UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 18-1187 (TSC) Civil Action No. 18-1771 (TSC)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION FOR STAY OF DISCLOSURE OBLIGATION PENDING APPEAL

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Defendant respectfully moves this Court to stay the portion of its June 1, 2020, Orders (the "Orders") in these Freedom of Information Act ("FOIA") cases requiring disclosure of the drafts and email correspondence relating to a December 12, 2017, letter from Arthur E. Gary to Dr. Ron Jarmin, pending appeal to the D.C. Circuit. *See* Civ. A. No. 18-1187, ECF Nos. 31, 32; Civ. A. No. 18-1771, ECF Nos. 29, 30.

INTRODUCTION

This motion seeks to stay Defendant's obligation to produce a discrete category of agency records—the drafts of a letter that includes senior agency official's mental impressions and editorial comments—pending appeal of the Court's ruling that the drafts were not covered by FOIA Exemption 5, 5 U.S.C. § 552(b)(5), and the deliberative process privilege. The internal drafts of what has been referenced as the "Gary Letter" relate to an agency decision that has been set aside by the U.S. Supreme Court. *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

As discussed more fully below, Defendant has satisfied the four elements for a stay pending appeal. First, despite the Court's disagreement with Defendant's argument that the records fall within the deliberative process privilege and are exempt from disclosure under Exemption 5, the Southern District of New York ruled in Defendant's favor on the same issue as to certain of the same drafts. Further, because Defendant's position rests on controlling D.C. Circuit precedent, the agency's position has merit and, at minimum, raises serious legal questions. Second, there can be no doubt that Defendant will be irreparably harmed if the documents are release because disclosure will moot the pending appeals and the agency will be unable to vindicate their interests in withholding the records under the deliberative process privilege. That is why stays of disclosure orders in FOIA cases are routinely granted pending appeal, and this Court should do so here.

The remaining two factors—harm to others (including Plaintiff) and the public interest—can be considered together. When the Supreme Court set aside the Department of Commerce's ("Commerce") decision to include a citizenship question on the 2020 Census, the significance of the Gary Letter drafts became more historical rather than closely tied to a matter of urgent public debate. Relatedly, because the 2020 Census is now essentially completed and the presidential election will be held on November 3, 2020, there is reasonable time for meaningful legal review of the government's asserted privilege over the information. The bottom line is that, particularly given the significant amount of information about the Gary Letter that already has been made public, the balance tips heavily in favor of granting a partial stay pending appeal in these cases because the delay associated with pursuing an appeal will not irreparably harm Plaintiff or deprive the public of additional information that might have contributed to their ability to make informed political choices at the ballot box.

For the following reasons, the Court should grant this motion and stay Defendant's obligation to produce the Gary Letter drafts pending the disposition of the pending appeals from this Court's June 1, 2020, Orders.

BACKGROUND

These FOIA cases arises out of the Secretary of Commerce's decision to reinstate a question about citizenship on the 2020 census questionnaire. On December 12, 2017, the Department of Justice sent the Department of Commerce a letter requesting reinstatement of a citizenship question on the census. The letter was signed by Mr. Gary, the General Counsel of the Justice Management Division and directed to Dr. Jarmin, the senior official at the U.S. Census Bureau. This agency action was immediately challenged in several lawsuits and ultimately was vacated by the United States Supreme Court. *Dep't of Commerce v. New York*,

139 S. Ct. 2551 (2019). The Gary Letter stated that data gathered from a citizenship question would aid Defendant's enforcement of the Voting Rights Act.

On February 1, 2018, Plaintiff submitted a FOIA request to three Department of Justice components: the Civil Rights Division ("CRT"), the Justice Management Division ("JMD"), and the Office of the Attorney General 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." *See, e.g.*, Civ. A. No. 18-1771, ECF No. 22-6, Exhibit A at 1. Specifically, Plaintiff 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," or "CVAP." *Id.* at 3.

Plaintiff commenced these actions on May 21, 2018 (Civ. A. No. 18-1187) and July 30, 2018 (Civ. A. No. 18-1771). During the litigation, Defendant produced the non-exempt portions of responsive documents to Plaintiff. ECF No. 22-3 ¶ 9 (Allen Declaration); ECF No. 22-4 ¶ 6 & Exhibit C (Brinkmann Declaration); ECF No. 22-5 Exhibits D, E, F & G (Cooper Declaration). Defendant's *Vaughn* Indexes reflect that the agency withheld non-final drafts of the Gary Letter as well as portions of email chains discussing edits, comments, and revisions to the Gary Letter pursuant to FOIA Exemption 5 and the deliberative process privilege. *See* Civ. A. No. 18-1187, ECF Nos. 22-3 (JMD *Vaughn* Index); 22-4 (OIP *Vaughn* Index); 22-8 (CRT *Vaughn* Index).

