UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	**Case No. 19-cv-03544 (APM)**
UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

In August 2017, Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") submitted a Freedom of Information Act ("FOIA") request for information and records relating to former Department of Homeland Security ("DHS") Adviser for Policy Katharine Gorka's involvement in DHS's decision to revoke certain grants under the Countering Violent Extremism Grant Program. Dissatisfied with DHS's response, CREW filed the instant suit, alleging that DHS's review of responsive records was inadequate; that its assertion of the deliberative process privilege was erroneous; that it improperly withheld portions of responsive records as nonresponsive; and that it improperly redacted the names of high-level government employees. DHS now moves for summary judgment. For the reasons stated below, the court grants DHS's motion in part, denies it in part, and remands the matter back to the agency.

II. BACKGROUND

On January 8, 2016, DHS announced the creation of the Countering Violent Extremism ("CVE") Task Force, an interagency effort to combat violent extremism within the United States.

Pl.'s Mem. of P. & A. in Opp'n to Def.'s Mot. for Summ. J., ECF No. 18 [hereinafter Pl.'s Opp'n], at 1. As part of the effort, DHS stated that it would award $10,000,000 in grants through its CVE Grant Program. *Id.* at 2. The grant program's purpose was to "develop and expand efforts at the community level to counter violent extremist recruitment and radicalization to violence." *Id.* (quoting Dep't of Homeland Sec., Fact Sheet: FY 2016 Countering Violent Extremism (CVE) Grants (July 6, 2016), https://www.dhs.gov/news/2016/07/06/fy-2016-countering-violent-extremism-cve-grants). On January 13, 2017, then Secretary of Homeland Security Jeh Johnson announced the CVE grantees, including two organizations dedicated to combating white nationalist extremism: Life After Hate and the University of North Carolina ("UNC") at Chapel Hill. *Id.* Life After Hate was founded by former white supremacists who have renounced their views and work to help others do the same; UNC received a grant to counter jihadist and white supremacist recruiting. *Id.* at 2–3.

Shortly after the Trump Administration took office, newly appointed Secretary of Homeland Security John Kelly "ordered a review of the CVE Task Force and froze the grant awards made by DHS for further review." *Id.* at 3. DHS Adviser for Policy Katharine Gorka, a key participant in the review, purportedly advocated for narrowing the Task Force's mission to focus on domestic Islamic extremism rather than white nationalism. *Id.* at 4. On June 23, 2017, DHS published a revised list of CVE Grant Program recipients, and neither Life After Hate nor UNC was included. Compl., ECF No. 1 [hereinafter Compl.], ¶ 13; *see also* Pl.'s Opp'n at 4.

On August 18, 2017, CREW filed a four-part FOIA request with DHS, asking for:

> (1) Copies of all calendars and/or other records from January 20, 2017 to the present reflecting meetings Katharine Gorka had [sic], currently Adviser to the Department of Homeland Security's Office of Policy, and formerly Adviser to the DHS Chief of Staff's Office;

> (2) Documents reflecting the responsibilities and duties of Ms. Gorka, both in her current role as Adviser to the DHS Office of Policy, and in her previous role as Adviser to the DHS Chief of Staff's Office;
>
> (3) All communications from January 20, 2017 to the present between Ms. Gorka and George Selim, former DHS Director of the Office for Community Partnerships, and/or his then deputy David Gersten; and
>
> (4) Documents reflecting DHS'[s] 2017 review of the Countering Violent Extremism (CVE) program, ordered by then-DHS Secretary John Kelly in January, as well as any other documents reflecting the decision to revoke CVE grant funding from the nonprofit organization, Life After Hate, and from the University of North Carolina at Chapel Hill.

