surrounding the deaths of two individuals in United States custody overseas (the "Recommendation Memoranda"). (*Id.* ¶ 15). On June 30, 2011, the Attorney General announced in a public statement that he accepted Durham's recommendations to open two full criminal investigations, and close the remaining matters (the "June 2011 AG Statement"). (*Id.* ¶ 16; *see also* Hibbard Decl. ¶ 17 & Ex. F).

As with the Tape Destruction Investigation, Durham's team conducted witness interviews in the course of the Interrogation Investigations, which were memorialized in FD-302s. (Durham Decl. ¶ 20). These witness interviews were likewise conducted at Durham's direction, with the active participation of federal prosecutors. (*Id.*).

With respect to the two full criminal investigations that the prosecution team subsequently conducted, Durham ultimately concluded that criminal charges should not be filed. (*Id.* ¶ 17). His conclusions, and the supporting analyses, were embodied in two separate reports dated March 14, 2012, and July 11, 2012, which were addressed to the Attorney General and Deputy Attorney General (the "Declination Memoranda"). (*Id.* ¶ 17). On August 30, 2012, the

Attorney General announced that the two full criminal investigations were closed ("August 2012 AG Statement"). (*Id.* ¶ 17; *see also* Hibbard Decl. ¶ 18 & Ex. G).

C. The FOIA Requests

On April 11, 2014, Charlie Savage submitted two Freedom of Information Act ("FOIA") requests to DOJ (the "FOIA Requests"). The first request sought any reports from Durham to the Attorney General or Deputy Attorney General "describing or presenting findings from" the Tape Destruction Investigation or the Interrogations Investigations. (Hibbard Decl. Ex. A). The second sought "copies of the FD-302 reports summarizing interviews conducted as part of" the investigations described above. (Durham Decl. ¶ 3).

OIP located ten distinct reports and memoranda responsive to this request: the Tape Destruction Report (*Vaughn* Index Nos. 3-4); the two Obstruction Memoranda (*Vaughn* Index Nos. 15-16); the three Preliminary Review Reports (*Vaughn* Index Nos. 1, 5-10); the two Recommendation Memoranda (*Vaughn* Index Nos. 2, 11-12); and the two Declination Memoranda (*Vaughn* Index Nos. 13-14, 17-18) (collectively, the "memoranda").[2] (Hibbard Decl. ¶ 20). The FBI identified numerous FD-302s that were responsive to the FOIA Requests. (Durham Decl. ¶ 4). Each of these documents was withheld pursuant to Exemption 5, among other FOIA exemptions. (*Id.*; Hibbard Decl. ¶ 13 & n.5).

ARGUMENT

POINT I

LEGAL STANDARDS APPLICABLE TO FOIA

"Upon request, FOIA mandates disclosure of records held by a federal agency, unless the documents fall within enumerated exemptions." *Dep't of the Interior v. Klamath Water Users*

[2] OIP's *Vaughn* index lists 18 responsive documents in total, as it includes duplicate and near-duplicate documents with differing marginalia.

Protective Ass'n, 532 U.S. 1, 8 (2001) (citations omitted). While FOIA is intended to promote government transparency, *id.*, the FOIA exemptions are "intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). FOIA thus balances "'the public's right to know and the government's legitimate interest in keeping certain information confidential.'" *Assoc. Press v. U.S. Dep't of Justice*, 549 F.3d 62, 65 (2d Cir. 2008).

Summary judgment is the procedural vehicle by which most FOIA actions are resolved. *E.g.*, *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993); *Bloomberg L.P. v. Bd. of Governors of the Federal Reserve Sys.*, 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009). Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, "[a]ffidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) (footnote omitted). The declarations submitted by the agency in support of its determination are "accorded a presumption of good faith." *Id.* (internal quotation marks omitted). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (citation and internal quotation marks omitted). For the reasons set forth below, the Government's declarations logically and plausibly establish that the responsive documents are exempt from disclosure under FOIA Exemption 5.

POINT II

THE RESPONSIVE DOCUMENTS WERE PROPERLY WITHHELD UNDER EXEMPTION FIVE

DOJ properly withheld all of the responsive documents under Exemption 5. Exemption 5 exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not

be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991). "[A]gency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5 . . . ." *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002).

