UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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Defendant United States Department of Justice respectfully submits this Opposition to Plaintiff's Renewed Cross-Motion for Summary Judgment and in Support of Defendant's Renewed Motion for Summary Judgment.

INTRODUCTION

Plaintiff's cross-motion and opposition is based on the incorrect premise that the information withheld by Defendant under Exemption 5 and the deliberative process privilege involves explanations about the prior decision to request that the United States Census Bureau (the "Census Bureau") include a citizenship question on the 2020 Census. None of the withheld communications are fairly described as explaining or repeating the agency's request.

Instead, Defendant has withheld internal deliberations and drafts about other matters, including issues related to the request for inclusion of a citizenship question. The correspondence between officials of the White House, Department of Commerce, and Department of Justice plainly involves the development of an "official position" regarding how and when to inform Congress of the request. The comments to the interrogatory responses relate to the Voting Rights Act and have nothing to do with the citizenship question. The draft response to the Washington Post editorial board's inquiry addressed the three specific questions raised by the newspaper, not a rehash of the previously made decision. The draft response to Representative Gonzalez addressed some of the matters raised in his letter. For this reason, Plaintiff incorrectly argues that a recent D.C. Circuit case stands for the proposition that certain of Defendant's withholdings are not deliberative.

Plaintiff also characterizes Defendant's showing of foreseeable harm as "boilerplate," but takes no issue with Defendant's explanations, provides no contrary evidence to rebut Defendant's detailed declaration, and fails to explain what additional information would be

required under the statute. Nonetheless, to put this question entirely to rest, Defendant has submitted a fourth declaration to provide further specificity regarding the link between the information withheld in this case and the harms described previously if the withheld information is disclosed.

For these reasons, the Court should grant Defendant's Renewed Motion for Summary Judgment and deny Plaintiff's Renewed Cross-Motion for Summary Judgment.

ARGUMENT

I. DEFENDANT PROPERLY RELIED ON THE DELIBERATIVE PROCESS PRIVILEGE TO WITHHOLD INTERNAL COMMUNICATIONS AND DRAFTS TO RESPOND TO INQUIRIES BY THIRD PARTIES.

This section addresses the four remaining categories of Exemption 5 withholdings: (1) the DOJ-White House Correspondence; (2) draft responses to interrogatories propounded by the United States Commission on Civil Rights; (3) a draft response and comments regarding a response to questions from the Washington Post editorial board; and (4) draft responses to a letter from Representative Vicente Gonzalez.[1]

A. DOJ-White House Correspondence

OIP redacted portions of December 19, 2017, communications between Justice Department attorneys and White House officials "seeking advice and decision from the White

[1] In its renewed motion, Defendant also sought summary judgment with respect to (1) OIP's withholding in full of three pages of internal emails described as "Deliberative Discussions Regarding the Census and/or ACS" and (2) a draft letter ultimately sent by Arthur E. Gary to Kelly Welsh. Def.'s Mem. at 13-14, 16; Third Brinkmann Decl. ¶¶ 15-18, 28-30. Plaintiff has asserted that it no longer challenges Defendant's reliance on Exemption 5 and the deliberative process privilege. Opp. at 9 n.14. Defendant is therefore entitled to summary judgment on these issues. As discussed below, Plaintiff incorrectly argues that these two withholdings nevertheless should be produced because Defendant's justification of foreseeable harm was not adequate.

House as to congressional notification of DOJ's request for a citizenship question on the census." Def.'s Mem. at 8; Third Brinkmann Decl.[2] ¶ 19.

Plaintiff argues that this communication was not pre-decisional because it was made after Defendant's decision to request the citizenship question and a letter officially making the request to the Census Bureau. Opp.[3] at 10. Plaintiff further argues that this communication was not deliberative because it discussed how to notify Congress of the agency's request to the Census Bureau and did not "help the agency formulate its position" or "reflect[] the give-and-take of the consultative process." *Id.* at 11 (quoting *Jud. Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006)).

The redacted portions of these emails are not accurately characterized in that fashion. Rather, the deliberations withheld in these emails "reflect DOJ and White House officials' internal, deliberative work and guidance, including substantive discussions during which advice was sought regarding congressional notification of the citizenship question and related background context to inform the ongoing discussions." Third Brinkmann Decl. ¶ 21. This discussion and subsequent ultimate decision are plainly separate and distinct from the prior decision to request a citizenship question.

