

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
CAMPAIGN LEGAL CENTER,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 18-1771 (TSC)
v.	)	
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

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

CHANNING D. PHILLIPS, D.C. Bar #415793  
Acting United States Attorney

BRIAN P. HUDAK  
Acting Chief, Civil Division

PAUL CIRINO, D.C. Bar #1684555  
Assistant United States Attorney  
Civil Division  
U.S. Attorney’s Office for the District of Columbia  
555 4th Street, N.W.  
Washington, D.C. 20530  
Telephone: (202) 252-2529  
Facsimile: (202) 252-2599  
paul.cirino@usdoj.gov

*Counsel for Defendant*

Dated: September 17, 2021

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... i

BACKGROUND ..... 1

I. PLAINTIFF’S FOIA REQUESTS AND DEFENDANT’S INITIAL RESPONSES. .... 1

II. THE PARTIES’ INITIAL CROSS-MOTIONS FOR SUMMARY JUDGMENT. .... 2

III. DEFENDANT’S APPEALS CONCERNING THE COURT’S RULING AND THE COURT’S STAY OF DEFENDANT’S DISCLOSURE OBLIGATION PENDING APPEAL. .... 3

STANDARD OF REVIEW ..... 4

ARGUMENT ..... 6

I. DEFENDANT APPROPRIATELY WITHHELD INFORMATION SUBJECT TO EXEMPTION 5 AND THE DELIBERATIVE PROCESS PRIVILEGE. .... 6

    A. Exemption 5 and the Deliberative Process Privilege..... 6

    B. OIP Properly Relied on Exemption 5 and the Deliberative Process Privilege to Withhold Pre-Decisional, Deliberative Communications..... 7

        1. DOJ-White House Correspondence..... 8

        2. Draft USCCR Interrogatories ..... 9

        3. Deliberative Discussions Regarding Inter-Agency Correspondence..... 10

        4. Deliberative Discussions Regarding Congressional Correspondence ..... 10

        5. Deliberative Discussions Regarding the Drafting Process ..... 10

        6. Deliberative Discussions Regarding the Census and/or ACS ..... 13

        7. Draft Correspondence with Representative Gonzalez..... 14

        8. Draft Correspondence Between JMD and Department of Commerce ..... 16

    C. JMD Properly Relied on Exemption 5 and the Deliberative Process Privilege to Withhold Pre-Decisional, Deliberative Communications..... 17

        1. Draft Response..... 17

        2. Robinson-Gary Email ..... 19

II. DEFENDANT COMPLIED WITH FOIA’S SEGREGABILITY REQUIREMENT. ... 19

III. DEFENDANT COMPLIED WITH FOIA’S FORSEEABLE HARM REQUIREMENT..... 20

CONCLUSION..... 22

## TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>Amadis v. Department of State</i> , 971 F.3d 364 (D.C. Cir. 2020) .....	20
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986) .....	5
<i>Armstrong v. Executive Office of the President</i> , 97 F.3d 575 (D.C. Cir. 1996) .....	19
<i>Brown v. Department of State</i> 317 F. Supp. 3d 370 (D.D.C. 2018) .....	15
<i>Campaign Legal Center v. Department of Justice</i> , Civ. A. No. 18-1187 (TSC) (D.D.C.) .....	1
<i>Canning v. Department of Justice</i> , 567 F. Supp. 2d 104 (D.D.C. 2008) .....	19
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986) .....	5
<i>Coastal States Gas Corp. v. Department of Energy</i> , 617 F.2d 854 (D.C. Cir. 1980) .....	6, 20
<i>Competitive Enterprise Institute v. Environmental Protection Agency</i> , 232 F. Supp. 3d 172 (D.D.C. 2017) .....	12-13
<i>Dudman Communications Corp. v. Department of the Air Force</i> , 815 F.2d 1565 (D.C. Cir. 1987) .....	16
<i>Gold Anti-Trust Action Committee, Inc. v. Board of Governors of Federal Reserve System</i> , 762 F. Supp. 2d 123 (D.D.C. 2011) .....	5, 9
<i>Judicial Watch v. Department of Transportation</i> , 796 F. Supp. 2d 13 (D.D.C. 2011) .....	13
<i>Krikorian v. Department of State</i> , 984 F.2d 461 (D.C. Cir. 1993) .....	15
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986) .....	5
<i>Mead Data Central, Inc. v. Department of Air Force</i> , 566 F.2d 242 (D.C. Cir. 1977) .....	19
<i>NLRB v. Sears, Roebuck &amp; Co.</i> , 421 U.S. 132 (1975) .....	6, 20

