

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
BRENNAN CENTER	)	
FOR JUSTICE	)	
AT NEW YORK UNIVERSITY	)	
SCHOOL OF LAW,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 18-1841 (ABJ)
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT’S RESPONSE TO PLAINTIFF’S  
STATEMENT OF MATERIAL FACTS  
AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Rule 7(h), defendant United States Department of Justice (“DOJ”), on behalf of the Civil Rights Division (“CRT”), responds to plaintiff’s statement of material facts as to which there is no genuine issue as follows:

1. Plaintiff’s FOIA request (the “NVRA FOIA”), sent to Defendant by letter on July 20, 2017, sought the following information relating to the letter sent on June 28, 2017 by T. Christian Herren, Jr., Chief of DOJ’s Voting Section, to state election officials across the country (the “DOJ Letter”):

- 1) All documents the Department of Justice (“DOJ” or “Department”) received or receives from state or local election officials in response to the Letter.
- 2) All communications and documents, including but not limited to emails and memoranda, between any DOJ officer, employee, or agent, or any White House liaison to the Department, and any other person, including but not limited to any officer, employee, or agent of the White House or the Presidential Advisory Commission on Election Integrity concerning the Letter.

Compl. Ex. A at 1, ECF No. 1-5. The DOJ Letter is publicly available at <https://www.documentcloud.org/documents/3881855-Correspondence-DOJ-Letter-06282017.html> (last visited Apr. 11, 2019).

Response:

2. The Brennan Center requested expedited processing of the NVRA FOIA pursuant to the FOIA statute and DOJ's regulations. Compl. ¶ 10 & Ex. A at 1, ECF Nos. 1, 1-5.

Response: Admit but aver that this is not a material fact because the processing of this FOIA request has been completed.

3. Plaintiff had previously submitted a different FOIA request (the "SDNY FOIA") to DOJ in May 2017, requesting documents relating to the "Presidential Advisory Commission on Election Integrity" ("PACEI") established by President Trump in May 2017, which requested the following records:

1. All communications, including but not limited to emails and memoranda, between any Department of Justice ("DOJ" or "Department") officer, employee, or agent, or any White House liaison to the Department, and any other person, including but not limited to any officer, employee, or agent of the White House or DOJ, or any member of the presidential transition team or the presidential campaign of Donald Trump, regarding the Presidential Advisory Commission on Election Integrity or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system.

2. All communications, including but not limited to emails and memoranda, between any Department officer, employee, or agent, or any White House liaison to the Department, and any member of the Presidential Advisory Commission on Election Integrity, other than Vice President Michael Pence, since November 8, 2016.

3. All documents relating to the Presidential Advisory Commission on Election Integrity or any other effort since November 8, 2016 to establish a commission, task force, or committee to study voter fraud or any aspect of the voting system, including all documents discussing or making reference to the following subjects:

a) The Executive Order creating the Presidential Advisory Commission

on Election Integrity;

- b) The reasons for forming the Presidential Advisory Commission on Election Integrity;
- c) The goals and mission of the Presidential Advisory Commission on Election Integrity; and
- d) The membership of the Presidential Advisory Commission on Election Integrity, including the criteria for selection of its members.

Complaint ¶ 8-27, *Brennan Ctr. for Justice v. U.S. Dep't of Justice*, No. 17-cv-06335 CBH, ECF No. 1 (S.D.N.Y. Aug. 21, 2017).

Response: Admit that plaintiff had made a prior FOIA request to DOJ in May 2017, and that FOIA request speaks for itself and is the best evidence of its contents. This statement, however, is not a material fact because that prior FOIA request is not at issue.

4. DOJ acknowledged receipt of the NVRA FOIA request on July 24, 2017. Compl. ¶ 15; Ans. ¶ 15, ECF No. 10; Declaration of Tink Cooper, Acting Chief of the Freedom of Information/Privacy Act Branch, Civil Rights Div., DOJ (“Cooper Decl.”) Ex. A, ECF No. 21-2.

Response: Admit but aver that this is not a material fact because the processing of this FOIA request has been completed.

5. Between November and December 2017, Plaintiff followed up with DOJ several times regarding the NVRA FOIA request. In communications between Plaintiff and DOJ in March 2018, DOJ expressed that it needed to coordinate with the U.S. Attorney’s Office for the Southern District of New York (which was handling litigation concerning the SDNY FOIA) and inquired as to how the SDNY FOIA and NVRA FOIA requests differed. *See* Compl. ¶¶ 17-18; Ans. ¶¶ 17-18.

Response: Admit but aver that this is not a material fact because the processing of the FOIA request at issue in this case has been completed.

6. The Brennan Center provided a written explanation by email on March 19, 2018. Compl. ¶ 19 & Ex. C, Ex. A thereto; Declaration of Maximillian Feldman (“Feldman Decl.”) ¶ 4 & Ex. A thereto

Response: Admit but aver that this is not a material fact because the processing of the FOIA request at issue in this case has been completed.

7. On March 20, 2018, the Department responded by letter to the NVRA FOIA request. Compl. Ex. B, ECF No. 1-6; Coop. Decl. Ex. B, ECF No. 21-2. The Department denied *in toto* the NVRA FOIA’s first request for “[a]ll documents the [Department] received or receives from state or local election officials in response to the [DOJ Letter],” invoking FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), on the purported basis that “disclosure [] could reasonably be expected to interfere with law enforcement proceedings.” *Id.* at 1. The Department also claimed that certain unspecified information within the requested records was protected from disclosure pursuant to FOIA Exemption 5, U.S.C. § 552(b)(5), “since the records consist of attorney work product and include intra-agency memoranda containing pre-decisional, deliberative material and attorney client material,” and pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), to the extent that “disclosure [] could reasonably be expected to constitute an unwarranted invasion of privacy.” *Id.*

Response: Admit that by letter dated March 20, 2018, the Department sent plaintiff a letter, and that letter speaks for itself and is the best evidence of its contents.

8. Regarding the NVRA FOIA request for “[a]ll communications and documents, including but not limited to emails and memoranda, between any DOJ officer, employee, or agent, or any White House liaison to the Department, and any other person, including but not limited to any officer, employee, or agent of the White House or the Presidential Advisory Commission on Election Integrity concerning the Letter,” DOJ produced 407 pages of

records and stated that that production was subject to excision of information protected under FOIA Exemptions 5 and 6. *Id.* at 1-2. DOJ denied access to four pages of documents under FOIA Exemptions 7(A) and 5. *Id.* at 2.

Response: Admit that by letter dated March 20, 2018, DOJ sent plaintiff a letter, and that letter speaks for itself and is the best evidence of its contents.

9. The 407 pages of documents released by DOJ each related to the PACEI. The DOJ Letter, in contrast, was referenced on just three of the pages. Feldman Decl. ¶ 6. All but three of the 407 pages had already been produced to the Brennan Center in response to the SDNY FOIA request. *Id.* Those three new pages contained a letter from DOJ to Senator Whitehouse. *Id.* ¶ 7 & Ex. B thereto.

Response: Admit that by letter dated March 20, 2018, DOJ sent plaintiff a letter, and that letter speaks for itself and is the best evidence of its contents.

10. On April 27, 2018, in response to the SDNY FOIA, DOJ made a 100-page production that contained documents responsive to both the SDNY FOIA and the NVRA FOIA, including a series of redacted emails regarding DOJ's response to an op-ed regarding the DOJ Letter. *See* Feldman Decl. ¶ 8; Compl. Ex. C, Ex. B thereto, ECF No. 1-7.

Response: Admit that on April 27, 2018, DOJ responded to plaintiff's SDNY FOIA request, and that FOIA response speaks for itself and is the best evidence of its contents. This statement, however, is not a material fact because that prior FOIA request is not at issue.

11. DOJ has indicated in declaration testimony that the terms "Presidential Advisory Commission, Presidential Advisory Commission on Election Integrity, PACEI, 'Election Integrity Commission' NEAR "voting system,' 'task force' NEAR vote NEAR fraud, Study

NEAR ‘voting system,’ Pence, Kobach, Lawson, Gardner, Dunlap, Blackwell, McCormick, Dunn, Rhodes, von Spakovsky, Adams, King, and Borunda” were searched in response to the NVRA FOIA. Cooper Decl. ¶ 11, ECF No. 21-1. DOJ also has stated that the Civil Rights Division had “received several FOIA requests relating to the Commission” and that the search conducted “encompassed the search terms and parameters of these similar FOIA requests.” *Id.*

Response: Admit that the Cooper Declaration specified certain search terms used in connection with plaintiff’s FOIA request, and that declaration speaks for itself and is the best evidence of its contents

12. The Brennan Center timely filed an appeal with DOJ on May 15, 2018. Compl. Ex.C, ECF No. 1-7; *see also* Compl. ¶ 24; Ans. ¶ 24.

Response: Admit that plaintiff filed an administrative appeal but whether it was timely is a legal conclusion and not a statement of material fact.

13. By August 7, 2018, DOJ had not responded to the Brennan Center’s appeal, and Plaintiff filed the instant suit. *See generally* Compl., ECF No. 1.

Response: Admit.

14. On November 14, 2018, DOJ issued a supplemental response to the NVRA FOIA releasing approximately 100 pages of publicly available court documents filed in the Eastern District of Kentucky in *Judicial Watch v. Grimes*, No. 3:17-cv-0094 (E.D. Ky.). Cooper Decl. ¶ 16, ECF No. 21-1; *id.* Ex. C, ECF No. 21-2. DOJ maintained that approximately 20,200 pages of documents should be withheld under Exemptions 5, 6, and 7(A) and (C). Cooper Decl. ¶ 16, ECF No. 21-1; Mem. of Points & Authorities in Supp. of Def.’s Mot. for Summ. J. (“Def.’s Br.”) at 4-15, ECF No. 21. The Department invoked the same FOIA Exemptions in a

*Vaughn* index provided to the Brennan Center on November 29, 2018, and attached in identical form to the Department's Motion for Summary Judgment. Summ. Categorical Index ("*Vaughn* Index"), ECF No. 21-3; *see also* Feldman Decl. ¶ 10.