A. The Documents Are Protected Under the Attorney Work Product Privilege

The attorney work product privilege protects documents and other memoranda prepared by an attorney in anticipation of litigation, *see Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947), and is designed "to avoid chilling attorneys in developing materials to aid them in giving legal advice and in preparing a case for trial." *John Doe Corp. v. United States*, 675 F.2d 482, 492 (2d Cir. 1982). The attorney work product doctrine exempts from disclosure "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3).Without such protection, an entity would have to choose between protecting its litigation prospects by "scrimp[ing] on candor and completeness," or prejudicing its litigation prospects, by disclosing "assessment of its strengths and weakness . . . to litigation adversaries." *United States v. Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998).

The privilege sweeps very broadly. It includes within its scope "factual material, including the result of a factual investigation." *In re Grand Jury Subpoena Dated July 5, 2005*, 510 F.3d 180, 183 (2d Cir. 2007). It encompasses both civil and criminal matters. Indeed, although "the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more

vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." *United States v. Nobles*, 422 U.S. 225, (1975). Moreover, the work product privilege continues to apply even though litigation (or the prospect of litigation) has ended. *See generally FTC v. Grolier Inc.*, 462 U.S. 19, 28 (1983).

1. The Memoranda Are Protected Under the Work Product Privilege

It is well-established, and plaintiffs do not dispute, that a prosecutorial memorandum analyzing whether to bring a criminal prosecution constitutes protected work product, even where the memorandum ultimately concludes that charges should not be brought. *Wood v. FBI*, 432 F.3d 78, 84 (2d Cir. 2005); *see also A. Michael's Piano, Inc., v. FTC*, 18 F.3d 138, 146-47 (2d Cir. 1994); *Kishmore v. U.S. Dep't of Justice*, 575 F. Supp.2d 243, 259-60 (D.D.C. 2008). The memoranda at issue here are precisely the types of documents that *Wood* held are entitled to protection. The memoranda set forth the evidence obtained by the prosecutors, discuss the sufficiency of such evidence, evaluate the potential admissibility of evidence at trial, analyze the types of criminal charges that could be brought against potential targets, and weigh the potential strengths and weaknesses of various legal strategies and possible defenses that could arise in a criminal prosecution. (Durham Decl. ¶¶ 10, 14, 15, 18; Hibbard Decl. ¶¶ 22, 23). That is, each of the memoranda was clearly prepared "because of the prospect of litigation, analyzing the likely outcome of that litigation," *Adlman*, 134 F.3d at 1202, and they are replete with attorneys' mental impressions and opinions.

More fundamentally, prosecution memoranda must remain protected because the disclosure of such documents would "chill the frank prosecutorial evaluations" of potential criminal charges, to the detriment of the criminal justice system. *Heggestad v. U.S. Dep't of*

Justice, 182 F. Supp.2d 1, 10 (D.D.C. 2000). Indeed, because it has long been recognized that a federal prosecutor's discretion to decline prosecution is beyond judicial review, *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967), documents underlying such prosecutorial decisionmaking ordinarily cannot be obtained in discovery, *see, e.g.*, *United States v. Carson*, 978 F. Supp.2d 34, 40 (D.D.C. 2013). Accordingly, the memoranda were properly withheld.

2. The FD-302s Are Protected Under the Work Product Privilege

It has long been understood that the notes of witness interviews are entitled to work product protection. *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981) ("Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes."). This is because such notes can reveal the focus of the attorney's investigation, the substance of the responses to such questions, and the attorney's beliefs as to how such facts relate to the inquiry. *Id.* The privilege therefore extends even to interview notes that merely record verbatim the contents of an interview. *See, e.g.*, *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307-08 (D.C. Cir. 1997); *cf. In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183-84 (2d Cir. 2007) (holding that audio recordings of conversations constitute fact work product).[3]

The work product privilege applies with equal force to interview notes prepared by investigators acting at the direction of attorneys. *See Nobles*, 422 U.S. at 238-39 (holding that

[3] Courts differ as to whether interview notes that merely record a witness's statement, but do not otherwise contain thoughts and impressions regarding the interview, constitute fact work product, which in civil proceedings may be subject to disclosure under a showing of substantial need, or opinion work product, which is subject to heightened protection. *Compare Abdell v. City of New York*, 2006 WL 2664313, at **6-7 (S.D.N.Y. Sept. 14, 2006) (citing cases), *with SEC v. Nadel*, 2012 WL 1258297, at *7 (E.D.N.Y. April 16, 2012) (citing cases). The Court need not address this issue here, however, as both fact and opinion work product are equally exempt from disclosure under FOIA Exemption 5. *See, e.g.*, *A. Michael's Piano*, 18 F.3d at 146.