<i>National Association of Home Builders v. Norton</i> , 309 F.3d 26 (D.C. Cir. 2002) .....	7
<i>National Security Archive v. Central Intelligence Agency</i> , 752 F.3d 460 (D.C. Cir. 2014) .....	6, 7
<i>Petroleum Information Corp. v. Department of Interior</i> , 976 F.2d 1429 (D.C. Cir. 1992) .....	9
<i>Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation</i> , 3 F.4th 350 (D.C. Cir. 2021) .....	12, 21
<i>Russell v. Department of the Air Force</i> , 682 F.2d 1045 (D.C. Cir. 1982) .....	16
<i>Students Against Genocide v. Department of State</i> , 257 F.3d 828 (D.C. Cir. 2001) .....	5
<i>Sussman v. U.S. Marshals Service</i> , 494 F.3d 1106 (D.C. Cir. 2007) .....	19
<i>Weisberg v. Department of Justice</i> , 705 F.2d 1344 (D.C. Cir. 1983) .....	5
<b><u>Statutes</u></b> .....	<b>Page(s)</b>
5 U.S.C. § 552(b) .....	6, 19
5 U.S.C. § 552(b)(5) .....	6
5 U.S.C. § 552(a)(8)(A)(i)(I) .....	20
<b><u>Rules</u></b> .....	<b>Page(s)</b>
Federal Rule of Civil Procedure 56(a) .....	4-5
Federal Rule of Civil Procedure 56(c)(1)(A) .....	5

Defendant United States Department of Justice (the “Department” or “DOJ”) respectfully submits this Memorandum of Law in support of Defendant’s Renewed Motion for Summary Judgment in this Freedom of Information Act (“FOIA”) case. Because no genuine disputes of material fact exist and Defendant is entitled to judgment as a matter of law, the Court should grant this motion and enter judgment in favor of Defendant and against Plaintiff.<sup>1</sup>

## BACKGROUND

### I. PLAINTIFF’S FOIA REQUESTS AND DEFENDANT’S INITIAL RESPONSES

On February 1, 2018, CLC submitted a FOIA request to three DOJ components—the Civil Rights Division (“CRT”), the Justice Management Division (“JMD”), and the Office of the Attorney General (“OAG”), seeking “all records pertaining to Arthur Gary’s December 12, 2017 request to the Census Bureau to add a Citizenship question to the 2020 Census Questionnaire.” ECF No. 1 Ex. 1 at 3. CLC asked DOJ to search for “[a]ny documents to, from or mentioning Dr. Ron Jarmin or Dr. Enrique Lamas” and to search for documents containing any of the following eight search terms: “2020 Census”, “long form”, “citizenship question”, “question regarding citizenship”, “ACS”, “American Community Survey”, “citizen voting age population”, and “CVAP.” *Id.*

On July 30, 2018, Plaintiff commenced this civil action by filing the Complaint. ECF No. 1. The Complaint alleged that JMD and OAG had not complied with FOIA in responding to Plaintiff’s FOIA request. Plaintiff asked the Court to order Defendant to disclose all non-exempt

---

<sup>1</sup> Plaintiff has filed a related case involving DOJ’s Civil Rights Division’s response to its FOIA request. *Campaign Legal Center v. Dep’t of Justice*, Civ. A. No. 18-1187 (TSC) (D.D.C.). The remaining claims involving the Civil Rights Division’s response are appropriately addressed in that civil action. This motion addresses the claims asserted in the Complaint with respect to Plaintiff’s FOIA requests to the Justice Management Division and the Office of the Attorney General.

records and to provide a *Vaughn* Index for all documents Defendant claims are exempt from disclosure. ECF No. 1. at 6.

DOJ's Office of Information Policy ("OIP") responded to Plaintiff's request for records from OAG.<sup>2</sup> On December 13, 2018, OIP advised Plaintiff that it was releasing 69 pages, including some pages with redactions and withholding one page in full, and advised Plaintiff that certain pages had been referred to other DOJ components and federal agencies for processing and direct response to Plaintiff. First Brinkmann Decl.<sup>3</sup> ¶ 6 & Ex. C. On March 29, 2019, OIP released 129 pages, some with certain withholdings, and withheld in full 90 pages. *Id.* ¶ 7 & Ex. D. OIP's withholdings were based on FOIA Exemptions 5 and 6.

Between October 5, 2018, and December 6, 2019, JMD released 115 pages to Plaintiff, with some redactions based on Exemptions 5 and 6. Allen Decl. ¶ 9 (ECF No. 22-3). On May 7, 2019, JMD released three pages to Plaintiff; these versions removed some redactions on previously produced records. *Id.*

## **II. THE PARTIES' INITIAL CROSS-MOTIONS FOR SUMMARY JUDGMENT**

On May 8, 2019, Defendant moved for summary judgment as to OIP and JMD's responses to Plaintiff's request, as well as CRT's response based on referrals from OIP and JMD. ECF No. 22.

On June 1, 2020, the Court partly granted and partly denied each party's cross-motion for summary judgment. ECF Nos. 29, 30. The Court repeated its rulings from Case No. 18-1187

---

<sup>2</sup> OIP is responsible for processing FOIA requests seeking records from within OIP and from six senior leadership offices of the DOJ, specifically OAG, Deputy Attorney General, Associate Attorney General, Legal Policy, Legislative Affairs, and Public Affairs.

