

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ARAB AMERICAN INSTITUTE, )  
 )  
 Plaintiff, )  
 ) Civil Action No. 18-cv-0871 (ABJ)  
 v. )  
 )  
 OFFICE OF MANAGEMENT )  
 AND BUDGET, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

**DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant Office of Management and Budget (“OMB” or “Defendant”) respectfully moves for summary judgment in its favor. In support of this motion, Defendant submits the attached memorandum of law, statement of material facts, and agency declaration and the exhibits thereto. Also attached is a proposed order.

Dated: January 31, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
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Plaintiff,	)	
	)	Civil Action No. 18-cv-0871 (ABJ)
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AND BUDGET,	)	
	)	
Defendant.	)	
_____	)	

**MEMORANDUM IN SUPPORT OF  
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

This case arises from Plaintiff Arab American Institute’s Freedom of Information Act (“FOIA”) request directed to OMB. Defendant has reasonably complied with the request for records submitted by Plaintiff under FOIA. Having completed its search for responsive records subject to FOIA and released all nonexempt information, Defendant respectfully moves the Court to grant summary judgment, pursuant to Federal Rule of Civil Procedure (“Rule”) 56(a), on all of Plaintiff’s claims.

**STATEMENT OF FACTS**

Defendant incorporates herein the attached Defendant’s Statement of Material Facts to Which There is No Genuine Issue.

**STANDARDS OF REVIEW**

**I. Motion for Summary Judgment Under Rule 56**

Under Rule 56 of the Federal Rules of Civil Procedure, a court will grant summary judgment when “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). A fact is “material” when it “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty*

*Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

## **II. Discharge of FOIA Obligations**

“FOIA cases are typically and appropriately decided on motions for summary judgment.” *Ryan v. Fed. Bureau of Investigation*, 174 F. Supp. 3d 486, 490 (D.D.C. 2016) (internal quotation marks omitted). “When an agency moves for summary judgment on the grounds that it has discharged its FOIA obligations, all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester, and only after the agency proves that it has fully discharged its FOIA obligations is summary judgment appropriate.” *Id.*

“An agency will be granted summary judgment on the adequacy of its search if it ‘show[s] beyond material doubt [ ] that it has conducted a search reasonably calculated to uncover all relevant documents.’” *Id.* “Adequacy ‘is judged by a standard of reasonableness and depends, not surprisingly, on the facts of each case.’” *Id.* “[A] search may be reasonable if it includes all systems ‘that are likely to turn up the information requested.’” *Id.* at 490-91.

“To meet its burden and show adequacy, ‘the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith.’” *Id.* at 491. “These declarations are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.” *Id.* (internal quotation marks omitted). “An agency can show reasonableness in its affidavit by setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched.” *Id.* (internal quotation marks omitted).

“The agency need not search every record in the system or conduct a perfect search.” *Judicial Watch, Inc. v. U.S. Dep’t of the Treasury*, No. 15-1776 (RMC), 2017 WL 1207414, at \*2

(D.D.C. Mar. 31, 2017). “[T]he fact that a particular document was not found does not demonstrate the inadequacy of a search.” *Andrews v. Dep’t of Justice*, 212 F. Supp. 3d 109, 113 (D.D.C. 2015) (internal quotation marks omitted). Also, “the [m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.” *Id.* (internal quotation marks omitted).

## ARGUMENT

Defendant has appropriately searched for and provided records responsive to the request at issue, subject to the withholding of certain information pursuant to the applicable FOIA Exemptions. The adequacy of Defendants’ searches is not in dispute and therefore is not addressed in this motion. Defendant has disclosed all reasonably segregable information.

