UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARAB AMERICAN INSTITUTE, Plaintiff, v. OFFICE OF MANAGEMENT AND BUDGET, Defendant.	Civil Action No. 18-871 (ABJ)

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant Office of Management and Budget ("OMB"), by and through undersigned counsel, respectfully submits this reply in support of its motion for summary judgment, ECF No. 32, and opposition to Plaintiff's cross-motion for summary judgment, ECF No. 34. OMB's withholdings under Freedom of Information Act ("FOIA") Exemption 5, 5 U.S.C. § 552(b)(5), are justified and legally sufficient.[1] Accordingly, for the reasons set forth below and in support of OMB's motion for summary judgment, the Court should enter summary judgment in favor of OMB and deny Plaintiff's dispositive motion.

Plaintiff's challenge to OMB's withholdings under FOIA Exemption 5 is flawed. Plaintiff posits that this Court must decide "what constitutes a decision for purposes of Exemption 5 in the context of a self-effectuating process, such as a census." ECF No. 34-1 at 9. Plaintiff's focus on

[1] Plaintiff does not challenge OMB's withholdings under Exemption 6. *See* ECF No. 34-1 at 9 n.5. Additionally, as stated in the parties' May 13, 2020, joint status report, Plaintiff no longer challenges the four documents identified in Part II.A of its cross-motion for summary judgment. *See* ECF No. 38. Throughout this brief, all citations are to the ECF page number, not to any internal pagination within the document.

what constitutes a decision, however, is misplaced. The only question presented in this litigation is whether OMB properly withheld under Exemption 5 material that is pre-decisional and deliberative. *See* 5 U.S.C. § 552(b)(5). OMB has shown—and further demonstrates here—that the answer is yes. As for the purported "decision" Plaintiff cites to refute OMB's position that its decision-making process never concluded, *see* ECF No. 34-1 at 9-11; Ex. 1, that decision was made by another agency, the Bureau of the Census ("Census Bureau") that is part of the United States Department of Commerce, not OMB.[2]

I. OMB Properly Withheld Material Encompassed By the Deliberative Process Privilege

A. OMB described the pre-decisional and deliberative nature of its withholdings with specificity and detail.

OMB demonstrated that the information it withheld under Exemption 5 is both pre-decisional and deliberative. OMB withheld material related to the work of its Interagency Working Group for Research on Race and Ethnicity ("IWG"), consisting of 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." ECF No. 32-2 at 8 (Decl. Heather V. Walsh ("Walsh Decl.") ¶ 22). These materials include, among other things: drafts of IWG meeting materials, *id.* at 6 (Walsh Decl. ¶¶ 17-18); non-final drafts of a presentation deck about the IWG's work that underwent revisions prior to public disclosure, *id.* (Walsh Decl. ¶ 17); early drafts and outlines of IWG recommendations, *id.* (Walsh Decl. ¶ 18); drafts of the IWG's report and frequently asked question materials, *id.* at 7 (Walsh Decl. ¶ 19); drafts of the IWG reports that were shared internally for the

[2] This Court may take judicial notice that the Census Bureau is part of the United States Department of Commerce. *See* https://www.census.gov/about.html (last visited May 13, 2020); Fed. R. Evid. 201.

purpose of internal review and comment, *id.* (Walsh Decl. ¶ 20); internal draft materials circulated in preparation for a webinar event about OMB's potential decision about the IWG's recommendations, *id.* (Walsh Decl. ¶ 21); and internal drafts of a Federal Register notice that would have been intended to represent OMB's final decision about the IWG's recommendation, *id.* at 8 (Walsh Decl. ¶ 21). As the Walsh Declaration makes clear, these materials were generated before OMG adopted any policy, *see Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980), and "part of the agency give-and-take—of the deliberative process—by which the decision itself is made," *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975); *see also Senate of the Commonwealth of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (explaining that a document is pre-decisional if it "precedes, in temporal sequence," the decision to which it relates). OMB's declaration is accorded "a presumption of good faith," *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), and Plaintiff offers no reason to suggest otherwise.

The Court should also reject Plaintiff's unsupported contentions that the Walsh Declaration "makes a sweeping and broad description of the IWG process," ECF No. 34-1 at 13, and is "conclusory," *id.* at 13 n.8. The Walsh Declaration offers a detailed explanation about the nature of materials the IWG generated, *see* ECF No. 32-2 at 6-9 (Walsh Decl. ¶¶ 16-22), the steps for the agency's decision-making process related to the IWG's work, *id.* at 5-6 (Walsh Decl. ¶ 15), and the reasons certain materials are deliberative and exempt from disclosure under 5 U.S.C. § 552(b)(5), *see id.* at 6-9 (Walsh Decl. ¶¶ 16-22). Summary judgment "is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by

evidence of agency bad faith." *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). An agency's justification for invoking an FOIA exemption "is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370-374-75 (D.C. Cir. 2007). Such is the case here.

