IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 18-1771 (TSC) Oral Argument Requested

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff Campaign Legal Center ("CLC") hereby opposes the Motion for Summary Judgment filed by Defendant Department of Justice ("DOJ") and respectfully files this Cross-Motion for Summary Judgment in the above-captioned matter. Relief in favor of CLC is appropriate because DOJ has failed to conduct a reasonable search for responsive records and is withholding responsive materials not subject to the claimed exemptions. This motion is accompanied by and supported by a memorandum of law, statements of disputed and undisputed material facts, supporting declaration, exhibits, and a proposed order.

Respectfully submitted,

__/s/ Nadav Ariel_____
BUCKLEY LLP
Adam Miller (DC Bar # 496339)
Nadav Ariel (DC Bar # 1023141)
2001 M Street NW, Suite 500
Washington, DC 20036
202-349-7958
amiller@buckleyfirm.com
nariel@buckleyfirm.com

CAMPAIGN LEGAL CENTER
Danielle M. Lang (DC Bar # 1500218)
1411 K Street NW, Suite 1400
Washington, DC 20005
202-736-2200
dlang@campaignlegalcenter.org

Counsel for Plaintiff Campaign Legal Center

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 18-1771 (TSC) Oral Argument Requested

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

Table of Contents

INTRODUCTION

In March 2018, Commerce Secretary Wilbur Ross announced his decision to add a "citizenship question" to the upcoming 2020 census survey. Widely expected to depress response rates among certain minority groups, this decision has become a major ongoing national controversy. This lawsuit is not about the merits of the administration's decision, but rather about whether the public has a right to know what information led to that decision and whether the administration's public statements and justifications for its decision were truthful. Congress passed the Freedom of Information Act to "open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 372, 96 S. Ct. 1592, 1604, 48 L. Ed. 2d 11 (1976); *see also N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S. Ct. 2311, 2327, 57 L. Ed. 2d 159 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.").

Secretary Ross claimed that he decided to add the citizenship question in response to a request from the Department of Justice ("DOJ"). That request, memorialized in a letter dated December 12, 2017 from Assistant Attorney General Arthur Gary to the Census Bureau, stated that DOJ was requesting to add a question regarding citizenship to the census in order to obtain data to aid the department's enforcement of Section 2 of the Voting Rights Act. Shortly thereafter, on February 1, 2018, Campaign Legal Center ("CLC") submitted the FOIA requests to DOJ now at issue seeking documents relating to DOJ's request. In response, DOJ initially failed to produce any responsive records despite granting the request expedited processing due to the recognition of the urgent public interest in the materials at issue. CLC then filed this lawsuit, challenging DOJ's failure to timely respond to the FOIA requests. Thanks to pressure from this Court, DOJ has since

commenced production of responsive materials but has disclosed only a small number of documents, with many others improperly withheld under overbroad claims of exemption.

CLC respectfully requests that the Court deny DOJ's motion for summary judgment and instead grant its cross-motion for summary judgment. *First*, with respect to the documents that DOJ is withholding, none of the claimed privileges apply. DOJ's proffered *Vaughn* indices are deficient and fail to provide the court with sufficient information to apply the claimed privileges. Moreover, the documents are not subject to the deliberative process privilege because they post-date the agency decisions at issue and therefore are neither pre-decisional nor deliberative; they are not subject to the presidential communications privilege because DOJ has not established that they were authored or solicited by the President or his immediate White House advisors on a matter of presidential decision-making; and they are not subject to the attorney work product doctrine because they were not prepared in anticipation of litigation. *Second*, with respect to its searches, DOJ failed to meet its burden to sufficiently describe the records searched, why only those records were selected for search and not others, and the search processes. And the limited information that DOJ did provide revealed substantive deficiencies, raising doubt about the adequacy of the search due to its limitation to only certain types of records, custodians, and an insufficient use of search term searches.

FACTUAL BACKGROUND

On March 26, 2018, Department of Commerce ("Commerce" or "the Commerce Department") Secretary Wilbur Ross announced his decision to add a question regarding citizenship status to the 2020 Census Questionnaire.[1] Secretary Ross claimed that his decision

[1] Ex. 1 (Mar. 26, 2018 Memorandum from Sec'y of Commerce Wilbur Ross to Under Sec'y of Commerce for Econ. Affairs Karen Dunn Kelley on Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire).

arose due to a December 12, 2017 request from Arthur Gary, the General Counsel of DOJ's Justice Management Division ("JMD"), to add the citizenship question to the 2020 Census Questionnaire (the "December 12, 2017 letter").[2] The purported reason for the request was to allow DOJ to better enforce Section 2 of the Voting Rights Act.[3] However, as clearly shown by numerous documents subsequently released by Commerce and DOJ and as concluded by three United States District Courts, that justification was a pretext.[4] The decision to add the question was made months before DOJ sent its letter.[5] In a supplemental memorandum, issued months later, Secretary Ross was forced to acknowledge that the deliberative process for the decision occurred before the December 12, 2017 request.[6]

Internal documents recently released by the Commerce Department's Census Bureau ("Census") and DOJ confirm that the decision to add the citizenship question was made well before DOJ's December 12, 2017 letter. Likewise, the decision by DOJ to issue the December 12, 2017 letter, providing a rationale for the addition, was also made well before the letter was drafted. On May 2, 2017 Secretary Ross wrote, "I am mystified as to why nothing have [sp] been done in response to my months old request that we include the citizenship question. Why not?" Earl Comstock, a commerce official, responded,

> "I agree Mr. Secretary. On the citizenship question we will get that in place.… We need to work with Justice to get them to request

[2] Ex. 2 (Dec. 12, 2017 Letter from A. Gary to Dr. R. Jarmin).

[3] *See* Ex. 2 (Dec. 12, 2017 Letter from A. Gary to Dr. R. Jarmin).

[4] *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 567-68 (S.D.N.Y. 2019); *State v. Wilbur Ross*, 358 F. Supp.3d 965, 974 (N.D. Cal. 2019); *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp.3d 681, 694 (D. Md. 2019).

[5] *Id.*

[6] Ex. 3 (Jun. 21, 2018 Supplemental Memorandum by Sec'y of Commerce Wilbur Ross Regarding the Administrative Record in Census Litigation).