The withheld communications reflect an internal discussion among Department of Commerce, Department of Justice, and White House officials, including legal and policy staff, concerning "the W[hite] H[ouse] view on notifying Congress on the DOJ request." *See* ECF

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2 Citations to "Def.'s Mem." refer to the Memorandum of Law in Support of Defendant's Renewed Motion for Summary Judgment, filed September 17, 2021. ECF No. 48-1. Citations to "Third Brinkmann Decl." refer to the Third Declaration of Vanessa R. Brinkmann, dated September 17, 2021. ECF No. 48-2.

3 Citations to "Opp." refer to the Motion in Support of Plaintiff's Renewed Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment, filed November 2, 2021. ECF No. 51.

No. 51-14 at 19-20, 22-23 (Opp. Ex. 12) (redacted record). Importantly, the internal email chain reflects that the discussion was intended to develop an "official position" on that issue. *Id.* at 17-18. The subsequent discussion withheld under Exemption 5 reflects Executive Branch officials' questions, recommendations, and advice regarding the Department of Commerce's request for advice from the White House.

Plaintiff also is wrong to describe these communications as "merely explain[ing] an already-decided agency policy." Opp. at 10. The withheld communications do not reflect explanations of the previous decision to request the addition of a citizenship question on the census. Rather, the email chain reflects that Executive Branch officials were engaged in a robust internal debate about a different topic—the Department of Commerce's request for White House advisement on how and when Congress should be notified about Defendant's request to the Census Bureau. It is apparent from the non-exempt portion of this email chain that this topic was a novel issue for the participants and that this matter was separate and distinct from the then-completed decision to make the request to add the citizenship question.

Plaintiff also misses the mark by arguing that the withheld communications do not reflect the development of any agency policy. Opp. at 10. As this Court has previously recognized, a relevant agency decision need not always involve a "formal policy." ECF No. 29 at 13 (citing *Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of the Fed. Reserve Sys.,* 762 F. Supp. 2d 123, 135-36 (D.D.C. 2011)). The privilege "shields from disclosure . . . 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are made.'" *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). Here, there can be no serious dispute that the communications at issue reflect the

deliberations among representatives of three Executive Branch agencies to develop an "official position" on the matter under consideration, which is how and when to notify Congress about Defendant's request to the Census Bureau. ECF No. 51-14 at 19-20; *see Competitive Enter. Inst. v. EPA*, 12 F. Supp. 3d 100, 120 (D.D.C. 2014) ("[S]ince the communication at issue involved 'how to communicate with members of Congress . . . and how to prepare for potential points of debate or discussion' . . . [t]he challenged redaction was therefore proper.")

For these reasons, the withheld communications are covered by the deliberative process privilege. They are pre-decisional because they definitively occurred before a decision was made. The internal discussions are deliberative because they constitute discussions, comments, and opinions that plainly reflect "the give-and-take of the consultative process." *Jud. Watch, Inc.*, 9 F.3d at 151.

B. Draft USCCR Interrogatory Responses

OIP redacted two comment bubbles, reflecting an editor's questions and rationale for proposed edits, on one page of draft interrogatory responses served on Defendant by the United States Commission on Civil Rights. Def.'s Mem. at 9-10; Third Brinkmann Decl. ¶ 23.

Plaintiff argues that these comments to the agency's draft interrogatory responses were not pre-decisional because they reflected "wordsmithing" about what Defendant's policy is, and not the formulation or exercise of policy-oriented judgment. Opp. at 13. Plaintiff also argues that the redacted comments were not deliberative because they constitute "a reflection or explanation of a decision already made." *Id.* at 14.

Defendant did not describe the communications in the withheld comment bubbles as "wordsmithing," and that characterization is not accurate. The agency's supporting declaration makes clear the comments at issue were substantive. Fourth Brinkmann Decl. ¶ 20 ("The

withheld information consists of substantive editorial comments expressing a concern about the implications of a particular response, as well as other suggestions concerning language and strategy that were not reflected in the final document, which were intended to improve the overall quality of the Department's response to the USCCR.") Nor do the comments constitute "a reflection or explanation of a decision already made," as Plaintiff also speculates. The redacted information does not relate to the decision to request the inclusion of a citizenship question on the 2020 Census. Rather, these communications are the reviewer's considered collaboration on the most accurate way to respond to Interrogatory Nos. 8 and 9, which request information about the Voting Rights Act, *not* the proposed citizenship question. As with the email chain addressed in the preceding section, the comments here clearly reflect deliberations that were part of the process to develop an appropriate agency response.[4]

Accordingly, these comments are protected from disclosure by Exemption 5 and the deliberative process privilege. They are pre-decisional because they pre-date the final version of the interrogatory responses, and they are deliberative because they reflect internal agency advice, suggestions, and explanations intended to develop a final version of the responses.