Def.'s Mot. for Summ. J., ECF No. 15 [hereinafter Def.'s Mot.], Decl. of James V.M.L. Holzer, ECF No. 15-3 [hereinafter First Holzer Decl.], ¶ 7. Nearly two years later, on June 23, 2019, DHS sent CREW a letter advising that it had located a total of 693 pages responsive to CREW's request, and that it was releasing eight pages in full and 685 pages in part, with withholdings made pursuant to 5 U.S.C. §§ 552(b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). *Id.* ¶ 14. DHS considered the release responsive to parts two, three, and four of CREW's request. *Id.* DHS later corrected the information in the letter to state that it was actually releasing 695 responsive pages: eight in full and 687 in part, with withholdings made pursuant to the same exemptions noted above. *Id.*

On September 20, 2019, CREW filed an administrative appeal. *Id.* ¶ 15. Although DHS confirmed receipt of the appeal on the same day, it did not issue a decision before CREW filed the instant suit on November 25, 2019. *Id.*; *see* Compl. The Complaint alleges that (1) DHS "failed to conduct an adequate search reasonably calculated to locate responsive records" in violation of FOIA, 5 U.S.C. § 552(a)(3), and DHS regulations, 6 C.F.R. § 5.6(d)(3); and (2) DHS "wrongfully withheld responsive documents by incorrectly asserting and failing to explain its withholding under FOIA Exemptions 5, 6, 7(C), and 7(E)." Compl. ¶¶ 29–35. On April 1, 2020, DHS

produced an additional 370 pages of records in response to part one of CREW's request. First Holzer Decl. ¶ 17. Ninety-nine pages were released in full, and 271 were released in redacted form. *Id.* In a letter accompanying the production, DHS advised CREW that it had located and sent six pages to other agencies for consultation. *Id.* ¶ 18. On July 17, 2020, DHS made a supplemental release of those six pages and released certain other pages that had previously been withheld in part. *Id*. That same day, DHS filed the motion for summary judgment now before the court. *See* Def.'s Mot.

III. LEGAL STANDARD

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When a court applies this standard, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A dispute is "genuine" only if a reasonable fact-finder could find for the nonmoving party; a fact is "material" only if it can affect the outcome of litigation. *Id.* at 248–49.

FOIA cases are often decided on motions for summary judgment. *See Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009). The attendant claims are premised on an agency's improper withholding of records. *See McGehee v. CIA*, 697 F.2d 1095, 1105 (D.C. Cir. 1983). To obtain summary judgment in a typical FOIA action, an agency must satisfy two requirements. First, it must demonstrate that it has conducted a search "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). To carry this burden, the agency may submit a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain

responsive materials (if such records exist) were searched." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Production of such an affidavit allows a requester to challenge, and a court to assess, the adequacy of the search performed by the agency. *Id.* The agency's affidavits are afforded "a presumption of good faith, which cannot be rebutted by purely speculative claims." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal quotation marks omitted).

Second, "materials that are withheld must fall within a FOIA statutory exemption." *Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 252 (D.D.C. 2005). A court may award summary judgment in a FOIA case using solely the information included in the agency's affidavits or declarations if they are "relatively detailed and non-conclusory," *SafeCard*, 926 F.2d at 1200 (citations and internal quotation marks omitted), describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith," *Mil. Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007) (cleaned up).

IV. DISCUSSION

CREW challenges various aspects of DHS's search for and review of responsive records, as well as its withholding of information. The court addresses each issue below.

A. DHS's Search for and Review of Responsive Records

1. CREW's Request for Documents Reflecting DHS's 2017 Review of the CVE Program

CREW's fourth request involved two categories of documents: (1) "[d]ocuments reflecting DHS'[s] 2017 review of the Countering Violent Extremism (CVE) program, ordered by then-DHS Secretary John Kelly"; and (2) "documents reflecting the decision to revoke CVE grant funding from the nonprofit organization, Life After Hate, and from the University of North Carolina at Chapel Hill." First Holzer Decl. ¶ 7. CREW asserts that "DHS's search simply overlooked the first request." Pl.'s Opp'n at 5–6.

