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)

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

The purpose of the Freedom of Information Act ("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." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). In this matter of critical national importance, the Department of Justice ("DOJ") has failed to comply with FOIA's strong statutory mandate to allow "citizens to know 'what their Government is up to'" by inappropriately claiming FOIA exemptions to withhold documents and by failing to conduct an adequate search for requested documents. *See NARA v. Favish*, 541 U.S. 157, 171 (2004) (quoting *DOJ v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989)).

DOJ has failed to meet its burden to demonstrate that it has properly withheld documents pursuant to FOIA Exemption 5 because it has not (and cannot) show that the documents are predecisional and deliberative. First, DOJ's *Vaughn* indices remain deficient, preventing CLC

and this Court from evaluating whether the claimed exemptions apply to certain documents. Second, the evidence shows that the documents at issue were created *after* each key decision point — after Secretary Ross' decision to add the citizenship question to the census, after Attorney General Sessions' decision to send the letter requesting the addition, and after the decision about the basis on which the request would be made. Additionally, the documents at issue were not part of a deliberative process, because they played no role in making agency policy. Third, DOJ's argument that the documents are protected solely on the basis of their status as "drafts" and discussions of drafts is untenable and contrary to law.

DOJ has also failed to meet its burden to show that it has properly withheld documents pursuant to Exemption 5 on the basis of the work product and presidential communications privileges. The documents it claims are protected by the work product privilege were created in response to a request for information outside of any reasonable anticipation of litigation. Further, DOJ has not met its burden to show that the documents it claims are protected by the presidential communications privilege were prepared in order to provide advice *to the President* on a matter that required direct presidential decision making.

In addition, DOJ has failed to demonstrate the adequacy of its searches. First, the searches conducted by the Civil Rights Division ("CRD") ignored CLC's narrowly tailored proposed search terms and only searched the records of two custodians despite the existence of other custodians with relevant records. *See also CLC v. DOJ*, Civ. No. 18-1187 (TSC) (D.D.C.) (Dec. 10, 2018) (Doc. #20) (Reply brief at Section I.B, discussing these and additional deficiencies in CRD's search). The search performed failed to uncover responsive documents produced elsewhere that should have been identified, and DOJ offers no explanation as to how a clearly responsive document was overlooked in its search. Second, the searches conducted by

the Justice Management Division ("JMD") consisted of a single custodian performing a manual search of his own emails, neglecting to search other electronic files and paper documents. It is also unclear whether the custodian actually ran the search terms provided by CLC since the search was "manual." The manual self-collection by the lone employee thus leaves substantial doubt as to the adequacy of the search, especially in light of recent developments demonstrating DOJ's significant contradictions and lack of disclosure regarding the process leading to DOJ's request to add the citizenship question to the census. Accordingly, DOJ cannot meet its burden of demonstrating the adequacy of its searches. *Weisberg v. U.S. Dep't of Justice*, 705 F. 2d 1344, 1351 (D.C. Cir. 1983) ("What the agency must show beyond material doubt is that it has conducted a search reasonably calculated to uncover all relevant documents.").

Finally, just over one week ago, the *New York Times* reported on the discovery of previously hidden documents showing that a Republican political consultant worked closely with the government officials involved in DOJ's request to add a citizenship question to the 2020 Census.[1] The consultant, Dr. Thomas Hofeller, wrote a draft of the letter requesting the addition of the citizenship question to the census on the purported basis that it would aid DOJ with enforcement of the Voting Rights Act ("VRA"). That draft was later provided to DOJ official John Gore, who ultimately drafted the request letter for DOJ. The final letter as drafted by Gore borrows from Dr. Hofeller's draft and a 2015 study he authored. Dr. Hofeller's papers reveal that, contrary to the stated purpose of bolstering VRA enforcement, the actual intention of those

[1] Michael Wines, *Files Disclose Partisan Hand in 2020 Census*, N.Y. TIMES, May 31, 2019, at A1.

involved in adding the citizenship question was, in his own words, to "clearly be a disadvantage for the Democrats," and "would be advantageous to Republicans and Non-Hispanic Whites."[2]

The involvement of Dr. Hofeller, an outside political consultant, undermines any claim that the letter was the product of sensitive agency deliberations. Moreover, DOJ's failure to produce or log any documents demonstrating Dr. Hofeller's apparently significant involvement in the lengthy process leading to the addition of the citizenship question raises further doubts about the adequacy of the searches. But most importantly, the disclosure of these documents puts in stark relief the pretextual nature of DOJ's letter requesting the addition of the citizenship question to the census. The documents plainly establish that government officials, with the assistance of a partisan political operative, concocted a false story about using the data to bolster VRA enforcement, when in actuality their plan and goal was to take an action that would "clearly be a disadvantage for the Democrats," and "would be advantageous to Republicans and Non-Hispanic Whites." The essence of FOIA is to force into the open exactly this type of conduct, so that the people are reasonably informed of the government's conduct and can hold accountable those responsible.

