IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Case No. 1:19-cv-2267-EGS

DEFENDANT U.S. DEPARTMENT OF JUSTICE'S COMBINED RESPONSE TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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[1] Exhibit G is attached to the present filing. Exhibit A through Exhibit F, and their relevant attachments, were filed as part of the Department's motion for summary judgment. *See* ECF No. 25.

INTRODUCTION

The majority of Plaintiff's brief is focused on the Department's withholding of emails and memoranda exchanged between the U.S. Attorney's Office for the Southern District of New York ("SDNY") and the Department's most senior leadership offices, the Office of the Attorney General ("OAG") and the Office of the Deputy Attorney General ("ODAG"). The Department withheld those records (in full or in part) under Exemption 5 because they are protected by the attorney work product privilege and the deliberative process privilege, and in part under Exemptions 6 and 7(C) to protect personal privacy.

Plaintiff's central challenge to those withholdings is its speculation that "the documents at issue almost certainly relate to an investigation of then-President Donald Trump." Pl. Mem. in Supp. of Mtn. for Summ. J, ECF No. 27-1 at 1 ("Pl. Mem."). Proceeding from the assumption that the Department's assertions of the work product doctrine and the deliberative process privilege are based solely on the anticipated prosecution of former President Trump, Plaintiff argues that these privileges do not apply "because there was no prosecutorial decision to be made with respect to President Trump nor was there litigation to anticipate because at all relevant times, he was protected by DOJ's policy of not indicting a sitting president." *Id.* at 15. Plaintiff's assumption is, however, wrong. The Department's assertions under these privileges are supported by the Department's deliberations about and potential litigation concerning individuals *other than* former-President Trump. Plaintiff's core challenge to the Department's privilege assertions regarding these records therefore fails.

Plaintiff devotes considerably less attention to the remaining categories of documents at issue, *i.e.* records associated with witness interviews, and records relating to search warrant applications. With respect to the first set of documents, the Department explained in its opening brief (ECF No. 25-1) ("Gov't Mem.") why those records were withheld in full or in part pursuant to Exemption 5 and the attorney work product privilege, and pursuant to Exemptions 6 and 7(C) to protect personal privacy. Nothing in Plaintiff's motion comes close to undermining the Department's withholdings of these records, which is supported by substantial precedent. With respect to

the records relating to search warrant applications, the Department explained that release of those materials, even with redactions of identifying information, would likely reveal the undisclosed identities of the individuals whose property was the subject of the search warrants. Plaintiff's brief provides no reason to second-guess the Department's explanation of why disclosure would result in a substantial invasion of privacy that would far outweigh any public interest in disclosure.

At the end of the day, the Department need only show that its "justification for invoking a FOIA exemption . . . appears 'logical' or 'plausible.'" *Larson v. U.S. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) (quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007)). The Department has easily cleared that bar. Accordingly, the Court should enter summary judgment in favor of the Department.

ARGUMENT

I. Plaintiff No Longer Challenges The Department's Withholdings of Certain Categories of Records

In its brief, Plaintiff affirmatively waived any challenge to certain categories of records. Plaintiff no longer challenges "the Criminal Division Records" (*see* Gov't Mem. at 29-31), the "Filter Memoranda" (*id.* at 31-32), and "the March 30, 2018, August 9, 2018, and August 18, 2018 Prosecution Memoranda" (*id.* at 33). *See* Pl. Mem. at 12-13 n.1. Plaintiff had previously agreed not to challenge the Department's withholdings made pursuant to Exemption 3 and Federal Rule of Criminal Procedure 6(e), and FOIA Exemption 7(E), as well as the identifying information of lower-level government employees. *See* Gov't Mem. at 3 & n.1. In addition, Plaintiff agreed not to challenge the Department's search, and did not request the processing of draft documents.

II. Plaintiff Fails To Rebut The Department's Showing That It Properly Withheld Records Relating to Communications Between the SDNY and Senior Department Officials

The large majority of Plaintiff's brief concerns memoranda and emails exchanged between the SDNY and senior Department officials, which Plaintiff refers to as the "SDNY Correspondence." *See* Pl. Mem. at 16-32. As explained in the Department's opening brief, the Department

properly withheld the SDNY Correspondence in whole or in part under Exemption 5 because the withheld information is protected by the attorney work product and deliberative process privileges, and in part under Exemptions 6 and 7(C) to protect personal privacy. *See* Gov't Mem. at 34-37. Plaintiff has failed to rebut any of the Department's claimed exemptions.

A. The Department Properly Withheld Information Pursuant to the Attorney Work Product Privilege

The core documents comprising the SDNY Correspondence were prepared by SDNY attorneys to provide information to OAG and ODAG about sensitive, then-pending investigations. These records concerned potential litigation and potential prosecutions and were prepared by attorneys and sent to Department officials with supervisory authority over the investigations and any potential prosecutions; accordingly, these records constitute attorney work product. *See* Gov't Mem. at 34-37. To determine whether the work product privilege applies, "the 'testing question' . . . is 'whether, 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.'" *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (quoting *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 568 n.42 (D.C. Cir. 1987)).

Plaintiff contends that the Department has not shown that the SDNY Correspondence was prepared in anticipation of litigation. Plaintiff's principal argument is that (1) the subject matter of the SDNY Correspondence must have concerned the potential prosecution of then-President Trump, *see* Pl. Mem. at 18, and (2) the Department cannot assert work product protection over such documents because "prosecution of [] President Trump was foreclosed by DOJ policy," and therefore "no criminal action could objectively have been anticipated against him as long as he held office," *id.* at 25-26; *see also id.* at 26 (stating that "[u]nder these circumstances," the attorney work product privilege "does not attach").

