UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff brought this action against Defendant U.S. Department of Justice asserting claims under the Freedom of Information Act ("FOIA"). Summary judgment should be granted to Defendant because Defendant has conducted a reasonable search for responsive records and has produced all non-exempt, segregable documents subject to FOIA.

FACTUAL BACKGROUND

Defendant hereby incorporates its Statement of Undisputed Material Facts, the Declarations of Michael H. Allen, Vanessa R. Brinkmann, and Tink Cooper, as well as the exhibits referenced therein.

LEGAL STANDARD

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 248. A genuine issue of material fact is one that "might

affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

The "vast majority" of FOIA cases are decided on motions for summary judgment. *See Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) ("FOIA cases typically and appropriately are decided on motions for summary judgment."); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) ("*CREW*"). An agency may be entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records, and each responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure. *See Weisberg v. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Media Research Ctr.*, 818 F. Supp. 2d at 137. "[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *CREW*, 478 F. Supp. 2d at 80 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'"

Media Research Ctr., 818 F. Supp. 2d at 137 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

ARGUMENT

DEFENDANT COMPLIED WITH ITS OBLIGATIONS TO SEARCH FOR RESPONSIVE INFORMATION AND PROPERLY APPLIED FOIA EXEMPTIONS IN RESPONDING TO PLAINTIFF'S FOIA REQUEST.

FOIA requires that an agency release all records responsive to a properly submitted request unless such records are protected from disclosure by one or more of the Act's nine exemptions. 5 U.S.C. § 552(b); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). Once the Court determines that an agency has released all non-exempt material, it has no further judicial function to perform under FOIA and the FOIA claim is moot. *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982); *Muhammad v. U.S. Customs & Border Prot.*, 559 F. Supp. 2d 5, 7-8 (D.D.C. 2008). As demonstrated below, Defendant satisfied its obligation to conduct adequate searches for records responsive to Plaintiff's FOIA request and properly withheld exempt information pursuant to applicable FOIA Exemptions 5 and 6.

I. DEFENDANT CONDUCTED SEARCHES REASONABLY CALCULATED TO UNCOVER RESPONSIVE RECORDS.

Under FOIA, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency 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."). A search is not inadequate merely because it failed to "uncover[] every document extant." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *see Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) (noting that "[p]erfection is not the standard by which the reasonableness of a

FOIA search is measured"). Rather, a search is inadequate only if the agency fails to "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Oglesby*, 920 F.2d at 68. An agency, moreover, is not required to examine "virtually every document in its files" to locate responsive records." *Steinberg v. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994); *see also Hall v. U.S. Dep't of Justice*, 63 F. Supp. 2d 14, 17-18 (D.D.C. 1999) (finding that agency need not search for records concerning subject's husband even though such records may have also included references to subject). Instead, as here, it is appropriate for an agency to search for responsive records in accordance with the manner in which its records are maintained. *Greenberg v. Dep't of Treasury*, 10 F. Supp. 2d 3, 13 (D.D.C. 1998).

Once an agency demonstrates the adequacy of its search, the agency's position can be rebutted "only by showing that the agency's search was not made in good faith." *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993). Hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of an agency's search. *Oglesby*, 920 F.2d at 67 n.l3. "Agency affidavits enjoy a presumption of good faith that withstands purely speculative claims about the existence and discoverability of other documents." *Chamberlain v. U.S. Dep't of Justice*, 957 F. Supp. 292, 294 (D.D.C. 1997), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997).