B. OMB's *Vaughn* Index provides sufficient detail about each withholding.

Contrary to Plaintiff's suggestions, OMB did not "simply mark[] a document a 'draft'" to "invoke the deliberative process privilege." ECF No. 34-1 at 11. Plaintiff highlights the titles of the documents at issue, ECF No. 34-1 at 12, but concedes (in a footnote) that "[t]itle is not dispositive, of course," *id.* at 12 n.6. OMB's *Vaughn* Index provides sufficient detail to address the substance of the material withheld under Exemption 5: "draft documents in the process of revision that do not reflect final agency decisions but are part of the decisionmaking process regarding the Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity." *See* ECF No. 32-2 at 21-29. Plaintiff's focus on "specific documents marked 'final'" and attempt to recast them as "final agency decision," ECF No. 34-1 at 13, are belied by OMB's explanation that the deliberative process encompassed all of the IWG's work.[3] *See* ECF No. 32-2 at 8 (Walsh Decl. ¶ 22).

There is "no set format for a *Vaughn* Index; it is the function of the document that matters, not the form." *Judicial Watch v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 34 (D.D.C. 2000). A *Vaughn* Index is sufficient where "'the requester and the trial judge [are] able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt

[3] Although the term "Final" may appear in certain file names, the content of these materials were not final and remained drafts. The IWG's work was submitted to Neomi Rao, administrator of OMB's Office of Information and Regulatory Affairs, for the purpose of soliciting her views and offering deliberative comments to her about the materials. ECF No. 32-2 at 7 (Walsh Decl. ¶ 20). These materials were withheld in full because they were not finalized or relied upon by OMB. *Id.* at 7-8 (Walsh Decl. ¶¶ 21-22).

from disclosure.'" *Id.* (quoting *Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994)). It is clear that Plaintiff deemed these descriptions sufficient when it determined not to dispute all but eight of OMB's withholdings.[4] *Compare* ECF No. 34-1 at 5, 11-13 (challenging the proffered reason for OMB's withholdings as to eight documents), *with* ECF No. 32-2 at 21-29 (providing the same or similar proffered reasons for withholdings beyond the eight documents at issue). Nevertheless, for clarity and to facilitate judicial review, OMB submits its revised *Vaughn* Index that corrects several inadvertent omissions and clarifies any remaining issues. *See* Suppl. Decl. Sarah V. Walsh ("Walsh Suppl. Decl.") ¶¶ 5-9; ECF No. 34-1 at 9 n.4 (inviting OMB to provide "clarification"). Taken together, OMB's original and revised *Vaughn* indices provide sufficient detail for this Court to evaluate OMB's deliberative process privilege claims.

C. OMB has satisfied its segregability obligation.

OMB also sufficiently explained that it conducted a "document-by-document review of all the records [it] collected" to assess whether factual or other nonexempt information could be segregated and disclosed pursuant to 5 U.S.C. § 552(b). ECF No. 32-2 at 10 (Walsh Decl. ¶ 25). In a footnote, Plaintiff challenges OMB's process, claiming that "it is impossible" to determine whether OMB reasonably segregated information that could be disclosed "absent review of the actual documents." ECF No. 34-1 at 13 n.8. This argument fails for three reasons. First, courts need not consider cursory arguments raised solely in a footnote. *See, e.g.*, *Huntington v. U.S. Dep't of Commerce*, 234 F. Supp. 3d 94, 101 (D.D.C. 2017) (citing cases). Second, "[a]gencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," a presumption the requester can only overcome by providing some "quantum of evidence." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). Plaintiff

[4] Plaintiff's challenge is now limited to four documents. *See supra* note 1; ECF No. 38.

proffers no evidence to overcome the presumption. Third, Plaintiff's suggestion that disclosure is the only method to verify OMB's compliance with its statutory obligation is not the law of this circuit. OMB's *Vaughn* Index states where OMB disclosed any reasonably segregable portion of each document. *See* ECF No. 32-2 at 21-29. Considering the *Vaughn* Index together with the Walsh Declaration, OMB has met its burden of demonstrating compliance with FOIA's segregability requirement. *See People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 296-97 (D.D.C. 2007); *see also SafeCard Servs., Inc.*, 926 F.2d at 1200 (according a "presumption of good faith" to agency declarations).