Therefore, summary judgment for DOJ is inappropriate and instead the Court should grant summary judgment for CLC and order DOJ to complete a reasonable search and produce all responsive documents not properly subject to a FOIA exemption.

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[2] *See infra* Section I.C discussing newly released documents belonging to Thomas Hofeller. It is notable that, even before the revelation of these documents, three separate federal courts found that the government's stated basis for adding the citizenship question was pretextual. *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 new materials have led to a pending motion for sanctions in the New York case based, in part, on Mr. Gore's apparent false testimony on this issue.

ARGUMENT

I. DOJ Has Not Met Its Burden to Show that the Deliberative Process Privilege Applies to the Withheld Materials

A. DOJ Has Not Met Its Burden to Show that Withheld Materials are Predecisional

DOJ withheld numerous documents on the ground that any draft letter pre-dating the final version is "plainly pre-decisional and deliberative" because it reflects deliberations about the contents of the letter. DOJ Reply at 8. Under DOJ's strained and implausible interpretation of the law, every "draft" document would automatically be pre-decisional and deliberative because it reflects deliberations about its contents. This is not the law.

As this court and others have made clear, "drafts are *not* presumptively privileged." *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 260 (D.D.C. 2004) (emphasis added). "A post-decisional document, draft or no, by definition cannot be 'predecisional.'" *Id.*; *see also Lee v. F.D.I.C.*, 923 F. sup. 451, 458 (S.D.N.Y. 1996) ("The mere fact that a document is a draft … is not sufficient reason to automatically exempt it from disclosure."). Rather, a draft must still be both predecisional and deliberative to qualify for exemption from FOIA's policy of disclosure. *See Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 257-58 (D.C. Cir. 1982) ("The designation of the documents here as 'drafts' does not end the inquiry, however… Even if a document is a 'draft of what will become a final document,' the court must ascertain 'whether the document is deliberative in nature.'").[3]

[3] To escape this precedent, DOJ appears to misattribute language to a decision of this court. For the quote that draft documents "are, by definition, predecisional and they are 'typically considered deliberative,'" DOJ cites to *Hardy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 243 F. Supp. 2d 155, 164 (D.D.C. 2017). DOJ Reply at 5-6. However, *Hardy*, which can be found at 243 F. Supp. 3d (and not 243 F. Supp. 2d), contains no such quote. It appears that DOJ may have intended to cite *Bloche v. Department of Defense*, 370 F. Supp. 3d 40, 51 (D.D.C. 2019). However the very next sentence of that opinion directly contradicts DOJ's position: "*An agency of course may not elude disclosure requirements by simply labeling a document a 'draft,*' but if it identifies a policy-oriented decisionmaking process to which the

The refusal to give draft status talismanic importance makes sense in light of FOIA's policy of promoting transparency. If every document subject to future revision were included in Exemption 5, it would swallow FOIA whole. The draft letters and emails at issue here were not predecisional, and therefore are not properly withheld under Exemption 5.

DOJ's unsupported contention that the "pertinent agency decision was the determination of the *contents* of the letter in question," is untenable in this case. A document is only "predecisional if it was generated before the adoption of an agency policy." *See* DOJ Reply at 6; *Judicial Watch, Inc. v. FDA*, 449 F. 3d 141, 151 (D.C. Cir. 2006). The relevant agency decision at issue was the decision to add the citizenship question to the census, or, giving DOJ the benefit of the doubt, DOJ's decision to accede to the Commerce Department's request that DOJ send a letter requesting the addition of the citizenship question. Mere wording choices are not "agency policy" for purposes of the deliberative process procedure. *Hooker v. U.S. Dept. of Health and Human Services*, 889 F.2d 1118, 1120 (D.D.C. 2012) ("The D.C. Circuit has found that where a plaintiff requests records of correspondence surrounding or leading up to an agency publication, the relevant agency decision for purposes of applying the deliberative process privilege is the decision to publish.") (*citing Formaldehyde Inst. v. Dept. of Health and Human Services*, 889 F.2d 1118, 1120 (D.C. Cir. 1989) (overruled on other grounds).

