

No. 20-\_\_\_\_.

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In the Supreme Court of the United States.

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Assassination Archives and Research Center,

Petitioner,

-v-

Central Intelligence Agency,

Respondent.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of  
Columbia Circuit

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MOTION FOR AN EXTENSION OF TIME  
IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

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## **CORPORATE DISCLOSURE STATEMENT**

As a preliminary matter, Petitioner Assassination Archives and Research Center, Inc. (“AARC”) is a non-stock, non-profit Virginia corporation dedicated to the collection and dissemination of materials related to political assassinations. AARC has no parent or subsidiary entities. As noted, as a non-stock, non-profit entity, AARC does not issue stock or other form of ownership.

### **MOTION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI**

**To the Honorable Chief Justice, John G. Roberts, Jr., of the Supreme Court of the United States assigned to the District of Columbia Circuit:**

Petitioner, Assassination Archives and Research Center (“AARC”), by counsel, hereby applies for an Order from Chief Justice John G. Roberts, Jr., pursuant to S.Ct. Rule 13.5 for an extension of time of 60 days within which to file a petition in this Court for a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit. The United States Circuit Court of Appeals for the District of Columbia entered judgment *Per Curiam* against Petitioner on October 11, 2019 in Appeal No. 18-5280 (Appendix A), and its orders denying Petitioner’s petition for rehearing or rehearing *en banc* were entered *Per Curiam* on December 10, 2019, (App. B). The time Petitioner has to file a petition for a writ of *certiorari* will expire on March 9, 2020, unless this motion is granted. This motion to extend the time for Petitioner to file its petition is not filed more than 10 days prior to the date when the petition for a writ of *certiorari* is due pursuant to 28 U.S.C. § 2101(c) and S. Ct. Rule 13 due to a new development explained herein- that this Court announced a grant of a writ of *certiorari* in another case on March 2, 2020 presenting an issue similar to one in Petitioner’s case in which the results of the

two cases are in conflict. This Court has jurisdiction over the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

Petitioner seeks the extension of time to consider this Court’s grant of a writ of *certiorari* announced on March 2, 2020 in the case #19-547, *Fish and Wildlife Serv., et al. v. Sierra Club, Inc.*. The *Fish and Wildlife Service* case presents the issue of compelled release under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552(a), of draft documents for which a deliberative process privilege was asserted by the government pursuant to FOIA exemption b(5). Petitioner AARC’s case involves the Central Intelligence Agency’s successful assertion of the b(5) deliberative process privilege for information reflecting CIA’s preliminary search activities in response to Petitioner’s FOIA request. The Court of Appeals discusses the b(5) exemption at pages 2 and 3 of its October 11, 2019 Judgment (App. A) in upholding CIA’s assertion of the deliberative process privilege. Petitioner wishes to consider whether to bring a petition for a writ of *certiorari* in light of this Court granting *certiorari* in the *Fish and Wildlife Service* case. The timing of the announcement of the grant of the writ of *certiorari* in the *Fish and Wildlife Service* case on March 2, 2020 creates a practical impossibility for Petitioner to consider and prepare a petition for a writ of *certiorari* before the March 9 deadline.<sup>1</sup>

### **BACKGROUND**

Appellant AARC is a non-profit, non-stock corporation, organized in 1984 for the purposes of collecting, preserving and making available to the public research materials relating to

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<sup>1</sup> Petitioner also wishes to consider the decision by Judge Walton in the district court handed down March 5, 2020 requiring *in camera* inspection of the Mueller Report as part of *de novo* review under FOIA. *EPIC v. DoJ*, Civil Act. Nos. 19-810 and 19-957, U.S. District Court for the District of Columbia; and the decision by Judge Lamberth handed down March 2, 2020 granting a FOIA plaintiff discovery including depositions in *Judicial Watch v. Dept. of State*, Civil No. 14-1242, U.S. District Court for the District of Columbia.

political assassinations and related subjects, and conducting research in the field. As part of its research and public information functions, AARC uses government records made available to it under the Freedom of Information Act (“FOIA”). AARC’s archive contains the largest collection of materials on the assassination of President John F. Kennedy in private hands.<sup>2</sup> R.1, p. 2. (“R.” refers to the docket entries in this case, Civil No. 17-0160 in the District Court for the District of Columbia.)