C. Deliberative Discussions Regarding the Drafting Process

Defendant's remaining withholdings in the category labeled "Deliberative Discussions regarding the Drafting Process" are found in three pages reflecting internal discussion of a proposed one-paragraph response to questions from the Washington Post editorial board. Def.'s Mem. at 10-13; Third Brinkmann Decl. ¶ 11. Defendant argued that the withholding of a draft response to the Washington Post's inquiry was covered by the Court's previous conclusion that

[4] Notably, those involved in the drafting apparently understood the deliberative and confidential nature of the draft, which bears the phrases "PRIVILEGED & CONFIDENTIAL" and "INTERNAL DELIBERATIVE DRAFT" in the header on every page.

the deliberative process privilege applies to responses to press inquiries. ECF No. 29 at 22 (citing District Court decisions).

Plaintiff, however, argues that the D.C. Circuit's opinion in *Reporters Committee for Freedom of the Press v. FBI*, 3 F.4th 350, 363 (D.C. Cir. 2021), implicitly overruled this Court's ruling on the parties' initial summary judgment motions. Opp. at 14-15. Specifically, Plaintiff argues that the appellate court's decision stands for the proposition that a draft formulating a response to press inquiries is pre-decisional only if there is an "unsettled policy landscape." *Id.* Plaintiff also contends that these internal drafts are not deliberative because "the Department had already made its decision" regarding the addition of a citizenship question on the 2020 Census. *Id.* at 16.

Plaintiff's arguments are misplaced because they are based on the erroneous premise that the Washington Post requested the agency's position on whether it would request that the Census Bureau include a citizenship question on the 2020 Census. That decision had already been made. As the email demonstrates, the Washington Post asked three entirely different questions:

> How does the Department respond to those who take the stated concerns about voting rights as an ominous signal about the administration's intentions in possibly changing Census questions? For purposes of Section 2 cases, how much harder is it to use A[merican] C[ommunity] S[urvey] data? Does the additional hassle really justify changing Census forms in a way that might well drive up costs and deter population counting?

Exhibit A. There would be no need for the proposed response to restate the previously made decision because the Washington Post presented specific questions about three other issues: the agency's future intentions regarding the Census, the feasibility of using American Community Survey data, and the costs and benefits of changing the Census forms. Accordingly, the withheld proposed response to these specific questions and related internal deliberations do not involve the decision that Plaintiff erroneously characterizes as "already made."

Plaintiff also is incorrect that D.C. Circuit's decision in *Reporters Committee* is somehow inconsistent with the Court's prior ruling or otherwise requires that the Court conclude that the deliberative process privilege does not apply to these communications. This argument is based on the flawed premise that the withheld communications involved Defendant's prior decision to ask the Census Bureau to add a citizenship question and thus did not involve issues that were "unsettled." Opp. at 15-16. The proposed response and comments about that proposal are not fairly described as "reflecting a final agency decision," *Sierra Club*, 141 S. Ct. at 785-86, but rather more accurately reflect the agency's deliberations about the new issues and questions raised by the Washington Post's editorial board. The communications here are similarly distinguishable from the FBI's PowerPoint presentations that "describe already-made and in-place policy choices," which the D.C. Circuit found to be not deliberative in *Reporters Committee*, 3 F.4th at 367.

In fact, *Reporters Committee* supports the withholding of the draft response to the Washington Post. As Defendant argued in its opening brief, the withheld communications are analogous to the former FBI director's draft letter to editor because "they 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 in question, which the D.C. Circuit found to be protected from disclosure by Exemption 5 and the deliberative process privilege. *See* Def.'s Mem. at 12 (quoting *Reps. Comm.*, 3 F.4th at 363); *see also* Fourth Brinkmann Decl.[5] ¶ 9 (noting that the draft response to the Washington Post was prepared during the "ongoing intense public

[5] Citations to "Fourth Brinkmann Decl." refer to the Fourth Declaration of Vanessa R. Brinkmann, dated December 1, 2021, submitted herewith.

and congressional scrutiny, as well as legal challenges" that the citizenship question request generated).