work product "protect[s] material prepared by agents for the attorney as well as those prepared by the attorney himself"); *In re Grand Jury Subpoena Dated Oct. 22, 2001*, 282 F.3d 156, 161 (2d Cir. 2002) ("[T]he work product privilege applies to preparation not only by lawyers but also [by] investigators seeking factual information."). Where a law enforcement agent is acting at the direction of a government attorney, the agent's interview notes constitute work product. *See, e.g., United States ex rel. Landis v. Tailwind Sports Corp.*, -- F. Supp.3d --, 2014 WL 4851741, at *4 (D.D.C. Sept. 30, 2014). Accordingly, "investigative reports of the FBI and interview notes by its agents are materials prepared in anticipation of litigation and are thus work product." *United States v. Two Bank Accounts*, 2007 WL 108392, at *2 (D.S.D. Jan. 5, 2007); *accord United States v. Chatham City Corp.*, 72 F.R.D. 640, 643 (S.D. Ga. 1976).

The FD-302s generated during the Tape Destruction and Interrogation Investigations fall squarely within the protections of the work product privilege. They are the official memorialization of witness interviews, conducted by FBI agents and prosecutors in the course of criminal investigations that were pursued to determine whether to bring criminal charges. (Durham Decl. ¶¶ 12, 20). The FBI agents were acting at the direction of government counsel in this case—the witnesses to be interviewed were largely selected by government prosecutors and the questioning was conducted by both the FBI agents and government prosecutors. (*Id.*). The FD-302s therefore reveal the prosecutors' mental processes in determining which witnesses to interview and the nature and the focus of the questioning. (*Id.*).

Plaintiffs assert, without citation to any authority, that FD-302s cannot be protected by the attorney work product privilege "unless the FBI is seen as working to advance the litigation strategy of the prosecutors, and not as an agency independently gathering the facts objectively." Pl. Br. at 14. Such an argument proceeds from the false premise that federal prosecutors and FBI

agents, who both work under the direction of the Attorney General, are not together engaged in a quest to gather facts objectively. More fundamentally, the test for work product is not whether the document was prepared "to advance the litigation strategy" of an attorney, but whether they were prepared in anticipation of litigation, in this case a potential criminal prosecution. As the FD-302s in this case meet this standard, they are privileged and exempt from protection.

B. The Recommendation Memoranda Were Properly Withheld Under the Deliberative Process Privilege

In enacting Exemption 5, "[o]ne privilege that Congress specifically had in mind was the 'deliberative process' or 'executive' privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–51 (1975) ("those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process" (internal quotation marks omitted)). Legal advice, no less than other types of advisory opinions, "fits exactly within the deliberative process rationale for Exemption 5." *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980); *see Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356–57 (2005).

An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *accord Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (citations omitted). A document is "predecisional" when it "precedes, in temporal sequence, the 'decision' to which it relates," *id.*, and is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975).

"A document is 'deliberative' when it is actually . . . related to the process by which policies are formulated." *Grand Central*, 166 F.3d at 482 (internal quotation marks omitted;

alteration in original). Courts look to whether the document "formed an important, if not essential, link in [the agency's] consultative process," *id.* at 483, whether it reflects the opinions of the author rather than the policy of the agency, *id.*; *Hopkins*, 929 F.2d at 85, and whether it might "reflect inaccurately upon or prematurely disclose the views of [the agency]," *Grand Central*, 166 F.3d at 483. Pre-decisional deliberative documents include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Tigue*, 312 F.3d at 80 (internal quotation marks omitted); *Grand Central*, 166 F.3d at 482.

DOJ properly invoked the deliberative process privilege in withholding the Recommendation Memoranda. The Recommendation Memoranda clearly meet both criteria necessary for the deliberative process privilege to apply. First, they were pre-decisional: the memoranda were provided by Durham to the Attorney General before the Attorney General decided, on June 30, 2011, to authorize Durham to open full criminal investigations into the deaths of the two detainees. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) ("The identity of the parties to the memorandum is important; 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."). Second, they are deliberative. The memoranda constitute recommendations from a subordinate to the deciding official, setting forth Durham's subjective opinion on the proper course of action to take. (Durham Decl. ¶ 15). The Recommendation Memoranda are thus prototypical documents "'reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Hopkins*, 929 F.2d at 84-85 (quoting *Sears*, 421 U.S. at 150).