For support, CREW points to paragraph 11 of the first declaration of James Holzer, Deputy Chief FOIA Officer for DHS's Privacy Office. *See id.* at 8. Holzer explains that

> [f]or part four of [CREW's] request, [DHS] searched, using . . . the search terms (and variations thereof) "Life After Hate" and "Univ. North Carolina at Chapel Hill", the emails of the 24 individual DHS employees within what is now known as the Office of Public Engagement (OPE) (previously known as the Office for Targeted Violence and Terrorism Prevention ("TVTP") and the Office of Community Partnerships ("OCP")) who had been involved with the CVE *grants*.

First Holzer Decl. ¶ 11 (emphasis added); Reply in Supp. of Def.'s Mot. for Summ. J., ECF No. 21 [hereinafter Def.'s Reply], Second Decl. of James V.M.L. Holzer, ECF No. 21-1 [hereinafter Second Holzer Decl.], ¶ 5 (indicating the same). This search, CREW insists, was tailored to only the second category of documents in its fourth request—those regarding grant funding. *See* Pl.'s Opp'n at 8 ("CREW's [fourth] request was broader, yet DHS ignored those differences."). DHS responds that it "conducted the search of these offices and these individuals because 'the FOIA Division worked closely with the staff responsible for the CVE program to identify a list of agency staff members involved with the program or who made decisions relating to the program.'" Def.'s

Reply at 2 (quoting First Holzer Decl. ¶ 11). Furthermore, DHS emphasizes, whether it conducted an adequate search for documents is a matter of "administrative judgment and expertise" and therefore is "hardly an area in which the courts should attempt to micromanage the executive branch." *Id.* at 2–3 (quoting *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 662 (D.C. Cir. 2003)).

But just because courts should not resort to micromanagement does not mean they do not have a responsibility to ensure that agencies adhere to their FOIA obligations. *See Charles v. Office of Armed Forces Med. Exam'r*, 730 F. Supp. 2d 205, 216 (D.D.C. 2010) (noting that agencies must "adher[e] to the full scope or the precise language of the plaintiff's request, as they are required to do"). That DHS addressed only the second half of CREW's fourth request is evident from the search terms used by the agency. Holzer states that, with respect to "part four of [CREW's] request," "the search terms (and variations thereof) 'Life After Hate' and 'Univ. North Carolina at Chapel Hill'" were run across the email files of 24 document custodians. First Holzer Decl. ¶ 11. But Holzer references no other search terms. The agency's search was thus laser-focused on the two grantees identified in part two of CREW's fourth request. Such a narrowly defined search was not reasonably calculated to capture the broader range of records pertaining to the first part of the request—i.e., the ordered review of the CVE program.

In his supplemental declaration, Holzer replies that CREW's inadequate-search claim relies on the "false assumption" that Secretary Kelly communicated his desire for a review of the program via email, rather than in-person or over the phone. Second Holzer Decl. ¶ 8. "DHS has previously reviewed all of Secretary Kelly's emails during the course of another FOIA litigation matter, and while drafting this declaration, FOIA staff reviewed those releases and did not find any emails relating to this review." *Id.* But this answer is not responsive. The fact that DHS

reviewed Secretary Kelly's emails for responsiveness, and found none, does not address its failure to search more broadly for records within the agency concerning review of the CVE program. Presumably, officials and employees other than Secretary Kelly would have such records.

The court therefore denies DHS's motion for summary judgment as to this issue. On remand, DHS should perform a proper search to find any documents reflecting the 2017 review of the CVE program ordered by Secretary Kelly.