Response: Admit that on November 14, 2018, DOJ issued a response to plaintiff, and that response speaks for itself and is the best evidence of its contents

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
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Plaintiff,	)	
	)	
v.	)	Civil Action No. 18-1841 (ABJ)
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF’S  
CROSS-MOTION FOR SUMMARY JUDGMENT AND IN REPLY TO PLAINTIFF’S  
OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGEMENT**

**PRELIMINARY STATEMENT**

This case involves a request by plaintiff, under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, submitted to defendant United States Department of Justice’s (“DOJ”) Civil Rights Division (“CRT”), seeking certain information CRT received from state and local election officials in response to a June 28, 2017 letter sent from T. Christian Herren, Jr., Chief of the Voting Section, to all states covered by the National Voter Registration Act (“NVRA”) and the Help America Vote Act (“HAVA”) (referred to herein as the “DOJ Letter”). DOJ moved for summary judgment demonstrating that CRT had performed an adequate search for responsive records, and properly withheld information from plaintiff under Exemptions 5, 6, 7(C) and 7(A) of the FOIA.

Plaintiff does not challenge the invocation of Exemptions 6 and 7(C). Plaintiff challenges the adequacy of the search and the invocation of exemptions 5 and 7(A). Plaintiff first argues that the search was inadequate because CRT allegedly used broad search terms that relate solely to the Presidential Advisory Commission on Election Integrity (“PACEI”) and not the DOJ Letter



pertaining to the NVRA and HAVA, and DOJ failed to identify the names of the custodians who searched for responsive records. Plaintiff's argument, however, is built solely upon unwarranted speculation and an erroneous legal premise that the name of each custodian searched must be provided.

Second, plaintiff argues that Exemption 7(A) does not apply because the law enforcement threshold has not been met and CRT's Vaughn index and declaration fail to adequately explain how release of the requested information would interfere with any enforcement proceedings. Plaintiff is patently wrong that the proceedings at issue here are akin to audits. On the contrary, they are enforcement proceedings of a type the Court of Appeals has found to meet the Exemption 7 threshold. To the extent that additional information on the harm from release of the withheld information is needed, the accompanying Supplemental Declaration of Tink Cooper ("Supp. Cooper Decl.") explains in more detail the application of Exemption 7(A).

Third, plaintiff argues that Exemption 5 cannot apply because CRT failed to demonstrate certain information withheld under the deliberative process was both predecisional and deliberative. Plaintiff also argues that the attorney work product privilege cannot apply because CRT has failed to demonstrate any ongoing or anticipated litigation to support its claim.

On the contrary, both Cooper declarations demonstrate that the withheld information is predecisional and deliberative, and that the attorney work product information pertains to anticipated litigation.

Plaintiff has failed to undermine DOJ's demonstration in this case that summary judgment is warranted for defendant. Correspondingly, plaintiff's cross-motion for summary judgment should be denied.

## ARGUMENT

### **I. CRT has Performed an Adequate Search for Responsive Documents.**

Plaintiff argues that CRT's search was inadequate because CRT purportedly used search terms pertaining to the PACEI and not to the DOJ Letter. Plaintiff's Opp. at 9. Plaintiff offers no support for its claim that the search terms used applied only to the PACEI and not to the DOJ Letter. Id.

Instead, plaintiff speculates that the terms apply only to the PARCEI based on a conversation plaintiff had with CRT. Plaintiff argues that it explained to CRT that its FOIA request to the Southern District of New York was different than its request for records concerning the DOJ Letter and yet the next day CRT responded to its FOIA request for records pertaining to the DOJ Letter. Plaintiff's Opp. at 10. The timing of CRT's response in no way suggests that CRT misunderstood what plaintiff was requesting.

The Supplemental Cooper Declaration explains that in response to plaintiff's FOIA request CRT used information located in searches undertaken in response to prior FOIA requests for similar information, and also conducted new searches for records responsive to plaintiff's FOIA request. Supp. Cooper Decl., ¶ 3. Thus, contrary to plaintiff's claim, CRT did not rely solely on prior searches for information responsive to other FOIA requests.

Plaintiff also argues that CRT failed to identify each of the almost 80 custodians who were involved in the search for responsive records. Plaintiff's Op. at 9-10. Plaintiff cites no support that CRT is required to specifically identify each custodian. Id. The first Cooper declaration adequately identified high level officials involved in the search. Cooper Decl., ¶¶ 7-10.

Ms Cooper further explains in her supplemental declaration that:

As described in the first declaration, Plaintiff's request was forwarded to the Voting Section. Three individuals in the Voting Section have personal knowledge of the Section and all matters, cases, or other law enforcement proceedings addressed by the Section: Chris Herren, the Chief of the Voting Section; Rebecca J. Wertz, the Principal Deputy Chief; and Robert S. Berman, a Deputy Chief and the designated FOIA contact for the Voting Section. As the senior management and leadership of the Voting Section, Mr. Herren, Ms. Wertz, and Mr. Berman searched for all responsive records regarding the DOJ Letter. Although inadvertently omitted from my first declaration, the June 28, 2017 letter was also used as the search term. The Section located responsive records from 44 chief election officials in the states and in the District of Columbia.

Supp. Cooper Decl., ¶ 6.

Plaintiff also argues that it received documents responsive to its FOIA request in this case, in response to its FOIA request in the Southern District of New York, but not in response to the request here, and that these overlooked materials demonstrate that the search was inadequate. Plaintiff's Opp. at 11.

On the contrary, the question is not "whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." Steinberg v. Department of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (*quoting* Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984)); accord Nation Magazine v. Customs Service, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995). The "[f]ailure to turn up [a specified] document does not alone render [a] search inadequate." Nation Magazine, 71 F.3d at 892, n.7.

As explained in the Supplemental Cooper Declaration, the records that plaintiff refers to originated in DOJ's Office of Information Policy ("OIP"), not CRT. Although OIP consulted with CRT about certain of the information contained in these documents, these were OIP documents, not CRT documents. Plaintiff's FOIA request, however, was directed to CRT. Supp. Cooper Decl., ¶ 9. Moreover, CRT made a supplemental release of this information to

plaintiff on March 20, 2018. *Id.* at ¶ 10.

As Ms. Cooper previously explained, CRT’s search was directed at the two offices within CRT likely to possess all the materials regarding the Commission and the Letter. Cooper Decl., ¶ 4. Plaintiff does not challenge that these were the appropriate offices to target in the search. *See* Plaintiff’s Opp. at 8-11. Indeed, plaintiff does not challenge any other description of the search performed. *Id.*

The Cooper Declaration and Supplemental Cooper Declaration make clear that CRT performed a thorough search for responsive records. Plaintiff has failed to undermine CRT’s showing that it identified all the places where responsive records might reasonably be found and performed a broad enough search to retrieve any responsive records.

**II. Pursuant to Exemption 5, CRT Properly Withheld Information Subject to the Deliberative Process Privilege and Work-Product Doctrine**

DOJ has invoked FOIA Exemption 5 to protect from disclosure information that is subject to the deliberative process and the attorney work product doctrine. Plaintiff challenges the invocation of both privileges.

**A. Deliberative Process Privilege**

Plaintiff argues that DOJ has failed to justify the application of the deliberative process privilege to four groups of documents for which it is asserted.

Plaintiff first challenges in “Group 1” the withholding of an email chain that relates to “the development of responses to Congressional inquiries for committee hearings on voting issues.” Plaintiff’s Opp. at 29, *quoting Vaughn Index* at 1. Inexplicably, plaintiff claims that this description does not establish that the document is predecisional. *Id.* at 29.

This argument has no merit. A description stating that the information pertains to “the development of responses” plainly shows that it is not a final document. In order to make this fact crystal clear, the Supplemental Cooper Declaration states that “[t]his document was both predecisional, and deliberative, reflecting opinions and recommendations as to the appropriate response to convey.” Id. at ¶ 43. Any factual information was an inextricable part of the deliberative discussions. Id.

Plaintiff next challenges in “Group 2” the withholding of email chains containing preliminary assessments of attorneys about whether states were in compliance with the NVRA and the HAVA. Plaintiff’s Opp. at 30. Plaintiff challenges the invocation of the deliberative process privilege for this information, on the grounds that the email chain may contain factual information, and that CRT failed to identify the positions and job duties of the authors and recipients. Id.

These email chains were sent to and from CRT attorneys in the Voting Section. The information withheld reflects opinions and recommendations about an ongoing enforcement action. Supp. Cooper Decl., at ¶ 43. Any factual information was an inextricable part of the deliberative discussions. Id.

Plaintiff challenges in “Group 3” the withholding of an email chain discussing potential areas in which two agencies could cooperate. Plaintiff’s Opp. at 30. Plaintiff argues that DOJ failed to explain how this discussion reflects the give and take of the consultative process as opposed to a mere discussion of administrative matters. Id.

The Supplemental Cooper Declaration explains that “[t]his email chain was between Special Counsel to the Acting Attorney General and the U.S. Election Assistance Commission. The document contains candid, frank, pre-decisional identification of proposed subject matters

and issues of vital enforcement issues that, if released, would harm the Division's capacity to conduct future exchanges without chilling the staff's exchange and presentation of views." Id. at ¶ 43. Any factual information was an inextricable part of the deliberative discussions. Id.

