IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant U.S. Department of Justice ("DOJ" or the "Department") continues to fall short of its straightforward obligations under the Freedom of Information Act ("FOIA") in this case, for the same reasons already addressed in the Cross-Motion for Summary Judgment (the "Motion") filed by Plaintiff Brennan Center for Justice at New York University School of Law (the "Brennan Center"). As the Brennan Center previously explained, DOJ shoulders dual burdens here. The agency must show that it made "a good faith effort to conduct a search for the [] records" requested in the Brennan Center's July 20, 2017 FOIA request (the "NVRA FOIA"), *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990), and justify its decision to withhold responsive documents by furnishing "reasonably specific detail" demonstrating "that the information withheld logically falls within the claimed exemption[s]" to FOIA, *McKinley v. FHFA*, 789 F. Supp. 2d 85, 87-88 (D.D.C. 2011).

DOJ has not cleared either hurdle. The Department's Opposition to the Motion and the accompanying Supplemental Declaration of Tink Cooper (the "Supplemental Cooper Declaration") misconstrue several of the Brennan Center's arguments and raise fresh doubt as to whether the agency ever understood—much less crafted an adequate search addressing—the full scope of the NVRA FOIA. Nor do the Department's sweeping arguments regarding its supposed authority to withhold documents pursuant to FOIA Exemptions 5 and 7(A) move the dial. DOJ effectively requests unfettered authority to withhold over 20,000 pages of concededly responsive documents that it asserts were "compiled for law enforcement purposes," Def.'s Resp. to Pl.'s SMF at 9, without the need to identify any concrete investigative predicate or threat of interference likely to result from disclosure. But FOIA requires more: particularized explanations sufficient to meet DOJ's clear "burden of establishing the applicability of the

claimed exemption[s]." *Assassination Archives & Res. Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003). The Brennan Center is entitled to judgment as a matter of law, and the Court should order DOJ to complete a new search responding to the NVRA FOIA and produce those records that it improperly has withheld. 5 U.S.C. § 552(a)(4)(B).

I. DOJ HAS NOT ESTABLISHED THAT ITS SEARCH WAS ADEQUATE.

It is DOJ's burden to establish "beyond material doubt that its search was reasonably calculated to uncover all relevant documents" responsive to the NVRA FOIA. *Nation Magazine, Washington Bureau v. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (internal citations and quotations omitted). To do so, DOJ must show that it made a "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68. Far from satisfying that rigorous standard, DOJ's Opposition and Supplemental Cooper Declaration ignore deficiencies that the Brennan Center identified in the initial Cooper Declaration, indicating that DOJ still misunderstands what an adequate search would have entailed.

First, DOJ's Opposition and Supplemental Cooper Declaration do not credibly address the concerns that the Brennan Center raised regarding the apparent conflation of the searches in response to the NVRA FOIA with that of a separate May 2017 FOIA request that was filed by the Brennan Center and subsequently the subject of litigation in the U.S. District Court for the Southern District of New York (the "SDNY FOIA"). As explained in the Memorandum of Points and Authorities in Support of Plaintiff's Motion (the "Memorandum") ECF No. 24-1, the two FOIA requests sought two distinct categories of documents: The SDNY FOIA requested three particular categories of documents relating to the Presidential Advisory Commission on Election Integrity (the "PACEI"), while the NVRA FOIA requested records related to a letter

sent on June 28, 2017, by T. Christian Herren, Jr., the Chief of DOJ's Voting Section, in which DOJ requested information regarding states' procedures for compliance with federal laws governing the maintenance of voter registration lists (the "DOJ Letter"). *See* Memorandum at 3-4. DOJ clearly did not understand how the SDNY FOIA and NVRA FOIA differed, because it sent an e-mail on March 19, 2018 asking that very question. *Id.*at 4. Yet DOJ made its purportedly full response to the NVRA FOIA, denying *in toto* the NVRA FOIA's first request and producing only 407 pages of records in response to the second request, only one day after the Brennan Center explained the differences. *Id.* at 4-5. DOJ's suggestions that "additional searches" specific to the NVRA FOIA were conducted in that single day, Supp. Cooper Decl. ¶¶ 2-3, ECF No. 28-1, and that it understood the differences in the requests even before then, Def.'s Resp. to Pl.'s SMF at 3, are simply not persuasive. If DOJ understood the differences, there would have been no need to seek clarification, and the "additional searches" that DOJ suggests it conducted would not have been necessary. If such searches were necessary, as DOJ appears to concede, after obtaining search returns, DOJ would have had to identify any new responsive materials and conduct a line-by-line review of the over 20,000 pages[1] of withheld records to determine whether any additional content could be released as responsive to the NVRA FOIA. To imagine that this volume of activity occurred in a single day strains credulity, and DOJ has never asserted that it undertook such an extraordinary review.