<sup>3</sup> Citations to "First Brinkmann Decl." refer to the Declaration of Vanessa R. Brinkmann, dated May 8, 2019, submitted with Defendant's initial motion for summary judgment. ECF No. 22-4.

concerning CRT's search and withholdings. In addition, the Court (1) found that CRT and OIP improperly withheld material under the presidential communications privilege; (2) directed Defendant to determine whether the deliberative process privilege applies to a DOJ-White House email thread; (3) found that the OIP improperly relied on the attorney work-product privilege to withhold draft interrogatory responses; (4) directed Defendant to provide a further declaration as to whether the deliberative process privilege applied to the draft interrogatory responses; (5) held that it lacked sufficient information to determine whether the deliberative process privilege applies to other withholdings by OIP; and (6) directed JMD to provide an additional declaration to support its reliance on the deliberative process privilege regarding a "draft response" and the "Robinson-Gary Email." Mem. Op.<sup>4</sup>

**III. DEFENDANT'S APPEALS CONCERNING THE COURT'S RULING AND THE COURT'S STAY OF DEFENDANT'S DISCLOSURE OBLIGATION PENDING APPEAL**

On July 1, 2020, Defendant filed a Notice of Appeal with respect to the Court's summary judgment ruling and subsequently clarified that the appeal was solely with respect to the deliberative process privilege claim over the drafts and emails related to the Gary Letter. Case No. 20-5233 (D.C. Cir.).

On August 31, 2020, OIP released to Plaintiff the DOJ-White House Correspondence and the Draft USCCR Interrogatories, totaling 58 pages, with certain withholdings made pursuant to

---

<sup>4</sup> Citations to "Mem. Op." refer to the Court's Memorandum Opinion, entered June 1, 2020. ECF No. 29.

Exemption 5’s deliberative process privilege, as well as Exemption 6.<sup>5</sup> Third Brinkmann Decl.<sup>6</sup> ¶ 6.

On July 9, 2020, JMD exercised its discretion to release all withholdings in the document referenced in the Court’s Opinion and described in JMD’s *Vaughn* Index as an *Email from Barry Robinson to Arthur Gary*. Mem. Op. at 27.

On November 2, 2020, Defendant moved for stay of its disclosure obligation of the drafts and emails of the Gary Letters pending appeal in both cases. ECF No. 39. On May 5, 2021, the Court granted Defendant’s motion. ECF No. 43. On September 15, 2021, the D.C. Circuit held oral argument.

On September 17, 2021, OIP exercised its discretion to release certain additional records that the Court’s June 1, 2020, decision identified as requiring further explanation. Third Brinkmann Decl. ¶ 7. Specifically, OIP released all withholdings identified in OIP’s *Vaughn* Index under the categories “Deliberative Discussions Regarding Inter-agency Correspondence” and “Discussions Regarding Congressional Correspondence,” as well as one page containing some of the category of withholdings identified as “Deliberative Discussions Regarding the Drafting Process.” *Id.*

### STANDARD OF REVIEW

Summary judgment is appropriate 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.

---

<sup>5</sup> With respect to the Draft USCCR Interrogatories, OIP previously asserted that the deliberative process privilege to withhold these pages in full. Upon further review, and at its discretion, OIP lifted these withholdings, except for two “comment bubbles” reflecting an editor’s questions and rationale for proposed edits. Third Brinkmann Decl. ¶ 6 n.2.

<sup>6</sup> Citations to “Third Brinkmann Decl.” refer to the Third Declaration of Vanessa R. Brinkmann, dated September 17, 2021, and submitted herewith.

R. Civ. P. 56(a). In determining whether a genuine issue of material fact exists, the trier of fact must view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party must show that the dispute is genuine and material to the case. A “genuine issue” is one whose factual dispute is capable of affecting the substantive outcome of the case and is supported by admissible evidence that a reasonable trier of fact could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The burden on the moving party may be discharged by showing that there is an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

FOIA cases are typically and appropriately decided on motions for summary judgment. *Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 130 (D.D.C. 2011). In a FOIA action, an agency that moves for summary judgment “bears the burden of showing that there is no genuine issue of material fact, even when the underlying facts are viewed in the light most favorable to the requester.” *Weisberg v. Dep’t of Just.*, 705 F.2d 1344, 1350 (D.C. Cir. 1983). An agency can meet its burden by submitting declarations or affidavits. Fed. R. Civ. P. 56(c)(1)(A). Summary judgment is justified in a FOIA lawsuit once the agency demonstrates that no material facts are in dispute and, if applicable, that each document that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 833 (D.C. Cir. 2001).

## ARGUMENT

### I. DEFENDANT APPROPRIATELY WITHHELD INFORMATION SUBJECT TO EXEMPTION 5 AND THE DELIBERATIVE PROCESS PRIVILEGE.

#### A. Exemption 5 and the Deliberative Process Privilege.

FOIA “does not apply” to documents identified in its exemptions. 5 U.S.C. § 552(b).