Finally, plaintiff challenges in "Group 4" the withholding of numerous pages in part, arguing that DOJ failed to demonstrate that the withheld information contains no factual information or does not relate to final decisions or completed actions. Plaintiff's Opp, at 31. Plaintiff cites no authority for the proposition that all factual information must be released. Id. In fact, this is inaccurate. The deliberative process privilege also protects factual materials that are closely intertwined with opinions, recommendations, and deliberations. Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 513 (D.C. Cir. 2011) ("[T]he legitimacy of withholding does not turn on whether the material is purely factual in nature or whether it is already in the public domain, but rather on whether the selection or organization of facts is part of an agency's deliberative process."); Mapother v. Dep't of Justice, 3 F.3d 1533, 1538-39 (D.C. Cir. 1993).

Additionally, the fact that predecisional information may relate to a final decision subsequently made, or action subsequently completed, does not mean that the predecisional information loses its protected status. Plaintiff cites no support for such a proposition. Moreover, "[t]o the extent that any of the withheld information relates to a final decision or action subsequently completed, the withheld information was created before any final decision or completed action and contains opinions and recommendations about decisions yet to be made or actions yet to be taken." Supp. Cooper Decl., ¶ 43. Any factual information was an inextricable part of the deliberative discussions. Id.

Plaintiff does not deny that Exemption 5's deliberative process privilege was designed specifically to prevent harm to the government's decision-making process. The Cooper Declaration and Supplemental Cooper Declaration amply demonstrates that the information withheld here is predecisional and deliberative in nature. Its release would harm the agency's decision-making process in ways courts have recognized should be prevented through the application of FOIA Exemption 5.

### **B. The Attorney Work-Product Doctrine**

CRT invoked the attorney work-product privilege to protect documents and information prepared in anticipation of litigation against a state for violations of the NVRA and HAVA. Cooper Decl., ¶ 24. The information withheld concerns "evaluations, analysis, recommendations, and discussions in contemplation of anticipated litigation against a state for possible violations of NVRA or HAVA [the disclosure of which would] reveal the very core of the Department's review of compliance with these statutes, and release of this information would undermine the Department's litigating position should the underlying enforcement actions become the subject of litigation." Supp. Cooper Decl., ¶ 44.

Plaintiff argues that DOJ has not identified actual anticipated litigation for which the documents were prepared. Plaintiff's Opp. at 32. The Voting Section is a litigating section. Its law enforcement investigations under the federal voting rights laws are all undertaken in anticipation of possible enforcement litigation. One of the state investigations flowing from the 2017 letter has already resulted in litigation and another has resulted in a settlement short of litigation. There may well be others that follow. Consequently, litigation was clearly anticipated and disclosure of the withheld information would reveal evaluations, analyses, strategies, and the

like that would hurt the government's case in court in the anticipated litigation were to occur. Supp. Cooper Decl., ¶ 44.

Because Exemption 5's attorney work-product doctrine was designed to prevent this very problem, and protect the government's work in anticipation of litigation, CRT's invocation of Exemption 5 here should be upheld.

**III. Pursuant to Exemption 7(A), CRT Properly Withheld Information Exempted from Disclosure Under Two Sub-Parts of Exemption 7.**

In order to invoke any of the subsections of Exemption 7, an agency must demonstrate as a threshold matter that the records were "compiled for law enforcement purposes." 5 U.S.C. 552(b). An agency satisfies this requirement when it demonstrates that "disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated." CREW v. U.S. Dep't of Justice, 746 F.3d 1082, 1096 (D.C. Cir. 2014).

Plaintiff challenges that the records at issue were compiled for law enforcement purposes and claims that they merely consist of an audit or compliance review. Plaintiff's Opp. at 19, 21. Plaintiff argues that the agency must have a particularized suspicion of wrong doing, a predicate, or probable cause that the federal laws have been violated in order for the Voting Section to open a law enforcement proceeding. Plaintiff's Opp. at 20. Plaintiff is wrong, both as a matter of fact and as a matter of law.

In Public Employees for Env'tl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, 740 F.3d 195,202-03 (D.C. Cir. 2014) ("PEER"), a case notably ignored by plaintiff, the Court of Appeals explained what the term "law enforcement" means within Exemption 7 of the FOIA as follows:



The term “law enforcement” in Exemption 7 refers to the act of enforcing the law, both civil and criminal. *See Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C.Cir.2002); Black's Law Dictionary 964 (9th ed.2009) (defining “law enforcement” as the “detection and punishment of violations of the law”). Law enforcement entails more than just investigating and prosecuting individuals *after* a violation of the law. As Justice Alito explained in his important concurrence in *Milner*, the “ordinary understanding of law enforcement includes ... proactive steps designed to prevent criminal activity and to maintain security.” *Milner v. Department of the Navy*, — U.S. —, 131 S. Ct. 1259, 1272, 179 L.Ed.2d 268 (2011) (Alito, J., concurring). “Likewise, steps by law enforcement officers to prevent terrorism surely fulfill ‘law enforcement purposes.’ ” *Id.*

*Id.* at 203. The foregoing makes clear that law enforcement proceedings that qualify for protection under Exemption 7 are not limited to proceedings that occur to enforce the law once there is a basis to believe that the law has been violated. Instead, law enforcement proceedings also encompass proactive proceedings to investigate whether the law has in fact been violated.

The Court of Appeals made this point clear in CREW. The Court emphasized that “Exemption 7(A) reflects the Congress's recognition that ‘law enforcement agencies ha[ve] legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it [comes] time to present their case.’ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978)”. CREW, 746 F.3d at 1096 (emphasis added).

Thus, to invoke Exemption 7(A), an agency must demonstrate that it has an ongoing or reasonable anticipated law enforcement proceeding, which can consist of an investigation into whether any violation of the law has occurred. An actual violation of the law does not have to be identified in order to invoke Exemption 7(A). PEER, 740 F.3d at 203. Thus, contrary to plaintiff's claim, see Plaintiff's Opp. at 23, law enforcement proceedings are considered initiated even without a suspicion that an actual violation of the law has in fact occurred.

Instead, agency records are considered “compiled for law enforcement purposes” and subject to withholding under Exemption 7(A), if the investigatory activity that gave rise to the documents is related to the enforcement of federal laws, and there is a rational nexus between the investigation at issue and the agency’s law enforcement duties. Stein v. U.S. Securities and Exchange Comm., 2017 WL 3141903 (D.D.C. July 24, 2017).

The Voting Section is one of the litigation sections in CRT. This Section has the jurisdiction and responsibility for conducting investigations and taking enforcement action under the civil provisions of the federal voting rights statutes enacted by Congress. Supp. Cooper Decl., ¶ 12. The first Cooper Declaration explains that all of the records withheld under Exemption 7 “are related to the enforcement of federal laws by CRT, specifically the NVRA and HAVA.” Cooper Decl., ¶ 17. The records were thus compiled for the Voting Section’s enforcement of federal voting laws with a nexus between the HAVA and NVRA investigations and the Section’s civil law enforcement duties. This does not, as plaintiff argues, consist of an audit.

The Supplemental Cooper Declaration explains that:

The Voting Section does not conduct audits, but rather conducts law enforcement investigations to enforce federal voting laws under its jurisdiction. In fulfilling its obligation to enforce the NVRA and the other federal voting rights laws, the Voting Section is not required to wait until evidence is available that a state may have violated these statutes. The Section, as part of its law enforcement activities, can and does proactively gather information concerning the electoral practices of jurisdictions as a preemptive measure to ensure there is compliance with federal law. Much of that information is not otherwise publicly available or otherwise available to the Section absent a specific request by the Section to states for that information and an appropriate and complete response from the states. Oftentimes, these information requests are necessarily accompanied by follow-up discussions between the Section and state officials to fully understand the information provided and to reconcile it with other available information. Once that information is gathered, it is not typically possible to determine or ascribe the significance of any particular document gathered in such reviews with regard to compliance with the

NVRA or other federal laws, since even information in public documents could have relevance that could preclude its release under FOIA. Sometimes, and rarely, a document may provide prima facie evidence of a violation of federal laws, such as when there is a direct admission of non-compliance.

Id. at ¶16.

Plaintiff cannot second-guess the CRT's decision to investigate by suggesting that these are not valid law enforcement proceedings. An agency's decision whether to investigate, prosecute or enforce has been recognized as purely discretionary and not subject to judicial review. Williams v U.S. Dept. of Justice, 2016 WL 8677198 (D.D.C. July 29, 2016). Similarly, government prosecutors have broad discretion for their prosecution decisions. This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Wayte v. United States, 470 U.S. 598, 607 (1985). Thus, the Court should decline plaintiff's suggestion that the Court pass judgment on whether the enforcement proceedings at issue here are valid proceedings.

Plaintiff's reliance on cases distinguishing audits from law enforcement proceedings has no bearing here. Plaintiff's Opp. at 22, n.9. For example, John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989), concerned whether information originally compiled for a non-law enforcement purpose could be exempt under Exemption 7 if later recompiled for a law enforcement purpose. Id. at 154. Contrary to plaintiff's suggestion, the Court found that such a recompiling could bring the information within Exemption 7's protection. Id.

Similarly, in Philadelphia Newspapers, Inc. v. U.S. Dep't of Health & Human Services, 69 F. Supp.2d 63 (D.D.C. 1999), the documents at issue were compiled as part of a routine Medicare compliance audit, conducted by the Office of Audit Services, which was an administrative arm of the Office of Inspector General. Id. at 67. The responsibilities of the Voting Section bear no resemblance whatsoever to an Office of Audit Services. Supp. Cooper Decl., ¶¶ 14-16.