Second, nothing in DOJ's Opposition or the Supplemental Cooper Declaration addresses

[1] DOJ's *Vaughn* index makes clear that the vast majority of the records it has withheld in full (i.e., 20,217 pages) are those that would be responsive to the portion of the NVRA FOIA seeking records related to the DOJ Letter, and not directly related to the PACEI (as had been the sole focus of the SDNY FOIA). *See Vaughn* Index ¶ 4, ECF No. 21-3. In other words, DOJ did not know to search for the bulk of the records at issue until after it learned from the Brennan Center on March 19, 2018, that records related to the DOJ Letter, and not just the PACEI, were responsive.

the Brennan Center's concern that DOJ failed to use search terms that would have captured the documents requested in the NVRA FOIA. In its opening brief, the Brennan Center pointed out that the initial Cooper Declaration identified a series of search terms relating to the PACEI, but not the DOJ Letter. *See* Memorandum at 9 & n.4. In response, Ms. Cooper supplemented her declaration to state—for the first time, nearly two years after the FOIA request was filed and nearly eleven months into a litigation in which the adequacy of the search is perhaps the central issue—that, in fact, "the June 28, 2017 letter was also used as the [sic] search term." Supp. Cooper Decl. to Def.'s Reply. to Pl.'s Opposition to Def.'s SMF ¶ 6, ECF No. 29-1. But even this eleventh-hour averment does not adequately clarify what the search terms were. Did they include "June 28, 2017 letter," as the Supplemental Cooper Declaration seems to suggest? "T. Christian Herren, Jr."? Something else? By failing to provide such detail (or any detail) regarding the search terms purportedly used—and given that the search terms that DOJ *did* identify were clearly not designed with the NVRA FOIA in mind—DOJ has not met its burden to show that it conducted a good faith search. *See Oglesby*, 929 F.2d at 68 ("A reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched, is necessary . . . ."); *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982) (an agency may rely on declaration testimony, but must "explain in reasonable detail the scope and method of the search" to show "compliance with the obligations imposed by the FOIA").

Finally, and relatedly, nothing in DOJ's briefing establishes that the Department's search captured the correct list of custodians for documents responsive to the NVRA FOIA. The Brennan Center is not "argu[ing] that CRT failed to identify each of the almost 80 custodians who were involved in the search for responsive records," or asking for the identities of each

custodian, as DOJ suggests. *See* Def.'s Resp. to Pl.'s SMF at 3. The point is that DOJ is required to provide something other than its own say-so to confirm that the proper custodians were selected, particularly given that there was obviously confusion as to the scope of the NVRA FOIA and that a reasonable search clearly would have required a different custodian list than the SDNY FOIA.[2] Providing the names of three high-level officials identified as custodians, Cooper Decl. ¶ 11, ECF No. 21-1; Supp. Cooper Decl. ¶ 6, is not enough to permit the Brennan Center or this Court to determine whether DOJ identified the correct aggregate universe of custodians to accomplish a good faith search, as is DOJ's burden. *See Oglesby*, 929 F.2d at 68.

Because DOJ has not satisfied its burden to show that it undertook a "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to product the information requested," *Oglesby*, 920 F.2d at 68, the Brennan Center is entitled to judgment as a matter of law on the adequacy of the search.

II. DOJ HAS NOT DEMONSTRATED THAT EXEMPTION 7(A) APPLIES.

DOJ does not quibble with the standard it must satisfy to establish its invocation of FOIA Exemption 7(A): it bears the burden of "demonstrat[ing] that disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated." *Citizens for Responsibility & Ethics in Washington ("CREW") v. U.S. Dep't of Justice*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) (internal quotation marks omitted). As explained in the Brennan Center's opening brief, to satisfy its burden, DOJ must not only establish the

[2] In particular, because the NVRA FOIA uniquely requested "[a]ll communications and documents . . . 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 [DOJ] Letter," Compl. Ex. A at 2, an appropriate custodian list for a search responsive to the NVRA FOIA could not have been limited to individuals involved in PACEI.

existence of a pending or anticipated proceeding, but also demonstrate *with specificity*, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding. Mem. at 19-23.