The Freedom of Information Act requests at issue in this case seek additional new information related to the events surrounding the assassination of President Kennedy on November 22, 1963. In 2012 Appellant AARC became aware of a formerly Top Secret document released under the President John F. Kennedy Assassination Records Collection Act, 44 U.S.C. § 2107 note, containing important new information. This document consisted of a memorandum of a briefing of the Joint Chiefs of Staff by the head of Central Intelligence Agency (“CIA”) Cuban operations Desmond Fitzgerald on September 25, 1963. During this briefing, Mr. Fitzgerald informed the Joint Chiefs that CIA was attempting to recruit individuals in the Cuban military to join in an effort to overthrow the Castro regime. Mr. Fitzgerald stated that CIA saw a parallel in history, the plot to assassinate Adolf Hitler during World War II, and that the Hitler plot was being studied by CIA in detail to develop an approach to dealing with Castro. R. 1-1, page 7, para. 13.

Former CIA Director Allen Dulles wrote extensively about the July 20, 1944 plot to kill Hitler in his book *Germany’s Underground, the Anti-Nazi Resistance*, 1947, 2000 Da Capo Press, pp. 1-11. Dulles had personal involvement with the July 20 plotters from his position in

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<sup>2</sup> AARC does not espouse or support any particular theory about the assassination of President Kennedy.

Bern, Switzerland as a principal officer of the Office of Strategic Services (“OSS”), forerunner of the CIA. *Id.* at xi-xii.<sup>3</sup> Dulles served as CIA Director in the Kennedy administration until the failure of the Bay of Pigs investigation after which Kennedy replaced Dulles. Dulles served as an active member of the Warren Commission that investigated President Kennedy’s assassination.

Despite Dulles’ membership on the Warren Commission and personal knowledge of the facts of CIA plots to assassinate Castro from his service as CIA Director, information concerning CIA plots to assassinate and overthrow Fidel Castro was withheld from the Warren Commission that investigated President Kennedy’s murder. R. 8-5 (President Gerald Ford foreword). Although subsequent investigations of President Kennedy’s assassination included plots to assassinate and overthrow Castro, information was not provided about CIA’s detailed study of the plot to assassinate Hitler. R. 8-3 (Church Committee excerpt); R.8-4 (CIA Inspector General’s Report on plots to assassinate Castro); R. 26-1, *Politico* article on Castro plots; R.30-3 (Church Committee excerpt). Information about U.S. plots to assassinate Castro was believed significant because of the possibility of retaliation against U.S. leaders, or that these plots themselves may have been turned against President Kennedy.

To AARC’s knowledge, this additional information about studying the 1944 plot to kill Hitler to develop an approach to overthrow Castro is new information that has not been previously

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<sup>3</sup> The plot to assassinate Hitler was attempted unsuccessfully on July 20, 1944, and is known as the “July 20 plot” or “Valkyrie plot”. Valkyrie was the codename for a Nazi Germany secret plan to suppress internal rebellion by foreign workers. The July 20 plot planners attempted to use the Valkyrie operation to overthrow Hitler’s regime, however Hitler was only slightly wounded and quickly reasserted his authority. Dulles, Allen Welsh, *Germany’s Underground*, Da Capo Press (2000), p. 1; Casey, William, *The Secret War Against Hitler*, The Berkley Publishing Group, (1989), p. 138. As noted, Allen Dulles was a Director of the CIA and a member of the Warren Commission that investigated President Kennedy’s assassination.

investigated by U.S. government agencies. Through its FOIA requests, AARC is attempting to find and reveal additional information about this episode to fill out the public record. The Court of Appeals has properly recognized the high public interest in the subject of the Kennedy assassination, stating, “(w)here that subject is the Kennedy assassination — an event with few rivals in national trauma and in the array of passionately held conflicting explanations — showing potential public value is relatively easy.” *Morley v. Central Intelligence Agency* (“*Morley IX*”), 810 F.3d 841,844 (D.C.Cir. 2016). This case involves factual material at the heart of the unresolved issue as to whether the plots to assassinate Castro may have precipitated the assassination of the President.