### **I. DEFENDANT PROPERLY APPLIED FOIA EXEMPTIONS IN RESPONDING TO PLAINTIFF’S FOIA REQUEST.**

OMB properly applied FOIA Exemptions in responding to Plaintiff’s FOIA request.<sup>1</sup>

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<sup>1</sup> The Parties have narrowed the withholdings being challenged by Plaintiff to the following:

Document ID	Production Date	Page Count	Document Date	Title
OMB183FY18176_000003025	No. 5 - 02/22/2019	19	11/16/2017	Final Report of IWG 20170823.docx
OMB183FY18176_000003027	No. 5 - 02/22/2019	6	11/16/2017	Director Memo Race Ethnicity 20170823.docx
OMB183FY18176_000000702	No. 4 - 10/15/2018	1	6/14/2017	MENA Final Report Outline.docx
OMB183FY18176_000001710	No. 4 – 10/25/2018	8	6/23/2017	RE: MENA Subgroup Outline for IWG Final Report
OMB183FY18176_000000339	No. 5 - 02/22/2019	1	8/23/2017	R/E IWG – Final Report
OMB183FY18176_000000752	No. 5 - 02/22/2019	6	11/3/2017	Revised Draft FRN on Race Standard 20171103_np.docx
OMB183FY18176_000000321	No. 5 - 02/22/2019	36	3/6/2018	Scenario 1 – OMB Decision Webinar – OMB Does NOT Make revisions – 110717.pptx
OMB183FY8176_000000764	No. 5 – 02/22/2019	25	11/1/2017	Scenario 2 – OMB Decision Webinar – OMB Does Makes[sic] revision.pptx
OMB183FY18176_0000003026	No. 5 – 02/22/2019	17	11/16/2017	Proposed FRN and Revised Standard 20170823.docx

**A. OMB Properly Applied FOIA Exemption 5.**

Exemption 5 protects disclosure of privileged documents that are not ordinarily available to a party in litigation. *NLRB v. Sears Roebuck Co.*, 421 U.S. 132, 149 (1975); *see FTC v. Grolier Inc.*, 462 U.S. 19, 26 (1983); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987). The three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege (referred to by some courts as “executive privilege”), the attorney work-product privilege, and the attorney-client privilege. *See Sears*, 421 U.S. at 149. Here, OMB applied Exemption 5’s deliberative process privilege to certain withheld documents.

**The Deliberative Process Privilege**

Exemption 5 exempts from disclosure information concerning certain inter- and intra-agency communications protected by the deliberative process privilege. 5 U.S.C. § 552(b)(5). The deliberative process privilege protects information reflecting advisory opinions, recommendations, and deliberations that are part of the process by which the government makes decisions or formulates policies. The privilege is designed to protect the integrity of the decision-making process by shielding candid discussions among government employees and preventing public confusion from premature disclosure of decisions before the government has formulated a final opinion. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); *see, e.g., Russel v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Jordan v. DOJ*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc); *Kidd v. DOJ*, 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (protecting documents on basis that disclosure would “inhibit drafters from freely exchanging ideas, language choice, and comments in drafting

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documents”) (internal quotation marks omitted); *Chem. Mfrs. Ass’n v. Consumer Prod. Safety Comm’n*, 600 F. Supp. 114, 117 (D.D.C. 1984) (finding that ongoing regulatory process would be subject to “delay and disrupt[ion]” if preliminary analyses were prematurely disclosed).

For the deliberative process privilege to apply, the information withheld must be both predecisional and deliberative. *See Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (“The deliberative process privilege protects materials that are both predecisional and deliberative.” (citing *Petroleum Info. Corp. v. U.S. Dep’t of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992))). Information is predecisional if it temporally precedes the decision about which it pertains and if it is prepared/compiled to assist decision-makers in reaching that decision. *Jordan*, 591 F.2d at 774; *see also Maydak v. DOJ*, 362 F. Supp. 2d 316, 326 (D.D.C. 2005) (protecting information concerning federal inmate that was used by BOP officials as part of continuing process of making decisions regarding inmate’s status). Information is deliberative if it is actually part of the give-and-take by which the government made its decision. *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). Recommendations, draft documents, proposals, suggestions, and other subjective documents reflecting the opinion of the writers, rather than the policy of the agency, are the types of documents often found to be deliberative. *Sears*, 421 U.S. at 150; *Jemigan v. Dep’t of the Air Force*, 1998 WL 658662, at \*2 (9th Cir. Sept. 17, 1998) (protecting “opinions and recommendations” of agency investigating officer); *Nat’l Wildlife Fed. v. U.S. Forest Serv.*, 861 F.2d 1115, 1121 (“Recommendations on how to best deal with a particular issue are themselves the *essence* of the deliberative process.”); *Ctr. for Medicare Advocacy v. HHS*, 577 F. Supp. 2d 221, 236 (D.D.C. 2008) (protecting documents containing “advice, recommendations, and suggestions”).