A. DOJ's Own Submissions Confirm that There Was No Pending or Reasonably Anticipated Law Enforcement Proceeding.

The Brennan Center explained in its opening memorandum that DOJ must identify a "concrete prospective law enforcement proceeding[]"—that is, an investigation predicated on credible allegations of unlawful conduct—to satisfy its burden with respect to Exemption 7(A). Mem. at 19 (quoting *Nat'l Sec. Archive v. FBI*, 759 F. Supp. 872, 883 (D.D.C. 1991)). Far from doing so, the Supplemental Cooper Declaration confirms that the DOJ Letter was simply a generic call for data that was not founded on any specific allegations or reasonable suspicion of unlawful conduct by the receiving states, admitting that the "law enforcement" activity supposedly justifying DOJ's withholdings was nothing but the gathering of information done "*as a preemptive measure* to ensure there is compliance with federal law." Supp. Cooper Decl. ¶ 16 (emphasis supplied). As the Brennan Center previously explained, an open call for information from which a "concrete prospective law enforcement proceeding" may develop is not sufficient to satisfy Exemption 7(A). Mem. at 23.

Whether "proactively gather[ing] information," Supp. Cooper Decl. ¶ 16, properly constitutes an "audit," *see* Def.'s Resp. to Pl.'s SMF at 9-12, is a red herring. What matters is that DOJ has not met its burden to show in substance that the request for information was in connection with "investigatory activities [that] are realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached." *Pratt v.*

Webster, 673 F.2d 408, 421 (D.C. Cir. 1982).[3] Indeed, the Supplemental Cooper Declaration makes clear that the decision to send the DOJ Letter was not predicated on any reasonable suspicion or allegation of wrongdoing, the quintessential feature of a qualifying law enforcement proceeding.

DOJ's suggestion that CRT's "proactive" efforts are sufficient because law enforcement proceedings "are considered initiated even without a suspicion that an actual violation of the law has in fact occurred," Def.'s Resp. to Pl.'s SMF at 10, is not persuasive. Indeed, this Court has explained that "only investigations which focus directly on specifically alleged illegal acts are covered by Exemption 7." *Philadelphia Newspapers, Inc. v. U.S. Dep't of Health & Human Servs.*, 69 F. Supp. 2d 63, 67 (D.D.C. 1999).[4] For if, as DOJ suggests, "an agency could withhold information whenever it could imagine circumstances where the information might have some bearing on some hypothetical enforcement proceeding, then FOIA would be meaningless." *See Badran v. U.S. Dep't of Justice*, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987).

The cases cited by DOJ do not support its position either, because DOJ appears to be

[3] In *Pratt*, which DOJ ignores, the D.C. Circuit explained that even an agency generally engaged in law enforcement must "be able to identify a particular individual or a particular incident as the object of its investigation and the connection between that individual or incident and a possible security risk or violation of federal law" to invoke FOIA Exemption 7. *Pratt*, 673 F.2d at 420 (rejecting FBI's argument that it satisfied Exemption 7 per se as a law enforcement agency). While *Pratt* did not analyze Exemption 7(A), it effectively rejected DOJ's position— that CRT's general enforcement function effectively gives blanket protection under Exemption 7(A)—and held that the mere presence of a law enforcement function fails to show the existence of a "concrete" open or prospective law enforcement proceeding. *Nat'l Sec. Archive*, 759 F. Supp. at 883.

[4] In its opposition, DOJ makes much of the fact this case involved an administrative agency that does not resemble DOJ's Voting Section. Def.'s Resp. to Pl.'s SMF at 12. While it is true that there is a distinction in how agencies are treated under Exemption 7 if they are law enforcement agencies, as opposed to agencies performing solely administrative functions, there is no dispute that all agencies still must establish that threshold "law enforcement proceedings" exist to trigger the application of Exemption 7(A). *Nat'l Sec. Archive*, 759 F. Supp. at 883. DOJ does not argue otherwise.