In response to Plaintiff's FOIA request, Defendant searched all locations likely to contain responsive records. Specifically, JMD's General Counsel, Arthur Gary, conducted a manual search of his emails for responsive records. Allen Decl.[1] ¶ 7. Based on the knowledge of

[1] Citations to "Allen Decl." refer to the Declaration of Michael H. Allen, dated May 7, 2019, and submitted herewith.

officials familiar with the matter, JMD determined that no other custodians would have responsive material that would not already be captured by the search of Mr. Gary's emails. *Id.*

In addition, OIP searched for potentially responsive records within the Office of the Attorney General, the office from which Plaintiff's request specifically sought records. Brinkmann Decl.[2] ¶¶ 14-18. To ensure that it captured all potentially responsive records, OIP conducted broad searches of unclassified email records and computer hard drives within the Office of the Attorney General and the Departmental Executive Secretariat. *Id.* ¶ 14. OIP searched email and computer files for 10 records custodians within the Office of the Attorney General, using the same date range and keywords and phrases that Plaintiff specified in its FOIA request. *Id.* ¶ 15. Further, OIP searched for responsive records in the electronic database of the Departmental Executive Secretariat using the search terms and individuals that Plaintiff identified in its FOIA request and a date range that was consistent with Plaintiff's request. *Id.* ¶ 17.

The Civil Rights Division focused its search on the two offices likely to encompass all materials regarding Mr. Gary's December 12, 2017, letter to the Census Bureau: the Voting Section and the Office of the Assistant Attorney General. Cooper Decl.[3] ¶¶ 4-10. The Voting Section determined that responsive documents were likely to be found in the electronic files of the Voting Section's Chief, Chris Herren. *Id.* ¶ 6. Mr. Herren searched his email account and found responsive records, which he forwarded to the Civil Rights Division's Freedom of Information/Privacy Act Branch. *Id.* The Voting Section noted that the records forwarded in response to Plaintiff's request were identical to the responsive records located for two earlier

[2] Citations to "Brinkmann Decl." refer to the Declaration of Vanessa R. Brinkmann, dated May 8, 2019, and submitted herewith.

[3] Citations to "Cooper Decl." refer to the Declaration of Tink Cooper, dated May 8, 2019, and submitted herewith.

FOIA requests that were directed to the December 12, 2017, letter and the addition of the citizenship question. *Id.* ¶ 7.

The Civil Rights Division also referred Plaintiff's request to the Office of the Assistant Attorney General. *Id.* ¶ 8. After consulting with Mr. Gore about several pending FOIA requests concerning the December 12, 2017, letter, the Office of the Assistant Attorney General determined that Mr. Gore was the only custodian who had a substantive role in the preparation of the letter or who had communications with individuals outside of the Office of the Attorney General regarding the letter. *Id.* ¶ 9. The Civil Rights Division subsequently conducted a further search of Mr. Gore's email account for records with the term "census" and for handwritten notes, drafts, or other hard copy documents for the period January 23, 2017, through August 2, 2018, relating to the process of developing the December 12, 2017, letter. *Id.*

Further, the Civil Rights Division searched for records responsive to the portion of Plaintiff's request for records to, from, or mentioning Dr. Ron Jarmin or Dr. Enrique Lamas; and for any documents containing the following phrases: "2020 Census," "long form," "citizenship question," "question regarding citizenship," "ACS," "American Community Survey," or "CVAP (i.e., citizen voting age population)." *Id.* ¶ 14. The search terms used were reasonably calculated to uncover the requested documents regarding the December 12, 2017 letter and information regarding the 2020 Census questionnaire, and the Division's search efforts were reasonably and logically organized to uncover relevant documents and to search all locations likely to contain responsive documents. *Id.* ¶¶ 13, 15.

In summary, JMD, OIP, and the Civil Rights Division each conducted adequate searches of the locations that were reasonably likely to contain records responsive to Plaintiff's FOIA request. Accordingly, the Court should find that Defendant conducted reasonable searches for

responsive documents. *See Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009) (observing that the adequacy of an agency's search "is measured by the reasonableness of the effort in light of the specific request"); *Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, Civ. A. No. 11-1971 (JEB), 2012 WL 5928643, at *4 (D.D.C. Nov. 27, 2012) (finding that agency's methodology was "sound" where agency compared the FOIA request to its program offices' functions in order to determine which component offices to search).