> that citizenship be added back as a census question, and we have the court cases to illustrate that DoJ has a legitimate need for the question to be included. I will arrange a meeting with DoJ staff this week to discuss."[7]

Given that Secretary Ross was only sworn in on February 28, 2017, the request to add the citizenship question must have been one of his earliest actions. What followed, according to another federal court was "a cynical search to find some reason, any reason, or an agency request to justify that preordained result."[8]

Specifically, Secretary Ross sought to have DOJ provide a post-hoc justification for the decision. On August 8, 2017, Secretary Ross inquired "where is the DoJ in their analysis? If they still have not come to a conclusion please let me know your contact person and I will call the AG."[9] On September 8, 2017, Mr. Comstock responded that: "I spoke several times with James McHenry [DOJ] by phone, and after considering the matter further James said that Justice staff did not want to raise the question… James directed me to … the Department of Homeland Security… after discussion DHS really felt it was best handled by the Department of Justice. At that point… I asked James Uthmeier [OGC at Commerce] to look into the legal issues and how Commerce could add the question to the Census itself."[10]

After DOJ staff initially balked at issuing the request, cabinet-level officials got involved. A call was set up for September 18, 2017 between Secretary Ross and Attorney General Sessions, who was "eager to assist" on the request for the citizenship question and ready to "do whatever

[7] Ex. 4 (May 2, 2017 email correspondence between E. Comstock and Sec'y W. Ross).

[8] *State v. Ross*, No. 18-cv-01865, 2019 WL 1052434 at *3 (N.D. Cal. Mar. 6, 2019).

[9] Ex. 5 (August 8, 2017 email from Sec'y W. Ross to E. Comstock).

[10] Ex. 6 (Sept. 8, 2017 memo from E. Comstock to Sec'y W. Ross)

[Secretary Ross] need[s] us to do" on the issue.[11] With DOJ's agreement to request the citizenship question apparently in hand, Census pressed ahead with finalizing the questionnaire and the printing process. In the meantime, DOJ began drafting the letter, relying on the Commerce Department's proposed rationale and work product, and a draft letter provided to it by a Trump Transition Official.[12] Two months later, on November 27, Secretary Ross contacted DOJ again to ensure that the request would be timely made, and shortly thereafter DOJ's Arthur Gary issued the December 12 letter.[13]

Despite this record demonstrating that the DOJ letter was a post-hoc rationalization of an already made decision, Census continues to claim that the reason it plans to ask the citizenship question is to enable DOJ to enforce Section 2 of the Voting Rights Act ("VRA").[14] This explanation is highly dubious and three separate federal courts have held that it is false and misleading.[15] The government's non-political experts have concluded that adding the citizenship question will result in "substantially less accurate citizenship status data than are available from

[11] Ex. 7 (Sept. 18, 2017 email from D. Cutrona to W. Teramoto).

[12] Ex. 8 (draft letter requesting reinstatement of the citizenship question); Ex. 9 (Memorandum from the House Committee on Oversight and Reform Majority Staff to Committee Members (March 14, 2019)); *see also New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 555 (S.D.N.Y. 2019).

[13] Ex. 10 (Nov. 27, 2017 email from Sec'y W. Ross to P. Davidson re: Census Questions).

[14] *See* U.S. CENSUS BUREAU, WHY WE ASK (2018) (https://www.census.gov/content/dam/Census/newsroom/press-kits/2018/why-we-ask-fact-sheet.pdf) (last accessed May 21, 2019).

[15] *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 567-68 (S.D.N.Y. 2019); *State v. Wilbur Ross*, 358 F. Supp.3d 965, 974 (N.D. Cal. 2019); *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp.3d 681, 694 (D. Md. 2019).

administrative sources."[16] DOJ has never previously suggested that ACS data is insufficient to support their Voting Rights Act claims and the administration has never articulated any reasonable basis to believe that adding the citizenship question will result in any changes in VRA enforcement. Independent experts have echoed Census' internal conclusion and found that "adding a citizenship question is very likely to undermine the census."[17] Moreover, the groups that regularly enforce the VRA in court as well as VRA experts agree that the move will harm, not help, Latino communities' voting power and representation.[18]

---

[16] Ex. 11, Memorandum from John M. Abowd, Chief Scientist and Associate Director for Research and Methodology, U.S. Census Bureau, Technical Review of the Department of Justice Request to Add Citizenship Question to the 2020 Census (Jan. 19, 2018).

[17] *See* American Statistical Association, The American Statistical Association Strongly Cautions against Addition of a Citizenship Question on the 2020 Census (August 2, 2018) (https://www.amstat.org/asa/files/pdfs/POL-2020CensusCallForComments.pdf) (last accessed May 21, 2019); Jan. 26, 2018 letter from six former directors of the Census Bureau to Secretary Ross (https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2018/03/27/Editorial-Opinion/Graphics/DOJ_census_ques_request_Former_Directors_ltr_to_Ross.pdf) (last accessed May 21, 2019); *see also See, e.g.*, DOJ-MSJ Ex. E, p. 55 (12/22/2017 email from Ron Jarmin to Arthur Gary explaining that "the best way to provide … block level data with citizenship voting population … would be through utilizing [data] the Census Bureau already possesses.")

[18] *See, e.g.*, Letter from Chiraag Bains, Dir. of Legal Strategies, and Brenda Wright, Demos, to Jennifer Jessup, Dep'tl Paperwork Clearance Officer, Dep't of Com. (Aug. 7, 2018), https://www.demos.org/publication/demos-sends-letter-urging-department-commerce-reject-last-minute-addition-citizenship-qu (last accessed May 21, 2019)("[E]nforcement of voting rights and other key civil rights laws will be dramatically undermined by adding a question to the census that is certain to drive down the response rates of communities that already feel under siege from the current Administration's constant vilification and targeting of immigrants."); Letter from Faiz Shakir, Nat'l Pol. Dir., and Jennifer Bellamy, Senior Legis. Couns., Am. C.L. Union, to Jennifer Jessup, Dep'tl Paperwork Clearance Officer, Dep't of Com. (Aug. 6, 2018), https://www.aclu.org/letter/aclu-comments-opposing-inclusion-citizenship-question-2020-census (last accessed May 21, 2019) Brief for the Leadership Conf. on Civ. and Hum. Rts. et al. as Amici Curiae Supporting Plaintiffs, California v. Ross, No. 3:18-cv-01865-RS (N.D. Cal. Jul. 24, 2018) ("Even setting aside the adequacy of current citizenship data for Section 2 enforcement, adding a citizenship question would not help the communities that amici represent to vindicate their rights under the Voting Rights Act. Indeed, it would have precisely the opposite effect."); Letter from Eric Schneiderman, Atty. Gen. of N.Y., et al. to Wilbur Ross, Sec'y, Dep't of Com. (Feb. 12, 2018), https://www.brennancenter.org/sites/default/files/legal-work/Multi-State-Attorney-General-Letter-re-2020-Census.pdf (last accessed May 21, 2019)

But the question in this case is not whether the administration's policy is permissible, but rather whether the public has a right to know the truth.[19] Public release of documents is particularly important where other avenues to accountability have failed. In sworn congressional testimony, Secretary Ross stated that the addition of the citizenship question was added "solely" in response to DOJ's request.[20] The glaring inconsistency of Secretary Ross' statements to Congress with the available record has been of immense public and media interest.[21] The effects of the decennial census directly implicate bedrock features of our system of representative government, including Congressional apportionment. The people have a right to review for themselves all DOJ records subject to FOIA on this topic.