conflating Exemption 7's general requirement that documents have been "compiled for law enforcement purposes" with Exemption 7(A)'s more stringent requirement to prove the existence of an actual "enforcement proceeding" likely to be compromised by the disclosure of documents. The Department's citation to *Public Employees for Envtl. Responsibility ("PEER") v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 204 (D.C. Cir. 2014) for its definition of "law enforcement" is inapposite, because *PEER* did not deal with Exemption 7(A). *Id.* at 199. It also did not involve "proactive proceedings to investigate" legal violations, as DOJ suggests. *See* Def.'s Resp. to Pl.'s SMF at 10. Rather, the court found that an agency's emergency action plans for dams and to help prevent attacks on dams satisfied the threshold Exemption 7 requirement that the withheld documents be "compiled for law enforcement purposes." *Id.* Thus, *PEER* does not support DOJ's position that it can adequately establish the existence of an "enforcement proceeding" for purposes of Exemption 7(A) by making a general call for compliance data, "even without a suspicion that an actual violation of the law has in fact occurred." *See* Def.'s Resp. to Pl.'s SMF at 10.

Much more relevant to this action is *CREW*, but not for the reasons DOJ suggests. That case reiterated that "a law enforcement agency invoking [Exemption 7(A)]" must "show that the material withheld 'relates to a concrete prospective law enforcement proceeding.'" 746 F.3d at 1097. It did not hold that agency activity unmoored to any suspicion of a violation of law could constitute a "law enforcement proceeding," as DOJ appears to suggest. *See* Def.'s Resp. to Pl.'s SMF at 10. Rather, *CREW* specifically explained that "Exemption 7(A) is temporal in nature," such that events like sentencing hearings and appeals, once they have passed, are "no longer pending or reasonably anticipated" sufficient to serve as a basis for invoking the exemption. *Id.* at 1097. Similarly, there simply is no evidence here that DOJ was undertaking at the time of the

DOJ Letter—or even now—any predicate investigation into potential violations of federal voting laws that could justify withholding *in toto* over 20,000 pages of responsive records applicable to compliance by 44 states and the District of Columbia.

As a fallback position, DOJ asserts that specific versions of the DOJ Letter that it sent to particular states were investigative in nature because they were "tailored to some extent to specific questions about data and compliance in each state identified." Def.'s Resp. to Pl.'s SMF at 13. Setting aside the vagueness of this assertion, DOJ's tailoring of letters at best suggests that CRT may have surveyed different issues as part of its "review of states' compliance." Cooper Decl. ¶ 23. It does not show that DOJ had any particular suspicion of wrongdoing by the recipients of the letters, much less a factual predicate for a "concrete" investigation into all 45 recipient jurisdictions. Nor is the Brennan Center "pass[ing] judgment on whether the enforcement proceedings at issue here are valid proceedings" or somehow "second guess[ing]" CRT's decision. Def.'s Resp. to Pl.'s SMF at 12. The Brennan Center is not judging the validity of the proceedings; it is pointing out that DOJ's own description of the "proceedings" shows that they do not satisfy the standard for invoking Exemption 7(A), because CRT admittedly did not even have a "suspicion that an actual violation of the law had in fact occurred," at the time the information was requested. The law is clear that DOJ must cite to more than generic "overall ongoing" investigative efforts to meet its burden to show a "concrete prospective law enforcement proceeding[]" motivating its document withholdings. *Nat'l Sec. Archive*, 759 F. Supp. at 883. Its failure to do so here requires the production of these documents.

B. DOJ Has Not Met Its Burden to Demonstrate Interference.

Even assuming that the Department sufficiently demonstrated that all of the over 20,000 pages of withheld documents related to ongoing or reasonably anticipated "enforcement proceedings"—which it has not—DOJ still has not carried its burden under Exemption 7(A) to

show that disclosure of the particular documents at issue "could reasonably be expected to interfere" with such proceedings. 5 U.S.C. § 552(b)(7)(A). DOJ's Opposition and the Supplemental Cooper Declaration offer no meaningfully new explanation in this regard.