Here, all of the materials withheld pursuant to the deliberative process privilege were created after the "agency decisions" were made. On May 2, 2017, a Commerce Department

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draft contributed, the privilege claim will usually be upheld." *Bloche v. Department of Defense*, 370 F. Supp. 3d 40, 51 (D.D.C. 2019) (emphasis added). As made clear by the full quote, the "identification of a policy-oriented decisionmaking process to which the draft contributed" does not automatically mean the document will be privileged. *Id.* Here, DOJ has failed to even identify a "policy-oriented decisionmaking process to which" the withheld materials contributed. *See infra* section I.B.

official informed Secretary Ross that "we will get [the citizenship question] in place… We need to work with Justice to get them to request that citizenship be added[.]" Plaintiff's Cross Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment ("CLC Mot."), Doc. #23, Ex. 4. Later, on September 17, 2017, a DOJ official informed the Commerce Department that "we can do whatever you all need us to do and the delay was due to a miscommunication. The AG is eager to assist." CLC. Mot. Ex. 7. The agency policy was established at this point; everything afterwards was mere wordsmithing. Thus, DOJ has not and cannot meet its burden to prove that the withheld materials were made prior to the decision to send the letter.

B. DOJ Has Not Met Its Burden to Show that Withheld Materials are Deliberative

In addition to failing to show the materials were predecisional, DOJ has not met its burden to show the withheld materials were 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.2d 1136, 1144 (D.C. Cir. 1975). In this case, Secretary Ross asked on May 2, 2017 why no action had been taken on his "months old request" to add a citizenship question, and a Commerce official responded "[w]e need to work with Justice to get them to request that citizenship be added back as a census question, and *we have the cases that show they need the data*." CLC Mot. Ex. 4 (emphasis added). The matter was then elevated to Attorney General Sessions, who told Secretary Ross on or about September 17, 2017 that he was "eager to assist." *See* CLC Mot. Ex. 7; Ex. A.[4] The Department of Commerce also encouraged

[4] Ex. A is an unredacted version of an email from Arthur Gary to John Gore on Sept. 11, 2017 in which Arthur Gary states that he was contacting John Gore "regarding some concerns raised that the Secretary of Commerce raised last week with the AG relating to the 2020 Census." The unredacted version was produced by DOJ in related litigation. *See* Reply in Support of Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment Ex. A (Doc. # 19-2, page 6 of 69), *Campaign Legal Center v. Dep't of*

DOJ to reach out to a Trump Administration transition official who provided DOJ with an initial draft letter. CLC Mot. Exs. 8-9. Thus, by the time the documents at issue were created, not only had DOJ already decided to send the request to the Census Bureau, the policy position and reasoning DOJ would proffer had also already been decided by the Department of Commerce and provided to DOJ as a fait accompli.

All of the withheld materials were created in service of carrying out the agency's already-decided policy, not to assist in deciding what the policy decision should be. Another court has confirmed this specific conclusion, finding that "in drafting the letter, AAAG Gore relied not only on the Commerce Department's proposed rationale, but also on its work product and its advisors." *New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 555 (S.D.N.Y. 2019). A more typical and ordinary procedure would be for agency leadership to have a general policy idea and ask staff to make recommendations, in which case draft documents and emails circulating drafts would be part of a deliberative process to determine the final agency position.[5] However, the record indicates that was not what happened here.[6]

C. The Current Withholdings Contradict the Purposes of Exemption 5

Withholding under the deliberative process privilege must further the policy goals of the exemption. *See, e.g., Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 258

Justice, No. 18-1187 (TSC) (D.D.C. *filed* May 21, 2018). DOJ's continued claim of privilege here is thus invalid and suggests that DOJ's other privilege claims may be similarly overbroad. *Compare id. with* DOJ Mot. Ex. E (Doc. # 22-6, page 23 of 149).

