**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

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

Defendant United States Department of Justice ("DOJ") respectfully submits this Reply in Support of Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment in this Freedom of Information Act ("FOIA") case.

In response to Plaintiff's requests for agency records, the Department of Justice's Civil Rights Division, Office of Information Policy ("OIP"), and Justice Management Division ("JMD") (1) conducted searches that were reasonably calculated to uncover responsive documents; (2) appropriately relied on FOIA Exemption 5, 5 U.S.C. § 552(b)(5), to withhold information protected from disclosure by the deliberative process privilege, the attorney work product privilege, and presidential communications privilege; and (3) produced *Vaughn* indices that were consistent with FOIA.

For the reasons set forth below and in Defendant's Opening Brief, the Court should grant Defendant's motion for summary judgment and deny Plaintiff's cross-motion for summary judgment.

## ARGUMENT

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

Plaintiff asserts several arguments in connection with Defendant's searches for responsive documents. First, Plaintiff alleges that all three components failed to adequately describe their searches. Opp'n[1] at 24-25. Plaintiff further argues that JMD did not employ the search terms requested by Plaintiff and overlooked substantial materials in its search. *Id.* at 25-26. Finally, Plaintiff contends that the Civil Rights Division's search was deficient because an email was released in another litigation and not in connection with the request at issue here. *Id.* at 26. All of these arguments lack merit.

Defendants' search descriptions were plainly adequate. Plaintiff's complaint about JMD's search is that the supporting declaration does not describe the search terms, "the type of search," or whose inbox was searched. *Id.* at 24. Plaintiff apparently did not read the Declaration of Michael H. Allen. That declaration clearly states that Arthur Gary, JMD's General Counsel, conducted a manual search of his emails and used the search terms listed in Plaintiff's FOIA request. Allen Decl.[2] ¶ 7. Plaintiff's argument on this point is baseless.

Plaintiff then contends that OIP's declaration is deficient because the agency did not identify the custodians in the Office of the Attorney General ("OAG") whose records were searched. Opp'n at 24. As stated in OIP's initial declaration, searches were conducted "within OAG for a total of ten records custodians" including the "then-current OAG staff and a departed

[1] Citations to "Opp'n" refer to Plaintiff's Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment, filed May 22, 2019. ECF No. 24.

[2] Citations to "Allen Decl." refer to the Declaration of Michael H. Allen, dated May 7, 2019, submitted in connection with Defendant's Motion for Summary Judgment. ECF No. 22-3.

OAG official who had served as Chief of Staff." *See* Brinkmann Decl. [3] ¶ 15. OIP's initial declaration provided sufficient information. In an effort to resolve the issue, OIP is providing additional specificity in a second declaration, which identifies the ten OAG custodians. Second Brinkmann Decl.[4] ¶ 6. This additional information should satisfy Plaintiff's desire for the custodians' names.

Next, Plaintiff complains that JMD performed a manual search of an email account "without explaining what search terms or parameters it used." Opp'n at 25. That is incorrect. As noted above, JMD explained that Mr. Gary searched his emails and used the search terms that Plaintiff listed in its FOIA request, and also explained the date range of the search. *See* Allen Decl. ¶ 7.

Plaintiff also argues that JMD "overlooked responsive material" because the agency's search did not encompass paper records or non-email electronic records. Opp'n at 26. Plaintiff's argument is speculative. The component's supporting declaration states that, based on the knowledge of officials familiar with the subject matter of Plaintiff's request, "it was determined that no other custodians would have responsive material that would not already be captured by the search of Mr. Gary's email." Allen Decl. ¶ 7. Plaintiff has not offered any support for its contention that JMD possesses responsive records that were not found in Mr. Gary's email account. The Court should defer to the agency declaration, which is "accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C.

[3] Citations to "Brinkmann Decl." refer to the Declaration of Vanessa R. Brinkmann, dated May 8, 2019, and submitted in connection with Defendant's Motion for Summary Judgment. ECF No. 22-4.

[4] Citations to "Second Brinkmann Decl." refer to the Second Declaration of Vanessa R. Brinkmann, dated June 5, 2019, submitted herewith.

Cir. 1991) (internal quotation marks and citation omitted); *Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009) (recognizing substantial weight traditionally accorded agency affidavits in FOIA "adequacy of search" cases).