Here, OMB withheld information through redactions marked for Exemption 5 on 87 documents pursuant to the deliberative process privilege. OMB has withheld in full an additional 161 documents pursuant to the deliberative process privilege. *See* Appendix A (*Vaughn* Index). With respect to the threshold requirement of Exemption 5, OMB determined that each of the 248 records that OMB withheld in full or in part under Exemption 5 pursuant to the deliberative process privilege contained inter-agency communications. None of the information that OMB withheld under Exemption 5 was shared with anyone outside the Executive Branch. Declaration of Heather V. Walsh (“Walsh Decl.”) ¶ 14.

Among the records produced with redactions in OMB’s first document production was a document dated January 25, 2017, entitled “One-Page Memo for Beachhead Team.” *See* App’x. A, Document ID No. 001136. Among the deliberative material in this record is an outline of OMB’s planned steps for the agency’s decision-making process regarding the work of the IWG and potential revisions to OMB’s Race and Ethnicity Data Standards. The record states that the IWG was continuing to deliberate regarding its recommendations at this time, and that a Federal Register Notice was expected to be published in the coming months seeking public comments on potential recommendations of the IWG. The memo further states that the final planned step of the decision-making process would be that OMB would publish its decisions regarding changes to the Race and Ethnicity Data Standards, based on the IWG’s recommendations, in the Federal Register. In light of this contemporaneous description of the deliberative process for the Race and Ethnicity Data Standards, it is reasonable to conclude that OMB’s decision-making process was ongoing from roughly the start of the search period, through the submission of the IWG’s recommendations to OMB, and until such time that OMB announces a final policy decision regarding the standards. To date, OMB has not publicly released a decision regarding the standards, in the Federal Register

or in any other way. Since this decision-making process was never concluded, all inter- and intra-agency deliberations regarding these matters during the time of the search qualify for the deliberative process privilege. *Id.* ¶ 15.

OMB withheld drafts of IWG meeting materials from Marcy 2017, in full. *See* App'x A, Document ID No. 001878. Final versions of these materials consist entirely of meeting agendas and points of discussion to be used during the IWG's meeting, and therefore are entirely deliberative. Non-final drafts of a presentation deck regarding the IWG's work later revised before being presented to a public audience at a March 2017, conference were also withheld in full. *See, e.g.,* App'x A, Document ID No. 001069, -1071. These are draft documents which were undergoing revisions several days before they were scheduled to be presented publicly. *Id.* ¶ 17.

In June 2017, OMB staff circulated early drafts and outlines of the IWG's recommendations. OMB has withheld these drafts in full. *See* App'x A, Document ID Nos. 000691, -700, -702, -711, -774. OMB has also redacted deliberative discussions of the drafts in accompanying e-mail records. *See, e.g.,* App'x A, Document ID No. 001748. A schedule for the drafting process, assigning staff interim deadlines, was also withheld in full. *See* App'x A, Document ID No. 000703. In advance of the IWG's June 29, 2017, meeting, OMB staff circulated draft materials to be discussed during the meeting. *See* App'x A, Document ID Nos. 000458, -1710. These materials were withheld in full and contain highly deliberative draft mockups of census questionnaire documents and meeting planning materials. *See, e.g.,* App'x A, Document ID Nos. 000459-72. Additional draft materials and deliberative comments were circulated before and after the IWG's July 10, 2017, meeting. *See* App'x A, Document ID Nos. 001629, -1696. The report drafts and talking points were withheld in full as they are deliberative, non-final documents. *See, e.g.,* App'x A, Document ID Nos. 001949, -1697. Walsh Decl. ¶ 18.