This argument is meritless. It fundamentally depends on the assumption that the Department's work product assertions are based only on the anticipated prosecution of former President Trump, and that assumption is incorrect. The SDNY generally does not publicly confirm whether

an uncharged individual is or was the subject of a potential prosecution, and the Department cannot publicly identify individuals as to whom SDNY prosecutors anticipated potential prosecution without revealing privileged information and infringing the personal privacy of those individuals. *See* Ex. G, Supplemental Decl. of Thomas McKay ("Supp. McKay Decl.") ¶¶ 15-16. Nonetheless, the Department has clarified that the information withheld from the SDNY Correspondence includes information prepared in anticipation of potential litigation concerning individuals other than former President Trump. In AUSA McKay's initial declaration, he stated that "[t]he responsive portions of the November 28, 2018 email and the December 15, 2018 memorandum were prepared in anticipation of litigation, specifically, the potential prosecution of individuals other than Michael Cohen for campaign finance violations or for making false statements, giving false testimony, or otherwise obstructing justice[.]" McKay Decl. ¶ 39. In his supplemental declaration, AUSA McKay confirms that "[t]he potential prosecutions referred to in these statements included an individual or individuals other than former President Trump." Supp. McKay Decl. ¶ 10. Likewise, AUSA McKay's initial declaration states "the responsive portions of the February 22, 2019 memorandum and the March 1, 2019 memorandum were prepared in anticipation of the potential prosecution of one or more individuals for making false statements, giving false testimony, or otherwise obstructing justice in connection with the campaign finance investigation." McKay Decl. ¶ 42. The supplemental declaration again confirms that "[t]he potential prosecutions referred to in that statement included an individual or individuals other than former President Trump." Supp. McKay Decl. ¶ 11. In addition, these declarations also make clear that the March 1, 2019 memorandum was also prepared in anticipation of potential litigation involving an individual or individuals other than former President Trump. McKay Decl. ¶ 42; Supp. McKay Decl. ¶ 12.

As noted above, this is the most the government can say about this issue on the public record. Anything more would have to be submitted in an *in camera*, ex parte declaration, but that is unnecessary. So long as the documents pertain to an individual other than former President Trump, they could still be withheld in full under the work product doctrine – even if they were to include some analysis related to a potential prosecution against former President Trump and even

accepting Plaintiff's legal theory that prosecution of former President Trump was foreclosed by DOJ policy – because there is no duty to segregate under the work product doctrine (absent circumstances inapplicable here). *See, e.g.*, *Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice Exec. Office for U.S. Attys.*, 844 F.3d 246, 256 (D.C. Cir. 2016). Because the records at issue were prepared in anticipation of the potential prosecution of an individual or individuals other than former President Trump, they constitute attorney work product and no segregability analysis would be required. *See* Supp. McKay Decl. ¶¶ 10-12.

The remaining records in the SDNY Correspondence consist of the email chains in which the memoranda were exchanged between the SDNY and officials in senior Department leadership offices. *See* McKay Decl. ¶ 30. In general, these records contain a small amount of redacted text that is protected by the attorney work product privilege (as well as the deliberative process privilege, discussed below). As with the memoranda, these work product assertions are justified based on anticipated potential litigation against individuals other than former President Trump. Specifically, the "withheld portions of the . . . December 15, 2018 email were [] prepared in anticipation of the potential prosecutions addressed in the memoranda attached to the email."[2] McKay Decl. ¶ 39. Similarly, "the withheld portions of the March 1, 2019 email were also prepared in anticipation of potential litigation related to the campaign finance investigation and prosecution of Mr. Cohen." *Id.* ¶ 42. Because Plaintiff has not and cannot rebut the work product assertions of the underlying memoranda, the work product assertions for these email chains should also be upheld.[3]

[2] One of the memoranda attached to this email is non-responsive to Plaintiff's FOIA request. McKay Decl. ¶ 37 n.11; *see also id.* ¶¶ 35, 39; Ziese Decl. ¶ 17.

[3] With respect to the email chain spanning February 22 to February 24, 2019, the Department redacted only a very small amount of information pursuant to the deliberative process privilege. The redacted information identifies a matter discussed at the February 2019 meeting between SDNY and the Office of the Attorney General, *see* Ziese Decl. ¶ 21; McKay Decl. ¶ 41, and the Department has explained that this information is "unrelated to the Cohen matter or the matter that is the subject of Plaintiff's request," Ziese Decl. ¶ 21. This particular information is therefore not responsive to Plaintiff's request, although it is contained within a responsive record, but the Department explained that it was prepared in anticipation of litigation "over the matter identified." Ziese Decl. ¶ 21. While Plaintiff complains that the Department at times does not identify

To summarize, Plaintiff's principal argument against the Department's work product assertions is based on the assumption that these records were prepared only in anticipation of the potential prosecution of former-President Trump. *See* Pl. Mem. at 26 ("*If* the records withheld by DOJ pertain to criminal charges that were foreclosed by DOJ's policy that a sitting president is immune from prosecution, *then* the records were not in any subjective or objective sense being prepared in anticipation of litigation." (emphasis added, citation omitted)). Because that assumption is factually incorrect and the withheld portions of the SDNY Correspondence were prepared in anticipation of potential litigation against an individual or individuals other than former President Trump, Plaintiff's argument fails.

The foregoing is sufficient to grant summary judgment to the Department on this issue, but Plaintiff's argument fails for another, independent reason: it rests on a flawed legal theory. Plaintiff's basic contention is that there was no "litigation to anticipate" on the theory that "at all relevant times, [former President Trump] was protected by DOJ's policy of not indicting a sitting president." Pl. Mem. at 15. Specifically, Plaintiff relies on an opinion from the Department's Office of Legal Counsel that states "[o]ur view remains that a sitting President is constitutionally immune from indictment and criminal prosecution." *A Sitting President's Amenability to Indictment & Crim. Prosecution*, 24 Op. O.L.C. 222, 260 (2000) (hereinafter "OLC Op."). From this, Plaintiff contends that the Department is barred from asserting work product protection over documents created in anticipation of potential prosecution of the then-sitting president. *See, e.g.*, Pl. Mem. at 19-20.