Plaintiff's argument that the DOJ Letter constitutes a mere audit is also based on the misimpression that the identical letter was sent to each state. Plaintiff's Opp. at 21-22, 25. Plaintiff is wrong. As the Supplemental Cooper Declaration explains, "the letters followed a template for consistency, however, the letters were often tailored to some extent to specific questions about data and compliance in each state identified." Id. at ¶ 18. More particularly, Ms. Cooper explains that:

The letters that the Voting Section sent out to the states covered by the NVRA in July 2017 were investigative in nature. The letters were not part of an audit by the Section, since the Section does not have the jurisdiction or practice of doing such audits. While the July 2017 letters to states followed a template for consistency across the letters, the letters were often tailored to some extent to specific questions about data and compliance in each state. This process includes review of public information and other available information before letters are sent to the states. The letters are just one part of an overall process for discerning whether jurisdictions are in compliance with federal law.

Id. at ¶ 20.

Thus, the two Cooper declarations amply demonstrate that law enforcement proceedings were actively occurring with respect to the DOJ Letter. Consequently, the next question is whether release of the requested information would interfere with those proceedings.

Plaintiff argues that DOJ has improperly withheld information submitted by the states in response to the DOJ letter. Plaintiff claims that release of this information could not possibly

interfere with the government's case because the substance of what the state submitted is already known by the state. Plaintiff's Opp. at 24.

On the contrary, as the Supplemental Cooper Declaration explains:

[T]he Voting Section affirmatively requests information from elections officials and typically must confer with election officials to fully understand the data and what it signifies about the nature of the compliance with federal laws. This necessarily involves back-and-forth communications with jurisdictions as part of these requests. The Section seeks to work cooperatively with state and local election officials to obtain the information needed to conduct its law enforcement investigations. Cooperation with election officials and legal counsels for jurisdictions would be significantly hindered, or even foreclosed, if public disclosure or information about the current status of the law enforcement proceeding is released.

Id. at ¶ 30. Disclosure of this information could prevent the government from obtaining such data in the future. See Timken v. U.S. Customs Service, 531 F. Supp. 194, 199-200 (D.D.C. 1981) (holding that disclosure of investigation records would interfere with the agency's ability "in the future to obtain this kind of information"). This is especially true given that the Voting Section does not have general subpoena authority. Supp. Cooper Decl., ¶ 39.

Additionally, as Ms. Cooper explained in her first declaration, releasing one state's information could allow another state to try to manipulate its own data to present a more favorable position to CRT with respect to compliance issues under the NVRA and the HAVA, even if the reality was altogether different. Cooper Decl., ¶ 19. This clearly would harm CRT's efforts to ensure compliance with these federal statutes. Plaintiff's claim that a state could not alter or destroy evidence relevant to a NVRA violation without detection, Plaintiff's Opp, at 26, is without support and cannot overcome the Cooper Declaration's showing of harm.

Plaintiff argues that release of any records pertaining to Kentucky would not interfere with law enforcement proceedings because there has been a settlement with that state. Plaintiff's

Opp. at 27. Plaintiff concedes that DOJ released some records pertaining to Kentucky. Id. Plaintiff cites no authority for the proposition that a settlement necessarily precludes the application of Exemption 7(A) for related documents.

Proceedings with respect to Kentucky have not concluded. There is a consent decree in place until 2023 during which time Kentucky must show compliance with the terms of the decree. There are open compliance questions that remain subject to enforcement proceedings and additional action remains possible. Supp. Cooper Decl., ¶ 23. Thus, there are open, active enforcement proceedings in Kentucky that could be harmed by the release of the information withheld pertaining to Kentucky. Id.

Given that the Kentucky matter is an ongoing law enforcement proceeding, and the potential for additional court action exists, further release of documents at this time could reasonably be expected to cause some articulable harm. ABC Home Health Servs. v. HHS, 548 F. Supp. 555, 556, 559 (N.D. Ga. 1982)(holding documents protected when “final settlement” was subject to reevaluation for at least three years); Timken v. U.S. v. Customs Serv., 531 F. Supp 194, 199-200 (D.D.C. 1981)(finding protection proper when final determination could be challenged or appealed); Zeller v United States, 467 F. Supp. 486, 501 (S.D.N.Y. 1979)(finding that records compiled to determine whether party is complying with consent decrees were protectable).

Plaintiff complains that DOJ’s Vaughn Index and prior Cooper Declaration do not sufficiently explain the harms from releasing the categories of information withheld. Plaintiff’s Opp. at 12-14. To the extent that there is any merit to plaintiff’s claims, the Supplemental Cooper Declaration provides additional detail as to the categories of information withheld and

the harm that would result from their release.

For example, one category of records concerns draft documents submitted to CRT in response to a request for information or the submitters inquiries regarding the applicability of the HAVA or the NRVA. Ms Cooper states that:

The Section gathers and reviews these records for purposes of its compliance investigations and may discuss them further with the states. Some of these include draft statutes, draft regulations, or draft manuals or procedures submitted by the entity to the Division for purposes of the state description of their compliance efforts. Revealing these documents while the investigation is pending would provide critical insights into the government's legal thinking and strategy. It would also reveal potential evidence in the government's case. It would also cause harm by hindering the government's ability to control and shape the investigation. Such evidence would also undermine the pending investigation by prematurely revealing the scope and focus of the investigation, which would adversely impact prospective litigation. Disclosure could also discourage ongoing cooperative engagement with elections officials and their counsel regarding underlying compliance questions and also discourage any cooperating witnesses from providing information to the Section.

Id at ¶ 33. Ms. Cooper describes several other categories of information and the specific harm that would result from their disclosure. Id., at ¶¶ 26-36. All of this shows how release of the information withheld under Exemption 7(A) would harm CRT's enforcement proceedings. Id.

As Ms. Cooper explains:

In sum, to release any other documents before the investigations are completed and before final determinations are made would jeopardize these active law enforcement proceedings. The investigative materials relate to concrete, prospective law enforcement proceedings against the 44 states and D.C. These are active, ongoing enforcement actions regarding states' compliance with the federal voting rights statutes and voter registration list maintenance requirements under these federal statutes. Disclosure of these investigative materials would cause harms by revealing its investigation and litigation strategies utilized in fulfilling its statutory mandates under NVRA and HAVA and jeopardize CRT's enforcement interests. Disclosure would reveal the Division's strategy and evaluation of evidence pertaining to the pending enforcement proceedings against the states and the District of Columbia. Harm would result from prematurely releasing information that would reveal investigative strategies regarding the type

of information sought from the states, and what data is found to be particularly probative of a state's compliance with the voter registration list maintenance list requirements under the federal voting rights statutes. These materials include evaluations, analysis, recommendations and discussions in contemplation of possible litigation against a state for violations of NVRA or HAVA. Release at this time of the investigative materials could reveal the scope and focus of the investigations; tip off individuals or states to information of interest to law enforcement; provide subjects the opportunity to alter evidence to avoid detection; and reveal the core of the Department's review of compliance with these statutes.

Supp. Cooper Decl., ¶ 40.

Both Cooper declarations demonstrate that DOJ has properly asserted Exemption 7(A) to protect from disclosure categories of information in ongoing enforcement proceedings the release of which would harm the government's ability to successfully pursue its enforcement proceedings.<sup>1</sup>

#### **IV. CRT Has Complied with FOIA's Segregability Requirement.**

The Cooper Declaration states that CRT conducted a line-by-line review of the withheld information to ensure all reasonably segregable information was released, and that no additional reasonably segregable information can be disclosed. *Id.* at ¶ 28. Plaintiff simply argues that "it defies logic" that no additional information can be segregated and released. Plaintiff's Opp. at 33. Such speculation cannot overcome DOJ's sworn declarations. *See, e.g., Safecard Services Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

Then plaintiff seems to suggest that DOJ is required to go through each entry in the Vaughn Index and explain why no additional information can be segregated and released. Plaintiff's Opp. at 34. Plaintiff offers no details as to what additional information is needed. *Id.*

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<sup>1</sup> Plaintiff fails to oppose defendant's motion for summary judgment with respect to the invocation of FOIA Exemptions 6 and 7(C). Plaintiff's footnote 2 does not qualify as an opposition. Accordingly, DOJ is entitled to summary judgment on these claims.



Once an agency explains the basis for withholding certain information, states that it has reviewed the withheld information line-by-line and no additional nonexempt information exists to be released, the agency has met its obligations to show there is no additional segregable information to release. See Johnson v. EOUSA, 310 F.3d 771, 776 (D.C. Cir. 2002). Plaintiff cites to no authority that an agency must repeat this same information on a Vaughn index for each entry, when thousands of pages are at issue.

CRT has adequately demonstrated that no additional non-exempt information can be released, and thus this Court should find that the segregability requirement has been met.<sup>2</sup>

### **CONCLUSION**

Accordingly, for all of the reasons set forth above and in DOJ's prior memorandum, in the Cooper declarations and Vaughn Index, defendant respectfully submits that its motion for summary judgment should be granted and plaintiff's cross-motion for summary judgment should be denied.

Respectfully submitted,

JESSIE K. LIU,  
D.C. BAR # 472845  
United States Attorney  
for the District of Columbia

DANIEL F. VAN HORN,  
D.C. BAR #924092  
Chief, Civil Division

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<sup>2</sup> In a footnote plaintiff asks for summary judgment on Count III of the Complaint, seeking expedited processing of its request. Plaintiff's Opp. at 7, n.3. Given that plaintiff's request has already been processed, this claim is clearly moot. American Bar Ass'n v. Federal Trade Comm., 636 F.3d 641, 645 (D.C. Cir. 2011) (even if litigation poses a live controversy when filed, if events transpire to render a claim moot the Court should refrain from deciding it). Thus, plaintiff is not entitled to summary judgment on it.