[5] The cases cited by DOJ in its Reply in support of this principle demonstrate the importance of identifying whether the draft document had any role at all in the deliberative process. *See, e.g., Krikorian v. Dept. of State*, 984 F.2d 461, 466 (D.C. Cir. 1993) (determining that letters sought by plaintiff played an important role in the deliberative process even though ultimately never used by the agency).

[6] The case law cited by DOJ in its Reply at 5-8 is inapplicable here because those cases did not involve materials drafted after superior officials dictated the decision and rationale to the junior

(D.C. Cir. 1977). The purpose of the deliberative process 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). However, none of the purported injuries to the quality of agency decisionmaking claimed by DOJ apply to the facts here. *See* DOJ Reply Section II.B. Releasing the documents would not risk premature disclosure of policies because the withheld materials in this case were created after the policy was formulated by Secretary Ross and Attorney General Sessions. Nor would revealing the documents risk chilling internal discussion because the Attorney General agreed to Secretary Ross's request that DOJ issue the request letter, and then directed junior officers to draft the letter as requested. *Id.* For the same reason, release of the withheld documents here could not "stifle internal dissent," "lead to public ridicule of the dissenter," or "embarrass the employer." DOJ Reply at 11.

Meanwhile, the central purpose of FOIA is "to open agency action to the light of public scrutiny." *See Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885, 894 (D.C. Cir. 1995) (*citing Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976)). "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." *Coffey v. Bureau of Land Management*, 249 F. Supp. 3d 488, 495 (D.D.C. 2017)

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officials charged with writing down the document at issue. Instead, they related to drafts that were actually part of a deliberative process. For example, DOJ cites *Skull Valley Band of Goshute Indians v. Kempthorne*, where the court recognized Exemption 5 properly applies to "discussions among agency personnel about the relative merits of various positions which may be adopted." 2007 U.S. Dist. LEXIS 21079, at *40, *46 (D.D.C. Mar. 26, 2007). In this case, the withheld materials could not have discussed the merits of various positions that may have been adopted because they were created after the Attorney General decided which position the agency would take. Further, many of the cases DOJ cites are inapplicable here because they analyze the process of deciding on an agency public messaging position. However, DOJ specifically disclaims that the Dec. 12, 2017 Letter was such a public messaging document, making these citations inapposite. *See* DOJ Reply at 13-14, n.8.

(*quoting John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)). The importance of these policy goals is highlighted in this case, where Secretary Ross has testified falsely about this precise issue before Congress.[7]

Moreover, while the Census Bureau continues to maintain that it added the citizenship question in response to DOJ's request to assist in ensuring equal voting rights for minorities, the recently revealed Hofeller documents show clearly that the true motivation of those involved was to facilitate census results that would "clearly be a disadvantage for the Democrats," and "would be advantageous to Republicans and Non-Hispanic Whites."[8]

Therefore, DOJ has not met its burden to show that withholding furthers the purpose of the deliberative process privilege because withholding does not promote the quality of agency decision-making and runs counter to the purposes of FOIA.

II. DOJ Has Not Met Its Burden To Show that Withheld Materials are Subject to the Work Product Doctrine

DOJ claims work product protection over a limited number of documents created in response to interrogatories received from the US Commission on Civil Rights ("USCCR"). This claim fails because the documents were not created in anticipation of litigation. As DOJ recognizes, the attorney work product doctrine only applies to materials that "can fairly be said to have been prepared or obtained because of the prospect of litigation." DOJ Reply brief at 18

[7] In sworn testimony before Congress, Secretary Ross testified that the citizenship question was added "solely in response to DOJ's request." *See 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.). However, numerous documents revealed later have demonstrated that this was untrue. *See supra* Section I.A-B.

[8] Ex. B at pages 17, 19 of 75. These documents were filed by plaintiffs seeking sanctions related to discovery in *New York v. U.S. Dep't of Commerce*, 18-cv-2921, Doc. # 595 (filed May 31, 2019). The motion and select exhibits to the motion are attached here as Exhibit B.

(quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998)). But here, the documents were created not because of the prospect of litigation, but to provide information to another federal agency. And DOJ had no basis to anticipate litigation with USCCR, which does not even have legal authority pursue litigation or otherwise hold adversarial proceedings. *See* CLC Response Brief at 22.