II. DEFENDANT PROPERLY WITHHELD INFORMATION PURSUANT TO EXEMPTION 5.

Exemption 5 of FOIA protects "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). This exemption shields documents of the type that would be privileged in the civil discovery context, including materials protected by the attorney-client privilege and the executive deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *see Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004); *Rockwell Int'l Corp. v. DOJ*, 235 F.3d 598, 601 (D.C. Cir. 2001).

A. Defendants' Reliance on the Deliberative Process Privilege Was Proper.

Documents covered by the deliberative process privilege and exempt under Exemption 5 include those "'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Sears, Roebuck*, 421 U.S. at 150. As the Supreme Court has explained:

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.

Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (internal quotation marks and citations omitted).

The deliberative process privilege is designed to prevent injury to the quality of agency decisions by (1) encouraging open, frank discussions on matters of policy between subordinates and superiors; (2) protecting against premature disclosure of proposed policies before they are adopted; and (3) protecting against public confusion that might result from the disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's decision. *See Sears, Roebuck*, 421 U.S. at 151-53; *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Examples of documents covered by the deliberative process privilege include: recommendations, draft documents, proposals, suggestions, advisory opinions and other documents such as email messages, that reflect the personal opinions of the author rather than the policy of the agency or the give and take of the policy making process. *See Bloomberg, L.P. v. U.S. Sec. & Exch. Comm'n*, 357 F. Supp. 2d 156, 168 (D.D.C. 2004).

To invoke the deliberative process privilege, an agency must show that the exempt document is both pre-decisional and deliberative. *Access Reports v. U.S. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991); *Coastal States Gas*, 617 F.2d at 868; *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). For a document to be pre-decisional, it must be antecedent to the adoption of an agency policy or decision. *See Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc). To show that a document is pre-decisional, however, the agency need not identify a specific final agency decision; it is sufficient to establish "'what deliberative process is involved, and the role played by the documents at issue in the course of that process.'" *Heggestad v. U.S. Dep't of Justice*, 182 F. Supp. 2d 1, 7 (D.D.C. 2000); *see Gold Anti-Trust Action Comm. v. Board of Governors*, 2011 U.S. Dist. LEXIS 10319, at *22 (D.D.C. Feb. 3,

2011) ("even if an internal discussion does not lead to adoption of a specific government policy, its protection under Exemption 5 is not foreclosed as long as the document was generated as part of a definable decision-making process.").

A document is "deliberative" if it "'reflects the give-and-take of the consultative process.'" *McKinley v. FDIC*, 744 F. Supp. 2d 128, 138 (D.D.C. 2010). The privilege protects factual material in certain circumstances, such as if it is "inextricably intertwined" with deliberative material, *FPL Grp., Inc. v. IRS*, 698 F. Supp. 2d 66, 81 (D.D.C. 2010), or if disclosure "would 'expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Quarles* v. *Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990). "The 'key question' in identifying 'deliberative' material is whether disclosure of the information would 'discourage candid discussion within the agency.'" *Access Reports*, 926 F.2d at 1195.

Here, Defendant properly withheld information under Exemption 5 pursuant to the deliberative process privilege. OIP withheld 112 pages in full or in part, the Civil Rights Division withheld 135 pages in full or in part, and JMD withheld one email pursuant to the deliberative process privilege. Allen Decl. ¶¶ 9, 17-18 & *Vaughn* Index; Brinkmann Decl. ¶ 20 & Exhibit F; Cooper Decl.¶ 22-32 & *Vaughn* Index.