For example, the Brennan Center pointed out in its opening brief that to demonstrate interference, the Department would need to identify functional categories of the more than 20,000 pages of documents that it has withheld, tied to specific explanations of the interference expected to be caused by compelled disclosure for each functional category. Mem. at 23-28 (citing cases). While the Supplemental Cooper Declaration is structured to provide an *appearance* of greater functional detail than DOJ's original *Vaughn* index, it fails to do so in substance: It simply copies the list of document groups identified in the *Vaughn* index and parrots the same or similar conclusory statements regarding potential harms in a paragraph-by-paragraph format. *Compare Vaughn* Index ¶ 4, ECF No. 21-3 (claiming Exemption 7(A) coverage for 20,217 pages of "emails, letters, and other types of documents" provided by states, including "additional items such as legislation, draft versions of proposed bills, bills, regulations, codes, policies, guidance, brochures, and election manuals or descriptions" regarding topics such as voter registration and election procedures, felons, death notices, and case law, all withheld on the asserted ground that "[d]isclosure would jeopardize CRT's enforcement interests by revealing its investigation and litigation strategies") *with* Supp. Cooper Decl. ¶ 19 (identifying identical list of withheld "[c]ategories of documents being withheld" and citing concerns that providing further detail could "expose CRT's investigative focus and legal strategy in each investigation"). Even assuming that an actual document-by-document review of the withheld materials occurred, DOJ's descriptions simply do not provide sufficient detail for the Brennan Center or the Court to evaluate the functional categories that they comprise and any whether the

release of any particular category would interfere with law enforcement. *Bevins v. U.S. Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986).

Moreover, the supplemental information that DOJ has submitted actually confirms exactly what the Brennan Center was concerned about: that it is simply not believable that every one of the 20,000+ pages of documents raises concerns about interference. The Supplemental Declaration shows that the withheld records *include public information*, the release of which, as a matter of simple logic, cannot possibly interfere with any ongoing enforcement proceedings, given that *it is already public*. Supp. Cooper Decl. ¶ 27 (identifying a "subset of materials and information relating to compliance by jurisdictions with the federal voting rights statutes [that] are available publicly"); *see also* Memorandum at 24. DOJ does not seriously challenge the point that there is no interference with law enforcement proceedings when materials are publicly known. *See E. Coast Eng'g, Inc. v. Alexander*, No. 80-2752, 1981 WL 2308, at *2 (D.D.C. June 22, 1981) ("It is quite clear that the government's case cannot be hindered by release of information, the substance of which is already known to the subject."). These withheld documents should be produced forthwith.[5]

As to other types of withheld documents, DOJ argues that disclosure of the information sought in the DOJ Letter could prevent the Government from obtaining such data in the future and/or as part of "back-and-forth communications with jurisdictions as part of [its] requests." Def.'s Resp. to Pl.'s SMF at 14; Supp. Cooper Decl. ¶ 30. DOJ's own unsupported declaration testimony is not probative of states' willingness to continue sharing information regarding

[5] Indeed, this highlights the difference between the compliance review here and the sorts of investigations Exemption 7(A) is intended to protect. There is no risk here that information in DOJ's possession about the activities of a state will be revealed to that state by the disclosures sought by the Brennan Center's request, because each state already knows precisely what is in the records it produced.

compliance with federal voting laws subsequent to a FOIA disclosure. Nor does it make sense, where information has already been made available to the public, that DOJ's disclosure would have any effect on the state's decision to share such public information in the future.

Moreover, DOJ is dealing with state governments that should be presumed willing to engage cooperatively with the investigative efforts of another sovereign. This situation stands in sharp contrast to situations such as criminal investigations involving confidential informants or incentivized data-sharing as part of plea negotiations, in which it might logically be expected that a disclosure of information provided to the Government might have negative repercussions on subsequent attempts to obtain further detail. Nor is it anything like the scenario at issue in *Timken Co. v. U.S. Customs Serv.*, 531 F. Supp. 194 (D.D.C. 1981), *see* Def.'s Resp. to Pl.'s SMF at 14, in which an agency was allowed to withhold documents *under FOIA Exemption 4* because it relied on the voluntary cooperation of foreign manufacturers for obtaining confidential business and financial information those private entities would otherwise be disinclined to share. *See id.* at 198 (permitting withholding under Exemption 4 due to reliance on manufacturers' voluntary cooperation and where "[i]n order to obtain this information easily, it is [the agency's] custom to keep the information confidential"). A limited subset of the records were also withheld in that case pursuant to Exemption 7(A), because they became relevant to a law enforcement investigation, but the court determined that 7(A)'s interference prong was only met "for that information which [the court] has found to be commercially sensitive" in connection with the Exemption 4 claim, and ordered that the remaining 7(A) records be released. *Id.* at 199–200.

DOJ's argument that "releasing one state's information could allow another state to try to manipulate its own data to present a more favorable position to CRT" is likewise unavailing.