At summary judgment, Defendant submitted agency declarations stating that the emails and drafts at issue were circulated within the Department of Justice for additional review and input, that they involve different versions of the draft letter with edits, questions, comment

bubbles and frank discussion of vital enforcement interests. These drafts were prepared before the agency made any decisions concerning whether to suggest new questions to the U.S. Census Bureau. The agency asserted that, if such pre-decisional, deliberative communications were released, federal government employees would be much more cautious in their communications with each other and in providing all pertinent information and viewpoints to agency decision-makers in a timely manner. Allen Decl. ¶¶ 19-20; Brinkmann Decl. ¶ 24; Cooper Decl. ¶¶ 25-27. Defendant argued that the withheld information was deliberative and predecisional, and thus was properly withheld under Exemption 5 and the deliberative process privilege. *See, e.g.*, Case No. 18-1771, ECF No. 22-1 at 7-12, ECF No. 26 at 4-13.

On June 1, 2020, the Court partly granted and partly denied each party's cross-motion for summary judgment. *See* Civ. A. No. 18-1187, ECF Nos. 31, 32; Civ. A. No. 18-1771, ECF Nos. 29, 30. On the issue of Defendant's withholding of the letter drafts and related emails, the Court concluded that the agency's reliance on the deliberative process privilege was unwarranted. *See* Civ. A. No. 18-1187, ECF Nos. 31 at 9-14; Civ. A. No. 18-1771, ECF No. 29 at 12-16, 20, 26. The Court found that the withheld documents were not pre-decisional because the letter "did not involve discretion about an agency position or about the primary reasons for the agency position, because the "agency's position and the reasons for the letter had already been decided." *See* Civ. A. No. 18-1187, ECF No. 31 at 12; Civ. A. No. 18-1771, ECF No. 29 at 14. On this point, the Court stated that the drafts "were not used to help the agency make a decision, but rather were used to consummate the decision," and the drafts reflected the supervisors' review of the implementation of that decision. *See* Civ. A. No. 18-1187, ECF No. 31 at 13; Civ. A. No. 18-1771, ECF No. 29 at 15. Because the Court found that the withheld drafts and emails were not

pre-decisional, it did not address whether they are deliberative. *See* Civ. A. No. 18-1187, ECF No. 31 at 14; Civ. A. No. 18-1771, ECF No. 29 at 16.

On July 1, 2020, Defendant advised that it was reviewing the Court's ruling concerning the Gary letter drafts and email correspondence and would make a decision regarding an appeal by July 31, 2020. Civ. A. No. 18-1187, ECF No. 33 at 3. On July 31, 2020, Defendant filed Notices of Appeal in both of the above cases.[1] Civ. A. No. 18-1187, ECF No. 34; Civ. A. No. 18-1771, ECF No. 32.

In subsequent Joint Status Reports, Defendant requested that the Court continue to stay disclosure of the drafts of the Gary Letter for the duration of the appeal, but that Defendant would file a formal motion seeking stay of the Orders if the Court so preferred. Civ. A. No. 18-1187, ECF No. 37 at 3; Civ. A. No. 18-1771, ECF No. 35 at 4. During a telephonic status conference on October 7, 2020, the Court requested Plaintiff's position on this issue, and Plaintiff's counsel stated that Defendant should file a motion to stay the obligation to produce the Gary Letter drafts and emails.

APPLICABLE LEGAL STANDARD

A party seeking a stay pending appeal must show that four factors weigh in favor of a stay: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per

[1] The D.C. Circuit has assigned No. 20-5234 to the appeal of Civil Action No. 18-1187, and No. 5233 to the appeal of Civil Action No. 18-1771. On September 24, 2020, the D.C. Circuit granted the parties' joint motion to establish a briefing schedule in which Defendant's brief is due January 29, 2021, Plaintiff's brief is due on March 26, 2021, and Defendant's reply is due on April 23, 2021.

curiam). "A party does not necessarily have to make a strong showing with respect to the first factor (likelihood of success on the merits) if a strong showing is made as to the second factor (likelihood of irreparable harm)." *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 83 (D.D.C. 2018) (citing *Cuomo*, 772 F.2d at 974). Furthermore, "courts often recast the likelihood of success factor as requiring only that the movant demonstrate a serious legal question on appeal where the balance of harms strongly favors a stay." *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 193 n.5 (D.D.C. 2005) (citations omitted).