When Congress enacted FOIA Exemption 5 and protected “inter-agency or intra-agency memorandums or letters that would not be available” in litigation with an agency, 5 U.S.C. § 552(b)(5), it had the deliberative process privilege “specifically in mind.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). That well-established privilege “protect[s] the ‘decision making processes of government agencies’” by withholding “documents ‘reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *Id.*

FOIA’s exemption of documents covered by the deliberative process privilege serves a number of important purposes. Protecting internal agency deliberations from disclosure “encourage[s] the candid and frank exchange of ideas in the agency’s decisionmaking process,” which, in turn, improves “the quality of administrative decisions.” *National Security Archive v. CIA*, 752 F.3d 460, 462 (D.C. Cir. 2014); *see also Sears*, 421 U.S. at 150-51. The withholding of deliberative materials also “protect[s] against confusing the issues and misleading the public” by preventing the release of documents containing “rationales for a course of action which were not in fact the ultimate reasons for the agency’s action.” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The exemption and underlying privilege thereby ensure that agency officials are “judged by what they decided, not for matters they considered before making up their minds.” *National Security Archive*, 752 F.3d at 462.

The deliberative process privilege covers communications that are “pre-decisional” and “deliberative.” *Id.* at 463. To be pre-decisional, the communication “must have occurred before any final agency decision on the relevant matter.” *Id.* To qualify as deliberative, the communication must be “intended to facilitate or assist development of the agency’s final position on the relevant issue.” *Id.*; see also *National Ass’n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002) (“Material is deliberative if it reflects the give-and-take of the consultative process.”).

**B. OIP Properly Relied on Exemption 5 and the Deliberative Process Privilege to Withhold Pre-Decisional, Deliberative Communications.**

In its summary judgment ruling, the Court directed or allowed OIP to provide a declaration justifying its withholding of certain records and information pursuant to Exemption 5 and the deliberative process privilege. Specifically, the Court directed OIP to provide a further declaration with respect to the DOJ-White House Correspondence and the Draft USCCR Interrogatories. Mem. Op. at 20-22. The Court further concluded that it lacked the information necessary to determine whether the deliberative process privilege applies to the following documents or categories of documents: (1) Deliberative Discussions Regarding Inter-agency Correspondence; (2) Deliberative Discussions Regarding Congressional Correspondence; (3) Deliberative Discussions Regarding the Drafting Process; (4) Deliberative Discussions Regarding the Census and/or ACS; (5) Draft Correspondence Between JMD and Department of Commerce; and (6) Draft Correspondence with Representative Gonzalez. *Id.* at 23-25.

All the materials withheld by OIP under Exemption 5 are communications and draft documents generated by and wholly internal to the Executive Branch. Third Brinkmann Decl. ¶ 10. The following discussion provides relevant information about the content of the information withheld and explains, for each document or category of documents, the factual and legal basis

for the agency's determination that the documents are deliberative and pre-decisional under the governing law of this Circuit.

**1. DOJ-White House Correspondence**

OIP redacted portions of 10 pages that are described as "DOJ-White House Correspondence."<sup>7</sup> These documents "reflect emails between DOJ attorneys and individuals in the White House seeking advice and decision from the White House as to congressional notification of DOJ's request for a citizenship question on the census." First Brinkmann Decl. ¶ 28.

The material withheld by OIP in these records is pre-decisional because it was written before the final actions were taken in response to the Department of Commerce's request for the White House's views on notifying Congress regarding DOJ's request for a citizenship question. Third Brinkmann Decl. ¶ 20. The views expressed in the redacted portions, therefore, were presented before a decision had been made regarding the relevant issue—notification to Congress of DOJ's request for a citizenship question.

The redacted portions also are deliberative. The withheld communications reflect requests for information and attempt to properly characterize the actions and reasons to inform the White House's decision-making process. *Id.* ¶ 21. These deliberations also reveal specific concerns identified, proposed tentative next steps for actions to be taken, questions for further consideration, and similar discussions regarding the citizenship question issue in the context of Commerce's request. *Id.*

---

<sup>7</sup> As noted above, OIP initially withheld these records in full pursuant to the presidential communications privilege. In accordance with the Court's June 1, 2020, Memorandum and Opinion, OIP released, on August 31, 2020, a redacted version of these records that reflects withholdings based only on the deliberative process privilege.

## 2. *Draft USCCR Interrogatories*

OIP redacted two comment bubbles on one page of the 48-page document referenced as “Draft USCCR Interrogatories.”<sup>8</sup> These comments on the draft interrogatory responses reflect an editor’s questions and rationale for proposed edits. Third Brinkmann Decl. ¶ 23.

As the Court previously noted, “it is undisputed that the drafts were created before being sent to the Commission, and that they reflect deliberations about the contents of the documents.” Mem. Op. at 21. The Court, however, denied both parties’ motions concerning these records because “DOJ has not disclosed what types of decisions were involved in drafting the interrogatory answers.” *Id.*

On this issue, the Court also observed that while the deliberative process privilege applies to “the formulation or exercise of policy-oriented judgment,” the relevant agency decision does not necessarily have to involve a “formal” policy. Mem. Op. at 7 n.4, 13 (quoting *Petroleum Info. Corp. v. Dep’t of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) and *Gold Anti-Trust Action Comm.*, 762 F. Supp. 2d at 135-36 (stating that “even if an internal discussion does not lead to the adoption of a specific government policy, its protection under Exemption 5 is not foreclosed as long as the document was generated as part of a definable decision-making process.”).