Def.'s Resp. to Pl.'s SMF at 19. Again, DOJ's own declaration testimony is not probative of states' speculated designs to manipulate (existing) evidence of their compliance with federal laws. It also is not clear why the release of one state's information would interfere with proceedings in another, considering that states presumably would be subject to separate enforcement proceedings with no basis to be consolidated.[6] Nor is DOJ's supposition that disclosure of the withheld documents could "provide critical insights into the government's legal thinking and strategy," Def.'s Resp. to Pl.'s SMF at 16 (quoting Cooper Supp. Decl. ¶ 33), well-taken. For the same reasons that the Brennan Center previously explained, the withheld records in question encompass state-generated materials produced in response to the DOJ Letter, which already gave each state in question some sense of what DOJ's strategy might be. It is difficult to imagine what about the disclosure of documents *responding* to the DOJ Letter would "prematurely reveal[]" about the "scope and focus of the investigation" by DOJ or its "investigation and litigation strategies." Def.'s Resp. to Pl.'s SMF at 16 (quoting Cooper Supp. Decl. ¶¶ 33, 40).

Finally, as a whole, DOJ simply relies on conclusory, nonspecific, and self-serving statements in the two Cooper declarations asserting that "to release any other documents before the investigations are completed and before final determinations are made would jeopardize

[6] Indeed, it is difficult to believe that Congress, in crafting Exemption 7(A), could have intended to allow the government to withhold documents related to one law enforcement proceeding based on a generalized claim of interference with a similar type of enforcement proceeding against an entirely different party. Were that the case, the temporal limits of Exemption 7(A), *see CREW*, 746 F.3d at 1097, would be rendered meaningless, as records related to, for example, a drug trafficking enforcement proceeding against one defendant could never be released, even long after that proceeding had concluded, out of a fear that disclosure could interfere with a separate drug trafficking proceeding against a completely different defendant, simply because it might reveal general information about how the government approaches drug trafficking investigations.

these active law enforcement proceedings," Supp. Cooper Decl. ¶ 40, which DOJ argues the Brennan Center "cannot overcome." Fully presuming that the declarations were drafted in good faith, they do not carry DOJ's burden to show likely interference. For a declaration to be "accorded a presumption of expertise" in a FOIA action, it must be "clear, specific, and adequately detailed, setting forth the reasons for non-disclosure in a factual and non-conclusory manner." *Piper v. U.S. Dep't of Justice*, 294 F. Supp. 2d 16, 20 (D.D.C. 2003), *amended by* 428 F. Supp. 2d 1 (D.D.C. 2006). But the Cooper declarations repeatedly provide the sort of conclusory statements that are insufficient to demonstrate interference. *See Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) ("It is not sufficient for an agency merely to state that disclosure would reveal the focus of an investigation; it must rather demonstrate how disclosure would reveal that focus.").

III. DOJ HAS NOT MET ITS BURDEN TO SHOW THAT IT PRODUCED ALL SEGREGABLE INFORMATION.

DOJ has not shown that the 20,000-plus documents it withheld contain no information that can be segregated and disclosed.[7] *See* Mem. at 33-34. Its supplemental declaration falls short for the same reason the Vaughn Index and original declaration did. It offers only *conclusions* that these documents are subject to withholding, but no explanations as to *why*.

First, DOJ's own declarations take different positions on the scope of its segregability review in response to this request. As DOJ acknowledges, to meet "its obligations to show there is no additional segregable information to release," it needs to "state[] that it has reviewed the

[7] In the Supplemental Cooper Declaration, DOJ for the first time contends that certain records must be withheld pursuant to the Civil Rights Act, which assertedly "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." Supp. Cooper Decl. ¶ 39. That argument is irrelevant to the analysis of Exemption 7(A) and, as DOJ has never invoked FOIA Exemption 3 to withhold the records in question, it is waived, in any event.

withheld information *line-by-line* and no additional nonexempt information exists to be released." *See* Def.'s Resp. to Pl.'s SMF at 18 (citing *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002) (emphasis added)). Yet it is of two minds about whether it conducted this line-by-line review here. *Compare* Supp. Cooper Decl. ¶ 46 (asserting that "CRT conducted a document-by-document review of the responsive records and released the reasonably segregable, nonexempt information to Plaintiff"), *with* Cooper Decl. ¶ 28 (stating that "CRT conducted a line-by-line review of the withheld information to ensure that it contained no segregable, nonexempt information").