C. None of the Memoranda Have Been Expressly Adopted or Incorporated by Reference, and Therefore They Remain Exempt From Disclosure

Under narrow circumstances, a pre-decisional document that would ordinarily be covered by the deliberative process privilege may be subject to disclosure under FOIA. "An agency may be required to disclose a document otherwise entitled to protection under the deliberative process privilege if the agency has chosen 'expressly to adopt or incorporate by reference [a] . . . memorandum previously covered by Exemption 5 in what would otherwise be a final opinion.'" *La Raza*, 411 F.3d at 356 (quoting *Sears*, 421 U.S. at 161 (alterations in original)).[4]

The doctrine of adoption, first articulated by the Supreme Court in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 161, limits the deliberative process privilege under Exemption 5. In *Sears*, the Court held that "if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion," such document loses the protection of Exemption 5. *Id.*

Thus, in *La Raza*, the Second Circuit held that express adoption may occur when a policymaker repeatedly, explicitly, and publicly relies upon the reasoning contained in an otherwise exempt document as authoritative within the agency. *La Raza*, 411 F.3d 353-55, 360-61; *see also In re County of Erie*, 473 F.3d 413, 418 n.5 (2d Cir. 2007); *Wood*, 432 F.3d at 83-84. In *La Raza*, the court held that DOJ had adopted an unpublished Office of Legal Counsel ("OLC") memorandum as its policy, and therefore lost its ability to invoke the deliberative

[4] The Second Circuit has held that there are "two paths" by which a Court can determine if a document withheld under Exemption 5 is subject to disclosure: analysis under the express adoption doctrine or under the "working law" doctrine. *Brennan Center for Justice v. U.S. Dep't of Justice*, 697 F.3d 184, 201 (2d Cir. 2012). As the D.C. Circuit recognized in *Afshar v. Department of State*, "working law" refers to "those policies or rules, and the interpretations thereof, that 'either create or determine the extent of the substantive rights and liabilities of a person.'" 702 F.2d at 1141 (citation omitted). The Government does not understand Plaintiffs to be arguing that the "working law" doctrine has any applicability in this case, nor could they, as the memoranda do not set forth DOJ policy as to any issue. (Hibbard Decl. ¶ 29).

process and attorney-client privileges with respect to the memorandum, when the Attorney General and his high-level advisers "made a practice of using the OLC Memorandum to justify and explain [DOJ]'s policy," and "repeatedly depended on the Memorandum as the primary legal authority justifying and driving [DOJ's] change [in its policy]." *Id*. at 358.

1. The Express Adoption Doctrine Does Not Apply to the Work Product Privilege

Plaintiffs do not dispute that the memoranda are protected by the work product privilege. Plaintiffs instead contend that the memoranda are not exempt under Exemption 5 because DOJ expressly adopted the memoranda. The express adoption doctrine should not be extended to documents protected under the work product doctrine.

The Second Circuit has yet to decide whether the adoption doctrine articulated in *Sears* applies to the attorney work-product privilege, *Wood*, 432 F.3d at 84 (declining to decide whether adoption is applicable in the context of the work product privilege), although the doctrine has been extended to predecisional documents that were otherwise protected by the attorney-client privilege.[5] The logic of the adoption doctrine breaks down when extended to work product, however. *Sears* and its progeny make clear that adoption involves an inquiry into the predecisional element of the deliberative process privilege. The rationale of the express adoption doctrine arose out of a recognition that a document that would otherwise be protected by the deliberative process privilege is no longer predecisional if it has been transformed into a final decision. *See Sears*, 421 U.S. at 161; *Bristol-Meyers Co. v. FTC*, 598 F.2d 18, 24 (D.C. Cir. 1978) ("[A] memorandum prepared prior to the decision . . . will lose its predecisional

[5] The Second Circuit's rationale for extending the express adoption doctrine to documents protected by the attorney client privilege is that express adoption is akin to the waiver of the attorney-client privilege that occurs when a client expressly relies upon the attorney's advice as a claim or defense in litigation. *Brennan Center*, 697 F.3d at 207-08.

character if the agency chooses expressly to adopt or incorporate it by reference in a 'final opinion.'"); *Coastal States*, 617 F.2d at 866 (same).