As the agency’s declaration explains, the comments are deliberative because they reflect advice, suggestions, and explanations as part of evaluative discussions, including commentary on language all of which were part of a process to create an approved final set of responses to the USCCR on behalf of the Department. Third Brinkmann Decl. ¶ 24. This description therefore

---

<sup>8</sup> OIP initially withheld this record in full pursuant to the attorney work product privilege. In accordance with the Court’s June 1, 2020, ruling OIP released, on August 31, 2020, a redacted version of these records that reflects withholdings based only on the deliberative process privilege.

establishes that the comments were made as part of a defined editing process that culminated in the final version of Defendant's interrogatory responses. The Court should conclude that the comment bubbles that offered advice and suggestions regarding the draft interrogatory responses are appropriately withheld pursuant to the deliberative process privilege.

**3. *Deliberative Discussions Regarding Inter-Agency Correspondence***

On September 17, 2021, OIP released unredacted versions of the records identified as "Deliberative Discussions Regarding Inter-agency Correspondence." Third Brinkmann Decl. ¶ 7. These records, therefore, are no longer at issue.

**4. *Deliberative Discussions Regarding Congressional Correspondence***

On September 17, 2021, OIP released unredacted versions of the records identified as "Deliberative Discussions Regarding Congressional Correspondence." Third Brinkmann Decl. ¶ 7. Accordingly, these records are no longer at issue.

**5. *Deliberative Discussions Regarding the Drafting Process***

OIP initially withheld 12 pages referenced as "Deliberative Discussions Regarding the Drafting Process." Third Brinkmann Decl. ¶ 7. These withholdings "consist of internal deliberative discussions between Department employees, including comments, suggestions, and feedback regarding the drafting of . . . correspondence." First Brinkmann Decl. ¶ 26. Eight of these pages pertain to the drafting of the "Gary Letter," and are currently part of Defendant's appeal of that portion of this Court's Opinion. Third Brinkmann Decl. ¶ 11 n.3.

On September 17, 2021, the agency released one page in this category. *Id.* ¶ 7. In the three remaining pages, identified as OIP-0101 to 0103, OIP withheld Department officials' discussions of a proposed response to questions from the Washington Post editorial board related to the addition of a citizenship question to the 2020 Census. *Id.* ¶ 11.

The withheld communications are pre-decisional because they express the author's views about proposed language for draft responses to inquiries from the newspaper. *Id.* ¶ 12. These discussions occurred before the agency arrived at a final decision regarding the text of the response to the Post. *Id.*

The discussions were deliberative because they:

center on specific language to be used in a response to the newspaper's inquiry, including suggested edits and proposed revisions to the draft language for the response. When considering how to respond to inquiries from the news media, a significant aspect of the Department's decision-making process consists of deliberations around the creation of draft responses which are then circulated internally among Department employees, and further reviewed and discussed before they become final. During the course of their creation, all aspects of these responses are discussed between Department officials, from pre-draft strategizing discussions on how to respond to working drafts of response language that continually change as relevant staff make edits in track changes, suggest additional revisions, and contemplate strategies as they work toward a final letter or response. All aspects of the Department's responses to the press are subject to intense public scrutiny due to the Department's involvement in significant legal and policy matters. Importance and meaning are ascribed to the Department's exact phrasing, tone, and details as articulated in the language used in a public response.

*Id.* ¶ 13.

In its July 1, 2020, summary judgment ruling, the Court addressed whether three pages of internal DOJ emails containing deliberations about how to respond to press inquiries were appropriately withheld by OIP pursuant to the deliberative process privilege. Mem. Op. at 22-23. The Court found persuasive the reasoning of "numerous trial courts in this District" that have held that the deliberative process privilege applies to responses to press inquiries. *Id.* The Court correctly held that "the deliberative process privilege applies" and granted summary judgment in Defendant's favor with respect to these drafts.

Based on its well-reasoned analysis in its prior ruling, the Court should find that the remaining three pages withheld by OIP reflecting drafts of a response to the Washington Post

also are covered by the deliberative process privilege. As evident from the agency declarations' detailed description of the contents of these drafts, there is no substantive difference between the drafts at issue in this motion and those whose withholding was approved by the Court in its earlier decision. Mem. Op. at 22-23.