But even if DOJ did, in fact, conduct a line-by-line analysis, its conclusory statement that its review produced no segregable information falls short. DOJ bears the burden of offering enough information for the Brennan Center to challenge, and this Court to evaluate, its withholding decision. *See Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 349 (D.C. Cir. 1987) (describing the government's burden when justifying withholding decisions); *Mokhiber v. U.S. Dep't of Treasury*, 335 F. Supp. 2d 65, 69 (D.D.C. 2044) (explaining that the agency has "the burden of demonstrating that [the] withheld documents contain no reasonably segregable factual information"). It has not done so here.

DOJ's blanket assertions are not enough. DOJ states generally that "CRT conducted a document-by-document review of the responsive records and released the reasonably segregable, nonexempt information." Supp. Cooper Decl. ¶ 46. And DOJ states specifically with respect to the groups of documents withheld under Exemption 5 that "[a]ny factual information withheld is inextricably intertwined with the deliberative information." Supp. Cooper Decl. ¶ 43 (repeating this statement four times). These conclusory statements do not meet DOJ's burden. *See Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 90–91 (D.D.C. 2009) (finding inadequate

declaration that simply stated that all withheld information was not reasonably segregable because it was so intertwined with protected material that segregation was not possible); *Carter, Fullerton & Hayes LLC v. F.T.C.*, 520 F. Supp. 2d 134, 146 (D.D.C. 2007) (agencies must provide detailed justifications, not just "conclusory statements," to demonstrate that all reasonably segregable information has been released); *Wilderness Soc. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) (stating that a "blanket declaration that all facts are so intertwined to prevent disclosure under the FOIA does not constitute a sufficient explanation of non-segregability"). DOJ has not offered any information about what kind of materials the withheld documents contain, factual or otherwise. As a result, neither the Brennan Center nor this Court can test its assertion that "any" such information cannot be segregated from any deliberative material. *See Wilderness Soc.*, 344 F. Supp. 2d at 18–19 (granting summary judgment in plaintiffs' favor and requiring a compliant *Vaughn* index because "[w]ithout any description of the factual materials contained in the withheld documents, the agency has not satisfied its obligations.").

Even if DOJ's unelaborated assertions of non-segregability are given their most charitable interpretation, DOJ's showing would still fall short. Perhaps DOJ means to argue—without actually doing so—that given the types of documents it has withheld, any information contained in these documents would *necessarily* not be segregable. If so, DOJ would be wrong.

Exemption Seven. These documents consist, in the main, of documents State officials provided to DOJ in response to the DOJ Letter. These responses are highly likely to contain segregable, non-exempt information that is public or likely to be made public. By DOJ's own description, they include "legislation, draft versions of proposed bills, bills, regulations, codes, policies, guidance, brochures, and election manuals or descriptions regarding voter registration

procedures, election processes, convicted felons, and death notices." Index at 3. DOJ has not offered any reason why—and the Brennan Center cannot imagine one—there is no information within these sets of documents that could not be separated out and disclosed.

Exemption Five, Group One. This group of documents contains an "[e]-mail and attachment . . . regarding the development of responses to Congressional inquiries for committee hearings on voting issues." Index at 1. DOJ nowhere describes the scope of the congressional inquiries these documents discussed. Perhaps the inquiry posed *factual* questions, such as the number of enforcement actions DOJ had initiated during a given time period. Even assuming the documents contained some discussion that does qualify for the deliberative process privilege,[8] there is no reason to believe that the *factual* information in these documents could not be excised and disclosed.

Exemption Five, Group Two. This group of documents contains "email chains concerning preliminary assessments of attorneys about state compliance with the NVRA and HAVA." Supp. Cooper Decl. ¶ 43. Here again, this type of document could easily contain factual information that could be segregated from any deliberative material. For example, if an e-mail contains conclusions based on data that is publicly available and then summarizes that data, the summary or underlying data could be segregated out and disclosed. *See, e.g.*, *Petroleum Info. Corp.*, 976 F.2d at 1438 (distinguishing an effort "to select and edit" information from one "to reorganize and repackage a mass of dispersed public information").