OIP's withholdings included draft correspondence, draft responses, presidential communications, and other deliberative discussions regarding various topics, including the census, congressional correspondence, the drafting process, press inquiries, and inter-agency correspondence. Brinkmann Decl. ¶¶ 23, 29-30. The component withheld inter-agency documents that were draft documents that are routinely transmitted among employees of the Department of Justice. *Id.* ¶ 25 & Exhibit F. These drafts continually change as staff make

tracked changes, suggest edits, and contemplate strategies as they work toward final documents. *Id.* ¶ 25. The drafts withheld by OIP include drafts of the Department's responses to interrogatories propounded by the United States Commission on Civil Rights, as well as draft versions of Department correspondence with Congress or other federal agencies. *Id.* ¶ 26. "Draft documents, by their very nature, are typically predecisional and deliberative." *Blank Rome LLP v. Dep't of the Air Force*, Civ. A. No. 15-cv-1200 (RCL), 2016 U.S. Dist. LEXIS 128209, *14 (D.D.C. Sept. 20, 2016) (quoting *Exxon Corp. v. Dep't of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983)).

Here, the Civil Rights Division relied on the deliberative process privilege to withhold information in email exchanges among Justice Department officials and members of their staff concerning the December 12, 2017, letter. Cooper Decl. ¶ 23. Certain of these emails forward a draft letter regarding the 2020 Census and the citizenship question and request review and advice from the Office of the Assistant Attorney General. *Id.* ¶ 24. The emails forward multiple versions of the draft letters for further review, comments, and questions. *Id.* These emails are predecisional because they were drafted before determining the final contents of the letter, and portions of the emails are deliberative because they contain opinions, suggested edits, and recommendation. *Id.* The disclosure of the documents would harm the free exchange of views within the agency. *Id*. ¶ 25.

The Civil Rights Division also withheld 12 drafts of the letter from Mr. Gary to Dr. Ron Jarmin, Acting Director of the U.S. Census Bureau, regarding the 2020 census and the citizenship question. *Id.* ¶ 30. The drafts were attached to email exchanges between Mr. Gary and John Gore, including communications and positions relating to the addition of a citizenship question to the 2020 census described above, which the Civil Rights Division partially released.

Id. The drafts were circulated within the Department for additional review and input, and they are deliberative because they contain questions to elicit relevant information, comment bubbles, and edits. *Id.* The documents are pre-decisional because they were drafted before determining the final contents of the letter. *Id.* The documents contain candid, frank discussion of vital enforcement interests, which, if released, would harm the Division's capacity to conduct future exchanges without chilling the staffs' exchange and presentation of views.[4] *Id.*

Further, the Civil Rights Division withheld two cover memoranda from 2016 from the Civil Rights Division to JMD containing recommendations pursuant to a legal authority review for American Community Survey questions and new census questions. *Id.* ¶ 27. One of the memoranda is in draft form while the second memorandum is finalized. *Id.* These two memoranda are pre-decisional because they were drafted before JMD made any decisions concerning whether to suggest new questions to the U.S. Census Bureau. *Id.* They are deliberative because they contain recommendations and candid, frank discussion of vital enforcement interests. *Id.*

Finally, JMD withheld one email reflecting an interagency communication that discussed how the Department of Commerce is considering handling a matter, as well as five draft letters attached to responsive emails. Allen Decl. ¶¶ 9, 17-18 & *Vaughn* Index.

The three components, in relying on the deliberative process privilege to withhold information, determined that the information withheld related to agency decision-making, and that if such pre-decisional, deliberative communications were released, federal government

[4] The drafts of Mr. Gary's December 12, 2017, request to the Census Bureau to add a citizenship question to the 2020 Census questionnaire are the subject of a separate FOIA request that Plaintiff submitted to the Civil Rights Division. Plaintiff subsequently commenced a civil action alleging that the Civil Rights Division improperly relied on Exemption 5 with respect to those drafts. *Campaign Legal Ctr. v. U.S. Dep't of Justice*, Civil No. 18-1187 (TSC) (D.D.C.). Cross-motions for summary judgment in that case are fully briefed.

employees would be much more cautious in their communications with each other and in providing all pertinent information and viewpoints to agency decision-makers in a timely manner. Allen Decl. ¶¶ 19-20; Brinkmann Decl. ¶ 24; Cooper Decl. ¶¶ 25-27. This lack of candor would seriously impair the government's ability to foster the forthright, internal discussions necessary for efficient and proper decision-making, and would cause the foreseeable harm of discouraging and ultimately chilling inter-agency discussion and decision-making. Allen Decl. ¶ 20; Brinkmann Decl. ¶ 24; Cooper Decl. ¶¶ 25-27.