Finally, Plaintiff argues that the Civil Rights Division's search was deficient because Defendant released email correspondence in other litigation related to the citizenship question that is not mentioned in its responses to Plaintiff in this case. Opp'n at 26. Contrary to Plaintiff's contention, the existence of a single document that might have been responsive to Plaintiff's requests does not mean that the Civil Rights Division's search was deficient in this case. An agency's failure to turn up a specific document in its search does not alone render a search inadequate. *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Plaintiff has failed to advance a plausible non-speculative reason why the Civil Rights Division's search was inadequate. Accordingly, the Court should reject Plaintiff's argument on this ground.

For the above reasons, Defendant's searches were "reasonably calculated to uncover all relevant documents." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The Court should grant summary judgment in favor of Defendant on this issue.

## II. DEFENDANT PROPERLY WITHHELD INFORMATION PURSUANT TO EXEMPTION 5 AND THE DELIBERATIVE PROCESS PRIVILEGE.

Plaintiff argues that the documents withheld by Defendant are not subject to the deliberative process privilege because they post-date the agency decisions at issue. Opp'n at 2. Specifically, Plaintiff argues that the inter-agency communications are not deliberative because they were generated after a decision was made on agency policy. Opp'n at 12-20.

This argument is meritless for two reasons. First, with respect to draft documents and correspondence relating to draft documents, the relevant agency decisions here are not the

substantive decision as to whether to add a citizenship question to the 2020 Census. Rather, the drafts reflected the agency's decision-making process as to what the content of the final document would be. Second, because Plaintiff has not advanced any specific arguments explaining why the deliberative process privilege does not apply to the other documents (*i.e.*, other than the drafts and the correspondence relating to drafts), the Court should grant Defendant's motion as to those materials.

**A. Defendant Properly Withheld Draft Documents.**

In this case, pursuant to Exemption 5 and the deliberative process privilege, OIP withheld 81 pages[5] of draft documents as well as 12 pages regarding the drafting process; JMD withheld 15 pages of draft documents in full; and the Civil Rights Division withheld 129 pages[6] of draft documents and correspondence relating to draft documents. Allen Decl. Attachment (*Vaughn* Index); Brinkmann Decl. ¶ 20 & Exhibit F; Cooper Decl.[7] ¶¶ 22-31 & *Vaughn* Index.

Plaintiff's arguments that Defendant improperly withheld these drafts suffer from a single fatal defect: they fail to recognize that the deliberative process privilege applies to draft documents and other internal communications where the process at issue is determining the content of the final document. Because Plaintiff's position is based on the flawed premise that the deliberative process privilege must lead up to a formal agency decision – in this case, the decision to add a citizenship question to the 2020 Census – Plaintiff's arguments miss the mark.

Draft documents are quintessentially deliberative and pre-decisional. Indeed, draft documents "are, by definition, pre-decisional and they are 'typically considered deliberative.'"

[5] Specifically, OIP withheld 33 pages of draft correspondence and 48 pages of draft interrogatory responses. Brinkmann Decl. ¶ 20.

[6] Documents identified in Groups 1, 3, 4, 5, and 6 on the Civil Rights Division's *Vaughn* Index are drafts or documents relating to draft documents.

[7] Citations to "Cooper Decl." refer to the Declaration of Tink Cooper, dated May 8, 2019, and submitted in connection with Defendant's Motion for Summary Judgment. ECF No. 22-5.

*Hardy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 243 F. Supp. 2d 155, 164 (D.D.C. 2017) (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 155, 173-74 (D.C. Cir. 1980), and the D.C. Circuit has held that draft letters "reflect advisory opinions that are important to the deliberative process." *Krikorian v. Dep't of State*, 984 F.2d 461, 466 (D.C. Cir. 1993). In affirming the application of the deliberative process privilege to a draft letter, one court explained that the draft letter was "precisely the type of document that would come within this privilege." *Brown v. Dep't of State*, 317 F. Supp. 3d 370, 376-77 (D.D.C. 2018). And, as Plaintiff concedes, certain of the same draft letters at issue in this case have already been determined to be protected by the deliberative process privilege by another federal court. Opp'n at 17; *see New York v. U.S. Dep't of Commerce*, Civ. A. No. 18- 2921 (JMF), 2018 WL 4853891, *3 (S.D.N.Y. Oct. 5, 2018) ("[T]he Court concludes that the drafts of the 'Gary Letter' . . . are protected by the deliberative process privilege[.]").