2. DHS's Search for CVE Grant Records

Separately, CREW challenges as inadequate DHS's search for documents reflecting the decision to revoke the funding for Life After Hate and UNC. Pl.'s Opp'n at 8–12. CREW emphasizes that "when the Secretary is the decisionmaker, there is [naturally] a long line of employees and officials between staff and the Secretary who usher that decision-making process forward," but here, DHS's "search was confined only to 24 staff employees in the [Office of Public Engagement and the Office of Community Partnerships]." *Id.* at 8–9. CREW identifies a series of records from DHS's release indicating that high-level officials such as the Acting Deputy Secretary, Chief of Staff Kirstjen Nielsen, Deputy Chief of Staff Alan Meltzer, and Principal Deputy Undersecretary David Grannis were included on communications about the CVE grant review process. *See id.* at 9–11. Because "positive indications of overlooked materials" exist in the record, CREW contends, DHS's search was inadequate. *Id.* at 11 (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.D.C. 1999)).

DHS responds that it properly elected not to search the Office of the Secretary "because any communications with the Office of the Secretary and [the CVE grant program] and any final decisions made by the Secretary would be captured through a search[] of OPE (including TVTP) and OCP." Second Holzer Decl. ¶ 6. If during that search, indicia came to light that a record

existed but was not captured, consistent with practice, DHS would have undertaken a further search for the record. First Holzer Decl. ¶ 11. "Such additional searches were not determined to be necessary to respond to part[] . . . four of [CREW's] request." *Id.*

DHS's explanation makes sense with respect to emails sent between OPE/OCP staff and higher-level officials. A separate search of the Office of the Secretary would not be necessary to capture such emails. But it stands to reason that if officials within the Office of the Secretary were reviewing grants with staff, they were also communicating with one another as the review process made its way back up to Secretary Kelly. *See* Pl.'s Opp'n at 9–10 (citing records of multiple high-level meetings in March 2017 involving officials in the Office of the Secretary). Those emails—between high-level officials and not involving staff—naturally would not be captured in DHS's search of OPE/OCP employee communications, but they would be responsive to CREW's fourth request.

Thus, the court denies DHS's motion with respect to the adequacy of its search for CVE grant records. On remand, DHS should perform a search reasonably calculated to uncover email communications among officials within the Office of the Secretary regarding the decision to revoke grant funds from Life After Hate and UNC.

3. DHS's Review and Nondisclosure of Email Attachments

Next, CREW takes issue with DHS's review and nondisclosure of certain email attachments. Pl.'s Opp'n at 12–14. CREW submits a declaration from Jeffrey Gutman, and Table 1 of his declaration lists the pages of the DHS document production "in which there is an explicit reference to an attached document." *Id.* at 13; *id.*, Decl. of Jeffrey S. Gutman, ECF No. 18-2 [hereinafter Gutman Decl.], at 4 tbl.1. In total, there are 81 such references, and in 68 of them, "no attached document is released in whole, in part, or entirely redacted," Pl.'s Opp'n

at 13. *See* Gutman Decl. at 4 tbl.1. In CREW's view "[i]t is not clear whether DHS simply did not process the attached document, or that it did and withheld it in its entirety without paginating it, disclosing a fully redacted document, and adding it to the *Vaughn* index." Pl.'s Opp'n at 13.

DHS answers that it "separately evaluated each e-mail message and any attachments to determine whether each was responsive to [CREW's] request." Def.'s Reply at 4; *see also* First Holzer Decl. ¶ 13. As Holzer explains, it is "possible for a responsive email to have attachments that are deemed non responsive or duplicative by [DHS's] FOIA Analyst and [these attachments] may be excluded from the record set and therefore not included with the production." Second Holzer Decl. ¶ 9. Thus, DHS argues, CREW "has not demonstrated that [DHS] improperly withheld the attachments to e-mail messages." Def.'s Reply at 4.

The court agrees with CREW. As a threshold matter, a reasonable reading of CREW's FOIA requests clearly encompasses email attachments. CREW's third request sought all "communications," and its fourth request sought all "documents." First Holzer Decl. ¶ 7; *see PETA v. NIH*, 745 F.3d 535, 540 (D.C. Cir. 2014) ("Agencies have a duty to construe a FOIA request liberally." (cleaned up)).