WHEREFORE Petitioner Assassination Archives and Research Center hereby applies under Rule 13.5 for an Order from Chief Justice John G. Roberts, Jr., for an extension of time of 60 days within which to file a petition in this Court for a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit.

\_\_\_\_\_/s/  
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# **APPENDIX A**

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 18-5280**

**October Term, 2019**

FILED: OCTOBER 11, 2019

ASSASSINATION ARCHIVES AND RESEARCH CENTER,  
APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY,  
APPELLEE

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Appeal from the United States District Court  
for the District of Columbia  
(No. 1:17-cv-00160)

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Before: PILLARD and RAO, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

**J U D G M E N T**

This appeal was considered on the record and on the briefs and oral arguments of the parties. After according the issues full consideration, the Court is satisfied that appropriate disposition of the appeal does not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). For the reasons stated below, it is hereby

**ORDERED** and **ADJUDGED** that the denial of the motion for summary judgment and grant of the cross-motion for summary judgment be **AFFIRMED**.

In this Freedom of Information Act (FOIA) case, the Assassination Archives and Research Center (the Center) appeals an order of the district court denying the Center's motion for summary judgment and granting a cross-motion for summary judgment by the Central Intelligence Agency (CIA). At issue is whether, in response to FOIA requests by the Center, the CIA permissibly withheld pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), portions of intra-agency communications relating to the FOIA process itself.

On August 25, 2012, the Center submitted to the CIA a request for all records "pertaining to the CIA's study in 1963 of plots to assassinate Adolph Hitler" or "to communications by Allen

Dulles regarding plots to assassinate Adolph Hitler” during Dulles’s service in the CIA and a related office. After the CIA returned a determination that it had no responsive records, the Center submitted a supplementary request. In addition to somewhat expanding the scope of the previous request, the Center’s second letter requested “[a]ll index entries or other records reflecting the search for records responsive to this request in its original or amended form, including all search [terms] used with each of the components searched.”

As set forth in declarations from CIA Information Review Officer Antoinette Shiner, who was involved in responding to the Center’s amended FOIA request, CIA staff searched for responsive records in the files of eight different CIA sub-offices that the agency identified as “the locations reasonably expected to contain” the requested materials. Shiner Decl. (Jan. 19, 2018) at 2. Those offices were: “the Directorate of Analysis . . . ; Directorate of Operations . . . , including its operational files; the Office of the Director, the Director’s Action Center, the Office of the General Counsel, the Office of Congressional Affairs, the Center for the Study of Intelligence (which is part of the CIA’s Talent Center) and the CIA’s history staff office.” *Id.* at 2-3. Within each office, CIA staff searched “all relevant office databases, Agency share drives, and archival records.” *Id.* at 3. In carrying out each search, CIA staff used a wide variety of terms, including but not limited to “Hitler Assassination,” “Hitler Plot,” “1963 assassination study,” and “Dulles communication Hitler.” *Id.* at 4-5; Shiner Decl. (Oct. 13, 2017) at 3. Each of those terms was searched both as a complete phrase and as separate terms. For example, a search for “Hitler Assassination” would have returned all documents containing that exact phrase as well as all documents containing both “Hitler” and “assassination” somewhere in its body. Shiner Decl. (Jan. 19, 2018) at 5. Staff then reviewed each document uncovered by the searches and determined whether it was responsive to the Center’s particular request. *Id.*

In addition to directing those searches, Shiner also consulted with the CIA’s Chief Historian, who is “very knowledgeable about the Agency’s holdings with respect to” the subject matter at issue here. *Id.* at 3. The Chief Historian “personally conducted searches of history staff files for any reference to studies of anti-Hitler plots dating from the 1963 time frame,” but did not uncover any additional responsive documents. *Id.* at 3-4. The Chief Historian advised that, “due to the age of the subject matter and narrow scope of [the] request focusing on anti-Hitler plots, there would not be many responsive documents and anything related to assassination studies would likely be found at the National Archives.” *Id.* at 4. Based on our review of the redacted records, the declarations, and the CIA’s *Vaughn* index, we granted summary affirmance to the CIA as to the adequacy of the CIA’s search and the propriety of its application of FOIA Exemptions 1, 3, and 6, some of which were not contested. *Assassination Archives & Research Ctr. v. CIA*, No. 18-5280, 2019 WL 691517 (D.C. Cir. Feb. 15, 2019).