On February 1, 2018, CLC submitted a FOIA request to the Civil Rights Division, the Justice Management Division, and the Office of the Attorney General at the Department of Justice seeking all records pertaining to Mr. Gary's December 12, 2017 letter to the Census Bureau.[22] In

("[R]equesting citizenship data would undermine the purposes of the Voting Rights Act and weaken voting rights enforcement across the board.").

[19] To deny DOJ's motion for summary judgment, the Court does not need to find that Secretary Ross' explanation was false, only that DOJ has not met its burden to establish that withheld materials are predecisional and deliberative. *See infra.* Legal Standard.

[20] *FY19 Budget Hearing – Department of Commerce: Hearing Before the Subcomm. On Commerce, Justice, Science, and Related Agencies* of the H. Comm. on Appropriations, 115th Cong. (2018) (statement of Sec. Wilbur Ross, Commerce Sec.)

[21] *See, e.g.*, Salvador Rizzo, *Wilbur Ross's false claim to Congress that the census citizenship question was DOJ's idea*, WASH. POST, July 30, 2018, https://www.washingtonpost.com/news/fact-checker/wp/2018/07/30/wilbur-rosss-false-claim-to-congress-that-the-census-citizenship-question-was-dojs-idea/?utm_term=.b14d19800e60 (last accessed May 21, 2019); Michael Wines, *Census Bureau's Own Expert Panel Rebukes Decision to Add Citizenship Question*, N.Y. TIMES, March 30, 2018, http://www.nytimes.com/2018/03/30/us/census-bureau-citizenship.html (last accessed May 21, 2019)

[22] DOJ Motion Ex. A (FOIA Request). The response of the Civil Rights Division is the subject of separate litigation for which motions for summary judgment are fully briefed before this Court. *Campaign Legal Ctr. v. U.S. Department of Justice*, Civil No. 18-1187 (TSC) (D.D.C.).

particular, CLC sought (1) documents to, from, or mentioning Dr. Ron Jarmin or Dr. Enrique Lamas; and (2) documents containing the phrases "2020 census," "long form," "citizenship question," "questions regarding citizenship," "ACS," "American Community Survey," "citizen voting age population," *or* "CVAP," dating from January 20, 2017 to the present. This request was reasonable and narrowly tailored because CLC specified the relevant time period and provided a detailed list of search terms that were targeted to the addition of the citizenship question and unlikely to be present in unrelated DOJ records. For instance, Dr. Jarmin and Dr. Lamas are Commerce Department employees unlikely to have interacted with DOJ in other contexts.[23]

CLC's FOIA request sought expedited processing because there is an "urgency to inform the public" about the "actual or alleged government activity" covered by the request and because the requested records involve "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence." 28 C.F.R. § 16.5(e)(1)(iv). CLC addressed its request to three DOJ components. All of them acknowledged the urgency of the request and granted expedited processing. The Civil Rights Division and the Office of the Attorney General did so February 9, 2018 and the Justice Management did so on March 14, 2018.[24] However, only after CLC initiated this and related litigation against the components did DOJ begin a drawn out process of producing documents.[25]

---

[23] *See* DOJ Motion Ex. A (FOIA Request).

[24] CRD Decl. Ex. B (CRD Feb. 9, 2018 Response to FOIA); Exhibit 12 (OIP Division (on behalf of OAG) Feb. 9, 2018 Response to FOIA). JMD granted expedited processing in a March 14, 2018 phone call with Danielle Lang. CLC confirmed this in a follow up letter on June 22, 2018 letter to JMD. Exhibit 13 (June 22, 2018 Letter from CLC to JMD).

[25] Ex. 14 (October 5, 2018 DOJ Letter from M. Posner to D. Lang), (May 7, 2019 DOJ Letter from M. Posner to D. Lang).

LEGAL STANDARD

Summary judgment is appropriate where, viewing the record in the light most favorable to the non-moving party, "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Petroleum Info. Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992). In FOIA cases, when an agency claims an exemption, the burden is on the agency to show that requested material is covered by a statutory exemption. 5 U.S.C. § 552(a)(4)(B); *Petroleum Info. Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992). "In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). To meet its burden, a defendant agency must "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." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

When the adequacy of an agency's search process is at issue, the agency "must demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Palmieri v. United States*, 194 F. Supp. 3d 12, 17 (D.D.C. 2016) (quoting *Valencia-Lucerna v. U.S. Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999)) (internal quotation marks omitted). To make this showing, the agency must submit an affidavit "describ[ing] what records were searched, by whom, and through what process." *Nat'l Sec. Counselors v. Central Intelligence Agency*, 849 F. Supp. 2d 6, 11 (D.D.C. 2012) (quoting *Steinberg v. U.S. Dep't of Just.*, 23 F.3d 548 (D.C. Cir. 1994)) (internal quotation marks omitted). Summary judgment cannot be granted if "a review of the record raises substantial doubt as to the search's adequacy, particularly in view

of well defined requests and positive indications of overlooked materials." *Reporters Comm. for Freedom of Press v. Fed. Bureau of Investigation*, 877 F.3d 399, 402 (D.C. Cir. 2017) (quoting *Valencia-Lucerna v. U.S. Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999)) (internal quotation marks omitted).

ARGUMENT

I. DOJ HAS NOT SATISFIED ITS BURDEN TO SHOW THAT EXEMPTION 5 APPLIES

DOJ has withheld documents and portions of documents under various separate claimed categories of Exemption 5 but has failed to sufficiently justified the subject withholding under: the deliberative process privilege, the presidential communications privilege, and the attorney work-product privilege. "The strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *U.S. Dept. of State v. Ray*, 502 U.S. 164, 173 (1991). Further, "[i]n light of the FOIA's strong policy in favor of disclosure, … Exemption 5 is to be construed 'as narrowly as consistent with efficient Government operation.'" *Petroleum Info. Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (Ginsburg, J.) (*quoting EPA v. Mink*, 410 U.S. 73, 87, 93 (1973)).