For these reasons, the proposed response to the Washington Post's questions and related commentary and suggestions were pre-decisional and deliberative, and thus are protected from disclosure by Exemption 5 and the deliberative process privilege.

D. Draft Correspondence to Representative Gonzalez

OIP withheld in full three separate drafts of a letter from Assistant Attorney General Stephen Boyd to Representative Vicente Gonzalez; this letter was a response to a request for information regarding the addition of a citizenship question to the 2020 Census. Def.'s Mem. at 14-15; Third Brinkmann Decl. ¶ 28. JMD also withheld an early draft letter prepared for signature by Mr. Boyd to Representative Gonzalez regarding the same subject. Def.'s Mem. at 17-18; Plante Decl.[6] ¶ 12.

Once again, Plaintiff argues that these drafts are not pre-decisional because they were created only to communicate aspects of the agency's decision, which had previously been made. Opp. at 18. Plaintiff relies on the same point to argue that the records are not deliberative, arguing that these drafts are "wordsmithing an explanation of an existing policy or decision." *Id.* at 19. These arguments are inaccurate.

Representative Gonzalez, in his letter to the Attorney General dated January 9, 2018, did not ask Defendant to explain its previously made decision to request that the Census Bureau include a citizenship question.[7] The letter expresses the Congressman's concerns that the

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[6] Citations to "Plante Decl." refer to the Declaration of Jeanette Plante, dated September 17, 2021. ECF No. 48-3.

[7] Representative Gonzalez' letter is publicly available. Congressman Gonzalez Urges Attorney General Sessions to Reconsider Changes to U.S. Census Questionnaire | Congressman Vicente Gonzalez (house.gov) (accessed Dec. 1, 2021).

citizenship question may have unforeseen consequences on implementation and participation in the census in his district, might incite fear among immigrants, would represent a step backward from the recent efforts to address past inaccuracies, and could increase the costs of the Census or divert funds from efforts intended to improve accuracy.

Therefore, the withheld drafts are pre-decisional because they were prepared prior to the final version of the agency's letter in response, and they are deliberative because they reflect the drafting process to arrive at a final version of the letter regarding how to respond to a congressional inquiry. *Comm. on Oversight & Gov't Reform v. Lynch*, 156 F. Supp. 3d 101, 112 (D.D.C. 2016) ("[T]he Court holds that documents withheld by defendant that reveal the Department's internal deliberations about how to respond to press and Congressional inquiries . . . are protected by the deliberative process privilege").

II. DEFENDANT HAS COMPLIED WITH THE REQUIREMENT TO DEMONSTRATE FORESEEABLE HARM.

Defendant's motion was supported by detailed agency declarations describing the harm that was foreseeable if the information withheld pursuant to the deliberative process privilege were to be disclosed. Third Brinkmann Decl. ¶¶ 14, 22, 31; Plante Decl. ¶ 16.

In response, Plaintiff argues that Defendant's showing of foreseeable harm was inadequate because the agency "offered only boilerplate descriptions of potential harm." Opp. at 19-22. Plaintiff also contends that, because the underlying decision to add a citizenship question to the 2020 Census was found to be arbitrary and capricious, *Dep't of Com. v. New York*, 139 S. Ct. 2251 (2019), that somehow the relevant interests protected by the deliberative process privilege are "undercut." Opp. at 22-24. The Court should reject these arguments.

A. Defendant Has Satisfied Its Obligation to Demonstrate Foreseeable Harm.

In *Sierra Club*, the Supreme Court noted that the deliberative process privilege is "rooted in 'the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." 141 S. Ct. at 785 (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001)). Defendant's showing was more than adequate to demonstrate that these interests would be foreseeably harmed if the withheld materials were disclosed.[8]

The Third Declaration of Vanessa R. Brinkmann, ECF No. 48-2, explained exactly that in detail with respect to each of the withheld documents at issue. For example, "when communicating with the press, Department officials are keenly aware of the significance attached to the specific language used . . .so [t]heir ability to best articulate the Department's position would be significantly harmed if, instead of focusing on crafting the best response, they tempered their discussions with an eye towards eventual publication of their deliberations." Third Brinkmann Decl. ¶ 14; *see also id.* ¶¶ 22 (release of the DOJ-White House correspondence "would inhibit the Executive Branch's ability to engage in effective communications decision-making, and inter-agency coordination by interfering with the ability of these senior officials to engage in candid discussions and to obtain or offer advice"); 31 (explaining that the release of the withheld drafts would cause officials to "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."). Ms. Brinkmann also noted that "these types of harms are only heightened when the subject