Accordingly, disclosure of the materials withheld under Exemption 5 would reveal aspects of the Executive Branch's evaluative process and the manner in which relevant opinions and recommendations were formed. "The underlying purpose of the deliberative process privilege is to ensure that agencies are not forced to operate in a fish bowl," *Moye v. Nat'l R.R. Passenger Corp*., 376 F.3d 1270, 1278 (11th Cir. 2004), and disclosure of the materials at issue here would lead to such a result. The Court should uphold Defendant's Exemption 5 withholdings.

B. OIP's Reliance on the Attorney Work Product Privilege Was Proper.

In this case, OIP withheld two documents, totaling 24 pages, pursuant to Exemption 5 and the work product privilege. Both documents were draft responses to interrogatories that were propounded by the United States Commission on Civil Rights as part of a legal proceeding. OIP acted consistent with FOIA in withholding these materials.

Exemption 5 protects from disclosure attorney work product, which includes "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its . . . agent." Fed. R. Civ. P. 26(b)(3)(A); *see FTC v. Grolier, Inc.*, 462 U.S. 19, 20 (1983) ("It is well established that [exemption 5] was intended to encompass the attorney work[

]product rule."). The work product doctrine protects "the mental processes of the attorney." *Department of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8 (2001).

Under FOIA, work product materials are not considered to be routinely available in litigation because they can only be released under Rule 26(b)(3) upon a showing of substantial need and undue harm by the party seeking discovery. *Grolier*, 462 U.S. at 27; *see Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005) ("Any part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine and falls under Exemption 5.") (internal quotation omitted).

In this case, the draft interrogatory responses reflect information exchanged among or at the direction of federal agency attorneys, generated in reasonable anticipation of litigation. Brinkmann Decl. ¶¶ 34-35. OIP determined that disclosure of the draft responses would reveal Department attorneys' mental impressions, conclusions, opinions, or legal theories concerning anticipated or pending litigation, and have properly been withheld to avoid disclosure of work product. *Id.* ¶ 36. Disclosure of this information would hinder the Department's ability to conduct litigation on behalf of the United States and for the Department to ultimately formulate a position on the matters therein. *Id.* The documents withheld in this category reflect this routine yet essential attorney work-product produced by Department attorneys who execute this core function of enforcing federal laws. *Id.*

C. OIP Properly Relied Upon the Presidential Communications Privilege.

OIP further withheld one document based on Exemption 5 and the presidential communications privilege. The document is covered by the presidential communications privilege because it reflects communications between DOJ attorneys and individuals in the White

House seeking advice and decision from the White House. OIP's reliance on this privilege was appropriate.

In *United States v. Nixon*, 418 U.S. 683, 708 (1974), the Supreme Court recognized that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." The Court has conceived of the presidential communications privilege as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution" because it "relates to the effective discharge of a President's powers[.]" *Id.* at 708, 711. The privilege protects "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." *Id.* at 708. The Court concluded these considerations "justify[ ] a presumptive privilege for Presidential communications." *Id.* The scope of the presidential communications privilege is thus defined in terms of communications that involve the Office of the President, the exercise of the President's responsibilities, and confidential presidential decisionmaking. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977). The presidential communications privilege is broader than the deliberative process privilege, in that it applies to the entirety of documents, and includes both decisional and post-decisional records. *See, e.g., Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108 (D.C. Cir. 2004).