That conclusion does not follow, and indeed it is plainly contrary to other language contained in the OLC opinion. While noting that indictment of a sitting president is impermissible, the Office of Legal Counsel was explicit that prosecution of the president would be allowable after his or her term expires. OLC Op. at 255 ("Recognizing an immunity from prosecution for a sitting

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"what litigation was anticipated," Pl. Mem. at 25, that information is privileged, as it would reveal the deliberations of the OAG officials discussing the underlying memoranda, *see* Ziese Decl. ¶ 21.

President would not preclude such prosecution once the President's term is over or he is otherwise removed from office by resignation or impeachment."); *see also id.* at 255 n.32 (noting that the immunity discussed here was of a "temporary nature"). The Office of Legal Counsel further recognized that a criminal investigation was permissible, even during the president's time in office.[4] *Id.* at 257 n.36 ("A grand jury could continue to gather evidence throughout the period of immunity[.]"). It would be a bizarre state of affairs if such a criminal investigation was allowable, but any documents created pursuant to that investigation could not be protected by the attorney work product privilege. That simply cannot be correct.

Finally, while Plaintiff's overriding argument against the Department's work product assertions is that "there was no prosecutorial decision to be made . . . nor was there litigation to anticipate" because of Plaintiff's mistaken assumption that the Department's work product assertions depended on the potential prosecution of former President Trump, *see* Pl. Mem. at 15, Plaintiff's papers may also be read to suggest that the Department has not established the basic elements of the attorney work product privilege, *see id.* at 25. To the extent this is also Plaintiff's argument, it is meritless.

Plaintiff states that the Department's index and declarations "fail to show that the SDNY Correspondence was prepared in contemplation of litigation," and in support of that assertion Plaintiff cites three paragraphs of one of the Department's declarations. Pl. Mem. at 25 (citing Ziese Decl. ¶¶ 17, 21-22). This argument seeks to set up a strawman. While the Ziese Declaration provides additional context for the Department's work product claims, the Department's primary support for its work product assertions in the SDNY Correspondence is located in the McKay

[4] These points were echoed in the Mueller Report. Indeed, Plaintiff quotes the Mueller Report as saying "while the OLC opinion concludes that a sitting President may not be prosecuted, it recognized that a criminal investigation during the President's term is permissible." Pl. Mem. at 18 n.2 (quoting Special Counsel Report, Vol. II, at 1). The next sentence (which is not quoted in Plaintiff's brief), however, states that "[t]he OLC opinion also recognizes that a President does not have immunity after he leaves office." Special Counsel Report, Vol. II, at 1.

Declaration.[5] *See* Ziese Decl. ¶ 7 (noting that the Ziese Declaration "should be read in tandem with" the McKay Declaration, "which provides information regarding SDNY/EOUSA's withholding of certain documents pursuant to the attorney work-product and deliberative process privileges").

The McKay Declaration amply demonstrates that these records constitute attorney work product. These records were generated as a result of a request from supervisory Department officials (in OAG and ODAG) asking the relevant prosecuting office (SDNY) for information concerning then-pending criminal investigations. *See* McKay Decl. ¶¶ 35-37, 41. The main substantive records (comprising the November 29, 2018 email and the three memoranda) were prepared by the prosecution team and the Deputy U.S. Attorney and sent to the requesting offices. *Id.* ¶¶ 35-38, 41-42. The substance of these records summarize or discuss the status of and/or anticipated steps in pending criminal investigations (*id.* ¶¶ 35-36, 38, 41), respond to questions asked by the Attorney General (*id.* ¶ 41), or concern potential litigation related to the campaign finance investigation and prosecution of Mr. Cohen (*id.* ¶ 42). AUSA McKay affirmatively states that the responsive information was prepared in anticipation of prosecution of individuals for campaign finance violations or obstructing justice, or in anticipation of potential litigation related to the campaign finance investigation and prosecution of Mr. Cohen. *Id.* ¶¶ 39, 42. In short, there can be no question that "in light of the nature of the document[s] and the factual situation in the particular case," these records "can fairly be said to have been prepared or obtained because of the prospect of litigation.'"[6] *In re Sealed Case*, 146 F.3d at 884.

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[5] Plaintiff later cites the McKay Declaration's statements concerning the work product privilege and pointedly does not allege that the McKay Declaration fails to establish the general elements of the privilege. *See* Pl. Mem. at 25-26. Instead, Plaintiff argues only that the statements in the McKay Declaration cannot justify the privilege based on Plaintiff's argument that the Department must have been relying on the potential prosecution of former President Trump to justify the privilege. *Id.*

[6] The remaining SDNY Correspondence consist of the email chains forwarding, attaching, and/or discussing the aforementioned memoranda. McKay Decl. ¶ 30. The discrete portions of these additional emails withheld as attorney work product are protected because they were prepared in anticipation either of the potential prosecutions addressed in memoranda attached to the emails

B. The Department Properly Withheld Information Pursuant to the Deliberative Process Privilege

Because the withheld information contained in the SDNY Correspondence is protected by the attorney work product privilege, the Court need not consider whether any other exemptions cover this material. If the Court reaches the issue, however, Plaintiff has also failed to rebut the Department's logical and plausible showing that the withheld material is predecisional and deliberative, and therefore is exempt under Exemption 5 pursuant to the deliberative process privilege. *See* Gov't Mem. at 34-37.

Plaintiff asserts that the deliberative process privilege is inapplicable because the Department "has not identified a *bona-fide* decision-making process to which the SDNY Correspondence relate." Pl. Mem. at 16. In support of this contention, Plaintiff offers two arguments. First, Plaintiff argues that the Department has failed to adequately explain how the SDNY Correspondence played a role in an agency decisionmaking process. *See* Pl. Mem. at 17. Second, Plaintiff argues that these records could not have been part of a "*bona-fide*" decisionmaking process because the records must have been related to the potential prosecution of then-President Trump, who at all times was protected by the Department's policy of not prosecuting sitting presidents, and therefore "there was no prosecutorial decision to be made." *Id.* at 15. Both of these arguments are meritless.