In late July and early August 2017, drafts of the IWG's report were circulated by OMB staff, along with a draft "frequently asked questions" document. *See, e.g.*, App'x A, Document ID Nos. 001629, -1696. The report drafts and talking points were withheld in full as they are deliberative, non-final documents. *See, e.g.*, App'x A, Document ID Nos. 001949, -1697; Walsh Decl. ¶ 19.

On August 23, 2017, the draft of the IWG report was shared with OIRA Administrator Neomi Rao in an e-mail requesting her views by September 8, 2017, and including additional deliberative comments about the drafts, which were redacted in OMB's production. *See* App'x A, Document ID No. 003027. A follow-up e-mail to Administrator Rao transmitted the four accompanying draft annexes to the report. That transmitting e-mail also notes in unredacted text that some information remained incomplete in the attached draft annexes. *See* App'x A, Document ID No. 000035. The draft report, annexes, and other accompanying materials were withheld in full. *See* App'x A, Document ID Nos. 003850-3855, -0036-38; Walsh Decl. ¶ 20.

In November 2017, OMB staff circulated draft materials for a planned "webinar" event regarding OMB's potential decision regarding the IWG's recommendations. *See* App'x A, Document ID No. 000762. These draft materials were withheld in full because they were not finalized or relied on by OMB. *See, e.g.*, App'x A, Document ID Nos. 00763-764. Also in November and continuing until December 4, 2017, staff of OMB circulated drafts of a Federal Register Notice that would have been intended to represent OMB's final decision regarding the recommendations of the IWG. The e-mails circulating these drafts were produced with redactions of deliberative information. *See, e.g.*, App'x A, Document ID No. 001288. The attached drafts were withheld in full. *See, e.g.*, App'x A, Document ID Nos. 001298-90. OMB ultimately did not publish a Federal Register notice regarding the agency's decision regarding the recommendations

of the IWG and no final decision regarding the IWG's recommendations has been made by OMB to this date. Walsh Decl. ¶ 21.

The withholdings described above are discussions and drafts that were created as part of a decision-making process conducted among staff in OMB in consultation with other Executive Branch agencies pursuant to authority delegated to OMB to manage federal information policy. In this case, staff of OMB as well as other Executive Branch components and agencies, were conducting policy processes contributing to the IWG's recommendations, and then a policy process regarding whether and how OMB would finally implement those recommendations by issuing a Federal Register notice that would revise the MENA standards. The deliberations shown in the information being withheld concern the then-pending decisions by the Executive Branch on what the IWG should recommend, and what OMB should do with those recommendations. This information is predecisional because, in each case of redacted information, officials were discussing matters intended to be subsequently decided based on these deliberations. The redacted information is deliberative in that it reflects the weighing of options, queries, opinions, and arguments as part of confidential discussions and deliberations that informed the Executive Branch's internal policy formulation process regarding revisions to the MENA standards. OMB redacted such information from these records to protect frank discussions from being chilled by the effects of public scrutiny of the deliberative process. Walsh Decl. ¶ 22.

The compelled disclosure of the records and information withheld or redacted due to the deliberative process privilege would inhibit the frank and candid expression of views and the sharing of information that are essential for OMB to carry out its responsibilities and would greatly impair the free exchange of information, ideas, and analysis within OMB, and between OMB and other agencies in the Executive Branch. As a consequence, disclosure would have an adverse

impact on the quality of Executive Branch decision-making on the apportionment of federal funds, a type of decision that occurs frequently within OMB. The effectiveness of the deliberative process that OMB conducts depends on preserving an environment in which Executive Branch officials can explore issues thoroughly and present their views, concerns, and recommendations candidly. The decision-making process regarding apportionment actions is often a lengthy iterative process, where OMB staff gather information from agencies and other sources, consolidate what they have learned, evaluate and analyze the data, and develop policy recommendations. These recommendations are reviewed and potentially revised as more information and viewpoints are accumulated. The documents generated during this process, including those at issue here, show in detail the thinking of OMB staff as they considered recommendations and develop options for consideration by OMB's policy officials. If such information were to be publicly disclosed, the frank exchange of confidential opinions and analysis among Executive Branch officials and staff would be significantly inhibited. Walsh Decl. ¶ 23.