/s/ Marina Utgoff Braswell  
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BRENNAN CENTER )  
FOR JUSTICE )  
AT NEW YORK UNIVERSITY )  
SCHOOL OF LAW, )

Plaintiff, )

v. )

U.S. DEPARTMENT OF JUSTICE, )

Defendant. )

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Civil Action No. 18-1841 (ABJ)

**ORDER**

Upon consideration of defendant's motion for summary judgment, plaintiff's opposition and cross-motion for summary judgment, and the entire record in this case, the Court finds that there are no issues of material fact and the defendant is entitled to judgment as a matter of law.

Therefore, it is hereby

ORDERED that defendant's motion for summary judgment is granted; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied.

This is a final, appealable order.

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UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BRENNAN CENTER FOR JUSTICE

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

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No. 18-cv-01841

SUPPLEMENTAL DECLARATION OF TINK COOPER

I, Tink Cooper, declare the following to be true and correct:

1. I am the Acting Chief of the Freedom of Information/Privacy Act (FOI/PA) Branch of the Civil Rights Division (“CRT” or the “Division”) of the United States Department of Justice in Washington, D.C. My duties include supervision of the FOI/PA Branch of CRT, which is responsible for processing all Freedom of Information Act (FOIA), 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, records access requests received by the Division. I make the statements herein on the basis of personal knowledge, as well as information acquired by me in the course of performing my official duties. I am responsible for processing the documents responsive to Plaintiff’s FOI/PA request to CRT that is at issue in this lawsuit.

2. This declaration supplements, and hereby incorporates by reference, the information previously provided in my first declaration. The purpose of this declaration is to address specific

issues raised by Plaintiff's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment and to clarify my first declaration.

SEARCH CONDUCTED

3. In response to Plaintiff's request, CRT utilized information learned from multiple searches undertaken in response to earlier-filed FOIA requests for similar subject matters and also undertook additional new searches specific to this request. CRT's search was directed to the two offices, the OAAG and the Voting Section, likely to encompass all relevant materials regarding the Commission and its June 28, 2017 letter ("DOJ Letter") as more fully described in the first declaration.

4. Plaintiff issued two requests to CRT which implicated some of the same records. The Division recognized there were two different requests with overlapping subject matters. Plaintiff even admitted the two requests "bear(s) some similarity" but that it did not overlap entirely with this request. Because of the similarity of the two requests and identical language in some portions, I reached out to resolve any ambiguity. This was an attempt to clarify Plaintiff's ultimate interests and objectives and as evidence of the agency's good faith.

5. CRT searched for almost 80 custodians. Plaintiff challenges the fact the CRT did not identify the 71 staff members of the Voting Section. CRT provided the names and titles of the higher level and senior management custodians in the Office of the Assistant Attorney General (OAAG) and the Voting Section. The names of other Voting Section staff members include attorneys, paralegals, clerical and administrative staff can be provided if the court determines it is necessary. As discussed in the first declaration, many broad search terms were used in the search

for the time period from November 8, 2016 through July 25, 2017. CRT subsequently extended the search through September 27, 2017, using the same search terms.

6. As described in the first declaration, Plaintiff's request was forwarded to the Voting Section. Three individuals in the Voting Section have personal knowledge of the Section and all matters, cases, or other law enforcement proceedings addressed by the Section: Chris Herren, the Chief of the Voting Section; Rebecca J. Wertz, the Principal Deputy Chief; and Robert S. Berman, a Deputy Chief and the designated FOIA contact for the Voting Section. As the senior management and leadership of the Voting Section, Mr. Herren, Ms. Wertz, and Mr. Berman identified all responsive records regarding the DOJ Letter. Although inadvertently omitted from my first declaration, the June 28, 2017 letter was also used as the search term. The Voting Section senior management located responsive records from 44 chief election officials in the states and in the District of Columbia. The materials responsive to the FOIA request were gathered from the investigation files related to each state and maintained by the Voting Section staff working on those matters and investigations. These investigations are part of the Division's case management system referred to as "ICM" (Interactive Case Management System). As the Division's official case management system, ICM tracks matters and cases from their inception to conclusion.

7. In searching for the first item of Plaintiff's FOIA request, the Voting Section located approximately 20,200 pages of responsive records from documents provided by the chief election officials of the 45 jurisdictions covered by the NVRA and HAVA (44 states and D.C.) in response to CRT's June 28, 2017 letter. [Note: The Vaughn correctly identified the 45 NVRA and HAVA investigations (44 states and the District of Columbia), while a typographical error was made in the first declaration to refer to 45 investigations and the District of Columbia.] These records

consisted of the documents received by the Division from the 45 election officials (from all states and D.C.) covered by the NVRA in response to the DOJ Letter.

8. CRT determined that certain documents regarding the NVRA and HAVA investigation into the Commonwealth of Kentucky could be released because that proceeding is in a different stage. Those documents were released in full because it was determined that their release would not interfere with the law enforcement proceedings against the Commonwealth of Kentucky. CRT determined that disclosure of any of the responsive records in the other (44 states and D.C.) pending law enforcement proceedings is reasonably expected to interfere with those proceedings.

9. Plaintiff also alleges that it received records in its New York FOIA case which should have been produced in the instant case. We note the 100 page production on April 27, 2018 was a response by the Office of Information Policy and not the Civil Rights Division. The Office of Information Policy (OIP), a different component of the Department of Justice, has responsibility for records originating with the offices of the Attorney General, Deputy Attorney General, and Associate Attorney General, and other Department of Justice senior management offices. A handful of documents in OIP's April 27, 2018 production contained CRT's equities, about which OIP consulted with CRT, but the primary equities were the senior management offices. The record was, up to that point, considered to be an OIP record since OIP had the primary equities. As Department of Justice regulations make clear, "the Department has a decentralized system for processing requests, with each component handling requests for its records." 28 C.F.R. § 16.1(c). In accordance with 28 C.F.R. § 16.1, *et. seq.*, and the Department of Justice's policy and practice, OIP is the authority responsible for making all disclosure determination regarding records that

originated with the senior management offices or that contain exchanges between the senior management offices and lower level offices such as the Civil Rights Division. For these reasons, OIP was the primary Department of Justice component responsible for handling this record. Plaintiff alleges certain actions are taken by the Department of Justice as a whole when it is conflating the individual responses of CRT and OIP. Again, as the regulation states, each component has different responsibilities regarding its own FOIA requests. Plaintiff's request here was directed to CRT, not the Department of Justice or OIP.

10. Plaintiff is apparently alleging that the Senator Whitehouse letter should have been produced by the Division as a response in both of its FOIA requests. The record was, up to that point, considered to be an OIP record since OIP had the primary equities as the letter was issued by the Office of Legislative Affairs, one of the senior management offices. OIP informed the Civil Rights Division that OIP addressed this record in its response to the similar FOIA request for the New York lawsuit on March 31, 2018 and released it in full. The Division had obtained OIP's authorization to re-address records and released the letter to Plaintiff on March 20, 2018 for this FOIA request.

EXEMPTION 7(A) – Information compiled for pending law enforcement proceedings

11. Here, the records compiled for law enforcement purposes relate to the enforcement of federal voting laws for which the Division has jurisdiction; specifically, the Help America Vote Act (HAVA), 42 U.S.C. §15301 *et. seq.*, and the National Voter Registration Act (NVRA), 42 U.S.C. § 1973gg *et. seq.*

12. The Voting Section is one of the litigation sections in the Civil Rights Division of the U.S. Department of Justice. The Voting Section has the jurisdiction and responsibility for



conducting investigations and taking enforcement action under the civil provisions of the federal voting rights statutes enacted by Congress. 28 C.F.R. 0.50; Justice Manual, Title 8. These statutes include the Voting Rights Act, the Uniformed and Overseas Citizens Absentee Voting Act, the National Voter Registration Act, the Help America Vote Act and parts of the Civil Rights Acts. The Voting Section is the part of the Department of Justice that is authorized to do this civil enforcement work.

13. Over decades of experience, the Voting Section has developed methodologies for how it does its investigations and enforcement work, and how it responds to the many requests for information it receives regarding such open investigations. The Voting Section's leadership is composed of Department of Justice attorney-managers. All of these attorney managers have served in the Civil Rights Division for two decades or more, and in most instances, these managers have served the Voting Section for that entire time. The Section's leadership has personal familiarity with the Section's historical practices regarding investigations and enforcement actions and requests for information regarding the Section's work.

14. The Voting Section's investigations under the federal voting rights statutes most often deal with state and local governmental entities that conduct voter registration and election activities and whether those entities are in compliance with the federal voting rights laws. The Section's investigations are also generally aimed at structural compliance issues that occur across a number of election cycles. As a consequence, the Section's investigations under many of its statutes often stretch across many years and many election cycles before reaching a resolution as to whether enforcement action is necessary, and if so, what type of resolution is appropriate. The Voting Section does not "do audits" of compliance by jurisdictions, routine or otherwise. That is

not the Section's jurisdictional mandate or methodology. Rather, the Section opens law enforcement investigations, which are based on the Section's law enforcement functions under the federal voting rights laws. These investigations are tracked in the Civil Rights Division's Interactive Case Management system (ICM).