1. The SDNY Correspondence Was Part of an Agency Decisionmaking Process

To assert the deliberative process privilege, it is not necessary for an agency to identify a specific decision with which each record relates. *See, e.g., N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 n.18 (1975); *Access Reports v. U.S. Dep't of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991). Rather, as Plaintiff recognizes (at 16), to properly assert the privilege the Department need only identify the "deliberative process [that] is involved, and the role played by the documents in issue in the course of that process." *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980); *accord Access Reports*, 926 F.2d at 1197.

(McKay Decl. ¶ 39), potential litigation related to the campaign finance investigation and prosecution of Mr. Cohen (*id.* ¶ 42), or potential litigation in an unrelated matter (Ziese Decl. ¶ 21).

The Department has satisfied this test. *See* Gov't Mem. at 34-37. As explained in the Department's declarations, the Attorney General and the Deputy Attorney General exercise supervisory authority over the Department of Justice, including the various United States Attorney's Offices. Ziese Decl. ¶¶ 11-12. Accordingly, when litigating components provide information to these senior leadership offices about the status of pending investigations, they do so as part of a deliberative process in which the leadership offices may weigh in on the contemplated actions of the subordinate components. *See id.* ¶ 13; *see also id.* ¶¶ 17-22. This is particularly true when the requested information concerns decisions that are particularly important, sensitive, or high-profile. *Id.* ¶ 13.

This is what happened here. The records in the SDNY Correspondence were generated because of requests for information from senior Department leadership offices. *See* McKay Decl. ¶¶ 35-38, 41. Specifically, officials within OAG and ODAG requested information that concerned certain pending, sensitive investigations. *See id.* SDNY complied and provided the requested information. *Id.* SDNY afterward provided additional information, in some cases to respond to specific questions asked by the Attorney General. *Id.* ¶¶ 37-38, 41. When subordinate litigating components provide such information to OAG or ODAG, it is understood that they are doing so as part of a deliberative process that is predecisional to the decision by OAG or ODAG as to whether and how to weigh in on the investigations, including by endorsing, modifying, or rejecting the contemplated actions of the subordinate offices, especially when the information relates to high-profile and sensitive investigations. *See* Ziese Decl. ¶¶ 13-15, 17-18, 21.

In light of the Department's declarations explaining the foregoing, the Department has squarely placed the SDNY Correspondence within an agency decisionmaking process that began with requests for information from leadership offices and proceeded through the SDNY's responses to those requests (including providing responses to follow-up requests), all with the understanding that leadership could weigh in regarding the SDNY's contemplated actions in the sensitive investigations at issue. *Cf. Coastal States*, 617 F.2d at 868 ("The identity of the parties to

the memorandum is important; a document from a subordinate to a superior official is more likely to be predecisional[.]").

Plaintiff does not directly contest that the flow of information sketched above can qualify as a "deliberative process" within the meaning of the relevant caselaw. Pl. Mem. at 20-21; *see Coastal States*, 617 F.2d at 868. Instead, Plaintiff tries to characterize the Department's argument as "claiming that *any* briefing material submitted to the Attorney General or Deputy Attorney General is deliberative." Pl. Mem. at 20 (emphasis added); *see also id*. at 21 (stating the Department's claim as "the deliberative process privilege reaches all correspondence with agency leadership"); *id*. at 22 ("DOJ is claiming that deliberative process extends to any document in which an author deliberated about what, if anything, to write."). The Department's argument, however, is not so broad. Instead, the Department's argument is focused on the particular records at issue in this case and the particular supervisory decisions to be made by Department leadership with respect to these particular investigations. *Contrast Leopold v. U.S. Dep't of Justice*, 411 F. Supp. 3d 1094, 1106 (C.D. Cal. 2019) (the Department "cannot claim exemption of this memo on the basis that an unidentified official may – not will – at some point refer to the memo when preparing for an unidentified press inquiry"). As explained above, the records at issue were generated after senior leadership reached out to SDNY to request information about pending, sensitive investigations. McKay Decl. ¶¶ 35-38, 41. SDNY provided that information, which led to the creation of additional correspondence between SDNY and the leadership offices (and within the leadership offices). *See id.* ¶¶ 35-43. These records concerned particularly sensitive and high-profile investigations, and it was understood that the information was being provided to senior leadership for them to weigh in on the proposed actions discussed in the memos, or not weigh in (which is in itself a decision).[7] *See* Ziese Decl. ¶¶ 13-15, 17-18. In sum, it is logical and plausible that the SDNY

[7] In addition, with respect to the February 22, 2019 and March 1, 2019 memoranda, AUSA stated that "[b]oth memoranda were prepared by the SDNY, at the request of the Attorney General or his staff, to facilitate the Attorney General's deliberations and decisions with regard to the campaign finance investigation and prosecution and the related investigation." McKay Decl. ¶ 43. AUSA McKay further stated that while he was "unable to provide specific information about the

Correspondence were part of an agency decisionmaking process. *Cf. Reporters' Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 372 (D.C. Cir. 2021) (finding "manifest" foreseeable harm to an agency's deliberative process when the records concerned conversations among the head of an agency about a highly sensitive matter).

For these reasons, the Court should also reject Plaintiff's argument that the SDNY Correspondence cannot be deliberative because the records "merely *summarize*[] a then-pending investigation." Pl. Mem. at 17. As an initial matter, only some of these records are described by the Department as consisting of summaries of investigations. *See* McKay Decl. ¶¶ 35-37, 41. More importantly, summaries of investigations can play a critical role in a deliberative process, as is the case here. Recall that Department leadership requested information about the status of pending investigations. By providing summaries of the investigations, *see* McKay Decl. ¶¶ 35, 41, the SDNY facilitated the leadership offices' ability to determine whether or not to weigh in, *see* Ziese Decl. ¶ 13.