Plaintiff's arguments ignore that the very process by which a draft document evolves into a final document itself constitutes a deliberative process warranting protection. "The choice of what factual material . . . to include or remove during the drafting process is itself often part of the deliberative process, and thus is properly exempt under Exemption 5." *ViroPharma Inc. v. Dep't of Health & Human Servs.*, 839 F. Supp. 2d 184, 193 (D.D.C. 2012); *see also Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 189 (D.D.C. 2009) ("[T]he selection and calibration of data is part of the deliberative process to which Exemption 5 apples.").

In this case, the pertinent agency decision was the determination of the *contents* of the correspondence in question. As common sense would indicate, the fact that DOJ officials were circulating drafts of the letter and proposing edits to those drafts means DOJ had not yet determined the contents of the letter at the time the records were created. Accordingly, the

records are necessarily predecisional. Plaintiff's attempt to downplay the significance of the drafting process by describing it as merely "wordsmithing," Opp'n at 18, ignores the D.C. Circuit's view that draft letters are "important to the deliberative process," *Krikorian*, 984 F.2d at 466, and further ignores numerous other authorities protecting similar materials from disclosure. *See, e.g.*, *Blank Rome LLP v. Dep't of the Air Force*, 2016 WL 5108016, *4-5 (D.D.C. Sept. 20, 2016); *Brown*, 317 F. Supp. 3d at 376-77 ("draft letter" that "appears to have been developed as part of a pre-decisional and deliberative process leading up to the drafting and transmission of a final letter, . . . is precisely the type of document that would come within this privilege").

Ignoring these well-established principles, Plaintiff argues that the deliberative process privilege only applies when the communications at issue relate to the adoption of an agency policy. Opp'n at 14. According to Plaintiff, if a communication about an agency policy occurs after the agency has made its decision, the communication is not pre-decisional and, therefore, not protected by the deliberative process privilege. *Id.* Rather, Plaintiff argues that the inter-agency discussion after the policy decision is not pre-decisional because the decision was already made. *Id.*

Plaintiff's argument is illogical and inconsistent with prevailing law in this circuit. Indeed, if Plaintiff's position were correct, then draft letters would almost never be protected by the deliberative process privilege because the decision to send a letter is typically made before the letter is actually drafted. The Court should not endorse Plaintiff's incorrect and unsupported view. Instead, it should conclude that the relevant agency decisions here are the agency's determinations of the final contents of each of the letters at issue.

The Court should reject Plaintiff's attempt to re-define the relevant agency decision as the "'decision to issue the request for the citizenship question," Opp'n at 16, as other courts have

done when faced with similar arguments. For instance, in *Sierra Club v. U.S. Department of Interior*, 384 F. Supp. 2d 1 (D.D.C. 2004), the plaintiff challenged the agency's application of Exemption 5 to draft letters on the grounds that they related to an agency policy that had already been finalized. *Id*. at 19-20. Nevertheless, the draft letters were exempt because "the specific 'decision' [at issue] was how best to respond to a related congressional inquiry," not the over-arching agency policy that was the subject matter of the letter. *Id*. at 20. Similarly, in *Radiation Sterilizers, Inc. v. U.S. Department of Energy*, No. 90-880, 1991 U.S. Dist. LEXIS 4669 (D.D.C. 1991), the plaintiff argued that a draft letter was "not predecisional because it was written after the [agency] decided to revise an advisory" and was not deliberative because the agency had "finished deliberating and the letter merely announced the results of a completed deliberative process." *Id*. *17. The Court rejected those arguments, holding that the "draft letter was predecisional to the final letter and was part of the deliberative process which led to the creation of the final letter." *Id*. Here, too, the draft letters and emails discussing the contents of the drafts are plainly pre-decisional and deliberative because they pre-date the final version of the letter and reflect the agency's discussions about what the letter should say.