The communications here are analogous to those that the D.C. Circuit recently held were subject to the deliberative process privilege. In *Reporters Committee for Freedom of the Press v. FBI*, 3 F.4th 350 (D.C. Cir. 2021), the agency withheld emails discussing proposed changes to the FBI Director's draft letter to the editor of the New York Times concerning the FBI's use of undercover agents to impersonate journalists. *Id.* at 362. The Court held that the proposed revisions to the letter involved "high ranking officials [who] were debating how to formulate the most appropriate and effective response to an ongoing national controversy." *Id.* at 363. The emails at issue, the Court concluded, "were part of an internal dialogue about critical judgment calls aimed at advancing the agency's interests in the midst of a vigorous public debate about" the policy. *Id.*

The draft responses to the Washington Post in this case should similarly be treated as exempt from disclosure, just as the D.C. Circuit treated the FBI Director's proposed revisions to the draft letter in *Reporters Committee*. Both cases involve senior government officials debating how to present a public response to a topic that had received national attention. The back-and-forth among senior agency officials discussing how that policy should be explained to the public is exactly the type of deliberation that the privilege was intended to encompass. *See also* Mem. Op. at 22-23 (holding that the deliberative process privilege applies to deliberations regarding how to respond to press inquiries) (citing, *inter alia*, *Competitive Enterprise Institute v. EPA*, 232 F. Supp. 3d 172, 187-88 (D.D.C. 2017) ("Emails 'generated as part of a continuous process of

agency decision-making regarding how to respond to a press inquiry are protected by the deliberative process privilege.”) (quoting *Judicial Watch v. DOT*, 796 F. Supp. 2d 13, 31 (D.D.C. 2011)).

For these reasons, Defendant is entitled to summary judgment with respect to these withholdings.

#### **6. *Deliberative Discussions Regarding the Census and/or ACS***

OIP withheld three pages of “Deliberative Discussions Regarding the Census and/or ACS.” Third Brinkmann Decl. ¶ 15. These withholdings “consist of internal emails among DOJ staff reflecting advice, preliminary research, and opinions, and analysis regarding the census or American Community Survey (“ACS”).” First Brinkmann Decl. ¶ 30. More specifically, these discussions relate to deliberations between DOJ’s Office of the Associate Attorney General and JMD and reflect an official’s desire to understand aspects of DOJ’s past involvement in the Census or ACS in anticipation of the 2020 Census and DOJ’s involvement. Third Brinkmann Decl. ¶ 15.

The redacted material is pre-decisional because it forms part of the ongoing internal DOJ deliberations to formulate a position regarding the upcoming 2020 Census. *Id.* ¶ 16. The communications seek to inform relevant agency officials about the relevant issues in advance of the 2020 Census, as well as the Department’s decisions related to that process. *Id.* These internal discussions ultimately led to DOJ’s decision to request that a citizenship question be added to the 2020 Census. *Id.*

These communications constitute a textbook example of deliberative communications because they reflect the essential “give and take” of the consultative process involving senior DOJ officials who were being informed about matters that they expected to confront in the future. *Id.* ¶ 17. More specifically, the redacted portions of these records reflect specific

questions, evaluative discussions, internal characterizations, opinions of Department actions, and preliminary views as the Department works toward formulating strategies and potential actions vis-a-vis the 2020 Census. *Id.*

These records are substantively similar to the “2016 memoranda sent from CRT to JMD,” discussed in the Court’s prior ruling. Mem. Op. at 16-17 (holding that the deliberative process privilege applies to the memos, which “contain recommendations for new census questions.”). *Id.* at 16. Just like those records, the three pages of deliberative discussions regarding the Census and/or ACS were drafted before any decisions concerning new census questions were made and plainly are part of the deliberative process by which the decision itself is made.

The Court should conclude that OIP properly relied on the deliberative process privilege to withhold these internal communications|.

#### **7. *Draft Correspondence with Representative Gonzalez***

The documents described as “*Draft Correspondence with Representative Gonzalez*,” consist of three separate drafts of a letter from Assistant Attorney General Stephen Boyd to Representative Vicente Gonzalez. OIP withheld these documents in full. Third Brinkmann Decl. ¶ 28.

Mr. Boyd’s letter was a response to a January 9, 2018, letter from Representative Gonzalez to the Attorney General seeking information regarding the addition of a citizenship question to the 2020 Census. *Id.* Like the other drafts addressed in this motion, this draft reflects the internal development of final decisions within the Department. The agency’s declaration explains that a significant aspect of the Department’s decision-making process consists of the creation of draft documents which are then internally reviewed, edited, and modified before they become final. *Id.* ¶ 30. During their creation, draft documents are routinely transmitted back and forth between government officials, continually changing as

relevant staff make tracked changes, suggest edits, and contemplate strategies as they work toward a final document. *Id.* This is an important step in DOJ's deliberative process as it is imperative that the agency communicate its official position cogently and after a well-considered process. *Id.* Notably, the draft response letter contains substantive differences as compared with the final signed response letter, including differences in content and language, mark-ups, and suggested edits. *Id.*

The deliberative communications reflected in the draft correspondence were part of the DOJ's internal process toward providing a response to Representative Gonzalez. This draft demonstrates that agency officials were providing advice about, and proposing modifications to, evolving versions of a draft response letter. Once those discussions concluded, the draft letter was finalized and sent to Representative Gonzalez. There can be no serious dispute that the final letter reflected DOJ's position regarding the question presented by Representative Gonzalez, and the deliberations reflected in the draft were an integral part of that process. *See, e.g., Krikorian v. Dep't of State*, 984 F.2d 461 (D.C. Cir. 1993) (affirming the District Court's conclusion that "two draft letters proposing two options for replies to public inquires" were properly withheld under the deliberative process privilege); *Brown v. Dep't of State*, 317 F. Supp. 3d 370, 376-77 (D.D.C. 2018) ("This draft letter appears to have been developed as part of a pre-decisional and deliberative process leading up to the drafting and transmission of a final letter, and as such is precisely the type of document that would come within" the deliberative process privilege).