2. Plaintiff's Argument Concerning Former President Trump Is Meritless

Unable to refute the Department's logical and plausible showings that these records were part of a deliberative process, Plaintiff again resorts to its contention that the records here must have concerned the potential prosecution of former President Trump. *See* Pl. Mem. at 18-21. According to Plaintiff, "[e]ven if the Deputy Attorney General or the Attorney General had theoretical authority to supersede local prosecutors, there was no prosecutorial decision to be made." *Id.* at 21 (citation omitted).

Once again, this attempted rebuttal of the Department's privilege showings depends on the false factual assumption that the withheld information relates to former President Trump, and only him. As discussed above, that assumption is incorrect. These records concern the potential prosecution of an individual or individuals other than President Trump. *See* Supp. McKay Decl. ¶¶ 10-

nature of the deliberations and decisions at issue without revealing privileged information," he confirmed that he could "provide more detailed information in an additional declaration provided ex parte and under seal," if the Court deems it necessary. *Id.*

12. And in any event, Plaintiff's argument also suffers from the same, fatal legal flaws discussed above. In short, Plaintiff is simply incorrect to assert "there was no prosecutorial decision to be made." Pl. Mem. at 21.

Because Plaintiff's attempted rebuttals of the Department's showings are meritless, the Court should hold that the withheld information in the SDNY Correspondence is properly protected by the deliberative process privilege, if the Court reaches the issue.

C. Plaintiff Has Failed To Rebut the Department's Showing That the Emails and Memoranda Are Subject to Other Partial Withholdings

While the Department's withholdings pursuant to Exemption 5 and the attorney work product privilege and deliberative process privilege are sufficient to cover all of the withheld material still in dispute concerning the SDNY Correspondence, these records are also subject to other partial withholdings under Exemptions 6 and 7(C) to protect personal privacy. *See* Gov't Mem. at 38. Although Plaintiff's brief could be read to suggest that the Department is withholding some or all of the SDNY Correspondence records in full under Exemptions 6 and 7(C), *see* Pl. Mem. at 26 (stating "DOJ also cannot rely on Exemptions 6 and 7(C) to withhold the SDNY Correspondence"), that is not the case. Rather, the Department has invoked these exemptions to withhold only *parts* of the portions of these records that remain at issue. *See* Gov't Mem. at 38.

Specifically, some information in the SDNY Correspondence "was withheld pursuant to Exemptions 6 and 7(C) in order to protect the personal privacy of uncharged subjects or persons of investigative interest, and other third parties." Griffin Decl. ¶¶ 47-48; *see also* McKay Decl. ¶ 46. Plaintiff speculates that release of the SDNY Correspondence (1) "would likely demonstrate whether DOJ pulled its punches in the investigation of President Trump" and (2) "could shed light on the extent to which the President's use of his appointment powers improperly influenced investigations of his personal conduct." Pl. Mem. at 27-28. But at least with respect to the Department's targeted withholding of information that implicates personal privacy, Plaintiff's assertions sweep far too broadly. Even assuming for the moment that release of these records would generally illuminate the matters identified by Plaintiff, Plaintiff has not shown that allowing partial withholdings

to protect the personal privacy of uncharged subjects and other third parties would meaningfully undermine any benefit to the public's understanding of the government's conduct.

In any event, the Department explained in detail in its opening brief why uncharged individuals and other third parties whose identifying information appears in criminal investigative files have among the most compelling privacy interests recognized under the FOIA. *See* Gov't Mem. at 13-21, 38. The Department further explained that the public interest in release of the records at issue in this case is low, particularly in light of the information that is already public about the Department's activities. *Id.* Especially in the context of the SDNY Correspondence, where the withholdings pursuant to Exemptions 6 and 7(C) would cover only those portions of the records necessary to protect personal privacy, Plaintiff has not demonstrated that the public benefit of disclosure would outweigh the important privacy interests at stake.

D. Plaintiff Has Failed To Rebut the Department's Showing That Disclosure of the SDNY Correspondence Would Harm Interests Protected by FOIA Exemptions

Finally, Plaintiff argues that the Department has not demonstrated that release of the SDNY Correspondence would result in a foreseeable harm to an interest protected by a FOIA exemption, as required by the FOIA Improvement Act of 2016.[8] *See* Pl. Mem. 32-34; *see also* 5 U.S.C. § 552(a)(8)(A)(i). Plaintiff's brief, however, offers no reason to second-guess the Department's detailed explanation for why release of these records would result in a foreseeable harm. *See* Gov't Mem. at 38-43.

Plaintiff's primary argument again rests on speculation that these records relate only to the potential prosecution of former President Trump, and therefore there can be no cognizable harm because there was no actual decision for the Department to make and no actual litigation to anticipate. *See* Pl. Mem. at 33-34. This argument simply rehashes the same legally and factually flawed assumptions rebutted in the Department's discussion concerning its work product and deliberative process privileges. Accordingly, Plaintiff's repackaged argument should be rejected for the same reasons as described above. *See* Supp. McKay Decl. ¶¶ 10-12.

[8] Plaintiff does not raise this argument with respect to any other category of records.

Plaintiff also fails to rebut the Department's commonsense view that agency deliberations would become less candid if the records at issue – which include internal communications sent to the highest echelons of the Department about its most sensitive investigations – were disclosed under FOIA. *See, e.g.,* Ziese Decl. ¶ 23. On this point, Plaintiff opines that "it is also possible that – in the unique case of an investigation of an unindictable sitting president – the possibility that records might be disclosed could also serve to improve the quality of information received." Pl. Mem. at 34. In analogous circumstances, however, the D.C. Circuit has held that foreseeable harm is "manifest" when the records involve discussions among high-ranking FBI officials about sensitive issues. *See Reporters Comm.*, 3 F.4th at 372. In any event, Plaintiff's conjecture is irrelevant. The Department's assessment that it is reasonably foreseeable that "disclosure would hinder Department staff's ability to provide candid evaluation" is clearly reasonable. Ziese Decl. ¶ 23. Plaintiff's vague musings cannot overcome the Department's sworn declarations on the subject. *See Mingo v. U.S. Dep't of Just.*, 793 F. Supp. 2d 447, 452 (D.D.C. 2011) ("An agency's declarations are 'accorded a presumption of good faith, which cannot be rebutted by purely speculative claims[.]'" (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