ARGUMENT

I. DEFENDANT HAS IDENTIFIED A SERIOUS LEGAL QUESTION ON APPEAL.

First, with due respect for the Court's decision, Defendant is reasonably likely to succeed on the merits of its appeal, and has, at a minimum, demonstrated a "serious legal question on appeal." *Al-Anazi*, 370 F. Supp. 2d at 193 n.5. But the Court need not lay odds on the government's chances on appeal because even were it to conclude that Defendant was unlikely to succeed, preserving the issues during the appeal and avoiding the irreparable harm created by mooting those issues through disclosure of the records presents precisely the sort of irreparable harm favoring granting a stay pending appeal. *See People for the Am. Way Found. v. Dep't of Educ.*, 518 F. Supp. 2d 174, 177-78 (D.D.C. 2007); *Ctr. for Int'l Env'tl Law v. Office of U.S. Trade Rep.*, 240 F. Supp. 2d 21, 22-24 (D.D.C. 2003).

On the relevant issue—whether the withheld information was pre-decisional—Defendant argued on summary judgment that the relevant agency decision here is the agency's determinations of the final contents of each of the letters at issue, and not the policy decision to request that a citizenship question be added to the 2020 Census questionnaire. Defendant cited multiple District Court and D.C. Circuit decisions that stand for the proposition that the privilege

applies to draft letters that relate to an agency policy that had already been finalized. *See, e.g.*, Case No. 18-1771, ECF No. 26 at 7-9. Defendant also explained that the withholding of the drafts advanced Exemption 5's purpose of affording government officials the freedom to provide their candid views when participating in the development of agency documents without the fear that their ideas will be publicly scrutinized and criticized. *Id.* at 9-13.

Defendant believes there is ample authority in this Circuit to support its position and that the agency is likely to prevail on appeal. *See, e.g., Judicial Watch v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006); *Krikoiran v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 155, 173-74 (D.C. Cir. 1980). In its summary judgment reply, Defendant also noted that the Southern District of New York had found some of the very same drafts of the Gary Letter to be protected by the deliberative process privilege. *New York v. Dep't of Commerce*, Civ. A. No. 18-2921 (JMF), 2018 WL 4853891, *3 (S.D.N.Y. Oct. 5, 2018) ("[T]he Court concludes that the drafts of the 'Gary Letter' . . . are protected by the deliberative process privilege.").

This Court distinguished the cases on which Defendant relied and rejected Defendant's argument that the relevant decision was the final contents of the letter, and not the decision to request that a citizenship question be included on the census. Defendant does not intend to reargue the matter in this motion; it suffices that the agency has a good faith basis for its position, which is supported by substantial legal authority and not contradicted by any directly controlling authority.

For these reasons, the Court should conclude that Defendant has, at a minimum, demonstrated a "serious legal question on appeal," particularly because two United States District Judges have made conflicting rulings on the issue with respect to the same records.

II. DEFENDANT WILL BE IRREPARABLY HARMED ABSENT A STAY.

Defendant will also be irreparably harmed absent a stay, for a simple reason: once the information contained in these documents is released to Plaintiff, the information cannot ever be clawed back and the issue will become moot. *See, e.g.*, *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored."); *Judicial Watch, Inc. v. U.S. Secret Service*, Civ. A. No. 09-2312 (BAH), 2011 WL 13377578, at *2 (D.D.C. Nov. 14, 2011) ("Several courts in this district have concluded that, in the FOIA context, irreparable harm occurs when the release of the documents would moot a defendant's right to appeal.") (citing *People for the Am. Way Found.*, 518 F. Supp. 2d at 177 ("Particularly in the FOIA context, courts have routinely issued stays where the release of documents would moot a defendant's right to appeal.")); *see also Ctr. for Int'l Envt'l Law*, 240 F. Supp. 2d at 22-23. Under the FOIA, a release to one is a release to all. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (recognizing that information disclosed under FOIA "belongs to citizens to do with as they choose"); *Swan v. Securities & Exch. Comm'n*, 96 F.3d 498, 500 (D.C. Cir. 1996) ("The statute [FOIA] contains no provisions requiring confidentiality agreements or similar conditions.").