Exemption Five, Group Three. This group of documents contains an "email chain

[8] The deliberative process privilege "is centrally concerned with protecting the process by which *policy* is formulated." *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992). It does not apply to, for example, a "mechanically compiled statistical report which contains no subjective conclusions." *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172, 1183 (5th Cir. 1978).

discussing areas where two agencies could cooperate." Supp. Cooper Decl. ¶ 43. Again, without any description of the factual information contained in these documents, it is just as reasonable to believe there *is* factual information that could be segregable. For example, the e-mails may contain a list of projects on which agencies had cooperated in this policy space previously. *See, e.g., United Am. Fin. v. Potter*, 531 F. Supp. 2d 29, 41 (D.D.C. 2008) (finding that an agency had not explained "why purely factual information in the public domain . . . is not reasonably segregable."). There is simply no way to know whether DOJ's assertion of non-segregability is correct without any information as to the factual information in these documents. *See, e.g., Ash Grove Cement Co. v. FTC*, 511 F.2d 815, 817 (D.C. Cir. 1975) ("Had [the District Court] verified the accuracy of at least a few of the agency's descriptions, his acceptance at face value of the accuracy of the rest would have stood on more solid ground. In the absence of more specific document analysis by the agency, we think such a procedure was necessary . . . .").

Exemption Five, Group Four. DOJ has never provided a description of the documents in this group—which contains 20,217 pages of documents, Index at 2—that it has withheld under Exemption 5. *See* Supp. Cooper Decl. ¶ 43 (referring to information "identified in paragraph 22 of my previous declaration"); Cooper Decl. ¶ 22 (referring to the documents withheld in *all* four categories as "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; CRT e-mails discussing potential areas where two agencies could cooperate; and e-mails between CRT attorneys in the Voting Rights Section concerning the conduct of an open and ongoing enforcement action regarding voting rights."). Thus, DOJ has failed to meet its burden of demonstrating that Exemption 5 applies to any documents in this group. It is not only impossible for the Brennan Center to argue against the *applicability* of the deliberative process

privilege, as an initial matter; the Brennan Center has no way to test DOJ's assertion that any factual information these documents contain is not segregable. This is exactly the kind of case that calls for this Court to either remand, or to review documents DOJ has withheld under this category to determine whether it has met its burden. *See, e.g.*, *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984) ("We have consistently held that with respect to decisions to review documents in FOIA cases, the district courts have substantial discretion.").

In sum, DOJ has not met its burden. Indeed, its segregability assertions refer to "any" factual material the documents may contain, raising doubt as to whether DOJ even determined that the documents *do* in fact contain factual information, much less conducted an actual analysis of whether such information could be released. This kind of "boilerplate segregability language" to describe records and failed to document any "inability on its part to parse records, such that incomplete segments of records would be rendered meaningless if disclosed" is not enough. *Ctr. for Biological Diversity v. OMB*, No. 07-4997, 2008 WL 5129417, at *9 (N.D. Cal. Dec. 4, 2008); *Carter*, 520 F. Supp. 2d at 148 (A "generic declaration" that factual information was "inextricably intertwined with" privileged material is not "a sufficient explanation of segregability"). Because DOJ has not met its burden, this Court should direct DOJ to perform an adequate segregability analysis, release all non-exempt, segregable documents, and sufficiently describe detail the documents that it continues to withhold in an amended *Vaughn* index—both as to documents already withheld, and any documents a proper search uncovers.[9]

[9] In a footnote, DOJ claims that because "plaintiff's request has already been processed," the Count III's request for expedited processing of any subsequent productions "is clearly moot." Def.'s Resp. to Pl.'s SMF at 18 n.2. Not so. Whether DOJ adequately processed the NVRA FOIA request is disputed. The Brennan Center requests that DOJ be ordered to produce all responsive documents on an expedited basis. *See* Mem. at 7 n.3.

CONCLUSION

For these reasons and those in its initial Memorandum, the Brennan Center respectfully requests that the Court deny DOJ's motion for summary judgment and grant the Brennan Center's Motion; order DOJ to conduct a new search for and produce, on an expedited basis, all records responsive to the NVRA FOIA; and direct DOJ to produce, on an expedited basis, those records that it improperly has withheld pursuant to FOIA. At the very least, the Brennan Center requests that DOJ be directed to further amend its *Vaughn* Index to provide sufficient detail regarding the scope of its search and the bases for any continued withholdings.

July 1, 2019

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

CERTIFICATE OF SERVICE

I hereby certify that, on July 1, 2019, I electronically filed with the Clerk of the Court for the U.S. District Court for the District of Columbia, using the Court's CM/ECF system, the foregoing Memorandum of Points and Authorities in Reply in Support of Plaintiff's Cross-Motion for Summary Judgment. The Court's CM/ECF system sent notification of such filing to all counsel of record in this case.

July 1, 2019

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