The policy deliberations reflected in these documents are representative of the kinds of deliberations that take place every day at OMB. While the specific subject matter, content, and course of deliberations vary, the deliberative process is generally similar with respect to the overall way in which OMB works with the White House, other components in the Executive Office of the President, and Executive Branch agencies when analyzing policies or legal issues. Maintaining the confidentiality of these types of pre-decisional and deliberative communications is critical for OMB to carry out its mission. *Id.* ¶ 24.

**B. OMB Properly Applied FOIA Exemption 6.**

OMB also withheld documents under FOIA Exemption 6, which protects from disclosure records related to “personnel and medical files and similar files the disclosure of which would

constitute a clearly unwarranted invasion of personal privacy.” To determine whether Exemption 6 would protect the information in question from disclosure, the agency must determine whether (1) the information in question is contained in personnel, medical, or “similar” files, and (2) disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy by balancing the public’s right to disclosure of the information against the individual’s right to privacy. *See Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1228 (D.C. Cir. 2008); *News-Press v. DHS*, 489 F.3d 1173, 1196-97 (11th Cir. 2007).

The Supreme Court has ruled that the term “similar files” encompasses any government record that concerns a particular individual; the term is not limited to records contained in personnel or medical files. *See, e.g., Dep’t of State v. Washington Post*, 456 U.S. 595, 599-603 (1982). This broad construction of “similar files” was necessary in view of Congress’s primary purpose in enacting Exemption 6, which was “to protect individuals from the injury and embarrassment that can result from the necessary disclosure of personal information.” *Id.* at 599.

OMB redacted OMB staff e-mail addresses and phone numbers not associated with fixed landlines (*i.e.*, mobile phones and conference call numbers were redacted) from the documents. Release of this information would constitute an unwarranted invasion of privacy because such disclosure would greatly increase the risk that these publicly-accessible communications tools could be abused by unsolicited “spam” e-mail and calls, reducing their users’ ability to avoid harassment and maintain their personal privacy. Meanwhile, the exact e-mail addresses and phone numbers of agency staff do not shed light on agency functions. Walsh Decl. ¶ 24.

## **II. DEFENDANT COMPLIED WITH FOIA’S SEGREGABILITY REQUIREMENT**

Under FOIA, if a record contains information exempt from disclosure, any “reasonably segregable,” non-exempt information must be disclosed after redaction of the exempt information.

5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are “inextricably intertwined with exempt portions.” *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show “with ‘reasonable specificity’” that the information it has withheld cannot be further segregated. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. Dep’t of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). “Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material,” which must be overcome by some “quantum of evidence” by the requester. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007).

In conducting a document-by-document review of all the records OMB collected that are responsive to the FOIA request, OMB carefully assessed whether any factual or otherwise non-exempt information could be segregated and disclosed pursuant to 5 U.S.C. § 552(b). OMB has determined that all non-exempt segregable information has been released. In particular, OMB determined, with respect to each portion of information withheld under Exemption 5 due to the deliberative process privilege, that the information redacted consisted of discussions involving deliberations in which facts are inextricably intertwined with deliberative discussion, opinions, and policy recommendations, such that disclosing any facts, and how they are presented, would reveal the thought processes of OMB during deliberations. Thus, OMB determined that disclosure of such factual material would reveal the nature and substance of the agency deliberations. Walsh Decl. ¶ 25.

Defendant has thus established, with reasonable specificity, that responsive documents were released in full or in part after a careful determination that there were no further reasonably

segregable portions appropriate for release. Therefore, the Court should find that Defendant has properly complied with their duty to segregate exempt from non-exempt information.

**CONCLUSION**

For the foregoing reasons, the Court should conclude that Defendant complied with its FOIA obligations by conducting adequate searches and grant summary judgment in its favor.

Dated: January 31, 2020

Respectfully submitted,

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