IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

Plaintiff Arab American Institute ("AAI"), by and through its undersigned counsel, respectfully submits this reply in support of its cross-motion for summary judgment, ECF No. 34, and opposition to Defendant's motion for summary judgment, ECF No. 32. In a February 16, 2018 Freedom of Information Act ("FOIA") request, AAI sought documents related to Defendant Office of Management of Budget's ("OMB") consideration of the Standards for the Classification of Federal Data on Race and Ethnicity (the "Standards") and its subsequent decision that the Standards would remain unchanged. The result of this decision by OMB meant that no Middle Eastern or North African ("MENA") category would, or could, be included in the 2020 Decennial Census. OMB contends that it never made a final decision regarding the Standards and, if any decision was made, it was made by the Census Bureau. However, the Census Bureau lacks the authority to unilaterally alter the Standards. Yet, OMB now uses this logic as its basis for claiming deliberative process protection under FOIA Exemption 5, 5 U.S.C. § 552(b)(5), and withholding documents from disclosure.

As set forth in Plaintiff's moving papers and further explained below, summary judgment in favor of OMB is not appropriate given the direct and binding effect that decisions by OMB regarding the Standards have on the Census design. OMB's shifting narrative now attempts to place the decision squarely and solely on the Census Bureau's shoulders while claiming it never made a decision. This attempt to obscure its involvement in the decision-making process only further highlights the need for transparency—the very purpose of FOIA.

AAI voluntarily narrowed the scope of documents at issue in an effort to resolve this matter expeditiously. The parties now dispute the proper withholding of five documents.[1] The list of documents which remain at issue is produced below:

Document ID	Production Date	Page Count	Document Date	Title
OMB183FY18176_000000702	No. 4 – 10/15/2018	1	6/14/2017	MENA Final Report Outline.docx
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
OMB183FY18176_000000764	No. 5 – 02/22/2019	25	11/1/2017	Scenario 2 – OMB Decision Webinar – OMB Does Make revisions – 110717.pptx
OMB183FY18176_000003026	No. 5 – 02/22/2019	17	11/16/2017	Proposed FRN and Revised Standard 20170823.docx

By only seeking a limited subset of documents, AAI did not deem OMB's *Vaughn* Index descriptions sufficient as OMB claims. ECF-39 at 5. Instead, AAI merely pursues what it considers to be the most relevant documents related to OMB's decision informed by both

[1] Four additional documents also discussed in Plaintiff's Motion for Summary Judgment are no longer disputed as noted in the parties' May 13, 2020 joint status report.

publicly available facts and information in the *Vaughn* Index. OMB had a binary choice which was well-documented by the paper trail it created: do something or do nothing (or what OMB calls "Scenario 1" and "Scenario 2"). On January 26, 2018, the Census Bureau announced that the race and ethnicity question would remain unchanged "in accordance with current OMB standards." U.S. CENSUS BUREAU, MEMORANDUM 2018.02: USING TWO SEPARATE QUESTIONS FOR RACE AND ETHNICITY IN 2018 END-TO-END CENSUS TEST AND 2020 CENSUS (2018). OMB cannot now seriously contend that its internal discussions on the matter never amounted to a choice between a change and the status quo.

Because a decision—here, inaction—was made, OMB's argument that all documents are protected as pre-decisional and deliberative must fail. Its motion for summary judgment must be denied and Plaintiff's motion for summary judgment granted. If the Court deems summary judgment inappropriate at this time, AAI believes *in camera* review by the Court is warranted given the narrow subset of documents at issue and the unique facts of this case.

I. OMB, NOT THE CENSUS BUREAU, CONTROLS THE STANDARDS

In an attempt to shield documents from public disclosure, OMB places the onus of the race and ethnicity question on the Census Bureau. OMB even asks the Court to take judicial notice that the Census Bureau is part of the Department of Commerce. ECF No. 39 at 2, n. 2. OMB suggests that the Census Bureau made the decision not to include the MENA category in the race and ethnicity question. However, as OMB well knows, it plays an integral and inextricable role in the Census process, particularly with regard to the race and ethnicity question. AAI, in partnership with OMB through the Census Information Center Network and the Decennial Census Advisory Committee, understands that it made the FOIA request of OMB, not the Census Bureau. AAI knowingly made the FOIA request of OMB as AAI is concerned

with OMB's decision regarding its recommendation for changes—or lack thereof—to the Standards.

OMB's argument that the decision to leave the MENA category off the Census rested with the Census Bureau, and therefore OMB never made a decision, rings hollow. While the Census Bureau may be the face of the Decennial Census, OMB and the Census Bureau are intertwined as the agencies worked with stakeholders on the contours of the 2020 Census. In fact—and of vital importance here—by virtue of the Standards, it is OMB that oversees the consideration of the race and ethnicity question, including the potential addition of the MENA category. *See* OFFICE OF MANAGEMENT AND BUDGET, *Review and Possible Limited Revision of OMB's Statistical Policy Directive on Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, https://www.federalregister.gov/documents/2016/09/30/2016-23672/standards-for-maintaining-collecting-and-presenting-federal-data-on-race-and-ethnicity (Sept. 30, 2016). Moreover, OMB, not the Census Bureau, recommends alterations to the Standards. In fact, the Census Bureau *cannot* make such a decision. *See, e.g.*, U.S. CENSUS BUREAU, *About Race*, https://www.census.gov/topics/population/race/about.html (last revised April 21, 2020) ("The U.S. Census Bureau *must* adhere to the 1997 Office of Management and Budget (OMB) standards on race and ethnicity which guide the Census Bureau in classifying written responses to the race question.") (emphasis added). Information about its decision to make no changes to the Standards, as it was poised to do, sits squarely with OMB.