DOJ's claim that the documents at issue may nevertheless be work product because "citizen complaints alleging discrimination often prompt Commission investigation[s]" is similarly baseless. DOJ Reply at 18. This claim constitutes pure speculation that cannot meet the standard that the anticipation of litigation be "objectively reasonable" and is contradicted by the actual interrogatories at issue. *See In re Sealed Case*, 146 F.3d at 884. Notably, DOJ identifies no actual adverse party here, no citizen complaint, and no actual litigation that was anticipated or filed. *Id.* at 887 (noting that the existence of an actual claim is one of the factors to consider in determining whether the materials at issue constitute work product). And the actual content of the interrogatories at issue do not appear to be investigating a citizen complaint, but rather seek broad information about civil rights enforcement (such as the number of cases filed, election observers deployed, informational letters sent, etc.) to aid a USCCR study. Thus, DOJ cannot carry its burden of establishing the existence of work product protection over the documents at issue.[9]

III. DOJ Has Not Met its Burden to Show That Withheld Materials are Subject to the Presidential Communications Privilege

[9] In passing, DOJ also asserts the deliberative process privilege over these documents but fails to establish its applicability. There is no policy decision to which these draft responses apply and therefore no applicable privilege. *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").

To qualify for the presidential communications privilege, communications must involve the president or immediate White House advisors ***and*** the subject of the communications must "ultimately call for direct decisionmaking of the president." *See 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); *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). After failing to address both prongs in its initial brief, DOJ provided a meaningful reply to the first requirement, but not the second. *See* DOJ Reply at 19-20. DOJ asserts that the "issue of ***potential*** presidential decision-making is … congressional notification of the Department of Justice's request for the addition of the citizenship question." *Id.* (emphasis added). However, DOJ offers no explanation for how this issue calls "for direct decisionmaking of the president." *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). DOJ does not state that these were communications made "in the course of preparing advice for the president." *Id.*

Further, DOJ does not show how a routine communication between DOJ and Congress would call for direct decisionmaking of the president. Indeed, DOJ has an entire component dedicated to communicating with Congress.[10] "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 met its burden to show that congressional notification calls for direct decisionmaking by the president or that the president was involved with decisionmaking on this issue.[11]

[10] *See* Office of Legislative Affairs, About the Office, https://www.justice.gov/ola/about-office (last accessed June 12, 2019).

[11] DOJ also claims these materials fall under the deliberative process exemption. However, DOJ has failed to carry its burden of establishing that the exemption applies. Initially, DOJ fails to provide CLC and this Court sufficient information to evaluate the privilege as it neglected to

IV. DOJ Failed to Conduct A Reasonable Search and Glaring Deficiencies Remain

DOJ has not met its burden to "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) (internal quotation marks omitted) (emphasis added).

A. DOJ Failed to Conduct a Reasonable Search

1. Justice Management Division

The Justice Management Division search was comprised of only a single official, Arthur Gary, performing a search of his own email records. DOJ has not provided a description of this official's search beyond the adjective "manual" and a vague claim that the official used the search terms CLC requested. JMD Decl. at ¶ 7. DOJ has not explained what such a "manual" search entailed, but it seems reasonable to assume that it was limited in nature and may not have included running all of CLC's search terms. The manual self-collection by the DOJ official thus leaves substantial doubt as to the adequacy of the search. *See National Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency*, 877 F. Supp. 2d 87, 108 (S.D.N.Y. 2012) ("[M]ost custodians cannot be 'trusted' to run effective searches because designing legally sufficient electronic searches in the discovery or FOIA contexts is not part of their daily responsibilities."). And that doubt is heightened by recent developments demonstrating contradictions and lack of disclosures by the other primary DOJ official involved

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provide the dates, authors, and specific subject matter of the communications at issue. Moreover, even to the extent the deliberative process privilege may apply to some of the communications, DOJ has a duty to segregate and produce portions not covered by the exemption. *See People for the Am. Way Foundation v. Nat'l Park Service*, 503 F. Supp. 2d 284, 295 (D.D.C. 2007) ("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.") (internal quotes omitted); 5 U.S.C. § 522(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

in drafting the request add the citizenship question. *See supra* Section I.C. DOJ cannot carry its burden of establishing it conducted reasonable searches where "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).