Accordingly, Plaintiff is incorrect in describing the withholdings as "[p]ost-hoc documents" which supposedly "do not reflect the 'give-and-take of the consultative process.'" Opp'n at 20. Again, the documents relate directly to the agency's decision concerning the drafting of the December 2017 letter, and it is well-settled that "the drafting process is itself deliberative in nature." *Skull Valley Band of Goshute Indians v. Kempthorne*, 2007 U.S. Dist. LEXIS 21079, *46 (D.D.C. Mar. 26, 2007); *see also Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 161 F. Supp. 3d 120, 132 (D.D.C. 2016) ("The deliberative process privilege protects not only the content of drafts, but also the drafting process itself."); *United Am. Fin.,*

*Inc. v. Potter*, 531 F. Supp. 2d 29, 44 (D.D.C. 2008) (holding that certain "drafts are clearly predecisional and deliberative, reflecting the give and take of the deliberative process that is typical of drafts that precede a final document."). Notably, Plaintiff has cited no decisions from within this Circuit ordering the disclosure of draft letters or communications about such letters.

Likewise, portions of emails discussing the contents of the draft letters and proposing revisions thereto are at the very heart of the deliberative process privilege because they reveal internal discussions about what information to include or not include in the letter. *See Judicial Watch, Inc. v. U.S. Dep't of State*, 349 F. Supp. 3d 1, 9 (D.D.C. 2018) ("[S]oliciting revisions and feedback on a draft is plainly predecisional and deliberative."). The D.C. Circuit has explained that the deliberative process privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). For this reason, courts routinely uphold the application of the deliberative process privilege to similar emails as those withheld in part by Defendant here. *See, e.g.*, *Hunton & Williams LLP v. U.S. EPA*, 346 F. Supp. 3d 61, 78 (D.D.C. 2018) (emails seeking and giving input on drafts of letters "fall squarely within the privilege"); *Hooker v. HHS*, 887 F. Supp. 2d 40, 56-59 (D.D.C. 2012) (withholding communications discussing development of draft because disclosure would reveal "ongoing, collaborative dialogue about the manuscript").

**B. Withholding the Draft Documents Advances the Purposes of Exemption 5.**

Plaintiff argues that release of the withheld materials would not "hinder agency decisionmaking" and that withholding the materials does not advance the purposes of Exemption 5. Opp'n at 17-20. But disclosure of these materials would hinder agency decisionmaking and otherwise undermine the purposes of Exemption 5 for precisely the same reasons that courts

have explained numerous times previously when approving the withholding of similar materials. The deliberative process privilege "serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *see also EPA v. Mink*, 410 U.S. 73, 87 (1973) (the privilege arises out of a recognition "that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny"). Accordingly, "draft documents are exempt from disclosure under the deliberative process privilege because they 'reflect the personal opinions of the writer rather than the policy of the agency.'" *Skull Valley Band of Goshute Indians v. Kempthorne*, 2007 U.S. Dist. LEXIS 21079, *46 (D.D.C. Mar. 26, 2007) (quoting *Coastal States*, 617 F.2d at 866). "Furthermore, disclosure of draft documents 'could lead to confusion of the public' because they might 'suggest 'as agency position that which is as yet only personal position.'" *Id*. (quoting *Russell v. Dep't of Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982)). "Finally, because the drafting process is itself deliberative in nature, the disclosure of draft documents could 'expose to public view the deliberative process of an agency.'" *Id*.

These important goals of the deliberative process privilege would be defeated if the materials withheld in this case were disclosed. As Defendant explained, "[t]he documents contain candid, frank discussion of vital enforcement interests that, if disclosed, would harm the

[Civil Rights] Division's capacity to conduct future exchanges without chilling the staff's exchange and presentation of views." Cooper Decl. ¶¶ 25, 27, 30. If the withheld materials were released, DOJ employees would feel less free to offer their own candid views when crafting important agency documents – particularly documents that may elicit significant public attention – for fear that their views will be publicly aired, scrutinized, and criticized. Release could also stifle internal dissent, for fear that internal disagreement, if disclosed, would lead to public ridicule of the dissenter or embarrass the employer. Also, releasing documents reflecting the *personal* views of agency employees would lead to public confusion about what the *government agency's* official position is on the citizenship question. In short, disclosing internal deliberations about a high-profile agency letter would undermine the fundamental purposes of the deliberative process privilege.