The only remaining issue is the permissibility of the Exemption 5 redactions to five records the CIA produced, which appear to be CIA internal forms used in processing the Center’s FOIA requests and produced pursuant to the Center’s request for records of the FOIA search process itself. The Center challenges the CIA’s use of the deliberative privilege on the grounds that the information at issue is purely factual, reporting what the CIA found in its searches. Oral Arg. Rec. at 10:39-11:01; Appellant Br. 21-23. The CIA, in turn, argues that the withheld materials would

reveal the decision-making process behind its final response to the Center's FOIA request. Appellee Br. 7-17.

We now hold that the CIA has permissibly invoked Exemption 5. Under FOIA Exemption 5, agencies need not turn over “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency,” 5 U.S.C. § 552(b)(5)—*e.g.*, records protected by the Executive's deliberative process privilege. *See EPA v. Mink*, 410 U.S. 73, 85-90 (1973). The privilege covers information that is both “predecisional” and “deliberative.” *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Documents are predecisional if they were “generated before the adoption of an agency policy,” and deliberative if they “reflect[] the give-and-take of the consultative process.” *Id.*

Here, the CIA invokes Exemption 5 to shield portions of the five internal FOIA task forms mentioned above. Specifically, the CIA has redacted from each form the substance of the intra-agency communication “[a]uthored by [the] Agency component employee tasked with the search” for the benefit of the agency official directing the CIA's internal records search. J.A. 217-219, 296-305.

The withheld communications indisputably precede the CIA's decision to release records to the Center. In addition, the redacted content “reflects the give-and-take” of a “consultative process” through which the agency sought to identify records within its possession potentially responsive to the Center's requests. *Id.* 189-90, 354, 357. We have previously held the privilege applicable to “factual material . . . assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action,” *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1539 (D.C. Cir. 1993), and we have described a “recommendation to a supervisor on a matter pending before the supervisor” as “a classic example of a deliberative document,” *Abteu v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 899 (D.C. Cir. 2015). Taken together, the entries in the agency's *Vaughn* index, the declarations, the forms themselves, and the context in which they are used make it sufficiently apparent that the redacted text describes the efforts of staff “in extracting pertinent material” and any issues they encountered along the way. In context, it is evident that the redacted matter amounted to predecisional communications from staff made for the purpose of informing the agency's ultimate decision as to what the law required of the Agency in response to the Center's FOIA request. *See* 5 U.S.C. § 552(a).

It suffices that the redactions on the FOIA forms reflect some predecisional agency give-and-take; the Center does not challenge the CIA's segregation efforts. *See* Appellant Br.; Appellee Mot. Summ. Affirmance 4 n.3. We therefore affirm the district court's grant of summary judgment to the CIA and denial of summary judgment to the Center on the issue of the CIA's withholdings under Exemption 5.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for hearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy  
Deputy Clerk

## **APPENDIX B**

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 18-5280****September Term, 2019****1:17-cv-00160-TNM-GMH****Filed On:** December 10, 2019

Assassination Archives and Research Center,

Appellant

v.

Central Intelligence Agency,

Appellee

**BEFORE:** Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith,  
Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges;  
Williams, Senior Circuit Judge

**ORDER**

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk  
BY: /s/  
Michael C. McGrail  
Deputy Clerk

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 18-5280****September Term, 2019****1:17-cv-00160-TNM-GMH****Filed On:** December 10, 2019

Assassination Archives and Research Center,

Appellant

v.

Central Intelligence Agency,

Appellee

**BEFORE:** Pillard and Rao, Circuit Judges; Williams, Senior Circuit Judge

**ORDER**

Upon consideration of appellant's petition for panel rehearing filed on November 25, 2019, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail

Deputy Clerk