II. Plaintiff Misconstrues How A "Decision" Relates to Exemption 5 Withholdings

A. The IWG's work is pre-decisional even where, as here, OMB never reached a final decision.

OMB properly withheld material under the deliberative process privilege because the IWG's work was both pre-decisional and deliberative. *See supra* Part I.A; ECF No. 32 at 5-11. OMB explained its planned decision-making process about the IWG's work, describing how one withheld document outlined

> 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 outline 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 document 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*.

ECF No. 32-2 at 5 (Walsh Decl. ¶ 15) (emphasis added). Given this contemporaneous description of the deliberative process for the Race and Ethnicity Data Standards, 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." *Id.* at 5-6 (Walsh Decl. ¶ 15). Since OMB "has not publicly released a decision regarding the standards, in the Federal Register or in any other way," the decision-making process "was never concluded." *Id.* at 6 (Walsh Decl. ¶ 15). Thus, OMB sufficiently justified its withholdings because "all inter- and intra-agency deliberations regarding these matters during the time of the search qualify for the deliberative process privilege." *Id.* (Walsh Decl. ¶ 15); *see also id.* at 9-10 (Walsh Decl. ¶¶ 23-24) (detailing the foreseeable harm if OMB is required to disclose these deliberative materials).

Rather than dispute OMB's reasoned, detailed explanation for its invocation of Exemption 5, Plaintiff focuses upon reference to the Federal Register and opines that "[p]ublication in the Federal Register or formal adoption of a policy is not the only manner in which an agency reaches a 'decision.'" ECF No. 34-1 at 9; *see also id.* at 11 ("There is no basis to assert that a Federal Register Notice regarding the agency's opinion on the recommendations of the IWG is a prerequisite for a 'decision.'"). But OMB does not contend that a decision exists only if it is published in the Federal Register. Rather, OMB determined in this instance that its "final planned step of the decision-making process would be that [it] *would publish its decisions* . . . in the Federal Register." ECF No. 32-2 at 5 (Walsh Decl. ¶ 15) (emphasis added). The absence of a Federal Register publication confirms that the IWG's efforts, which did not yield any final agency decision, were pre-decisional and deliberative. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 n.18 (1975) ("Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.").

This case illustrates that "[t]here may be no final agency document because a draft died on the vine." *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014); *see supra* note 3. "But the draft is still a draft and thus still pre-decisional and deliberative." *Id.* "[T]o require release of drafts that never result in final agency action would discourage innovation and candid internal proposals by agency officials and thereby contravene the purposes of the privilege." *Id.*; *see also Heartland All. For Human Needs & Human Rights v. U.S. Dep't of Homeland Sec.*, 291 F. Supp. 3d 69, 78-79 (D.D.C. 2018) ("A document may be predecisional even if a final decision is never reached."); *Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 58 (D.D.C. 2012) (finding draft manuscript protected under the deliberative process privilege even where it "was never finalized or approved as a reflection of agency policy in its draft form"); *Public Emps. for Env'tl Responsibility v. Bloch*, 532 F. Supp. 2d 19, 22 (D.D.C. 2008) (finding agency properly withheld proposed materials under Exemption 5 where "there had been no final agency decision"); *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995) (releasing deliberative documents because no final decision was issued would be "exalting semantics over substance"); *Landfair v. U.S. Dep't of Army*, 645 F. Supp. 325, 330 (D.D.C. 1986) ("It is undisputed that no final agency decision regarding the turbine deficiency problem has been reached. Given the status of the agency's decision-making process, its decision not to disclose the predecisional documents is entitled to particular judicial deference.").

B. Plaintiff's focus on a "decision" by another agency is irrelevant.

The deliberative process privilege does "not have an expiration date." *Nat'l Sec. Archive*, 752 F.3d at 464. Yet, Plaintiff seeks to transform pre-decisional withholdings into releasable records by claiming OMB made a final decision that "adhere[s] to the status quo." ECF No. 34-1 at 11. OMB, of course, did not make any decision regarding the IWG's work. *See* ECF No. 32-2

at 5-6 (Walsh Decl. ¶ 15); *supra* note 3. Rather, the purported "decision" to which Plaintiff refers was made by the Census Bureau.