Notably, the D.C. Circuit has found precisely the same concerns to justify the withholding of a draft document under the deliberative process privilege. In *Dudman Communications Corp. v. Department of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987), the court explained that "the disclosure of editorial judgments – for example, decisions to insert or delete material or to change a draft's focus or emphasis – would stifle the creative thinking and candid exchange of ideas necessary to produce good historical work." *Id*. at 1569. An "author would hesitate to advance unorthodox approaches if he knew that the Department's rejection of an approach could become public knowledge" and "editors would place pressure on authors to write drafts that carefully toe the party line." *Id*.

Lastly, Plaintiff suggests that Exemption 5 should not apply here because Plaintiff believes the documents in question are not sufficiently connected to policy matters. Opp'n at 18-19. That argument fails for at least two reasons. First, the documents are closely intertwined

with an important government policy determination, namely, the addition of a citizenship question to the 2020 Census. As Plaintiff recognizes, the December 2017 letter "is not addressed to Congress, the public, or the press" but rather "is styled as a policy document from one agency to another requesting a policy change." Opp'n at 18.

But even were the letter not related to a policy matter, Exemption 5 would still apply here. Courts have "clarified that the deliberative process privilege is not limited to consultations over official agency policy." *Sensor Sys. Support v. FAA*, 851 F. Supp. 2d 321, 330 (D.N.H. 2012). "Rather, the appropriate judicial inquiry is whether the agency document was prepared to facilitate and inform a final decision or deliberative function entrusted to the agency." *Id*. Moreover, the Supreme Court has explained that "cases uniformly rest the privilege on the policy of protecting the 'decision making processes of government agencies,' and focus on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental *decisions* and policies are formulated.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal citations omitted; emphasis added). Accordingly, the privilege protects the process leading to agency decisions generally, not just formal acts of agency policymaking. *See, e.g.*, *Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 560 (1st Cir. 1992) (upholding application of deliberative process privilege where "agency decision whether Army personnel are to be disciplined for alleged misconduct, or prosecuted under the Uniform Code of Military Justice for alleged criminal activity . . . is no less an agency function than the formulation or promulgation of agency disciplinary policy"); *Sensor Sys. Support*, 851 F. Supp. 2d at 330 (finding "argument that the deliberative process privilege does not attach to the draft responses because responding to a congressional inquiry involves neither the agency's decisional nor its policymaking function is unpersuasive" because agency response

"involved a deliberative function entrusted to the agency" and noting that the "fact that the response is not a formal act of agency policymaking is irrelevant"); *In re World Trade Ctr. Disaster Site Litig.*, Civ. A. No. 05-9141, 2009 U.S. Dist. LEXIS 114910, *6, 10-11 (S.D.N.Y. Dec. 9, 2009) (applying FOIA law to subpoena dispute and holding that "the deliberative process privilege is not limited to high-level government officials making policy decisions" but instead applies "to a range of agency decisions"); *Dean v. FDIC*, 389 F. Supp. 2d 780, 792 (E.D. Ky. 2005) (rejecting argument "that the deliberative process privilege under Exemption 5 is limited to materials that relate to the process by which agency policies are formulated, not simply agency decisions").

"Thus, even if an internal discussion does not lead to the adoption of a specific government policy, its protection under Exemption 5 is not foreclosed as long as the document was generated as part of a definable decision-making process." *Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 135-36 (D.D.C. 2011) (citing *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992)). For these reasons, the withholdings at issue are protected by the deliberative process privilege under Exemption 5.[8]

[8] Plaintiff discusses whether the December 2017 letter qualifies as a "messaging" document and cites a decision from the Southern District of New York holding that messaging documents are not protected by the deliberative process privilege. Opp'n at 17-20 (citing *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 811 F. Supp. 2d 713, 741-42 (S.D.N.Y. 2011)). But the "D.C. Circuit[] ha[s] held that deliberations about such 'messaging' decisions can be protected by the deliberative process privilege." *New York*, 2018 WL 4853891, *1 (citing *Nat'l Day Laborer* as an example of a case that has reached a different conclusion than the D.C. Circuit). Instead of relying on an out-of-circuit decision, Plaintiff should have cited D.C. Circuit authority, in which "messaging" documents may be protected by the deliberative process privilege. *See Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991) (applying deliberative process privilege to memorandum prepared "to help [the author's] superiors in the process of defending the legislative package that the Department had already offered"). In any event, the focus on whether the December 2017 letter is a "messaging" document misses the mark. As noted above, the letter was not intended to "explain an already