The Court should conclude that the iterations of the draft letter to Representative Gonzalez are exempt from disclosure pursuant to Exemption 5 and the deliberative process privilege.

**8. Draft Correspondence Between JMD and Department of Commerce**

OIP withheld in full a draft letter ultimately sent by Arthur E. Gary, then JMD's General Counsel, to Kelly Welsh, then General Counsel to the Department of Commerce. Third Brinkmann Decl. ¶ 28. The draft letter was an iteration of a response to a May 9, 2014, letter from the Department of Commerce to the Attorney General requesting that DOJ review the questions asked on its behalf in the American Community Survey, as well as an affirmation that the legal authorities supporting the Department's use of that information were accurate and complete. *Id.*

The analysis with respect to this letter is the same as the "Draft Correspondence with Representative Gonzalez," as discussed in the preceding subsection. Clearly, the draft is pre-decisional because internal edits and substantive differences between the draft letter and the final version predated the agency's final position regarding a response to Mr. Welsh. In addition, the deliberations were part of a discrete process directed to formulating a detailed response to the Department of Commerce regarding the Department of Justice's review of the questions asked on its behalf in the American Community Survey as well as an affirmation that the legal authority supporting the Department's use of that information was accurate and complete. *See Brown*, 317 F. Supp. 3d at 376-77; *Dudman Comms. v. Dep't of Air Force*, 815 F.2d 1565, 1569 (D.C. Cir. 1987) ("[T]he disclosure of editorial judgments—for example, decisions to insert or delete material or to change a draft's focus or emphasis—would stifle the creating thinking and candid exchange of ideas necessary to produce good historical work.") (citing *Russell v. Dep't of Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

For these reasons, Defendant is entitled to summary judgment with respect to these withholdings.

**C. JMD Properly Relied on Exemption 5 and the Deliberative Process Privilege to Withhold Pre-Decisional, Deliberative Communications.**

The Court directed JMD to file a declaration with additional information regarding two documents withheld by the agency: (1) the “Draft response” dated February 13, 2018, and (2) the “Robinson-Gary Email.” *Id.* at 26-27. Defendant addresses each of these items separately.

**1. Draft Response**

On its *Vaughn* Index, JMD identified a document that it withheld in full as “Draft Response. Census. Honorable Vicente Gonzalez, Attachment to Email from Arthur Gary to Michael Allen.” ECF No. 22-3 at 9. In its summary judgment ruling, the Court referred to this record as the “Draft response.” *See* Mem. Op. at 26. This record is an early draft of a letter prepared by JMD, the final of which was intended to be sent by DOJ’s Office of Legislative Affairs. Plante Decl.<sup>9</sup> ¶ 12. The draft was prepared for signature by Mr. Boyd to Representative Vicente Gonzalez and was sent as an attachment to an email dated February 13, 2018, from Mr. Gary, the JMD General Counsel, to Michael Allen, the Deputy Assistant Attorney General for Policy, Management, and Planning (Mr. Gary’s supervisor), for review and further circulation and development within the agency. *Id.* The draft letter was prepared to respond to a January 9, 2018, letter from Representative Gonzalez to Attorney General Sessions, requesting information about the December 2017 letter sent by DOJ to the Department of Commerce about adding a citizenship question to the 2020 Census questionnaire. *Id.* ¶ 13.

As with the draft letter to Representative Gonzalez withheld by OIP and discussed above, this draft is pre-decisional because it was created and presented as a working document that would be reviewed and further developed internally within the Department prior to determining

---

<sup>9</sup> Citations to “Plante Decl.” refer to the Third Declaration of Jeanette Plante, dated September 17, 2021, and submitted herewith.

the content of the final version of the response letter. *Id.* ¶ 14. The draft was part of a process of developing a final agency position about how to officially respond to Representative Gonzalez and what content and language to include in the final letter. *Id.* ¶ 14.

The draft is plainly deliberative, particularly when considered along with the version withheld by OIP and the final version released to Plaintiff. This is because the drafts reflect the development and successive working versions of these letters and thereby show the internal development of the final decision within DOJ. *Id.* ¶ 15. A significant aspect of the Department's decision-making process consists of the creation of draft documents which are then internally reviewed, edited, and modified before they become final. *Id.* During their creation, draft documents are routinely transmitted between Department employees, continually changing as relevant staff contemplate strategies as they work toward a final document. This is an important step in the Department's deliberative process as it is imperative that the Department communicate its official position cogently and after a well-considered process. *Id.* Here, the draft letter to Representative Gonzalez contains significant substantive differences from the final signed letter, including differences in content and language. *Id.*

The Court should analyze this record similarly to OIP's withholding of other drafts in the same deliberative process directed to the development of a final response to Representative Gonzalez. The draft response is pre-decisional because it was an iteration that predated the agency's decision regarding the contents of a final response to Congressman Gonzalez. In addition, the iterations of the letter were part of a discrete process directed to formulating a detailed response to Representative Gonzalez's questions regarding the policy questions at issue. *See Brown*, 317 F. Supp. 3d at 376-77. Defendant is entitled to summary judgment with respect to this record.