Accordingly, Plaintiff has not rebutted the Department's showing that release of the SDNY Correspondence would foreseeably harm an interest protected by a FOIA exemption.[9]

III. Plaintiff Fails To Rebut The Department's Showing That It Properly Withheld Materials Related to Search Warrants

The next category of records involves materials related to search warrants, which were withheld under Exemptions 6 and 7(C) "because their release would likely reveal the identities of individuals, other than Mr. Cohen, whose property was seized in connection with [the campaign finance] investigation and/or who were subject(s) of or person(s) of investigative interest in the

[9] Plaintiff also ignores the Department's argument that disclosure of these materials "would foreclose the opportunity to assert a viable privilege assertion in future civil litigation, as well as preventing Department lawyers from enjoying the traditional protection afforded to lawyers to allow them to diligently oversee litigation without undue interference." Gov't Mem. at 42 (citing Griffin Decl. ¶¶ 35-38).

campaign finance investigation." McKay Decl. ¶ 53. To determine whether a record is properly withheld under Exemptions 6 and 7(C), an individual's privacy right must be balanced against the public interest in disclosure. *See, e.g.*, *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989). Plaintiff has failed to rebut the Department's showing that this balance strongly tips in favor of withholding. *See* Gov't Mem. at 27-29.

In its opening brief, the Department acknowledged that "[o]ne or more of the individual(s) subject to these search warrants have been mentioned in publicly disclosed government documents related to the investigations." Gov't Mem. at 27 n.16. From this, Plaintiff asserts that the privacy interest at stake "is significantly diminished and not substantial enough" to justify nondisclosure. Pl. Mem. at 36. That analysis is too simplistic. Ample precedent recognizes that even when an individual is publicly connected to a criminal investigation, that individual retains substantial privacy interests in the release of undisclosed details about their association with the investigation. *See, e.g.*, *Nova Oculus Partners, LLC v. SEC*, 486 F. Supp.3d 280, 289 (D.D.C. 2020) ("[T]he fact that the individuals' identities have been publicly connected with a law enforcement matter does not 'waive all [] interests in keeping the contents of the [investigative] file[s] confidential' because those individuals still have a 'privacy interest . . . in avoiding disclosure of the details of the investigation.'" (quoting *Kimberlin v. U.S. Dep't of Justice*, 139 F.3d 944, 949 (D.C. Cir. 1998)); *see also CREW v. U.S. Dep't of Justice ("CREW I")*, 746 F.3d 1082, 1092 (D.C. Cir. 2014).

As the Department explained in its opening brief, this principle applies here. While it is true that the names of one or more of the relevant individual(s) have appeared in other government documents, the fact that these individual(s)' property was subject to search has *not* been officially acknowledged or disclosed. McKay Decl. ¶ 52. Release of these records could also reveal the identities of individual(s) who were "subject(s) of or person(s) of investigative interest in the campaign finance investigation." *Id.* ¶ 53. Especially because these individual(s) have not been charged with a crime as a result of the campaign finance investigation or related investigation, *see id.* ¶¶ 7, 9, these individual(s) retain a privacy interest in not disclosing unknown connections to the

SDNY's investigations, including whether their property was subject to a search warrant in a high-profile criminal matter.

That interest is substantial. Case after case endorses the commonsense idea that an individual has a strong interest in avoiding disclosures concerning their connection to criminal investigations. *Cf., e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995) ("In a number of cases, this court has found that individuals have an obvious privacy interest cognizable under Exemption 7(C) in keeping secret the fact that they were subjects of a law enforcement investigation."); *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) ("It is surely beyond dispute that 'the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.'" (quoting *Branch v. FBI*, 658 F. Supp. 204, 209 (D.D.C. 1987))). And again, individuals maintain a privacy interest in preventing disclosures concerning *additional* connections to a criminal investigations even when that individual has already been associated with the criminal investigation in some other way. *See CREW I*, 746 F.3d at 1092 (recognizing a public figure's "second, distinct privacy interest in the *contents* of [] investigative files" even after there had been a disclosure of "the *fact* that he was under investigation"). Moreover, as the Department explained in its opening brief – and not contradicted by Plaintiff – the privacy concerns are particularly acute here given that the records would indicate the individual(s) here were sufficiently close to the criminal activity in this high-profile matter that the government received warrants to search their property. Gov't Mem. at 27-28; *see* McKay Decl. ¶ 56; Griffin Decl. ¶ 50.

Plaintiff does not meaningfully grapple with the privacy interests at stake on this side of the balance, but instead suggests that disclosure is required because of the public's "strong interest" in disclosing records that would shed light on the underlying conduct and the government's investigation of that conduct. *See* Pl. Mem. at 35. However, "[t]he only relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would 'shed light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *CREW I*, 746 F.3d at 1093 (quoting *Dep't of Def. v. FLRA*, 510 U.S. 487,

497 (1994) (cleaned up)). Accordingly, the only cognizable interest that Plaintiff may rely on is the extent to which disclosure of these records would inform the public about why the Department declined to prosecute any individuals besides Mr. Cohen. *See* Gov't Mem. at 18-19.