A. DOJ Has Failed To Provide Sufficiently Detailed *Vaughn* Indices

An agency may meet its burden of establishing an exemption applies by "formulating a system itemizing and indexing that would correlate statements made in the [agency's] refusal justification with the actual portions of the document," commonly referred to as a *Vaughn* Index. *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). The index "must be specific enough to permit a reviewing court to engage in a meaningful review of the agency's decision." *Hall v. U.S. Dep't of Justice*, 552 F.Supp.2d 23, 27 (D.D.C. 2008). Further, "the need for a detailed description 'is of particular importance … where the agency is claiming that the documents are

protected by the deliberative process privilege under Exemption 5.'" *People for the Am. Way Foundation v. Nat'l Park Service*, 503 F. Supp. 2d 284, 295 (D.D.C. 2007) (*quoting Edmonds Institute v. U.S. Dept. of Interior*, 383 F. Supp. 2d 105, 108 n.1.).

However, DOJ's *Vaughn* indices contain numerous deficiencies that prevent the Court from engaging in a meaningful review of whether the exemption is proper. Indeed, OIP's and CRD's *Vaughn* indices appear intentionally obfuscatory, especially compared to JMD's more detailed and clear *Vaughn* index. For instance:

- All three indices fail to set forth the particular "deliberative process" that underlies the claim of exemption.
- OIP's *Vaughn* index fails to identify the author(s), dates, or general subject matter of the materials fully withheld pursuant to the deliberative process privilege.
- CRD's *Vaughn* index does not provide any bates numbers for documents withheld in part, leaving this Court and CLC to guess which descriptions correspond to which documents.
- Group 2 of CRD's *Vaughn* index identifies that the description applies to "a majority" of the documents contained in the group but fails to describe the minority of documents categories in the same group.
- Groups 5 and 6 of CRD's *Vaughn* index only identify the year the document was created but do not specify a date while Group 7 does not include any date information.

Given these deficiencies, the Court lacks sufficient information to determine that specific documents fall within the alleged privileges and whether portions of the withheld documents can be segregated from those portions which are allegedly exempted from disclosure.

B. DOJ Has Not Satisfied its Burden to Show That the Deliberative Process Privilege Applies

DOJ has not met its burden with respect to materials it claims are protected by the deliberative process privilege because it has not shown that the withheld materials are predecisional and deliberative in nature. *See Petroleum Info. Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) ("To qualify for withholding under Exemption 5's executive privilege, information must be both 'predecisional' and 'deliberative.'").[26]

Neither OIP nor JMD identify a deliberative process. Instead, both components assert that documents are shielded by the deliberative process privilege due to their nature as non-final drafts. Declaration of Vanessa R. Brinkman ("OIP Decl.") at ¶ 25-27; Declaration of Michael H. Allen ("JMD Decl.") at ¶ 17-20. However, as this Circuit has made clear, an agency must identify a decision-making process. *See Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (agency has "burden of identifying the decisionmaking process"). Further, drafts are not automatically exempt. *See Judicial Watch, Inc. v. U.S. Postal Service*, 297 F.Supp.2d 252, 260 (D.D.C. 2004) ("[D]rafts are not presumptively privileged.").

CRD erroneously identifies the deliberative process as determining the final contents of the Dec. 12 letter. Declaration of Tink Cooper ("CRD Decl.") at ¶ 30. However, the relevant agency decision at issue was the decision by Census to add the citizenship question. Failing that, the relevant agency decision would be whether DOJ would request the addition and on what basis. Both of these decisions had been made prior to the creation of the withheld material.

Shielding the drafts wordsmithing the content of the request cannot promote effective agency decision making because DOJ was not engaging in policy making when it was drafting the

[26] The majority of material withheld by DOJ is claimed to fall under Exemption 5; CLC does not challenge DOJ's Exemption 6 redactions.

request. It was, instead, drafting an already determined post-hoc rationale for an already decided policy. DOJ should not be able to use Exemption 5 to shield its deliberations on how to most effectively obscure the rationale for critical public policy decisions.

As explained by the Supreme Court, "[t]he ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions…However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached, and therefore equally difficult to see how the quality of the decision will be affected by the forced disclosure of such communications[.]" *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

1. The Withheld Materials Are Not Pre-Decisional

DOJ has not met its burden of demonstrating that the withheld materials were generated prior to the relevant agency decision being made. "A document is predecisional [only] if it was 'prepared in order to assist an agency decisionmaker in arriving at his decision,' rather than to support a decision already made." *Petroleum Info. Corp. v. U.S. Dept. of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (Ginsburg, J.) (*quoting Renegotiation Bd. v. Grumman Aircraft*, 421 U.S. 168, 184(1975)). "The most basic requirement of the [deliberative process] privilege is that a document be *antecedent* to the adoption of an agency policy. A post-decisional document, draft or no, by definition cannot be 'predecisional.'" *Judicial Watch, Inc. v. U.S. Postal Service,* 297 F.Supp.2d 252, 260 (D.D.C. 2004). Here, the evidence shows that the ultimate agency decisionmaker, Secretary Ross, had decided to add the citizenship question long before the creation of the withheld materials.

a) The Withheld Materials Were Created After the Decision to Add the Citizenship Question

The relevant inquiry in determining if a document is predecisional is "whether it was generated before the adoption of an agency policy." *See Coastal States Gas Corp. v. Dep't of Energy*, 617, F.2d 854, 866 (D.C. Cir. 1980). Here, the only adoption of an agency policy was the decision to add the citizenship question to the 2020 Census by the Commerce Department.

On May 2, 2017, Secretary Ross emailed Earl Comstock "I am mystified as to why nothing have [sp] been done in response to my months old request that we include the citizenship question." Comstock responded "I agree Mr. Secretary. On the citizenship question we will get that in place.… We need to work with Justice to get them to request that citizenship be added back as a census question[.]" *See* Ex. 4 (May 2, 2017 email exchange between Secretary Ross and Earl Comstock). Three courts have reviewed these materials and concluded that Secretary Ross made the decision to add the question months before DOJ agreed to request it and began drafting a letter. *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 567-68 (S.D.N.Y. 2019); *State v. Wilbur Ross*, 358 F. Supp.3d 965, 974 (N.D. Cal. 2019); *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp.3d 681, 694 (D. Md. 2019).[27] Everything following Secretary Ross's decision was an exercise to manufacture a false justification. *See Wilbur Ross*, 358 F. Supp.3d at 973. Therefore, DOJ has not met its burden to show that the materials it is now withholding pursuant to the deliberative proves privilege were "prepared in order to assist an agency decisionmaker in arriving at his decision." *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975).