In addition, DOJ does not dispute CLC's contention that JMD failed to perform a search for any other electronic files not contained in email or for any hard copy documents. DOJ Reply Brief at 3. While it calls such claim "speculative," that is because DOJ failed to adequately disclose the extent of its searches. Notably, DOJ does not (and presumably cannot) represent that Mr. Gary did not have other responsive materials other than in his email box. *Id.*

2. Civil Rights Division

As discussed more fully in CLC's brief in related litigation, the Civil Rights Division has not undertaken a "search reasonably calculated to discover all relevant documents" because it unreasonably refused to use any of CLC's requested search terms and has not provided any explanation for doing so. *See CLC v. DOJ*, Civ. No. 18-1187 (TSC) (D.D.C.) (Dec. 10, 2018) (Doc. 20) (Reply brief at Section I.B, discussing the numerous omissions and deficiencies in CRD's search). Rather than use any of CLC's proposed search terms, CRD searched the Outlook inbox of only one official using only the single term "census."[12] *See* Declaration of Tink Cooper ("Cooper Decl."), Doc #22-5 at ¶ 9. While CRD states in its most recent declaration that it used CLC's proposed terms to search for hard copy documents for a limited

[12] DOJ also states one other official "undertook a search of his Outlook" but provides no further description of the search parameters. Cooper Decl. at ¶ 6. Presumably, the search did not utilize CLC's requested search terms and therefore likely overlooked responsive documents.

number of custodians, it does not explain why it refused to CLC's proposed search terms for electronic files. *See* Cooper Decl. at ¶ 14.

B. Recent Public Disclosures Raise Substantial Doubt as to the Search's Adequacy

Recent public disclosures demonstrate that CRD has also failed to provide documents that should have been discovered even by its inadequate search. In another litigation, DOJ produced an email between John Gore and another CRD employee discussing a hearing relating to the 2020 census. Even CRD's inadequate search should have located this document, because it contained CRD's search term, "census," in the subject line. *See* CLC Mot. Ex. 16; DOJ Reply at 4. DOJ offers no explanation for its failure to identify this document, which raises still more doubts as to the reasonableness and thoroughness of DOJ's search and response.

Indeed, it is noteworthy that DOJ also failed to disclose anything regarding Thomas Hofeller's involvement in these matters despite the fact that, as we now know, he was heavily involved. Given his role as a partisan political operative whose clear intention and purpose was to advantage Republicans and disadvantage Democrats, any such disclosure would have been politically damaging. This pattern indicates that DOJ's searches were not a "good faith effort to conduct a search for the requested records," and that it has not remedied that deficiency. *Reporters Comm. for Freedom of Press v. FBI*, 788 F.3d 399, 402 (D.C. Cir. 2017).

C. DOJ's *Vaughn* Indices Are Still Insufficiently Detailed

DOJ concedes that an agency providing a *Vaughn* index should "disclose as much information as possible without thwarting the exemption's purpose." DOJ Reply at 16 (internal quotation omitted). Yet DOJ has failed to do so here with glaring omissions in its indices absent any reasonable justification. Such failure frustrates CLC's and this Court's duty to examine the applicability of the claimed exemptions.

1. Office of Information Policy

OIP fails to provide complete information regarding author(s) or dates of the materials fully withheld pursuant to Exemption 5. *See* Second Brinkman Decl. at ¶ 17. Neither OIP's declaration nor its *Vaughn* index provide such information. *See* Brinkman Decl. at ¶¶ 20-26; OIP Vaugh Index. Further, though OIP claims that its provision of final versions of some of the withheld materials provide sufficient information to ascertain the authors and dates, the final documents do not contain the dates or authors of the withheld drafts. *See* Second Brinkman Decl. at ¶ 17; OIP Vaughn Index; OIP-0107 to OIP-0109. Failure to provide such basic information about the documents negates DOJ's ability to meet its burden to establish the claimed exemptions apply.

2. Civil Rights Division

Finally, despite admitting that "it would have been preferable to include Bates numbers," CRD has refused to update its production to include them, leaving it to plaintiffs and this Court to attempt to match up *Vaughn* index entries with claimed exemptions. *See* Suppl. Cooper Decl. ¶ 3(a). There is no justification for such a basic lack of disclosure.

CONCLUSION

For the reasons set forth above, CLC respectfully requests that the Court deny DOJ's motion for summary judgment and instead grant summary judgment in favor of CLC, order DOJ to promptly complete a reasonable search for documents responsive to the FOIA request, and order DOJ to produce all responsive improperly withheld documents and remove redactions from produced documents as not properly subject to FOIA Exemption 5.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 12th day of June, 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