The Supreme Court has explicitly clarified that its holding in *NLRB* applied only with respect to documents covered by the deliberative process privilege, and not documents protected by other Exemption 5 privileges. *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 n.23 (1979). In *Merrill*, the Court explained:

> It is true that in *NLRB v. Sears, Roebuck & Co.*, . . . [w]e held that, with respect to final opinions, Exemption 5 can never apply; with respect to other documents covered by 5 U.S.C. § 552(a)(2), we said that we would be "reluctant" to hold that the Exemption 5 privilege would ever apply. . . . These observations, however, were made in the course of a discussion of the privilege for *predecisional* communications. It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges. In this respect, we note that *Sears* itself held that a memorandum subject to the affirmative disclosure requirement of § 552(a)(2) was nevertheless shielded from disclosure under Exemption 5 because it contained a privileged attorney's work product.

Merrill, 443 U.S. at 361 n.23. In other words, the Supreme Court's observations in *Sears* concerned *the deliberative process privilege*, and not the attorney work product privilege.

Accordingly, following the *Merrill* decision, courts have held that, even if a document is a final opinion or is a recommendation that is eventually adopted as the basis for agency action, it retains its exempt status if it falls within the work-product privilege. *See Iglesias v. CIA*, 525 F. Supp. 547, 559 (D.D.C. 1981) ("It is settled that even if a document is a final opinion or is a recommendation which is eventually adopted as the basis for agency action, it retains its exempt status if it falls properly within the work-product privilege."); *Exxon Corp. v. FTC*, 476 F. Supp.

713, 726 (D.D.C. 1979) ("[F]inal opinions and attorney 'work product,' however, are not mutually exclusive. Thus, a document may be exempt as attorney 'work product' under exemption (b)(5) notwithstanding that it is also a 'final opinion', or has been incorporated by reference into a 'final opinion,' . . . .").

The Supreme Court's rationale for declining to extend the rationale of *Sears* to the attorney work product doctrine is fully applicable here. Many of the memoranda at issue here are not predecisional; they constitute decisions as to the issues addressed therein. They are nevertheless fully protected by the work product privilege. Indeed, in the litigation context, there are any number of documents that constitute final agency decisions as to litigation matters: memoranda analyzing the legal positions that will be taken in a particular case or type of case, memoranda determining that a prosecution should be brought or should be declined, memoranda setting forth the government's settlement position, memoranda evaluating matters of legal strategy, witness credibility, admissibility of evidence, or any number of issues that arise in the litigation context. The fact that such documents are not predecisional does not suggest that the work product privilege has been waived. Government attorneys, no less than private counsel, should be entitled to set forth their mental impressions and opinions comprehensively, without being forced to "scrimp on candor and completeness." *Adlman*, 134 F.3d at 1200.

2. The Documents Have Not Been Expressly Adopted or Incorporated by Reference as Agency Policy

Even assuming that the doctrine governing express adoption of predecisional advice as agency policy could apply to the types of litigation-focused analysis entitled to protection under the work product privilege, the facts here clearly fail to meet the standard for adoption. In delineating when a document loses its privileged status because of its adoption by an agency as its official policy, the Supreme Court and the Second Circuit have emphasized two important

limitations: (1) the adoption must be express, and (2) the adoption must include both the conclusion and the reasoning of the otherwise privileged document. *See Sears*, 421 U.S. at 161 (holding that doctrine applies "if an agency chooses *expressly* to adopt or incorporate by reference" a deliberative document (emphasis added)); *La Raza*, 411 F.3d at 358-59; *accord Wood*, 432 F.3d at 84. In the instant case, there are no public statements by a high-level Executive Branch official—or any governmental official for that matter—that even mention any of these memoranda, let alone their reasoning. Under the adoption standards set forth by the Supreme Court and the Second Circuit, this is fatal to plaintiffs' argument. As there are no public statements referencing these memoranda, there is certainly no evidence that would demonstrate that the Department of Justice expressly adopted the reasoning of the memoranda.

a. Express Adoption Requires an Explicit Public Reference to a Document

The Second Circuit has repeatedly emphasized that there can be no "express" adoption where the executive branch has never made any public reference to a document. While the Second Circuit has not required that the agency reference a particular document by title or date, in each of the Second Circuit cases in which adoption has been found, there has been, at a minimum, a public statement by a high-level official describing the document and its contents sufficiently to demonstrate that the agency was relying upon a specific document as setting forth the basis for the agency policy in question. In the instant case, there are no references in the public record to any of the memoranda at issue. This is fatal to plaintiffs' argument.