### C. Defendant Properly Withheld Other Deliberative, Pre-Decisional Documents Under Exemption 5.

In addition to the drafts and draft-related communications, OIP withheld nine pages regarding deliberative discussions regarding the Census and/or American Community Survey (three pages); congressional correspondence (one page); press inquiries (three pages); and inter-agency correspondence (two pages); and correspondence with a senior advisor to the President (ten pages). Brinkmann Decl. ¶ 20. JMD withheld a portion of a one-page email discussing how another agency was considering handling a matter. Allen Decl. ¶¶ 17-18. And the Civil Rights Division withheld 26 pages of documents that are not draft-related. Cooper Decl. & *Vaughn* Index (Groups 7 and 8). Plaintiff's cross-motion and opposition does not mention these documents, let alone argue that they were improperly withheld by Defendant.[9]

Even if the Court were to find that Plaintiff's cross-motion challenges Defendant's withholding of these materials, such a challenge is meritless. All of the documents withheld by Defendant are deliberative because they involved inter-agency or intra-agency communications concerning policy matters and they are pre-decisional because they are antecedent to the finalization of Defendant's responses to correspondence with Congress, other agencies, or press inquiries, or they reflect evaluative discussion and preliminary assessments of issues for final agency action and response. Brinkmann Decl. ¶¶ 31-32.

Internal communications regarding communications with Congress are routinely protected by the deliberative process privilege. *Competitive Enter. Inst. v. EPA*, 12 F.Supp.3d 100, 119-20 (D.D.C. 2014) (finding that records "involv[ing] how to communicate with

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made decision to the public," Opp'n at 17, but rather was an inter-agency letter about an important government policy determination.

[9] The only exception is Plaintiff's challenge to the documents withheld by OIP and the Civil Rights Division under the deliberative process privilege and the presidential communications privilege.

members of Congress . . . and how to prepare for potential points of debate or discussion" were exempt from disclosure under the deliberative process privilege); *Judicial Watch v. U.S. Dep't of Homeland Sec.*, 736 F. Supp. 2d 202, 208 (D.D.C. 2010) (deeming exempt under the deliberative process privilege records that "discuss[ed] how to respond to on-going inquiries from the press and Congress").

Similarly, internal discussions regarding how the agency should respond to a press inquiry fall within the deliberative process privilege. *See Competitive Enter. Inst. v. EPA*, 232 F. Supp. 3d 172, 187-88 (D.D.C. 2017) ("Emails 'generated as part of a continuous process of agency decision-making regarding how to respond to' a press inquiry are protected by the deliberative process privilege.") (quoting *Judicial Watch v. DOT*, 796 F. Supp. 2d 13, 31 (D.D.C. 2011)). Here, OIP properly withheld three pages that reflect internal deliberations concerning the agency's response to questions from the New York Times and the Chicago Tribune.

Defendant explained that "if deliberative emails such as these were routinely released to the public, federal agency employees would be much more circumspect in their online discussions with each other" with respect to discussions that are essential for efficient and proper decision-making, especially as it relates to responding to the media or Congress. Brinkmann Decl. ¶ 32; *see also* Allen Decl. ¶¶ 19-20; Cooper Decl. ¶¶ 22, 25, 27, 30.

For these reasons, as well as the reasons set forth in connection with Defendant's argument concerning draft documents, the Court should grant summary judgment with respect to Defendant's withholding of information pursuant to the deliberative process privilege.

**D. Defendant's *Vaughn* Indices Are Consistent with FOIA.**

Plaintiff alleges that Defendant's *Vaughn* indices are insufficient because the Court is unable to undertake a meaningful review of whether the agency properly relied on a FOIA exemption. Opp'n at 10-11. Plaintiff's argument is meritless.

An agency withholding documents under FOIA must provide a detailed description of the information withheld through the submission of a "*Vaughn* Index," sufficiently detailed affidavits or declarations, or both. *Bigwood v. U.S. Agency for Int'l Dev.*, 484 F. Supp. 2d 68, 74 (D.D.C. 2007); *see also Oglesby v. Dep't of the Army*, 79 F.3d 1172, 1178 (D.C. Cir. 1996). The *Vaughn* Index and/or accompanying affidavits or declarations must "provide[ ] a relatively detailed justification, specifically identif[y] the reasons why a particular exemption is relevant and correlat[e] those claims with the particular part of a withheld document to which they apply." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006) (quoting *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)). There is no set form for a *Vaughn* Index, but the agency should "disclose as much information as possible without thwarting the exemption's purpose." *Hall v. Dep't of Justice*, 552 F. Supp. 2d 23, 27 (D.D.C. 2008) (quoting *King v. Dep't of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987)).