[27] While the Supreme Court has granted Cetriorari in the New York and California federal district court opinions while the government has appealed the Maryland federal district court opinion has been appealed to the 4th Circuit, CLC submits that factual findings by the lower courts, as opposed to legal conclusions, are unlikely to be reversed.

b) The Withheld Materials Were Created After DOJ's Decision to Request the Citizenship Question

Even if DOJ's decision to request the addition of the citizenship question was an independent deliberative process (as opposed to a non-deliberative post-hoc effort to provide the appearance of a purported justification for Secretary Ross's decision), DOJ has not demonstrated that these materials were generated prior to that decision. *See Coastal States Gas Corp. v. Dep't of Energy*, 617, F.2d 854, 866 (D.C. Cir. 1980). Notably, some of the withheld material is dated after the December 12, 2017 letter was sent to the Commerce Department and does not appear to be part of any separate deliberative process. *See e.g.* Ex. 15 (Email from S. Flores to I. Prior on Dec. 19, 2017 (included in OIP's Mar. 29, 2019 response)); *see also* OIP *Vaughn* index entries for documents OIP-0101 to OIP-0102, OIP-0103, and OIP-0105. DOJ has not put forth any explanation of what deliberative process was ongoing after the Dec. 12 letter was sent and therefore has failed to meet its burden with respect to that material.

With respect to materials generated prior to finalization of the December 12 letter, documents released by the Department of Commerce indicate that DOJ had decided to make the request by September 18, 2017 at the latest. On that date, Secretary Ross spoke with Attorney General Sessions who was "eager to assist" in supporting the citizenship question decision and DOJ was ready to "do whatever [Commerce] need us to do" on the issue.[28] Consistent with that, on November 27, 2018 Secretary Ross sent an email indicating that Commerce had already committed itself to adding the question by taking significant steps towards implementing the addition and was anxious to receive the finalized request it was expecting from DOJ.[29]

[28] Ex. 7 (Sept. 18, 2017 email from D. Cutrona to W. Teramoto).

[29] *See* Ex. 10 (November 27-28, 2017 email exchange between Secretary Ross and Peter Davison).

Thus, even if DOJ's "decision" to issue the December 12 letter is the relevant decision, its motion and declarations do not meet its burden to show that the withheld materials were "prepared in order to assist an agency decision maker in arriving at his decision." *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). Rather, these documents suggest that the decision to issue the request for the citizenship question was made well in advance of the creation of the withheld materials and therefore are not pre-decisional.

2. The Withheld Materials Are Not Deliberative

DOJ has not met its burden to show that the withheld materials are deliberative. Documents are deliberative if they are "a part of the agency give-and-take of the deliberative process by which the decision itself is made." *Vaughn v. Rosen*, 523 F.3d 1136, 1144 (D.C. Cir. 1975); *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (A deliberative document "reflects the give-and-take of the consultative process."). When determining whether a document is deliberative, the Court must "must examine the information requested in light of the policies and goals that underlie the deliberative process privilege." *See Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1988). Here, documents released by the Commerce Department and DOJ indicate that the decision to add the citizenship question to the census and DOJ's decision to request the addition were both decided at the cabinet level *prior* to the creation of the documents at issue. Therefore, the materials do not reflect the "give-and-take of the consultative process."

The available evidence indicates that Commerce made the decision to add the citizenship question on its own and later shopped for assistance from other agencies to justify the addition. In a September 8, 2017 memo to Secretary Ross, Commerce's Earl Comstock wrote that he discussed the citizenship question with a DOJ official, but "after considering the matter further [the official] said that Justice staff did not want to raise the question given the difficulties Justice was

experiencing in the press at the time (the whole Comey matter). [The official] directed me to … the Department of Homeland Security... after discussion DHS really felt that it was best handled by the Department of Justice. At that point the conversation ceased and I asked … [an official in] the Department of Commerce Office of General Counsel, to look into the legal issues and how Commerce could add the question to the Census itself." *See* Ex. 6. Similarly, the decision by Justice to issue the request then appears to have been made during a September 18, 2017 call between Secretary Ross and Attorney General Sessions. *See* Ex. 7.

Post-hoc documents providing justifications for a pre-decided policy do not reflect the "give-and-take of the consultative process." *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *see also Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't Agency*, 811 F. Supp. 2d 713, 741 (S.D.N.Y. 2011) ("Nevertheless, a draft is only privileged if it contains discussions that reflect the policy-making process. It is not privileged if it reflects the personal opinions of a writer with respect to how to explain an *existing* agency policy or decision." (emphasis in original) (footnotes omitted)). Therefore, DOJ has not met its burden to show the withheld material is deliberative.

3. Withholding Does Not Advance the Purposes of Exemption 5

Finally, a recently released decision in the Southern District of New York that found that draft versions of the December 12, 2017 letter were protected by the deliberative process privilege for "messaging communications" should not control here. *See State of New York v. U.S. Dep't of Commerce*, 2018 WL 4853891 at *2 (18-cv-2921, S.D.N.Y. Oct. 5, 2018) (*citing Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196-97 (D.C. Cir. 1991). In that case, the court opined whether documents deliberating about "messaging" to explain an already made decision to the public can be protected under the privilege. The court found that they could, but did not provide any analysis of how the drafts of the December 12, 2017 letter constitute such documents. The letter is not

addressed to Congress, the public, or the press. *Id.* at *3 (noting that such messaging communications may involve substantive policymaking). Rather, it is styled as a policy document from one agency to another requesting a policy change. Indeed, as the court there recognized a "messaging" communication is not protected under the privilege if it is "little more than deliberations over how to spin a prior decision." *Id.* at *4. If any agency document that may become public can be categorized as a "messaging" document, then virtually any draft would be privileged. *Cf. Judicial Watch, Inc. v. U.S. Postal Service*, 297 297 F.Supp.2d 252, 260 (D.D.C. 2004) ("[D]rafts are not presumptively privileged."). Regardless, for the "messaging" deliberative privilege to apply, the posture of this action places the burden on DOJ to establish that the documents are messaging documents and were created primarily for that purpose. DOJ has made no such claim, let alone put forward any admissible facts that would meet this burden.

Meanwhile, DOJ has not met its burden to show that release of the materials would hinder agency decision-making. "Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). DOJ states that release of the withheld materials would cause harm, but "[a]n agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that the disclosure would defeat, rather than further, the purposes of the FOIA." *See Mead Data Cent., Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977). *See also Formaldehyde Inst. v. Dep't of Health and Human Services*, 889 F.2d 1118, 1123-24 (D.C. Cir. 1989) (overruled on other grounds) ("The pertinent issue here is what harm, if any, the [withheld material's] release would do to [the agency's] deliberative process."); *Lee v. FDIC*, 923 F. Supp. 451, 456 (S.D.N.Y. 1996) ("[T] the exemption should only be invoked when the dangers which motivated the enactment of the exemption are present[.]").