For example, in holding that the requirements for express adoption had not been met in the *Wood* case, the Second Circuit relied in part upon the fact that "neither [the endorsing official] nor any other high-level officials made any public references to the . . . [m]emo." *Wood*, 432 F.3d at 84. Similarly, in *Brennan Center*, the Second Circuit concluded that DOJ had

expressly adopted only one of the three OLC memoranda at issue, as that was the only document that had been explicitly referenced in public statements by executive branch officials. 697 F.3d at 205-06. The Court explained:

> Any agency faces a political or public relations calculation in deciding whether or not to reference what might otherwise be a protected document in explaining the course of action it has decided to take. In many cases, as here, the agency is not required to explain its reasons publicly. Nonetheless, where it determines there is an advantage to doing so by referencing a protected document as authoritative, it cannot then shield the authority upon which it relies from disclosure.

Brennan Center, 697 F.3d at 205; *see also id.* at 205 n.17 ("[I]f the agency did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly . . . that its action was based upon that memorandum, giving no other reasons or basis for its action.").

Thus, the deliberative process privilege is not overcome whenever an agency merely announces that a policy decision has been made and does not publicly rely upon any particular document in explaining the rationale for such a decision. To hold otherwise would impermissibly expand the express adoption doctrine, and threaten to eviscerate the privilege protecting a predecisional and deliberative document any time an agency official publicly announces the decision that follows. The deliberative process privilege is not concerned with "safeguard[ing] the quality and integrity of governmental decisions" only insofar as such decisions are not of sufficient importance to warrant a public announcement. *Hopkins*, 929 F.2d at 84; *Sears*, 421 U.S. at 150–51. Because Exemption 5 was designed to protect the government's ability to engage in a "frank discussion of legal or policy matters in writing," H.R. Rep. No. 89-1497, at 10 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427 ("the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl'"), strict adherence to the requirements for express adoption is essential.

b. Express Adoption Requires Adoption of the Document's Rationale

Explicit mention of the document in question is a necessary, but not sufficient, precondition of express adoption. A second critical element for establishing express adoption is an agency's explicit reliance upon both the conclusion and the rationale set forth in the privileged document. *La Raza*, 411 F.3d at 358. This is because "the public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground." *Sears*, 421 U.S. at 152. Thus, it is not enough that an agency expressed agreement with the conclusions expressed in such document, or even that it implemented proposed recommendations; there must be evidence of reliance upon the document's reasoning. *Wood*, 432 F.3d at 84; *La Raza*, 411 F.3d at 359. "If the agency merely carried out the recommended decision without explaining its decision in writing, we could not be sure that the memoranda accurately reflected the decisionmaker's thinking." *Afshar v. Dep't of State*, 702 F.2d 1125, 1143 n.22 (D.C. Cir. 1983); *see also Wood*, 432 F.3d at 84.

c. DOJ Did Not Expressly Adopt the Memoranda

Plaintiffs have failed to meet their burden of demonstrating that any of the memoranda have been expressly adopted by DOJ officials. *See Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 841 F. Supp.2d 142, 158 (D.D.C. 2012) (citing cases establishing the FOIA plaintiffs bear burden of demonstrating waiver of work product privilege in order to overcome Exemption 5). Most of the statements they identify describe Durham's investigations, not the contents of his reports, and thus cannot serve as evidence of express adoption of the latter. Indeed, plaintiffs cannot show that any DOJ official ever so much as referenced any of the

memoranda in a public statement. The lack of any public reference to the memoranda, much less to their reasoning, is fatal to plaintiffs' express adoption argument.

i. The Tape Destruction Report

Plaintiffs fail to establish that the Tape Destruction Report has been expressly adopted. First, Plaintiffs argue at length that the Attorney General, under public pressure to address the politically sensitive topic of the CIA's destruction of the videotapes, made public statements "to assure the public "that the investigations followed the law, and that, ultimately, the CIA's destruction of the videotapes . . . followed the law as well." Br. at 19-21. Plaintiffs further contend that, in the course of such public statements, Attorney General Holder expressly adopted the rationale and reasoning of the Tape Destruction Report. These arguments are both factually incorrect and legally insufficient to establish express adoption.