15. At various points in time, the Section may open investigations into particular compliance questions under the federal voting rights laws and send information requests to every state and territory at the same time. At other times, the Section may review the available information and decide to open investigations and send requests to only a subset of states at one time, or a series of subsets of states over various periods of time. This is true not just of the NVRA, but the other federal statutes the Section enforces as well. These law enforcement proceedings have the same investigative character, whether they are done all at once or done in parts or subparts. Sending investigative requests to every state helps to generate information that allows a more complete picture of compliance and non-compliance across the country on a given subject and allows the Section to discern where non-compliance may be the greatest. Because much of the information that the Section needs to determine compliance rests with state elections officials alone, and cannot otherwise be discerned from publicly available sources, the Section cannot obtain a real picture of compliance across the country without periodically requesting this information from the states.

16. Plaintiffs here mischaracterize the underlying letters to the states in July 2017 DOJ Letter as a "routine audit." The letters here were issued by the Voting Section pursuant to its authority under the HAVA and NVRA. The Voting Section does not conduct audits, but rather conducts law enforcement investigations to enforce federal voting laws under its jurisdiction. In

fulfilling its obligation to enforce the NVRA and the other federal voting rights laws, the Voting Section is not required to wait until evidence is available that a state may have violated these statutes. The Section, as part of its law enforcement activities, can and does proactively gather information concerning the electoral practices of jurisdictions as a preemptive measure to ensure there is compliance with federal law. Much of that information is not otherwise publicly available or otherwise available to the Section absent a specific request by the Section to states for that information and an appropriate and complete response from the states. Oftentimes, these information requests are necessarily accompanied by follow-up discussions between the Section and state officials to fully understand the information provided and to reconcile it with other available information. Once that information is gathered, it is not typically possible to determine or ascribe the significance of any particular document gathered in such reviews with regard to compliance with the NVRA or other federal laws, since even information in public documents could have relevance that could preclude its release under FOIA. Sometimes, and rarely, a document may provide prima facie evidence of a violation of federal laws, such as when there is a direct admission of non-compliance.

17. I, and another FOIA attorney under my direction and supervision, conducted a document-by-document review of these response records.

18. Plaintiff incorrectly claims that the July 2017 letter that DOJ sent to each State was identical. As more fully discussed below, the letters followed a template for consistency, however, the letters were often tailored to some extent to specific questions about data and compliance in each state identified. Plaintiff challenges the grouping of the responsive documents for the investigations regarding the 44 states and District of Columbia under HAVA and NVRA. Even

discussing the number of responsive documents for each state reveals sensitive internal information about the particular enforcement proceeding. For example, some states provided approximately 100 pages of responsive records, some states provided several hundred pages, and other states provided over a thousand pages. Disclosing the total volume of responsive information would reveal information about the nature, scope, focus, and conduct of the active ongoing investigation in each of the investigations regarding the 44 states and District of Columbia. To describe in detail the particular documents for each underlying law enforcement proceeding would also reveal more about the compliance or non-compliance of the voting laws in that particular state or entity.

19. Categories of documents being withheld consist of documents provided by the 45 chief election officials (for the 44 states and D.C.) in response to CRT's June 28, 2017 letter: documentary evidence and analyses of such evidence; emails, letters, and other communications with the states; the states' narrative responses to the Division's requests for information; proposed legislation; draft versions of proposed bills; bills, regulations, and codes; policies; guidance; brochures; election manuals or descriptions regarding voter registration procedures; election processes; convicted felons information; and death notices provided by the states. Other responses from the states include discussion of case law on particular issues such as the NVRA and HAVA. Some states provided supplemental responses in response to CRT's requests for clarification and additional information. CRT's supplemental document requests and the states' responses are part of the investigative materials specifically related to the compliance and non-compliance of the 44 states and D.C. with the NVRA and HAVA voter registration list maintenance requirements. Providing a document-by-document description of the records potentially responsive to Plaintiff's request at this time would undermine the very interests that CRT seeks to protect under Exemption

7(A) by revealing the information requested from a particular state which would in turn expose CRT's investigative focus and legal strategy in each investigation. In order to protect these interests, CRT has instead described the categories of responsive records that are being withheld.

20. The letters that the Voting Section sent out to the states covered by the NVRA in July 2017 were investigative in nature. The letters were not part of an audit by the Section, since the Section does not have the jurisdiction or practice of doing such audits. While the July 2017 letters to states followed a template for consistency across the letters, the letters were often tailored to some extent to specific questions about data and compliance in each state. This process includes review of public information and other available information before letters are sent to the states. The letters are just one part of an overall process for discerning whether jurisdictions are in compliance with federal law. This is a similar process to what the Voting Section undertakes for other types of compliance questions under other federal statutes it enforces. That process includes review of available public information before sending the letters, drafting letters and tailoring them to some extent to particular questions in various states, seeking information from the states, reviewing the information provided, following up with the states on missing items, contacting and often meeting with the states regarding further questions, doing additional research and looking at data across a number of years and across all states. This is an ongoing process for the Voting Section's investigations that often takes significant time, and make take a number of years, across numerous election cycles. In each state, there is an open investigative matter in ICM regarding compliance by these states with the NVRA, related to the July 2017 letters.

21. The July 2017 letters touched on a subject matter – voter registration list maintenance - that is peculiarly one that the Section must affirmatively ask for information about

from the states in order to conduct a meaningful investigation. The Section can send its staff into certain state offices, e.g., driver license offices, public assistance offices or disability services offices, simply to observe and it can perhaps discern at least some information about whether voter registration activity is occurring. However, sending Section staff into a state voter registration office simply to observe does not tell one much of anything meaningful about whether proper list maintenance is occurring in terms of timely and proper additions and removals from voter registration lists. To discern something meaningful about whether proper voter registration list maintenance is occurring, the Section needs specific information from jurisdictions and discussion with election officials to understand what is happening. Hence, the Section must affirmatively request such information from elections officials and typically must confer further with election officials to fully understand the data and what it signifies about the nature of compliance with federal law.

22. The investigations related to the July 2017 letters remain ongoing and will continue to incorporate new data as it becomes available. For example, such investigations include careful review and consideration of the nationwide data on NVRA compliance included as part of the Election Administration and Voting Survey (EAVS) data released every two years by the U.S. Election Assistance Commission (EAC) pursuant to the NVRA. The EAC has announced it will issue the new EAVS data from the 2018 federal election a bit more than a month from now, on June 30, 2019. <https://www.eac.gov/research-and-data/election-administration-voting-survey/> The Voting Section will be reviewing this nationwide data as part of its ongoing investigative efforts under the NVRA.

23. Additionally, Plaintiff seeks release under FOIA of certain materials related to the Voting Section's investigation of NVRA compliance in one state in particular, Kentucky. However, it would not be appropriate to disclose any further materials in that matter now while it remains ongoing, beyond those public materials that have already been released under FOIA. Based on its investigation related to the July 2017 letter to Kentucky, the Voting Section on behalf of the United States intervened in an existing private party lawsuit regarding compliance by Kentucky and its officials with the NVRA. *Judicial Watch and United States v. Grimes*, Civil Action No. 3:17cv00094 (E.D.K.Y.). In July 2018, the parties entered into a settlement of those allegations in the form of a consent decree that included certain specific requirements for Kentucky to come into compliance with the NVRA. By its own terms, the consent decree is to remain in place until at least October 2023. The consent decree also provides for the possibility that the court could extend the decree based on the consent of the parties or based on a finding that there has not been substantial compliance. The consent decree in this case provides for the court to retain jurisdiction to enter such further relief as may be necessary for the effectuation of the terms of the decree. There remain a number of open compliance questions in that matter that the parties are continuing to discuss, and additional action remains possible. Further release of documents from the Department's files related to the open and active law enforcement proceeding in Kentucky would not be appropriate at this time.

24. Exemption 7(A) clearly applies to the ongoing law enforcement proceeding in Kentucky as the Civil Rights Division retains oversight and other continuing enforcement responsibilities. For instance, we note there have been public news reports of allegations that certain Kentucky state officials may have directed staff to "ignore" and "slow-walk" compliance

with the consent decree after it was entered in this case and news reports indicate that state investigations into these allegations have been undertaken and remain unresolved. Public news reports also indicate that the state legislature has enacted legislation affecting the power the chief state elections official.

<https://www.kentucky.com/news/politics-government/article217402060.html>;

<https://www.kentucky.com/news/politics-government/article219381855.html>;

<https://www.propublica.org/article/kentucky-state-board-of-elections-power-grab>;

[https://www.courier-journal.com/story/news/politics/2018/08/28/republicans-demand-](https://www.courier-journal.com/story/news/politics/2018/08/28/republicans-demand-federal-investigation-kentucky-secretary-state-alison-lundergan-grimes/1117804002/)

[federal-investigation-kentucky-secretary-state-alison-lundergan-grimes/1117804002/;](https://www.courier-journal.com/story/news/politics/2018/08/28/republicans-demand-federal-investigation-kentucky-secretary-state-alison-lundergan-grimes/1117804002/)

[http://kentuckytoday.com/stories/beshear-appoints-independent-counsel-to-investigate-](http://kentuckytoday.com/stories/beshear-appoints-independent-counsel-to-investigate-grimes,15474)

[grimes,15474;](http://kentuckytoday.com/stories/beshear-appoints-independent-counsel-to-investigate-grimes,15474) [https://spectrumnews1.com/ky/louisville/pure-politics/2018/10/22/grimes-](https://spectrumnews1.com/ky/louisville/pure-politics/2018/10/22/grimes-speaks-following-allegations-of-misconduct-and-harassment)

[speaks-following-allegations-of-misconduct-and-harassment;](https://spectrumnews1.com/ky/louisville/pure-politics/2018/10/22/grimes-speaks-following-allegations-of-misconduct-and-harassment)

[https://www.wkyt.com/content/news/Grimes-calls-accusations-baseless-after-Beshear-](https://www.wkyt.com/content/news/Grimes-calls-accusations-baseless-after-Beshear-appointments-outside-counsel-to-lead-investigation-495096661.html)

[appointments-outside-counsel-to-lead-investigation-495096661.html](https://www.wkyt.com/content/news/Grimes-calls-accusations-baseless-after-Beshear-appointments-outside-counsel-to-lead-investigation-495096661.html);

[https://www.propublica.org/article/kentucky-legislature-bill-strips-authority-alison-](https://www.propublica.org/article/kentucky-legislature-bill-strips-authority-alison-grimes)

[grimes;](https://www.propublica.org/article/kentucky-legislature-bill-strips-authority-alison-grimes)<https://www.kentucky.com/news/politics-government/article227823859.html>;

[http://kentuckytoday.com/stories/grimes-contests-law-removing-much-of-her-election-](http://kentuckytoday.com/stories/grimes-contests-law-removing-much-of-her-election-powers,19316)

[powers,19316.](http://kentuckytoday.com/stories/grimes-contests-law-removing-much-of-her-election-powers,19316)

The Division makes no comment on any of these news reports but notes that questions raised in these news reports are allegedly related to compliance with the consent decree. Further, the Voting Section continues to confer with the Kentucky officials on a regular basis regarding compliance



questions with the consent decree to which the Department is a party. Those discussions have occurred as recently as the past week after the state's May 2019 primary election.