It is true that Exemption 5 typically protects "recommendations, draft documents, proposals, suggestions, and other subjective documents," but "the privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2nd Cir. 1999) (internal citations omitted). Indeed, "[t]he mere fact that a document is a draft … is not a sufficient reason to automatically exempt it from disclosure... [T]he policy reasons for the existence of the privilege must be implicated in order for the Court to find withholding of information necessary." *Lee v. F.D.I.C.*, 923 F. Supp. 451, 458 (S.D.N.Y. 1996). *See also Judicial Watch, Inc. v. U.S. Postal Service*, 297 297 F.Supp.2d 252, 260 (D.D.C. 2004) ("[D]rafts are not presumptively privileged.").

In a case such as this, where the decisions to add the question and make the request had already been made, withholding these materials cannot encourage open, frank discussion on matters of policy, because the materials were not generated as part of a process by which policies are formulated. *See New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 567-68 (S.D.N.Y. 2019); *State v. Wilbur Ross*, 358 F. Supp.3d 965, 974 (N.D. Cal. 2019); *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp.3d 681, 694 (D. Md. 2019). The documents would have been created regardless of the specter of future publication because they were created as part of an effort to provide a false justification for an agency decision that had already been made. "Deliberations about how to present an already decided policy to the public, or documents designed to explain that policy to—or obscure it from—the public, including in draft form, are at the heart of what should be released under FOIA… The concern of the privilege is to prevent the chilling of internal agency discussions that are necessary to the operation of good government; it is not concerned with chilling agency efforts to obfuscate, which are anathema to the operation of democratic

government." *See Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Enf't Agency*, 811 F. Supp. 2d 713, 741-42 (S.D.N.Y. 2011) (footnotes omitted).

Accordingly, DOJ has failed to meet its burden of demonstrating that the withheld materials qualify under the deliberative process privilege.

C. The Presidential Communication Privilege Does Not Apply

DOJ has not met its burden to show that the presidential communication privilege applies to the material at issue, communications between DOJ attorneys and an unidentified individual in the White House seeking advice as to congressional notification of the Department's request for a citizenship question. The presidential communications applies only for the narrow purpose of ensuring that the President receives the best and most candid advice. "The presidential communications privilege …'protects 'communications directly involving and documents actually viewed by the President,' as well as documents 'solicited and received' by the President or his 'immediate White House advisers [with] ... broad and significant responsibility for investigating and formulating the advice to be given the President.'" *Judicial Watch, Inc. v. United States Dep't of Def.*, 245 F. Supp. 3d 19, 28 (D.D.C. 2017), aff'd, 913 F.3d 1106 (D.C. Cir. 2019). The Presidential Communications privilege, like all FOIA exemptions, should be read as narrowly as possible. *Judicial Watch*, 245 F. Supp. 3d at 27. "The presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President." *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997).

DOJ has not provided sufficient information for the court to determine whether the communications were with "immediate advisors in the Office of the President." *See Judicial Watch, Inc. v. U.S. Dep't of Defense*, 245 F. Supp. 3d 19, 28 (D.D.C. 2017) (citations omitted). DOJ identifies no authors or dates for the subject communications. *See Am. Center for Law &*

Justice v. U.S. Dep't of State, 330 F. Supp. 3d 293 (D.D.C. 2018) (finding insufficient information to apply the presidential communications privilege where the claimant agency provided only a "bare-bones description of the contents of the withheld materials"). Moreover, while DOJ states that some communications were with the White House Counsel's Office, it describes others as being only with members of the Executive Office of the President, which suggests that the privilege is inapplicable. *See* OIP Decl. at ¶ 40; *see also Judicial Watch, Inc. v. Dept. of Justice*, 365 F.3d 1108 at fn1 (drawing a distinction between the Office of the President, which is not subject to FOIA, and the Executive Office of the President, which is subject to FOIA.). Moreover, DOJ has not established that the communications at issue concern a "quintessential and non-delegable Presidential power," or an issue that calls for direct decision-making by the President as opposed to operational decision-making. *In re Sealed Case*, 121 F.3d at 752-53.

To the extent DOJ argues that materials they claim are protected by the presidential communications privilege are also protected by the deliberative process privilege, DOJ has failed also to meet its burden to show that the deliberative process privilege for the same reasons as described *supra* at Section I.A.

D. The Attorney Work-Product Privilege Is Inapplicable

DOJ's claim of work product protection for draft responses to interrogatories issued by the United States Commission on Civil Rights is misplaced because the documents were not created in anticipation of an adversarial proceeding. "[A] proceeding, including an administrative proceeding, should be considered 'adversarial' only if the proceeding has adversaries, i.e., opposing parties. Thus, a proceeding should be considered 'adversarial' only if it is a proceeding in which one party has a claim against another party." *Adair v. EQT Prod. Co.*, 294 F.R.D. 1, 5 (W.D. Va. 2013) (citing *United States v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603, 628

(D.D.C.1979) in support and explaining that the case stands for the proposition that an administrative proceeding should be considered adversarial when an "***opposing party***" has a right of cross-examination or to present proof.) (emphasis added).

DOJ has failed to identify an adversarial proceeding for which the documents were created. *Id.* ("An assertion that a document is protected by the work-product doctrine must be established by specific facts and not conclusory statements.") Its claim that the documents were prepared in order to draft responses to interrogatories issued by United States Commission on Civil Rights is insufficient to establish work product protection. *See Nat'l Cong. for Puerto Rican Rights v. City of New York*, 194 F.R.D. 105 (S.D.N.Y. 2000) (rejecting work product claim over documents created in anticipation of hearings before the City Council's Committee on Public Safety and the United States Commission on Civil Rights because the "request for information does not itself constitute litigation nor does it support a claim of anticipated litigation."). Indeed, the United States Civil Rights Commission lacks statutory authority and historically has only had the power to issue subpoenas and interrogators, hold informational hearings and make recommendations in reports. *See* 42 USC 1975b, d. Therefore, it appears that the interrogatories were not part of an "adversarial proceeding" as required to establish work product protection. *Adair*, 294 F.R.D. at 6 (rejecting work product claim where "the party provided no evidence that the Board proceeding for which the withheld documents were prepared were adversarial."); *Cf. Kentucky Comm'n on Human Rights v. Inco Alloys Int'l*, 161 F.R.D. 671, 672 (W.D. Ky. 1995) (holding that commission investigation documents are not protected by the work product doctrine because the "Commission is adverse to no one, as they are not a party to the underlying litigation."). In addition, DOJ has failed to identify the dates of the documents, the authors, or subject matter, details required by courts to be included on

privilege logs to sustain a claim of work product. *See e.g. Hill v. McHenry*,2002 WL 598331, at *2-3 (D. Kan. Apr. 10, 2002) (listing requirements of a privilege log). Accordingly, this Court should reject DOJ's claim of work product protection and order the production of the withheld documents.