DOJ issued the November 2010 Press Release at the time it closed the Tape Destruction Investigation. That press release consisted, in its entirety, of only three sentences:

> In January 2008, Attorney General Michael Mukasey appointed Assistant United States Attorney John Durham to investigate the destruction by CIA personnel of videotapes of detainee interrogations. Since that time, a team of prosecutors and FBI agents led by Mr. Durham has conducted an exhaustive investigation into the matter. As a result of that investigation, Mr. Durham has concluded that he will not pursue criminal charges for the destruction of the interrogation videotapes.

(Hibbard Decl. Ex. E-1). DOJ did not offer any explanation for the decision that was reached. Nor did it attempt to justify its decision based upon the Tape Destruction Report. The November 2010 Press Release does not even reference an underlying document.

Given the sparse public statement issued by DOJ in connection with the closing of the Tape Destruction Investigation, Plaintiffs instead point to statements made by the Attorney General at the time DOJ announced the closing of the separate Interrogation Investigations. Pl.

Br. at 19-21. Yet other than a sentence describing Durham's background, the August 2012 AG Statement does not even reference the Tape Destruction Investigation (Hibbard Decl. Ex. G).

A declination memorandum such as the Tape Destruction Report does not lose its protected status once DOJ announces whether it will or will not bring charges in a particular case. Prosecutors routinely prepare such prosecution and declination memoranda, free in the knowledge that they can candidly assess the strengths and weaknesses of their case without fear that their analyses will be exposed to public scrutiny once DOJ announces whether it will bring charges. (Hibbard Decl. ¶ 22). Ordering disclosure of such memoranda "would severely hamper the adversary process as DOJ attorneys would no longer feel free to discuss potential litigation in this fashion or to memorialize important thoughts on litigation strategies for fear that the information might be disclosed to their adversaries . . . ." (Hibbard Decl. ¶ 24).

ii. The Obstruction Memoranda

Nor is there evidence that DOJ expressly adopted the Obstruction Memoranda. The criminal investigation into obstruction issues was still ongoing at the time DOJ issued the November 2010 Press Release, and the Obstruction Memoranda themselves were not prepared until some months later. (*Id.*). DOJ could hardly have adopted the non-existent documents underlying a non-existent decision when it issued the November 2010 Press Release. Furthermore, DOJ did not issue a public announcement of its decision not to bring obstruction-related charges with respect to the Tape Destruction Investigation. (Hibbard Decl. ¶ 20 n.7). Accordingly, there has been no express adoption of the Obstruction Memoranda.

iii. The Preliminary Review Reports and Recommendation Memoranda

In the Preliminary Review Reports and the Recommendation Memoranda, Durham reported to the Attorney General that 99 of the detainee treatment cases that were the subject of

his preliminary review should be closed without further investigation, and recommended that a full criminal investigation should be opened with respect to the deaths of two specific detainees. (Durham Decl. ¶¶ 14-15). On June 30, 2011, Attorney General Holder announced, without elaboration, that he had accepted these recommendations. (Hibbard Decl. Ex. F). The brief public statements made by Attorney General Holder on this subject did not constitute express adoption of the Preliminary Review Reports or the Recommendation Memoranda, as the Attorney General nowhere indicated he had adopted the rationales set forth in such memoranda.

Specifically, in the June 2011 AG Statement, the Attorney General stated: "Mr. Durham has advised me of the results of his investigation, and I have accepted his recommendation to conduct a full criminal investigation regarding the death in custody of two individuals. . . . The Department has determined that an expanded criminal investigation of the remaining matters is not warranted." (*Id.*). Similarly, the August 2012 AG Statement, issued upon the closing of such criminal investigations, reiterated: "In June of last year, the Attorney General announced that Mr. Durham recommended opening full criminal investigations regarding the death of two individuals while in United States custody at overseas locations, and closing the remaining matters. The Attorney General accepted that recommendation." (*Id.* Ex. G).

The Attorney General's acceptance of Durham's recommendations is analogous to the circumstances presented in *Wood*, 432 F.3d at 84, where a DOJ official simply indicated his concurrence with a memorandum recommending against a criminal prosecution. *Id.* The Second Circuit held that this was not sufficient to establish express adoption, noting that the elements of express adoption are not met when a decisionmaker merely accepts a recommendation set forth in a memorandum, as such acceptance does not show whether the decisionmaker had also adopted the reasoning of the memorandum. *Id.*; *see also La Raza*, 411

F.3d at 359 ("Where an agency, having reviewed a subordinate's nonbinding recommendation, makes a "yes or no" determination without providing any reasoning at all, a court may not infer that the agency is relying on the reasoning contained in the subordinate's report.").