Plaintiff has not and cannot show that disclosure would substantially advance this public interest, let alone do so enough to overcome the important privacy interests on the other side of the balance. As an initial matter, Plaintiff's brief describes the public interest here in terms of whether the Department acted appropriately during its investigations. *See* Pl. Mem. at 35 ("The public has a heightened interest in understanding how DOJ handled this investigation, *including whether it took sufficient steps* to investigate who besides Cohen was criminally responsible." (italics added)). However, "where . . . the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure." *N.A.R.A v. Favish*, 541 U.S. 157, 174 (2004). Instead, in these circumstances, "courts must insist on a meaningful evidentiary showing" from FOIA requesters before allowing disclosure of information protected by Exemption 7(C). *Id.* at 175. Plaintiff's discussion of the public interest, however, offers no actual evidence to support an inference of governmental wrongdoing. *See* Pl. Mem. at 35. And since "[u]nsubstantiated assertions of government wrongdoing . . . do not establish 'a meaningful evidentiary showing,'" *Boyd v. Crim. Div. of U.S. Dep't of Justice*, 475 F.3d 381, 388 (D.C. Cir. 2007) (quoting *Favish*, 541 U.S. at 175), Plaintiff's analysis of the public interest must fail to the extent it is based on Plaintiff's desire to unearth purported agency misconduct.

Even if Plaintiff's asserted public interest was construed more broadly, *see CREW I*, 746 F.3d at 1094-95, Plaintiff still cannot show that disclosure would substantially advance the public's understanding of the Department's activities. That is particularly true because the government has already released documents containing information similar to information contained within these records. Specifically, the government has disclosed that investigators sought, obtained, and executed warrants to search certain property of Mr. Cohen as part of the campaign finance investigation, *see* McKay Decl. ¶ 48, and the government has already publicly filed materials related to the

execution of those search warrants on the docket in Mr. Cohen's criminal case, *id.* ¶¶ 23, 52. The withheld materials at issue here concern search warrants for cellphones, email accounts, and electronic communications of certain third parties that also were obtained and executed in furtherance of the campaign finance investigation. *See id.* ¶¶ 49-50; Ex. B-1, EOUSA *Vaughan* index ("Search Warrant Records" section). The withheld search warrant applications are in many respects very similar to the search warrant applications that have already been publicly filed in redacted form in Mr. Cohen's criminal case. McKay Decl. ¶ 54. In particular, both the released Cohen search warrant applications and the search warrants that remain at issue contain a section that describes the campaign finance scheme in substantial detail. *Id.* ¶¶ 49-50, 54.

In light of the information already released by the government concerning similar search warrant applications, Plaintiff has not shown that any differential information contained in these search warrant materials is likely to significantly advance the public understanding of the Department's or the FBI's actions. *See U.S. Dep't of State v. Ray*, 502 U.S. 164, 178 (1991) (considering other publicly available information when weighing public benefit of disclosure of additional documents). Given this, and in light of Plaintiff's failure to recognize the weightiness of the privacy interests that remain at stake, Plaintiff has not rebutted the Department's showing that the search warrant materials were properly withheld pursuant to Exemptions 6 and 7(C).

Finally, Plaintiff's passing speculation that "[i]t is . . . likely that the information contained in the search warrant materials has either been 'officially acknowledged' or is in the 'public domain' and is not properly subject to an exemption," Pl. Mem. at 35, is likewise unavailing. The D.C. Circuit has "made clear that 'a plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Public Citizen v. U.S. Dep't of State*, 276 F.3d 634, 645 (D.C. Cir. 2002) (quoting *Afshar v. U.S. Dep't of State*, 702 F.2d 1125, 1129 (D.C. Cir. 1983)). Here, Plaintiff does no more than note that "the government has acknowledged that the individual or individuals searched have already been associated by the government with the investigation," and from this speculates that "it is therefore likely that the information contained in the search warrant materials"

has been officially acknowledged. Pl. Mem. at 35. This comes nowhere close to the requirement that plaintiffs must "point[] to specific information in the public domain that appears to duplicate that being withheld." *Public Citizen*, 276 F.3d at 645. Accordingly, the Court should grant summary judgment to the Department with respect to the Department's withholding of the search warrant records pursuant to Exemptions 6 and 7(C).

IV. Plaintiff Fails To Rebut the Department's Showing That It Properly Withheld Interview Records

The Department explained in detail in its opening brief why the responsive interview records (or portions of records) were withheld pursuant to Exemption 5 and the attorney work product privilege, as well as Exemptions 6 and 7(C) to protect personal privacy. Gov't Mem. at 6-26. Plaintiff's cursory discussion of these records (Pl. Mem. at 37-38) provides no basis to rebut the Department's showing that these materials have been properly withheld pursuant to Exemptions 5, 6, and 7(C).

With respect to work product, Plaintiff's only response is to contend that the Department has not established that these records are protected by the privilege "to the extent that those records were created in conjunction with an investigation of the former president of the United States." Pl. Mem. at 37. Specifically, Plaintiff once again asserts that the Department "at no point was in a position to anticipate litigation involving the former president because of its policy that a sitting president cannot be indicted." *Id.* This argument suffers from the same legal and factual flaws noted with respect to the SDNY Correspondence and should be rejected for the reasons discussed above. To eliminate any doubt about these specific documents, the Department's supplemental declaration makes clear that the interview records "were prepared or compiled in anticipation of potential prosecutions of individuals including persons other than former President Trump." Supp. McKay Decl. ¶ 13. Plaintiff also ignores the fact that another court has already upheld the Defendant's work product assertions over many of these very records. *See* Gov't Mem. at 10-11 & n.8; *see also Am. Oversight v. U.S. Dep't of Justice*, 19-cv-8215, 2021 WL 964220 (S.D.N.Y. Mar. 15, 2021), *appeal filed*, No. 21-1266 (2d Cir. May 13, 2021).