25. The Voting Sections' investigations connected to the July 2017 letters remain ongoing and continue to generate results. For example, on February 15, 2019, the Department of Justice announced it has entered into a Memorandum of Understanding with the State of Connecticut through the Connecticut Secretary of the State to help ensure compliance with federal law regarding maintenance of voter registration lists. This agreement was negotiated between the Voting Section and Connecticut officials. Under the agreement, Connecticut will coordinate its statewide voter registration database with Connecticut Department of Public Health records to identify registered voters who have died. Section 303 of HAVA requires states to implement a computerized statewide voter registration list and, along with Section 8 of the NVRA, includes requirements for maintaining this computerized list. As part of these requirements, a state must coordinate its voter registration lists with state agency records on death for purposes of removing the names of deceased voters from its voter rolls. This agreement is in effect for twenty-two months. Similar to the Kentucky consent decree and case law noted above, the Connecticut investigation is an ongoing law enforcement proceeding, and further release of documents at this time could reasonably be expected to cause some articulable harm. The announcement regarding the agreement between the Department and Connecticut is available at the following link: <https://www.justice.gov/opa/pr/united-states-announces-memorandum-understanding-ensuring-compliance-voter-registration>. The agreement itself is available at the following link: <https://www.justice.gov/opa/press-release/file/1132801/download>. Plaintiff is referred to this web link for a copy of the agreement.

26. As indicated above, the law enforcement proceedings into Kentucky and Connecticut are covered by Exemption 7A. Plaintiff alleges the Kentucky proceeding is closed. For the sake of argument, even assuming this statement is correct, both of the Kentucky and Connecticut matters are still be protected by 7A. Even after an underlying enforcement action is closed, the continued use of Exemption 7A may be proper, provided that related proceedings are still pending. *Al-Turki v. Dep't of Justice*, 175 F. Supp. 3d 1153, 1192 (D. Colo. 2016)(the documents at issue, while not directly related to an ongoing investigation, contain information that is intertwined with or related to other ongoing investigations). However, both the Kentucky and Connecticut matters remain as open enforcement matters for the Voting Section, with ongoing interaction with the states involved regarding compliance. In addition, these two proceedings also remain directly related to the other open state investigations under the NVRA and HAVA by the Voting Section.

EXEMPTION 7(A) – Release of Information could reasonably be expected to cause harm

26. Please refer to the first declaration and the Vaughn index for the discussion about the 9 pages of records withheld in full or in part. This section will more particularly describe the harms associated with release of the group of investigative documents collected as part of the law enforcement proceedings for the ongoing open investigations in the states and the District of Columbia consisting of approximately 20,200 pages.

27. We note that only a limited subset of materials and information relating to compliance by jurisdictions with the federal voting rights statutes are available publicly. Therefore, the Voting Section has to affirmatively request information from jurisdictions as part of its investigations, and the Section has to have follow-up conversations with jurisdictions as part of

those requests. Where possible, the Voting Section seeks to work cooperatively with state and local election officials to obtain the information needed to conduct its law enforcement investigations. This effort to work cooperatively with jurisdictions counsels against public discussion of open investigations and public disclosure of investigative materials in open investigations by the Section

28. Specific harms that would result from the release of these materials would impact the law enforcement proceedings. The potential disruption to its investigations from partial and premature release of information, the sensitivity and complexity of the Section's work, and the length of time it often takes for the Section to conclude its investigations that stretch across multiple election cycles, as well as efforts by the Section to maintain consistency in enforcement of the federal voting rights statutes across the country, are all considerations that support the non-disclosure of materials from open, active law enforcement proceedings. It would hinder the Section's ability to control and shape its investigations and enforcement activities.

29. Perhaps unlike other units of the Department of Justice, the Voting Section's open investigations are not made public, and that has been the Section's general historical practice. The Section does not publicly announce its investigations. Nor does the Section disclose its open investigations or the materials gathered as part of those open investigations to the public. Historically, the Section has received a large number of requests regarding its open investigations. The Section endeavors to respond to those many requests in as consistent a manner as possible, and does not generally make information public regarding its open investigations.

30. As described above, the Voting Section affirmatively requests information from elections officials and typically must confer with election officials to fully understand the data and

what it signifies about the nature of the compliance with federal laws. This necessarily involves back-and-forth communications with jurisdictions as part of these requests. The Section seeks to work cooperatively with state and local election officials to obtain the information needed to conduct its law enforcement investigations. Cooperation with election officials and legal counsel for jurisdictions would be significantly hindered, or even foreclosed, if public disclosure or information about the current status of the law enforcement proceeding is released.

31. One category of records involves the materials submitted by the state or local entities in response to the Division's initial Letter, and follow-up requests for information or inquiries on particular issues regarding HAVA or NVRA. The Section gathers and reviews these records for purposes of its compliance investigations and may discuss them further with the states. Prematurely revealing such information could reveal evidence or strategy in the government's cases. Disclosure of this information could prevent the government from obtaining such data in the future. *Timken v. U.S. Customs Service*, 531 F. Supp 194, 199-200 (D.D.C. 1981) (holding that disclosure of investigation records would interfere with the agency's ability "in the future to obtain this kind of information"). Plaintiff alleges, at a minimum, is it entitled to receive the information the state and local entities provided to the Justice Department in response to the letter and alleges there is not any harm from such release. As *Timken* held, this same theory generally applies to all ongoing government investigations and the Department's mental processes and legal strategies should be protected. Plaintiff misconstrues the underlying basis for a law enforcement proceedings.

32. Another category of records involves internal emails, documentary evidence and analyses of such evidence, internal communications between the attorney and the supervisor regarding the review and analysis of these collected records and evidence from the underlying 44

states and the District of Columbia law enforcement proceedings. Disclosure of such records and information would reveal internal thinking and mental processes which is clearly protected by the deliberative process privilege and the attorney work product privileges. These records may also discuss possible civil violations of the federal voting laws which go to the heart of the Voting Section's view of the states' compliance or non-compliance with the voting laws.

33. Another category of records involves draft materials submitted by the state or local entities responding to the Division's request for information or inquiries regarding HAVA or NVRA. The Section gathers and reviews these records for purposes of its compliance investigations and may discuss them further with the states. Some of these include draft statutes, draft regulations, or draft manuals or procedures submitted by the entity to the Division for purposes of the state description of their compliance efforts. Revealing these documents while the investigation is pending would provide critical insights into the government's legal thinking and strategy. It would also reveal potential evidence in the government's case. It would also cause harm by hindering the government's ability to control and shape the investigation. Such evidence would also undermine the pending investigation by prematurely revealing the scope and focus of the investigation, which would adversely impact prospective litigation. Disclosure could also discourage ongoing cooperative engagement with elections officials and their counsel regarding underlying compliance questions and also discourage any cooperating witnesses from providing information to the Section.

34. Another category of records involves the public materials submitted by the state or local entities responding to the Division's request for information or inquiries regarding HAVA or NVRA. The Section gathers and reviews these records for purposes of its compliance

investigations and may discuss them further with the states. Although some of these documents are public materials, release of these particular documents while the investigation is pending would provide critical insights into the government's legal thinking, strategy and overall investigative plans. It would also reveal potential evidence in the government's case and would cause harm by hindering the government's ability to control and shape the investigation. A unique feature of the voting laws is that the Section will review measures taken nationally in order to fully understand a state's actions. Such release would adversely affect the other ongoing 44 investigations and District of Columbia investigation.

35. Another harm would result in releasing this information which may potentially impact the negotiation process if the Department was attempting to settle a matter or negotiate a settlement agreement in lieu of protracted litigation. If information is prematurely released, it could harden the state's position so that it would no longer be amenable to the negotiation process or respond to other third party inquiries or articles in the news media about the effectiveness of one position over another. Thus, the states may be disinclined to negotiate with the Department.

36. Another harm may result from releasing information to private parties or private entities. Many of the voting rights statutes are unique because the statutes contain a private right of action for aggrieved persons. Hence, private parties such as plaintiffs here are free to conduct their own investigations, make their own information requests of jurisdictions, and bring their own lawsuits against jurisdictions under most of the federal voting rights statutes, including the NVRA. In general, private parties can seek the same information from states and other entities that conduct elections that the Voting Section can, and can bring the same types of enforcement actions. If private parties prevail in such cases, they can often obtain attorney's fees, unlike the Voting

Section, which cannot recover such fees. The Voting Section does not share materials from its open investigative with private parties for purposes of their investigations under the private rights of action, just as it would not share such information with any other members of the public.