The emails withheld by OIP pursuant to the presidential communications privilege are communications among DOJ and White House senior advisors on matters related to presidential decision-making regarding the 2020 Census. Brinkmann Decl. ¶ 40. Specifically, these records consist of emails between DOJ attorneys and individuals in the Executive Office of the President, including the White House Counsel's Office, who provide analysis, recommendations,

and advice about congressional notification concerning DOJ's request for a citizenship question on the 2020 census. *Id.*

The records withheld fall squarely within the presidential communications privilege because they are communications between senior White House staff and DOJ attorneys and reflect advice sought and opinions solicited by the White House. *Id.* ¶ 41. Accordingly, OIP's reliance on the presidential communications privilege (in addition to the deliberative process privilege, *see* Brinkmann Decl. ¶ 28) to withhold these emails was consistent with FOIA.

III. DEFENDANT PROPERLY WITHHELD INFORMATION PURSUANT TO EXEMPTION 6.

In response to Plaintiff's request, JMD and the Civil Rights Division redacted email addresses and cell phone numbers of journalists and other third parties, and similar contact information for high-ranking Department of Justice personnel pursuant to FOIA Exemption 6. These redactions were proper.

Exemption 6 permits the withholding of "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The term "similar files" is broadly construed and includes "Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *Lepelletier v. Fed. Deposit Ins. Corp.*, 164 F.3d 37, 47 (D.C. Cir. 1999) ("The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual."); *Govt. Accountability Project v. U.S. Dep't of State*, 699 F. Supp. 2d 97, 105-06 (D.D.C. 2010). In assessing the applicability of Exemption 6, courts weigh the "privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, the disclosure would work a clearly unwarranted invasion of personal privacy." *Lepelletier*, 164

F.3d at 46; *Chang v. Dep't of Navy*, 314 F. Supp. 2d 35, 43 (D.D.C. 2004). "[T]he only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Lepelletier*, 164 F.3d at 47 (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994)) (alterations in original); *Beck v. Dep't of Justice*, 997 F.2d 1489, 1492 (D.C. Cir. 1993) (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). "Information that 'reveals little or nothing about an agency's own conduct' does not further the statutory purpose." *Beck*, 997 F.2d at 1492.

In this case, the Civil Rights Division redacted the personal, direct telephone numbers, cell phone numbers, and email addresses of Department of Justice personnel have been redacted for privacy reasons. Cooper Decl. ¶ 33. Similarly, JMD withheld the contact information of individuals employed by DOJ and the contact information of individuals who are not employed by DOJ but who contacted a DOJ employee, for the most part members of the press. Allen Decl. ¶ 12. Accordingly, the privacy interest of these individuals clearly outweighs the nonexistent public interest. *See, e.g.*, *Beck v. Dep't of Justice*, 997 F.2d 1489, 1494 (D.C. Cir. 1993) ("something . . . outweighs nothing every time"); *see also Shurtleff v. EPA*, 991 F. Supp. 2d 1, 18-19 (D.D.C. 2013) (finding that government employees had a privacy interest in preventing the disclosure of their work email addresses).

IV. DEFENDANT COMPLIED WITH FOIA'S SEGREGABILITY REQUIREMENT.

Under FOIA, if a record contains information exempt from disclosure, any "reasonably segregable," non-exempt information subject to FOIA must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are "inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. Dep't of*

the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with 'reasonable specificity'" that the information it has withheld cannot be further segregated. *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. Dep't of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by some "quantum of evidence" by the requester. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007).

Here, after examining each of the records, Defendant determined that all reasonably segregable non-exempt information was disclosed and that the information withheld could not be segregated and released. Allen Decl. ¶ 16; Brinkmann Decl. ¶ 43; Cooper Decl. ¶¶ 31, 33. Therefore, the Court should find that Defendant properly complied with its duty to segregate exempt from non-exempt information.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court grant summary judgment in favor of Defendant.

Dated: May 8, 2019

Respectfully submitted,

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