E. The Court May Determine the Applicability of the Claimed Exemptions Via In-Camera Review

[The Court "may examine the contents of … agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions[.]" 5 U.S.C. § 552(a)(4)(B). *In camera* review is necessary where: 1) the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims; 2) there is evidence of bad faith on the part of the agency; 3) when the number of withheld documents is relatively small; and 4) when the dispute turns on the contents of the withheld documents, and not the parties' interpretations of those documents. *See Spirko v. U.S. Postal Service*, 147 F.3d 992, 996 (D.C. Cir. 1998).

If the Court is unconvinced to overrule Exception 5 and order the disclosure of the withheld materials, it has discretion to review the withheld materials *in camera* to satisfy itself before making a de novo determination as to the applicability of the exemption and whether the documents are both predecisional and deliberative. *See* 5 U.S.C. § 552(a)(4)(B); *Larson v. Dep't of State*, 565 F.3d 857, 869-70 (D.C. Cir. 2009).]

II. DOJ HAS NOT SHOWN THAT IT CONDUCTED A SEARCH REASONABLY CALCULATED TO UNCOVER ALL RELEVANT RECORDS.

A. DOJ Has Not Demonstrated the Reasonableness of its Search Process

DOJ's declarations fail to provide sufficient information for the Court to conclude that its searches were reasonable. Agency declarations must "describe what records were searched, by whom, and through what processes." *Sea Shepherd Conservation Soc'y v. Internal Revenue Serv.*, 208 F.Supp.3d 58, 69 (D.D.C. 2016). An agency's declaration is inadequate where it fails "to

describe the records [components] normally maintain, why they were selected for the search, or why others were excluded." *Palmieri v. United States*, 194 F. Supp. 3d 12, 18 (D.D.C. 2016). DOJ's declarations are deficient because they fail to provide a sufficient description of DOJ's search processes.

1. Inadequate Description of Search Process

JMD fails to meet its burden to adequately describe how it conducted its searches. *See Palmieri v. United States*, 194 F. Supp. 3d 12, 17 (D.D.C. 2016) (quoting *DeBrew v. Atwood*, 792 F.3d 118 (D.C.Cir.2015)) (Agency must submit "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed."). The Allen declaration does not meet this standard because it does not describe how records were searched beyond a conclusory statement that a single official "conducted a manual search of his emails for responsive records." JMD Decl. at ¶ 7. It does not set forth "the search terms used" or "the type of search performed." *Palmieri*, 194 F. Supp. 3d 12, 17 (D.D.C. 2016).JMD failed to describe "by what process" its records were searched. It does not explain what search terms were used, what is entailed by a "manual search" of an email, or which inbox files were searched.

OIP also fails to meet its burden to adequately describe its search. *See Sea Shepherd Conservation Soc'y v. Internal Revenue Serv.*, 208 F. Supp. 3d 58, 69 (D.D.C. 2016) (agency declarations must "describe what records were searched, by whom, and through what process.") OIP did not describe what records it searched because it did not identify the custodians whose records were searched. It only declares that searches "were performed for a total of ten records custodians," identifying just two, and then only by position. *See* OIP. Decl. at ¶ 15.

Thus, DOJ has not met its burden of proving that its "search was reasonably calculated to uncover all relevant documents" because it did not provided sufficient information for the Court

or CLC to understand the extent of its search. *Palmieri*, 194 F. Supp. 3d at 17 (D.D.C. 2016). Summary judgment for DOJ must therefore be denied.

B. DOJ's Search Was Substantively Deficient

To the extent DOJ did disclose information about its search, the disclosure raises substantial doubt as to the adequacy of the search and indicates multiple deficiencies. Substantial doubt precluding summary judgment exists when (i) the plaintiffs have set out well-defined requests, and (ii) there are positive indications of overlooked materials. *See Reporters Comm. for Freedom of Press v. Fed. Bureau of Investigation*, 877 F.3d 399, 402 (D.C. Cir. 2017) (quoting *Valencia-Lucerna v. U.S. Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999)) (internal quotation marks omitted). Both of those factors are present here.

1. JMD Ignored CLC's Well-Defined Reasonable Search Request

Regarding the first factor, CLC provided a well-defined and narrow request in which it carefully detailed the objective of its request, the types of materials it believed would satisfy its request, and seven particular search terms that would help locate responsive material. CLC sought documents containing the phrases "2020 census," "long form," "citizenship question," "questions regarding citizenship," "ACS," "American Community Survey," "citizen voting age population," *or* "CVAP." In contrast to the specificity of CLC's request, JMD's performed a "manual search" of a single email account without explaining what search terms or parameters it used. Presumably JMD did not employ any of CLC's requested search terms. *See Wiesner v. Fed. Bureau of Investigation*, 577 F. Supp. 2d 450, 458 (D.D.C. 2008) (court harbored "substantial doubt" as to adequacy of search because of FBI's "failure to explain adequately why it did not search its files using the additional search terms supplied by the plaintiff in his February 28, 2006 letter to the FBI.").

2. JMD's Search Disclosures Indicate It Overlooked Substantial Materials

Regarding the second factor, JMD's statements indicate that its search overlooked responsive material. JMD appears to have failed to search any paper records or any electronic records beyond a single email account. Such a limited search undoubtedly failed to account for responsive paper records and non-email electronic files (*e.g.* Word documents). *See Cause of Action v. Internal Revenue Serv.*, 253 F. Supp. 3d 149, 157–158 (D.D.C. 2017) (agency's initial declaration was inadequate because agency was required, in part, "to explain why it looked where it did and used the search terms it selected," but had failed to do so.).

3. CRD's Search Disclosures Indicate It Overlooked Substantial Material

CRD only searched the electronic records of two custodians, Chris Herren and John Gore. *See* CRD Decl. at ¶ 6, 9. This is despite DOJ producing emails, apparently produced in that search, with other CRD employees. *See, e.g.*, DOJ MSJ Ex. E (Doc. # 22-6 p. 76) (Nov. 1, 2017 email between John Gore, Chris Herren, and Ben Aguiñaga). DOJ has also, in other litigation, released email correspondence between Ben Aguiñaga and John Gore related to the citizenship question that it has not mentioned in any of its responses to CLC. *See* Ex. 16 (June 12, 2018 email from Ben Aguiñaga to John Gore). These omissions indicate that its search was not reasonably calculated to uncover all relevant documents.