III. PLAINTIFF WILL NOT BE SUBSTANTIALLY HARMED BY A STAY.

Furthermore, a stay of a limited part of this Court's order pending appeal is appropriate because the "issuance of the stay will not cause substantial harm to other parties." *Committee on the Judiciary U.S. House of Reps. v. Miers*, 575 F. Supp. 2d 201, 203 (D.D.C. 2008) (quoting *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003)).

In recent submissions to the Court, Plaintiff has not claimed it will suffer any harm if the Gary Letter drafts are not released pending appeal. Plaintiff has asserted that its FOIA request—not the Gary Letter drafts—"concerns the Administration's decision-making process relating to the census," which they describe as "a time-sensitive subject." *See* Civ. A. No. 18-1771, ECF No. 37 at 5. But such an assertion is in tension with Plaintiff's request that the appellate court extend the briefing through at least April 23, 2021. On balance, it appears that the most time-sensitivity in the material Plaintiff seeks was in the past, and that both now and going forward, the material will be of more historical than time-sensitive value because the Supreme Court has vacated the agency decision to which the Gary Letter pertains: Commerce's decision to include a citizenship question on the 2020 census questionnaire. *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). This development means that the withheld drafts, which relate to that decision, have less urgent public interest because the decision has been set aside. Plaintiff remains interested in pursuing the release of the Gary Letter drafts, but their significance for purposes of challenging the agency action or as a matter on which vital political choices depend is meaningfully diminished from the perspective of time.

Further, the Gary Letter drafts represent a narrow category of documents, particularly in relation to the voluminous productions that Defendant and Commerce have made in these and other similar cases. *See State of New York v. Dep't of Commerce*, Civ. No. 18-2921 (S.D.N.Y.); *N.Y. Immigration Coalition v. Dep't of Commerce*, Civ. No. 18-5025 (S.D.N.Y.). In response to Plaintiff's FOIA request, Defendant released records that were produced in the New York cases in response to subpoenas. Those productions include depositions and deposition testimony of Department of Justice officials about the Gary Letter. Given the information about the Gary Letter that has already been made public, it is unclear what information in the deliberative drafts

of the letter is so critical that Plaintiff would be harmed by a stay pending appeal of Defendant's obligation to disclose those records.

IV. THE PUBLIC INTEREST SUPPORTS GRANTING A STAY.

Finally, the public interest supports granting a stay limited solely to disclosure of the Gary Letter drafts and emails. Such a stay would not prevent this Court from resolving the other issues left open after the Court's June 1, 2020, Orders, including CRT's review and processing of documents resulting from the agency's supplemental search. Those proceedings will continue unimpeded. CRT will continue reviewing and processing the records that resulted from the supplemental search in September 2020.

Defendant recognizes that Commerce's decision to include a citizenship question was a matter of public interest—but only until the Supreme Court set aside that agency action. At this time, there is no basis to conclude that the public interest would be harmed if the Gary Letter drafts are not produced (if at all) until the conclusion of Defendant's appeals.

Previously, Plaintiff has argued that the Court should require Defendant to expedite its review and processing of the FOIA requests because of the June 2020 deadline for printing the census questionnaire, Case No. 18-1771, ECF No. 18 at 5; *see also id.*, ECF No. 20 at 4, and also because the request involved "a time-sensitive subject given the upcoming election." Civ. A. No. 18-1187, ECF No. 33 at 4.

Neither of those asserted reasons for urgency apply here. The 2020 Census is essentially finished; the U.S. Census Bureau reports that it completed data collection on October 15, 2020.[2]

[2] https://www.census.gov/newsroom/blogs/director/2020/10/the_end_of_2020_cens.html (last accessed Oct. 28, 2020).

Moreover, the presidential election will be held tomorrow, November 3, 2020. Given that (1) the Supreme Court's has set aside the agency action at issue; (2) the 2020 census is nearly completed; and (3) the 2020 presidential election will be held tomorrow, there is no basis to conclude that the public will be injured by the granting of a partial stay pending appeal.

CONCLUSION

For the reasons set forth above, the Court should grant this motion and stay the portion of its June 1, 2020, Order requiring Defendant to release the Gary Letter drafts and emails pending appeal.

Dated: November 2, 2020

Respectfully submitted,

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