Plaintiff discusses a memorandum in which Albert E. Fontenot, Jr., Associate Director for Decennial Census Programs at the Census Bureau, documented "the 2020 Census Program decision" to use two separate questions for collecting data about race and ethnicity. ECF No. 34-1 at 10-11; ECF No. 34-2 at 7-9. In Plaintiff's view, this Census Bureau memorandum makes it "difficult to imagine more definitive evidence that a decision was made, when it was made, and what the decision was." *Id.* at 11. Yet, nothing in this Census Bureau memorandum supports Plaintiff's argument that OMB made any decision that would permit disclosure of deliberative process materials encompassing the IWG's work. *See* Suppl. Walsh Decl. ¶ 10 ("OMB has sole authority to revise the data standards."). To the contrary, the Census Bureau memorandum acknowledges that "[t]he *Census Bureau needed to make a decision* on the design of the race and ethnicity questions," ECF No. 34-2 at 7 (emphasis added), and did so based upon "current OMB standards," *id.* at 8, that were implemented in 1997 and remained in force, *id.* at 7-8. The Census Bureau's decision is not OMB's decision, and the memorandum confirms that OMB made no final decision about the IWG's work.[5] *See id.* at 7-8; Suppl. Walsh Decl. ¶ 10 ("OMB's potential decision to alter the data standards would have been an entirely separate decision from any action taken by the Census Bureau to change the makeup of the 2020 census questions."). The IWG's work remains deliberative and protected from disclosure. *See Nat'l Sec. Archive*, 752 F.3d at 463-64.

[5] To the extent Plaintiff seeks information about the Census Bureau's decision, a separate FOIA request is properly addressed to the Census Bureau FOIA and Privacy Act Office. https://www.census.gov/about/policies/foia.html (last visited May 13, 2020).

C. Public statements by Census Bureau personnel do not justify release of OMB's deliberative material.

Next, Plaintiff cites public statements made by Karen Battle, chief of the Census Bureau's Population Division, to justify disclosure of OMB's deliberative process materials in light of OMB's "underlying decision to maintain the status quo." ECF No. 34-1 at 14. In essence, Plaintiff argues that the IWG's work is releasable because OMB "has referenced, adopted, and incorporated that material in the public statement of the agency's final decision." *Id.* (citing *Coastal States Gas Corp.* 617 F.2d at 866). Plaintiff is mistaken.

In *Coastal States Gas Corp.*, the D.C. Circuit observed that a predecisional document can "lose that status if it is adopted, formally or informally, as *the agency position* on an issue or is used *by the agency* in its dealings with the public." *Id.* (emphasis added). Neither circumstance occurred here. OMB never adopted the IWG's recommendations as its agency position. *Cf. id.* at 869 (observing that the documents at issue were subject to disclosure because they did not "discuss the wisdom or merits of a particular agency policy or recommend new agency policy, raising the possibility that their disclosure would mislead the public"). Plaintiff also points to no OMB statement adopting the IWG's recommendations in its dealings with the public. Instead, Plaintiff cites the statements of a Census Bureau official, who confirmed the inchoate nature of the decision-making process at issue here. ECF No. 34-1 at 14. And, decisions by the Census Bureau cannot be an adoption of OMB's deliberations. *See* Suppl. Walsh Decl. ¶ 10 ("The Census Bureau's decision about the 2020 Census would only govern actions taken by that agency.").

Plaintiff's arguments ignore the fundamental, pre-decisional nature of the IWG's work and do not overcome OMB's showing that it properly withheld these deliberative process materials under Exemption 5.

III. *In Camera* Review Is Unnecessary

Finally, the Court should decline Plaintiff's invitation to examine *in camera* the documents at issue in this case. Examination *in camera* "is a 'last resort' to be used only when the affidavits are insufficient for a responsible de novo decision." *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979). Indeed, summary judgment is appropriate without *in camera* review of materials where "the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith." *Id.*

There is no basis for the Court to conduct *in camera* review here. The Walsh Declaration provides detailed and sufficient information explaining the nature of the documents at issue and why they are pre-decisional and deliberative. *See* ECF No. 32-2 at 5-8 (Walsh Decl. ¶¶ 15-22). It explains the specific foreseeable harm that would result if these records are disclosed, *id.* at 9-10 (Walsh Decl. ¶¶ 23-24), and how OMB released all reasonably segregable material, *id.* at 10-11 (Walsh Decl. ¶ 25). Plaintiff articulates no reason why this Court should not accord "substantial weight" to OMB's declaration, *Elec. Privacy Info. Ctr. v. Nat'l Sec. Agency*, 798 F. Supp. 2d 26, 30 (D.D.C. 2011) (citing *Hayden*, 608 F.2d at 1387), and offers no evidence that contradicts the declaration or suggests any bad faith, *id.*

IV. Conclusion

For the foregoing reasons and those raised in support of its motion for summary judgment, OMB respectfully requests that the Court enter summary judgment in its favor and deny Plaintiff's cross-motion for summary judgment.

Dated: May 13, 2020

Respectfully submitted,

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