CONCLUSION

For the reasons set forth above, Plaintiff Campaign Legal Center respectfully requests that the Court deny summary judgment in favor of Defendant DOJ, grant summary judgment in favor of CLC, and order DOJ to (i) supplement its search for responsive materials to address its deficiencies and (ii) produce all responsive materials that are not properly exempt. Alternatively, CLC respectfully requests that the Court review the withheld materials *in camera* to determine the applicability of Exemption 5.

Respectfully submitted,

__/s/ Nadav Ariel_____
BUCKLEY LLP
Adam Miller (DC Bar # 496339)
Nadav Ariel (DC Bar # 1023141)
2001 M Street NW, Suite 500
Washington, DC 20036
202-349-7958
amiller@buckleysandler.com
nariel@buckleysandler.com

CAMPAIGN LEGAL CENTER
Danielle M. Lang (DC Bar # 1500218)
1411 K Street NW, Suite 1400
Washington, DC 20005
202-736-2200
dlang@campaignlegalcenter.org

Counsel for Plaintiff Campaign Legal Center

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 18-1771 (TSC) Oral Argument Requested

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE AND STATEMENT OF ADDITIONAL MATERIAL UNDISPUTED FACTS

Pursuant to Local Civil Rule 7(h), Plaintiff Campaign Legal Center ("CLC") hereby sets forth its response to Defendant DOJ's Statement of Undisputed Material Facts and further submits its statement of additional material facts as to which there is no genuine issue.

CLC has no basis on which to dispute or accept paragraphs 4-9 of Defendant's statement.

CLC disputes paragraph 10 of Defendant's statement to the extent it states "JMD determined that some limited information could be withheld as exempt from disclosure under FOIA Exemptions (b)(5) and (b)(6)." There are legal conclusions which CLC strongly contests.

CLC has no basis on which to dispute or accept paragraphs 18-32 of Defendant's statement.

CLC has no basis on which to dispute or accept paragraph 34 of Defendant's statement.

CLC has no basis on which to dispute or accept paragraphs 45-58 of Defendant's statement.

CLC has no basis on which to dispute or accept paragraphs 60-61 of Defendant's statement.

CLC disputes paragraph 62 of Defendant's statement to the extent it states that "the Civil Rights Division searched for records responsive to the request using the most comprehensive search term and by reviewing emails involving relevant personnel." The statement is a legal conclusion which CLC strongly contests.

CLC disputes the entirety of paragraph 63 of Defendant's statement. The paragraph is a legal conclusion which CLC strongly contests.

CLC has no basis on which to dispute or accept paragraph 64 of Defendant's statement.

CLC disputes the entirety of paragraphs 71-73 of Defendant's statement. The paragraph is a legal conclusion CLC strongly contests.

In addition, there is no genuine dispute with respect to the following additional material facts:

1. On May 2, 2017 Secretary Ross wrote in an email to Earl Comstock, a Commerce official, "I am mystified as to why nothing have [sp] been done in response to my months old request that we include the citizenship question. Why not?" On the same day, Earl Comstock responded, "I agree Mr. Secretary. On the citizenship question we will get that in place.… We need to work with Justice to get them to request that citizenship be added back as a census question, and we have the court cases to illustrate that DoJ has a legitimate need for the question to be included. I will arrange a meeting with DoJ staff this week to discuss." Ex. 4.

2. On August 8, 2017, Secretary Ross wrote in an email to Earl Comstock "where is the DoJ in their analysis? If they still have not come to a conclusion please let me know your contact person and I will call the AG." Ex. 5.

3. On September 8, 2017, Earl Comstock responded, "I spoke several times with James McHenry [DOJ] by phone, and after considering the matter further James said that Justice staff

did not want to raise the question… James directed me to … the Department of Homeland Security… after discussion DHS really felt it was best handled by the Department of Justice. At that point… I asked James Uthmeier [OGC at Commerce] to look into the legal issues and how Commerce could add the question to the Census itself." Ex. 6.

4. On September 17, 2017, Danielle Cutrona, a DOJ official, wrote in an email to Wendy Teramoto, a Commerce official, "The Attorney General is available on his cell… [I]t sounds like we can do whatever you all need us to do and the delay was due to a miscommunication. The AG is eager to assist." Ex. 7.

5. In October, 2017, a Trump transition official provided John Gore, the DOJ official who was the principal drafter of the Dec. 12, 2017 letter, with "a draft letter that would request the reinstatement of the citizenship question on the census questionnaire" using the Voting Rights Act as the basis for the request. Ex. 8; Ex. 9.

6. On November 27, 2017, Wilbur Ross wrote in an email to Peter Davidson, a DOJ official, "Census is about to begin translating the questions into multiple languages and has let the printing contract. We are out of time. Please set up a call for me tomorrow with whoever is the responsible person at Justice. We must have this resolved." Ex. 10.

7. On December 12, 2017, Arthur E. Gary sent a letter to the Census Bureau requesting that a citizenship question be added to the 2020 Census Questionnaire. Ex. 2.

8. On March 26, 2018, Secretary Ross issued a memorandum regarding the reinstatement of a citizenship question on the census. Ex. 1.

9. On June 21, 2018, Secretary Ross caused the Census Bureau to file a supplemental memorandum to the administrative record regarding the deliberative process for adding the citizenship question to the census. Ex. 3.

Respectfully submitted,

/s/ Nadav Ariel
BUCKLEY LLP
Adam Miller (DC Bar # 496339)
Nadav Ariel (DC Bar # 1023141)
2001 M Street NW, Suite 500
Washington, DC 20037
202-349-7958
amiller@buckleyfirm.com
nariel@buckleyfirm.com

CAMPAIGN LEGAL CENTER
Danielle M. Lang (DC Bar # 1500218)
1411 K Street NW, Suite 1400
Washington, DC 20005
202-736-2200
dlang@campaignlegalcenter.org

Counsel for Plaintiff Campaign Legal Center

CERTIFICATE OF SERVICE

I certify that on this 22th day of May, 2019, I electronically filed the foregoing document with the Clerk of Court via ECF, which will send electronic notification of such filing to all counsel of record.

__/s/ Nadav Ariel_____
Nadav Ariel

Counsel for Plaintiff Campaign Legal Center