Just as in *Wood*, the Attorney General accepted Durham's recommendations without further comment. He did not even reference the underlying memoranda prepared by Durham in announcing his decision, much less express agreement with the rationale set forth in such memoranda. (Hibbard Decl. Exs. F, G). As the record is devoid of any evidence that the Attorney General adopted their rationales, these documents remain protected under Exemption 5.

iv. The Declination Memoranda

Plaintiffs erroneously argue that DOJ expressly adopted the two Declination Memoranda when it announced in the August 2012 AG Statement that the two detainee-related criminal investigations were being closed. Pl. Br. at 18-19. Nothing in the August 2012 AG Statement serves to expressly adopt the Declination Memoranda, as the documents themselves were not mentioned by the Attorney General in the course of announcing this decision.[6]

In arguing that the August 2012 AG Statement constitutes evidence of express adoption, plaintiffs conflate statements regarding the investigation that was conducted by Durham and his team with statements regarding the memoranda prepared after the investigation was complete, which set forth Durham's confidential analyses of the strengths and weaknesses of potential prosecutions. Most of the public statements identified by plaintiffs describe the former, not the

[6] Subsequent to the filing of plaintiffs' motion, the Government made public comments regarding the declination decisions before the United Nations Committee on the Convention Against Torture on November 21, 2014. (Hibbard Decl. n.10). Although an official transcript of those statements is not available, the Government's remarks were substantively identical to the August 2012 AG Statement and November 2010 Press Release, except that the Government identified the number of witnesses interviewed in the course of the investigations. (*Id.*). Such information does not affect the adoption analysis, as it describes the investigations, and not the Declination Memoranda themselves, which were not referenced in the remarks. (*Id.*).

latter. Statements describing Durham's investigation do not demonstrate that the agency adopted any conclusions that Durham reached after such investigation was complete.

Plaintiffs' confusion of the two issues is demonstrated by the fact that the bulk of the statements identified as supposed evidence of adoption were published by DOJ long before a decision had been reached to decline prosecution. In particular, plaintiffs point to public statements describing the scope of Durham's investigation and the general types of information reviewed by the prosecution team. Pl. Br. at 18-19. Yet the Attorney General initially made these statements in 2011, a year before the Declination Memoranda were prepared. (Hibbard Decl. Ex. F). Almost verbatim language was then repeated in the August 2012 AG Statement announcing the closure of the Interrogation Investigations. (Hibbard Decl. Ex. G). These statements cannot serve as evidence of the express adoption of the Declination Memoranda.

The Attorney General's statements with respect to the actual declination decision itself were much more abbreviated:

> AUSA John Durham has now completed his investigations, and the Department has decided not to initiate criminal charges in these matters. In reaching this determination, Mr. Durham considered all potentially applicable substantive criminal statutes as well as the statutes of limitations and jurisdictional provisions that govern prosecutions under those statutes. . . . Based on the fully developed factual record concerning the two deaths, the Department has declined prosecution because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt.

(Hibbard Decl. Ex. G).

These statements are insufficient to demonstrate express adoption, because they do not expressly (or even implicitly) reference the underlying Declination Memoranda. DOJ did not "expose its staff's memorandum to public scrutiny" by stating publicly "that its action was based upon" the Declination Memoranda. *Brennan Center*, 697 F.3d at 205 n.17. DOJ never made "a

political or public relations calculation" to "reference what might otherwise be a protected document in explaining the course of action it has decided to take." *Id.* at 205. The Attorney General did not even allude to these protected documents, let alone describe their contents or rationale. Instead, the Attorney General simply did what the Second Circuit's precedent permitted him to do—he announced the decisions reached with respect to each investigation, without risking the privilege that attached to the underlying analytical documents by stating that the rationale for the decisions was set forth in a document shielded from public view.

CONCLUSION

For the foregoing reasons, DOJ's motion for summary judgment should be granted, and plaintiffs' motion for partial summary judgment should be denied.

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Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York

By: /s/ *Jeannette A. Vargas*
Jeannette A. Vargas
Tara M. LaMorte
Assistant United States Attorneys
86 Chambers Street
New York, New York 10007
(212) 637-2678/2746 (tel)
Jeannette.Vargas@usdoj.gov
Tara.Lamorte2@usdoj.gov