Defendant has satisfied these standards. With regard to Plaintiff's first complaint – that each component failed to describe the deliberative process underlying the claim of exemption – Plaintiff has ignored the detailed supporting declarations that were intended to be read in concert with the indices. *See, e.g.*, Brinkmann Decl. Exhibit F at 1 (stating that "[t]he descriptions of each record within this *Vaughn* Index are meant to be read in tandem with the OIP declaration, which provides a more fulsome explanation of the basis for withholding the information at issue."). Defendant's declarations provide ample information for Plaintiff and the Court to understand the basis of the deliberative process privilege claims. *See* Allen Decl. ¶ 18; Brinkmann Decl. ¶¶ 23-27, 29-32. Cooper Decl. ¶¶ 22-27. The Court should reject Plaintiff's argument that Defendant did not adequately explain the basis for its deliberative process privilege claims.

Plaintiff has failed to demonstrate that FOIA requires an agency to identify the author, dates, or general subject matter of the withheld materials, or that an agency is required to sequentially number each of the documents that are referenced on the *Vaughn* index. Given the significant detail in the declarations regarding the documents withheld under the deliberative process privilege, there is no need to provide additional descriptions about the documents. Importantly, Plaintiff does not allege that it lacks sufficient information to challenge the withheld documents. In any event, in response to Plaintiff's concerns, the Civil Rights Division is submitting a supplemental declaration to clarify certain information on its index. *See* Supp. Cooper Decl.[10]

For these reasons, Plaintiff has not established that the supporting declarations and *Vaughn* indices submitted by Defendant fail to adequately describe the reasons why the agency withheld the records in question.

## III. OIP PROPERLY WITHHELD INFORMATION PURSUANT TO EXEMPTION 5 AND THE ATTORNEY WORK PRODUCT PRIVILEGE.

Plaintiff argues that OIP improperly relied on the attorney work product privilege in withholding drafts of interrogatory responses issued by the United States Commission on Civil

[10] In response to Plaintiff's complaint that the Civil Rights Division did not use Bates numbers, the agency explained that it decided that sequential numbering on the documents was unnecessary in light of the relatively small number of partial redactions under Exemption 5. *See* Supplemental Declaration of Tink Cooper, dated June 5, 2019 ¶ 3(a). Plaintiff also complained that, with respect to five pages withheld under Exemption 6, the Civil Rights Division described the "majority" of the documents but not the "minority" of the documents; the agency responds that it used the word "majority" in error and that the description of these pages should refer to the entire group of emails. *Id.* ¶ 3(b). Finally, Plaintiff notes that Groups 5 and 6 of the index identify only the year of the document and Group 7 does not include any date information. In response, the Civil Rights Division' supplemental declaration asserts that in Group 5, one memorandum was marked "XX, 2016" and the second memorandum was dated June 30, 2016; in Group 6, the handwritten cover note and the memorandum are undated (but the Civil Rights Division believed that Mr. Gore received a copy of the note and memorandum in 2017, so that partial date was included in the index); and in Group 7, the date for this email chain is December 19, 2017, which was inadvertently omitted from the index. *Id.* ¶ 3(c).

Rights (the "Commission"). Opp'n at 21-23. Relying on cases outside this district, Plaintiff contends that the work product privilege only applies if the information at issue relates to an adversarial proceeding. Because Plaintiff has mischaracterized the applicable case law, the Court should reject its argument.

Courts in this circuit have been clear that the attorney work product privilege applies to material that "can fairly be said to have been prepared or obtained because of the prospect of litigation." *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998). The work product privilege applies when "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. *Senate of Puerto Rico v. U.S. Dep't of Justice*, 283 F.2d 574, 586 n.42 (D.C. Cir. 1987).