**2. Robinson-Gary Email**

On July 9, 2021, JMD exercised its discretion to release in full the document identified in JMD's *Vaughn* Index as an *Email from Barry Robinson to Arthur Gary*, which was referenced by the Court in its Opinion as the "Robinson-Gary Email." Plante Decl. ¶ 7; *see* Mem. Op. at 27. This record is no longer at issue.

**II. DEFENDANT COMPLIED WITH FOIA'S SEGREGABILITY REQUIREMENT.**

Under FOIA, if a record contains information exempt from disclosure, any "reasonably segregable," non-exempt information subject to FOIA 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 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. Exec. Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. Dep't of Just.*, 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).

Here, OIP conducted a line-by-line review of the responsive records to identify information exempt from disclosure. Third Brinkmann Decl. ¶ 27; Plante Decl. ¶ 17. Based on the line-by-line review, all non-exempt information was segregated and non-exempt portions were released. *Id.* The Court should conclude that Defendant complied with its obligation to segregate exempt from non-exempt information.

### III. DEFENDANT COMPLIED WITH FOIA'S FORESEEABLE HARM REQUIREMENT.

Finally, Defendant satisfied FOIA's requirement that, for each withholding, they "reasonably foresee[] that disclosure would harm an interest protected by [the] exemption." 5 U.S.C. § 552(a)(8)(A)(i)(I); *Amadis v. Dep't of State*, 971 F.3d 364, 370-71 (D.C. Cir. 2020). The agency declarations explained that, with respect to each withholding, it was reasonably foreseeable that disclosure of the withheld information would harm an interest protected by the exemption relied upon. *See* Third Brinkmann Decl. ¶¶ 14, 22, 31; Plante Decl. ¶ 16.

The foreseeable harm that Defendant has identified is exactly the injury to the quality of agency decisions that the deliberative privilege process was designed to prevent. Indeed, the privilege is intended to foster robust decision-making by (1) encouraging open, frank discussions on matters of policy between subordinates and superiors; (2) protecting against premature disclosure of proposed policies before they are adopted; and (3) protecting against public confusion that might result from the disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's decision. *See Sears, Roebuck*, 421 U.S. at 151-53; *Coastal States Gas Corp.*, 617 F.2d at 866.

Here, the agency declarants explained that, if the withheld deliberative and pre-decisional material were disclosed, interests protected by the deliberative process privilege would foreseeably be harmed. Relevant here are the withheld drafts in which agency officials engaged in deliberative discussions regarding specific language to be used in the agency's final position concerning a policy matter. The public release of the drafts would significantly harm agency officials' ability to best articulate DOJ's position because those officials would temper their discussions. Third Brinkmann Decl. ¶ 14; Plante Decl. ¶ 16. It is foreseeable that officials would therefore be tempted to "hold back" from sharing their views, and this would diminish the

strength of the Executive Branch's decision-making by chilling the participants' ability to feel free to candidly share their preliminary assessments, concerns, and recommendations. Third Brinkmann Decl. ¶ 22; Plante Decl. ¶ 16. In the context of the draft letters, DOJ officials would be more circumspect in their drafting, less willing to offer novel or alternative stances or proposals, and less frank in evaluating the work of others. Third Brinkmann Decl. ¶ 31; Plante Decl. ¶ 16. In addition, the disclosure of the draft documents would cause public confusion due to differences in the proposed language in draft responses or corresponding rationales, and the eventual final actions taken by DOJ in response to each of these situations. Third Brinkmann Decl. ¶ 14; Plante Decl. ¶ 16,

In this case, OIP and JMD have assessed the foreseeable harm as it relates to the draft documents that Defendant has withheld in this case. Both agencies evaluated each record and described the foreseeable harm that would occur if the withheld material were publicly disclosed. *See Reporters Committee*, 3 F.4th at 370-73.

For these reasons, the Court should conclude that Defendant satisfied its obligation under FOIA's foreseeable harm requirement.

\* \* \*

**CONCLUSION**

For the reasons set forth above, the Court should grant this motion and enter judgment in favor of Defendant.

Dated: September 17, 2021

Respectfully submitted,

CHANNING D. PHILLIPS, D.C. Bar #415793  
Acting United States Attorney

BRIAN P. HUDAK  
Acting Chief, Civil Division

*/s/ Paul Cirino*

---

PAUL CIRINO, D.C. Bar #1684555  
Assistant United States Attorney  
Civil Division  
U.S. Attorney's Office for the District of Columbia  
555 4th Street, N.W.  
Washington, D.C. 20530  
Telephone: (202) 252-2529  
paul.cirino@usdoj.gov

*Counsel for Defendant*