II. MAINTAINING THE STATUS QUO IS A DECISION AS IT RELATES TO THE DECENNIAL CENSUS

OMB next argues that even if it has a role in reviewing the Standards, the Census Bureau determined and announced the effect, thus OMB never made a determination. However, OMB

engaged with partners, including AAI, to consider a change to the Standards—a change that would necessarily flow through to the Census questionnaire. After several years of stakeholder engagement, research, and analysis, OMB did not make an affirmative recommendation to change the Standards. OMB believes a lack of modification means OMB made no decision and thus all documents are protected as pre-decisional and deliberative under Exemption 5. Yet, OMB could not have upheld the status quo after careful consideration of alternatives without an inherent decision to do so.

OMB argues that draft policies can simply "die[] on the vine" and remain pre-decisional in perpetuity. ECF No. 39 at 8. However, OMB knew its deliberation on the MENA question lasted until a date certain, at which time inaction defaulted to leaving the category off the Census. Unlike examples provided in case law, such as a draft speech never given or an unissued draft regulation, a change to the Standards was not a spontaneous review left unfinished. OMB considered changes against the backdrop of a constitutionally-mandated government function with strict deadlines. *See National Security Archive v. C.I.A.*, 752 F.3d 460, 463 (D.C. Cir. 2014). OMB's potential inclusion of the MENA category did not die on the vine like forgotten fruit. OMB purposefully left the Standards as they were after careful review and in the face of a known and looming deadline. OMB's own *Vaughn* Index makes it clear that OMB reached a fork in the road: "Scenario 1 - OMB Decision Webinar - OMB Does NOT Make Revisions" or "Scenario 2 - OMB Decision Webinar - OMB Does Makes Revisions." Supplemental Declaration of Heather V. Walsh, App'x A, ECF No. 40-2 at 17–18.

OMB relies extensively on *National Security Archive* in its discussion of what constitutes a draft, pre-decisional, and deliberative process document. 752 F.3d 460. That case concerned a FOIA request for one specific document. AAI, unlike the requester in *National Security Archive*,

is not seeking a particular document but rather categories of information. As articulated in *National Security Archive*, "if a person requests particular factual material . . . an agency cannot withhold the material merely by stating that it is in a draft document." *Id.* at 465. Based on the best evidence available including the January 26, 2018 Census announcement and the *Vaughn* Index provided in this case, AAI believes factual material constituting OMB's decision resides in the withheld material.

OMB informs that "[s]ince OMB had not publicly released a decision regarding the standards, in the Federal Register or in any other way, the decision-making process was never concluded." ECF No. 39 at 7. But, a formal declaration to maintain the status quo is not what was required of OMB here. The very printing of the 2020 Census evidenced the decision made by OMB: the Standards, and thus the race and ethnicity question, remain unchanged.

Made clear by the Walsh Declaration, OMB and its working group's "final planned step of the decision-making process would be that OMB would publish its decision regarding *changes* to the Race and Ethnicity Data Standards." ECF No. 32 at 5 (Walsh Decl. ¶ 15) (emphasis added). OMB acknowledges and even highlights this portion of the Walsh Declaration passage regarding a final publication of any potential changes to the Standards. ECF No. 39 at 6. OMB decided not to change the Standards necessitating no final publication. As explained in *SafeCard Services, Inc. v. S.E.C.*, the decision not to take a particular action can constitute a final decision. 926 F.2d 1197, 1204 (D.C. Cir. 1991) ("The SEC's decision not to file an injunctive action against a particular entity would . . . seem to constitute a final agency action in the adjudication of a case.") *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153-54 (1975) (finding the decision not to file an unfair labor practice complaint constituted a final action in the

adjudication of a case). Here, with the benefit of years of deliberation and stakeholder input, OMB decided to leave the Standards unchanged in advance of the 2020 Decennial Census.

III. THE LIMITED NUMBER OF DOCUMENTS AND NATURE OF THIS FOIA REQUEST IS A SUFFICIENT BASIS FOR *IN CAMERA* REVIEW

OMB provided the same blanket deliberative process claim for all five documents at issue. The Supplemental *Vaughn* Index added little in the way substantive explanations for the application of a FOIA Exemption. "A mere recitation of the standard for protection under the deliberative process privilege is not sufficient." *Heartland Alliance for Human Needs & Human Rights v. Dep't of Homeland Sec.*, 291 F. Supp. 3d 69, 79 (D.D.C. 2018). *See also Quiñon v. FBI*, 86 F.3d 1222, 1229 (D.C. Cir. 1996).

In camera review is appropriate here if the Court determines there is a genuine dispute as to whether OMB made a decision. *In camera* review of the two scenarios as outlined in OMB183FY18176_000000321 and OMB183FY18176_000000764 would, in particular, inform the Court as to the veracity of OMB's claim. Exercise of broad discretion is appropriate here given the narrowness of the issue and the limited number of documents in dispute. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); *Mobley v. CIA*, 806 F.3d 568, 588 (D.C. Cir. 2015); *Larson v. Dep't of State*, 565 F.3d 857, 869-70 (D.C. Cir. 2009); *Loving v. DOD*, 550 F.3d 32, 41 (D.C. Cir. 2008); *Armstrong v. Exec. Off. of the President*, 97 F.3d 575, 577-78 (D.C. Cir. 1996); *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 307 (D.D.C. 2007).

CONCLUSION

OMB engaged in a thorough, lengthy analysis involving an interagency working group and interested stakeholders, but the Standards remain unchanged. The decision, in other words, was to maintain the status quo. OMB should not now be permitted to hide behind the fiction that

only by affirmative action are decisions made. Exemption 5 should not function to block from the public the documents in question.

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Respectfully submitted,

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