There is also no reason to entertain Plaintiff's suggestion that "the Court should scrutinize the propriety of DOJ[']s] assertion of attorney work product privilege with respect to interview record[s], notes, and accompanying materials that were created after August 21, 2018, the day Cohen pleaded guilty." Pl. Mem. at 38. As explained in the Department's supplemental declaration, both the campaign finance investigation and the related investigation continued after Mr. Cohen pleaded guilty. Supp. McKay Decl. ¶ 14; *see* Ex. B-2 (Plaintiff's FOIA request, attaching an SDNY letter filed on Mr. Cohen's criminal docket, indicating that the campaign finance investigation continued after the date of Mr. Cohen's plea). Although no further charges were brought under either investigation, AUSA McKay makes clear that "each of the interview records discussed in [his] prior declaration, including those created after August 21, 2018, were created in anticipation of the potential prosecution of an individual or individuals as part of either the campaign finance investigation or the related investigation or both." *Id.*

The interview records' status as protected work product means that the Court need not consider Plaintiff's challenge to the Department's other withholdings, but in any event Plaintiff has also failed to rebut the Department's showing that the interview records were properly withheld in full or in part pursuant to Exemptions 6 and 7(C) to protect personal privacy. *See* Gov't Mem. at 13-21, 26. In its brief response, Plaintiff asserts that "[t]he privacy interests of these individuals are either non-existent or reduced because of the evidence and DOJ statements that are already in the public domain." Pl. Mem. at 38. However, this ignores the Department's argument that release of the interview records would reveal information that is *not* in the public domain, and which implicate some of the most important privacy interests recognized in FOIA caselaw. For example, the Department has explained that if these records were released, nearly all of the cooperating witnesses would be identifiable – even if those individuals' names, addresses, and other personally identifying information were redacted. *See* Gov't Mem. at 17; McKay Decl. ¶ 26. Release of these records could also reveal "which individual(s) were the subject(s) of the investigations or otherwise of investigative interest." McKay Decl. ¶ 25; *see* Gov't Mem. at 17. The cooperating witnesses' statements to prosecutors and FBI investigators also contain substantial amounts

of personal information. *See* Gov't Mem. at 17-18; Griffin Decl. ¶ 42. All of this information implicates important privacy interests that is well-recognized in FOIA caselaw, *see* Gov't Mem. at 13-21, and Plaintiff does not dispute the gravity of those interests. Thus, notwithstanding the fact that other information concerning these investigations is in the public domain, the interview reports have been properly withheld to protect personal information that remains non-public, and in which cooperating witnesses, third parties of investigative interest, and other third parties retain substantial privacy interests. *See, e.g.*, *Nova Oculus*, 486 F. Supp. 3d at 289; *CREW I*, 746 F.3d at 1092.

On the other side of the balance, Plaintiff contends that "[t]he public interest in understanding how DOJ handled the criminal investigation of Cohen, Trump, and potentially others is significant and outweighs the private interest in withholding these records." Pl. Mem. at 38. But Plaintiff fails to address the Department's contentions that the interview records are unlikely to advance that goal. *See* Gov't Mem. at 19-20. For example, the Department explained that the interview reports "do not weigh evidence or analyze the law, nor do they discuss prosecutors' reasoning as to whether or not to bring charges," and that if they were released, "the interview reports would provide only a snapshot of uncontextualized evidence." McKay Decl. ¶ 19. Plaintiff does not contradict this point. Likewise, Plaintiff fails to respond to the Department's argument that release of these records would not substantially increase the public's understanding of agency activities in light of the substantial amount of information that is already in the public domain. *See* Gov't Mem. at 19.

In short, Plaintiff offers no reason to second-guess the Department's showing that the privacy interests here far outweigh any speculative benefit to the public's understanding of agency activities that would result from the release of the interview records. *See* Gov't Mem. at 20-21. Accordingly, if the Court reaches the issue, it should hold that the Department properly withheld these records pursuant to Exemptions 6 and 7(C).

V. *In Camera* Review Is Unnecessary and Unwarranted

The Court should reject Plaintiff's request for *in camera* review. "*In camera, ex parte* review, though permitted under FOIA and sometimes necessary, is generally disfavored," and "should be invoked only when the issue at hand could not be otherwise resolved." *Schiller v. N.L.R.B.*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (quotation marks omitted).

Summary judgment is appropriate without *in camera* review of documents where an agency's affidavits "provide specific information sufficient to place the documents within [an] exemption category," and "this information is not contradicted in the record," nor is there "evidence in the record of agency bad faith." *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 626 (D.C. Cir. 2011) (quoting *Larson*, 565 F.3d at 870). "When the agency meets its burden by means of affidavits, in camera review is neither necessary nor appropriate." *Hayden v. Nat'l Sec. Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979).

In this case, the Department's declarations provide detailed information to show that the records at issue have been properly withheld in full or in part under Exemption 5 (via the attorney work product and deliberative process privileges) and Exemptions 6 and 7(C) (to protect personal privacy). With respect to the Department's Exemption 5 withholdings, the gravamen of Plaintiff's argument is that the Department could not have actually anticipated litigation or had any meaningful decision to deliberate because (under Plaintiff's mistaken view) the Department's privilege assertions were justified solely by the potential prosecution of President Trump. In addition to being legally flawed (*see supra*), Plaintiff's factual misapprehension is fully rebutted by the Department's supplemental declaration. *See* Supp. McKay Decl. ¶¶ 9-14. Accordingly, the Department has met its burden by supplying detailed affidavits explaining its exemptions, and "in camera review is neither necessary nor appropriate" to examine the Department's Exemption 5 withholdings. *Hayden*, 608 F.2d at 1387.

The same is true for the Department's withholdings under Exemptions 6 and 7(C). The Department's declarations explain the substantial privacy interests at stake, as well as why disclosure would be unlikely to substantially increase the public's understanding of the Department's

activities. Plaintiff's counterarguments failed to take into account the important privacy interests that individuals have in the non-disclosure of unknown associations with criminal investigations, or unknown details regarding their associations with criminal investigations, and also fail to take into account that substantial information concerning the campaign finance investigation is already in the public domain, thereby limiting any benefit in disclosure. Nor has Plaintiff come anywhere close to making the required showing that the Department's withheld information has been "officially acknowledged." *See supra.* In these circumstances, *in camera* review is unnecessary and unwarranted.

CONCLUSION

For the foregoing reasons, the Court should grant Defendant's motion for summary judgment and deny Plaintiff's cross-motion for summary judgment.

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Respectfully submitted,

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