[8] A review of the Third Brinkmann Declaration and the Fourth Brinkmann Declaration makes clear that the relevant explanations concerning foreseeable harm are not "boilerplate." Rather, the declarations are detailed and well-supported by confirmed facts and other specific information. *See Leopold v. Dep't of Just.*, Civ. A. No. 19-2796 (JEB), 2021 WL 3128866, at *4 (D.D.C. July 23, 2021).

matter of the deliberations pertains to matters of national controversy and concern, as is the case here." *Id.* ¶ 14. In addition to those concerns, disclosure of the withheld communications would cause public confusion due to the differences in the proposed language in draft responses or corresponding rationales, and the eventual final actions taken by the agency. *Id.*

Plaintiff presented no evidence to rebut any of these assertions. In fact, Plaintiff takes no issue with the substance of Defendant's allegations of foreseeable harm. Instead, Plaintiff takes the position that the supporting declaration was not robust enough, even though Plaintiff does not explain what additional information would be required for the agency to meet its burden under FOIA.

Defendant strongly disagrees with Plaintiff's argument. However, to address Plaintiff's arguments, the agency has submitted herewith an additional declaration that contains additional specificity regarding the foreseeable harm to agency deliberations that would result from disclosure of the specific withheld information. With respect to each withholding, Ms. Brinkmann confirms that reasonably foreseeable harm would result from the disclosure of the specific information withheld. Fourth Brinkmann Decl. ¶¶ 9-11, 13-14, 16-18, 20-21, 23-25. This determination was based on Ms. Brinkmann's assessment of the interest that the deliberative process privilege is intended to protect and the potential harm to those interests if the withheld information is released. *Id.* Defendant believes that it has provided the Court with as much information that it reasonably can provide to satisfy its obligations under the statute. 5 U.S.C. § 552(a)(8)(A)(i). *See Machado Amadis v. Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020) (holding that OIP's articulation of foreseeable harm was consistent with FOIA where the agency "specifically focused on 'the information at issue' and 'concluded that disclosure of that information would chill future internal discussions.'").

B. There Is No Basis to Order Disclosure of the Withheld Information Based on the Underlying Decision to Request a Citizenship Question.

Finally, Plaintiff argues that, even if Defendant can establish that its withholdings were proper under Exemption 5 and the deliberative process privilege, the Court should order the agency to release all information. Opp. at 22-24. Plaintiff reasons that "[a]ny assertion of harm by DOJ strains credulity for the simple reason that these documents do not reflect any policymaking by the Department of Justice." *Id.* at 23. The Court should reject this argument.

There are multiple flaws with Plaintiff's contention. First, Plaintiff assumes that the withheld information relates to the basis for Defendant's request that a citizenship question be included on the 2020 Census, an agency decision that the Supreme Court has found to be arbitrary and capricious. With one exception,[9] none of the remaining Exemption 5 withholdings were part of the deliberations leading up to the decision that subsequently was vacated. Rather, the communications at issue occurred afterwards and/or related to other specific questions. The draft interrogatory responses at issue related to the Voting Rights Act, not the citizenship question. And the White House correspondence involved the development of an "official position" as to how and when to notify Congress of Defendant's request to the Census Bureau. It would therefore be inaccurate to treat these communications as if they were part of a process that led up to the decision to make the request in the first place. There is no basis for Plaintiff to assert that the withheld records "discuss[] aspects of this charade," Opp. at 24, referring to the decision to request the citizenship question in the first place.

Notably, Plaintiff has failed to support its position with any legal authority that stands for the proposition that otherwise exempt information can be ordered to be produced if it was

[9] The only exception is the three pages of "Deliberative Discussions Regarding the Census and/or ACS." Def.'s Mem. at 13-14. Plaintiff, however, no longer challenges Defendant's reliance on Exemption 5 with respect to these withholdings.

associated with an agency decision that has been found to be arbitrary and capricious. Defendant is unaware of any such authority.

For these reasons, the Court should reject Plaintiff's argument that Defendant should be required to disclose all withheld information notwithstanding the applicability of the deliberative process privilege.

CONCLUSION

For the reasons set forth above and in Defendant's opening brief, the Court should grant Defendant's Renewed Motion for Summary Judgment, deny Plaintiff's Cross-Motion for Summary Judgment, and enter judgment in favor of Defendant with respect to the remaining claims in this case.

Dated: December 1, 2021

Respectfully submitted,

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