Here, OIP explained that it withheld the draft interrogatory responses because they reflect what DOJ attorneys considered to be important in responding to the Commission's interrogatories. Brinkmann Decl. ¶ 37. The receipt of interrogatories from the Commission indicates that litigation may be on the horizon because the Commission is charged with investigating complaints alleging that citizens are being deprived of their right to vote by reason of their protected status or because of fraud. 42 U.S.C. § 1975a(a). The Commission also has the statutory authority to hold hearings and issue subpoenas and propound depositions and interrogatories. 42 U.S.C. § 1975a(e). Given that citizen complaints alleging discrimination often prompt Commission investigations, it is reasonable for a party receiving interrogatories from the Commission to anticipate that there would be at least one party that could be considered an "adversary" to the federal government, and that the matter in question might lead to litigation (as did the issue of the citizenship question on the 2020 Census). Because the agency's

interrogatory responses could be used against the government in a future proceedings, it is logical that DOJ attorneys would assist in the preparation of these responses.

Accordingly, OIP properly relied on Exemption 5 and the attorney work product privilege in withholding documents that reflected the mental impressions and advice of agency attorneys who participated in draft interrogatory responses propounded by the Commission. Lastly, as discussed *supra* and in the Brinkmann Declaration, these draft interrogatory responses also have overlapping protection pursuant to the deliberative process privilege. *See* Brinkmann Decl. ¶¶ 20-27.

## IV. OIP AND THE CIVIL RIGHTS DIVISION PROPERLY WITHHELD INFORMATION PURSUANT TO EXEMPTION 5 AND THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE.

Plaintiff argues that OIP did not provide sufficient information with which to determine whether the communications were with immediate advisors in the Executive Office of the President and, further, that OIP did not establish that the communications concern quintessential and non-delegable Presidential power. Opp'n at 20-21. Plaintiff's position lacks merit.

OIP relied on Exemption 5 and the presidential communications privilege to withhold the entire ten-page email chain containing communications between DOJ attorneys and individuals in the White House seeking advice and decision from the White House regarding congressional notification of Defendant's request for a citizenship question on the census. Opening Br at. 14; Brinkmann Decl. ¶¶ 40-41. The White House advisors include John Zadrozny, a member of the Domestic Policy Council ("DPC") responsible for Justice and Homeland Security Policy. Second Brinkmann Decl. ¶ 11. The DPC is the principal forum used by the President for considering non-economic domestic policy matters and forms part of the Office of White House Policy. *Id.* Mr. Zadrozny was, at the time, a senior advisor to the President. *Id.* The subject of potential presidential decision-making involved in the email chain is congressional notification

of the Department of Justice's request for the addition of a citizenship question to the 2020 Census. *Id.* ¶ 12. In this email chain, Department of Justice leadership, Mr. Zadrozny, and other White House advisors all provide analysis, recommendations, and advice about the congressional notification issue. The emails include communications authored by Mr. Zadrozny. *Id.* The decision as to whether to notify Congress of the Department of Justice's request for the addition of a citizenship question to the 2020 Census had not been made prior to these email communications. Congressional notification was, instead, the subject of deliberations reflected in the emails. *Id.*

The ten-page email chain that OIP withheld (as well as the 23 pages withheld by the Civil Rights Division)[11] falls squarely within the presidential communications privilege as communications between a senior White House advisor and DOJ attorneys on matters related to presidential decision-making. Both components properly withheld the entire document because the presidential communications privilege "applies to documents in their entirety." *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997). The agency components carefully reviewed the records discussed above and determined that, because the presidential communications privilege applies to the entirety of documents, there is no reasonably segregable, nonexempt information to disclose to Plaintiff.

Additionally, as discussed in the First Brinkmann Declaration, these records are also partially protected by the deliberative process privilege to the extent that portions of the records also consist of pre-decisional, deliberative opinions, comments, and recommended edits. *See* Brinkmann Decl. ¶ 28. At the time, Mr. Zadrozny was a senior advisor to the President, and the

[11] The content of the email chain withheld by OIP (ten pages) and by the Civil Rights Division (23 pages) is the same. The version withheld by Civil Rights Division has more pages because the downloading of the document into the component's FOIA database modified the format and spacing to more than double the original document size. Supp. Cooper Decl. ¶ 4.

decision as to whether to notify Congress is a presidential decision. Accordingly, OIP and the Civil Rights Division's reliance on the presidential communications privilege is warranted, and the records are exempt from production pursuant to Exemption 5 for this independent reason.

**CONCLUSION**

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

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Respectfully submitted,

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