37. The statutory scheme of the federal voting rights statutes, and the Section's own investigative practices, do not contemplate that private parties can simply piggyback on and receive information from the Section's open investigative files to further their own investigations. If the Section were to share such information from open investigative files with private parties, and if it led to private parties filing suit against states and obtaining attorney's fees against jurisdictions, it could damage the Department's own ongoing investigative work across the country. Further, the release of such information would also damage the Section's ongoing cooperative relationship with jurisdictions, on which the Section depends for obtaining much of the information needed for its work.

38. The release of documents often is not appropriate because releasing some documents from the known universe of information provides an insight into the Section's potential theories by identifying the information it has retained for further review. And far from being a "routine audit," the information gathered is intrinsic to the Section's law enforcement efforts and obligations. Non-compliance oftentimes can only be discerned only from reviewing a large range of documents, both public and non-public. That is because state election practices can vary widely, and whether those practices comply with federal voting rights laws, including certain provisions of the NVRA, typically require a comprehensive analysis of all available public and non-public information. The public documents, and any non-public information the Section obtains, form an indivisible whole on which we make our enforcement decisions.

39. Additionally, unlike various other components of the Department of Justice, the Voting Section does not have general subpoena authority in support of its investigations, which are civil in nature. Rather, the Section has access to certain statutory authority to seek materials from election authorities in support of its investigations in the Civil Rights Act, in 52 U.S.C. 20701, *et seq.* While the Section relies on the investigative requests that the Civil Rights Act provides, the Section seeks to work cooperatively with jurisdictions where possible and seeks to avoid having to resort to actually filing enforcement actions in support of its investigative requests unless necessary. The statutory authority in the Civil Rights Act imposes on the Attorney General the clear requirement not to disclose the materials gathered from election authorities in investigative requests except under very specific circumstances. 52 U.S.C. 20706. This is a significant consideration in support of the general non-disclosure of open investigative materials by the Voting Section.

40. In sum, to release any other documents before the investigations are completed and before final determinations are made would jeopardize these active law enforcement proceedings. The investigative materials relate to concrete, prospective law enforcement proceedings against the 44 states and D.C. These are active, ongoing enforcement actions regarding states' compliance with the federal voting rights statutes and voter registration list maintenance requirements under these federal statutes. Disclosure of these investigative materials would cause harms by revealing its investigation and litigation strategies utilized in fulfilling its statutory mandates under NVRA and HAVA and jeopardize CRT's enforcement interests. Disclosure would reveal the Division's strategy and evaluation of evidence pertaining to the pending enforcement proceedings against the states and the District of Columbia. Harm would result from prematurely releasing information



that would reveal investigative strategies regarding the type of information sought from the states, and what data is found to be particularly probative of a state's compliance with the voter registration list maintenance list requirements under the federal voting rights statutes. These materials include evaluations, analysis, recommendations and discussions in contemplation of possible litigation against a state for violations of NVRA or HAVA. Release at this time of the investigative materials could reveal the scope and focus of the investigations; tip off individuals or states to information of interest to law enforcement; provide subjects the opportunity to alter evidence to avoid detection; and reveal the core of the Department's review of compliance with these statutes. CRT staff conducted a document-by-document review to identify and release any reasonably segregable information contained in the responsive records that would not harm ongoing law enforcement proceedings.

41. CRT's review of the responsive records in 43 of the 45 pending law enforcement proceedings reveal no materials that can be released without jeopardizing current and concrete investigative and litigation efforts. Premature release of these investigative materials would hinder the Division's efforts in investigating the states' compliance and noncompliance with the NVRA and HAVA and the voting maintenance list requirements. In addition, a review of the responsive records determined that there is no public source material available for release that would not adversely affect pending or prospective enforcement proceedings.

42. All of the responsive records, other than the 407 pages released in part and approximately 100 pages released in full in CRT's supplemental response, are withheld pursuant to Exemption 7(A) as discussed above.

EXEMPTION 5

43. Additionally, the responsive records include records that are withholdable pursuant to the attorney work product and deliberative process privileges under Exemption 5 of the FOIA.

With respect to the documents challenged by plaintiff:

Group 1: One document identified by plaintiff consists of an e-mail from CRT's Front Office to the Voting Section Chief regarding the development of responses to Congressional inquiries for committee hearings on voting issues. This document was both predecisional, and deliberative, reflecting opinions and recommendations as to the appropriate response to convey. Any factual information withheld is inextricably intertwined with the deliberative information.

Group 2: Plaintiff identifies email chains concerning preliminary assessments of attorneys about state compliance with the NVRA and HAVA. These emails were sent to and from CRT attorneys in the Voting Section concerning the conduct of an open and ongoing enforcement action regarding voting rights. The information withheld is predecisional and reflects opinions and recommendations about the selective factual information concerning compliance or noncompliance with the NVRA and HAVA. Any factual information withheld is inextricably intertwined with the deliberative information.

Group 3: Plaintiff identifies an email chain discussing areas where two agencies could cooperate. This email chain was between Special Counsel to the Acting Attorney General and the U.S. Election Assistance Commission. The document contains candid, frank, pre-

decisional identification of proposed subject matters and issues of vital enforcement issues that, if released, would harm the Division's capacity to conduct future exchanges without chilling the staff's exchange and presentation of views. Any factual information withheld is inextricably intertwined with the deliberative information.

Group 4: Plaintiff challenges information withheld in part under the deliberative process privilege, as identified in paragraph 22 of my previous declaration. Plaintiff speculates that there may be releasable factual information or "information relating to final decisions or completed actions." Plaintiff's Opp. at 31. Any factual information in the partially withheld information is inextricably intertwined with the deliberative information. To the extent that any of the withheld information relates to a final decision or action subsequently completed, the withheld information was created before any final decision or completed action and contains opinions and recommendations about decisions yet to be made or actions yet to be taken. Any factual information withheld is inextricably intertwined with the deliberative information.

The information withheld under Exemption 5 consists of internal analysis and discussions, strategies, and recommendations regarding possible litigation against a state for violations of the NVRA or HAVA. This analysis and advice concerns the legal sufficiency of a state's response with the recommendation from the line attorney to the supervisor regarding the appropriate further action to take on a matter, including whether to pursue possible litigation. This type of information reveals the internal deliberations of the attorneys as they evaluate the investigative materials. Thus, this information reveals

the core of the Department's review of states' compliance with the federal voting rights statutes. The information withheld reflects attorneys' legal work-product and recommendations to relevant decision makers. This information is predecisional and deliberative in nature and was also prepared in reasonable anticipation of litigation.

Exemption 5 of the FOIA exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The information withheld from plaintiff pursuant to Exemption 5 consists of documents created during the course of the Voting Section's review of states' compliance with the NVRA and HAVA, and remained wholly internal to DOJ. As such, they are "intra-agency" records within the threshold of FOIA Exemption 5.

44. The information protected pursuant to the attorney work-product privilege was created by Department attorneys concerning the conduct and strategies of enforcement actions pursuant to the NVRA and HAVA. These evaluations, analysis, recommendations, and discussions in contemplation of anticipated litigation against a state for possible violations of NVRA or HAVA reveal the very core of the Department's review of compliance with these statutes, and release of this information would undermine the Department's litigating position should the underlying enforcement actions become the subject of litigation.

45. In addition to being protected by the attorney work-product privilege, portions of the attorney communications are also exempt from disclosure pursuant to the deliberative process privilege, inasmuch as these discussions include preliminary assessments by attorneys about compliance or noncompliance with the NVRA and HAVA. These include recommendations and

advice concerning the legal sufficiency of a state's response with the attorney's recommendation to a higher level decision-maker at CRT who determines what further action is appropriate regarding the matter, including whether to pursue possible litigation. This information reflects the attorneys' opinions and analysis and its disclosure would reveal the internal deliberations of CRT attorneys as they evaluate compliance with the NVRA and HAVA. The deliberative process privilege is intended to protect the decisionmaking processes of government agencies from public scrutiny in order to enhance the quality of agency decisions. Disclosure of the information at issue would severely hamper the efficient day-to-day workings of CRT attorneys, who would no longer feel free to candidly discuss their ideas, strategies, and recommendations. This would impair CRT's ability to foster the forthright internal discussions necessary for efficient and proper enforcement of a state's compliance or noncompliance with the voter registration list maintenance requirements in the NVRA and HAVA.

46. CRT conducted a document-by-document review of the responsive records and released the reasonably segregable, nonexempt information to Plaintiff. All reasonably segregable, nonexempt information from these records has been disclosed to plaintiff. Of the approximately 500 pages released to Plaintiff, approximately 475 were released in full and 31 pages included partial redactions. The remaining 20,200 pages contains information about open and ongoing law enforcement investigations were withheld in full except for some records in Kentucky and Connecticut. The underlying investigations for possible violations of the NVRA and HAVA are open and continue to gather evidence. The release of this information at this time would reveal the content of the government's evidence, policies, recommendations, focus of investigations, and strategies regarding the states and D.C. that are the subjects of the ongoing investigations. The

disclosure would also reveal evaluations, analysis, legal strategies and case discussions would undermine the core legal analysis that the attorney work product privilege is meant to protect. The disclosure of predecisional and deliberative opinions would reveal the Department's pre-decisional decision-making process.

I declare under penalty of perjury that the foregoing is true and correct.



Tink Cooper, Acting Chief  
FOI/PA Branch  
Civil Rights Division  
U.S. Department of Justice  
Washington, D.C. 20530

Executed on: May 29, 2019