More to the point, the court finds that DHS did not consider whether responsive emails and their attachments should be treated as single records for purposes of disclosure. In *American Immigration Lawyers Association v. Executive Office for Immigration Review*, the D.C. Circuit left open "the range of possible ways in which an agency might conceive of a 'record,'" but it presumed the agency would tailor its approach to the specifics of a given case. 830 F.3d 667, 678–79 (D.C. Cir. 2016). In that case, the court held that an email chain was an indivisible record, and thus producible as a whole, even if portions of the chain referenced topics bearing no relationship to the FOIA request. *See id.* at 679–80. Here, it appears that DHS took a categorical

approach to reviewing each email and its attachment separately for responsiveness. Such an approach, however, overlooks the possibility that an email and its attachment, much like an email chain, could be considered a single "unit" for purposes of FOIA. *See id.* at 677 (stating that "once an agency identifies a record it deems responsive to a FOIA request, the statute compels disclosure of the responsive record—i.e., as a unit—except insofar as the agency may redact information falling within a statutory exemption").

In deciding whether to treat an email and its attachment as a single record, DHS might have considered whether the email made "explicit reference to, or include[d] discussion of, the . . . attachments." *Coffey v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1, 8 (D.D.C. 2017). If, for example, the portion of the email that is responsive to CREW's request references the attachment, that is reason to believe the email and attachment should be treated as a single record. On the other hand, if the attachment is referenced in a nonresponsive portion of the email, that is perhaps an indication that the two may be considered separate records. Regardless of the exact paradigm used, what is clear is that DHS should have given *some* consideration to the link between the emails and their attachments instead of automatically treating them as distinct records, but it did not.

As a result, summary judgment as to the review and nondisclosure of the relevant email attachments is denied.

4. Final Press Reports

CREW also maintains that DHS failed to disclose final press responses to inquiries about the grants made under the grant program and why Life After Hate was defunded. Pl.'s Opp'n at 14 (citing Def.'s Mot, *Vaughn* Index, Ex. E, ECF No. 15-8 [hereinafter *Vaughn* Index], at 5 (email chain at page range 120–24)). Because DHS "appears to have redacted draft answers to those questions," CREW argues that DHS likely made final statements in response to the press

inquiries, and that those statements "would squarely be covered" by CREW's fourth request. *Id*. Therefore, it concludes, "a search of records in the DHS press office related to the CVE grants would have been warranted." *Id.*

The court is unpersuaded. A plaintiff's "mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994). Here, CREW's belief that final press reports exist is based on at least two levels of speculation—that DHS "*appears* to have redacted draft answers to [inquiries]," which "*suggests*" DHS made final statements. Pl.'s Opp'n at 14 (emphasis added). Accordingly, on this issue, DHS's motion for summary judgment is granted.

B. DHS's Withholding and Redaction of Records

1. Records Related to John Barsa

FOIA Exemption 5 permits the withholding of "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "[T]he deliberative process privilege under Exemption 5 protects 'confidential intra-agency advisory opinions' and 'materials reflecting deliberative or policy-making processes.'" *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004). The purpose of the privilege is "to prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). "Materials that are 'predecisional' and 'deliberative' are protected, while those that 'simply state or explain a decision the government has already made or protect material that is purely factual' are not." *Judicial Watch*, 365 F.3d at 1113 (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)).

CREW contests DHS's invocation of the deliberative process privilege to withhold certain agency correspondence, given the presence of John Barsa on such correspondence. Pl.'s Opp'n at 14–25. Prior to May 8, 2017, CREW argues, Barsa was a "non-governmental member of the DHS Transition Team." Pl.'s Opp'n at 15; *see id.* at 19 ("Indeed, prior to May 8, each of the 29 e-mails he sent included a footer stating he was a member of the DHS transition team."); Exec. Branch Pers., Public Financial Disclosure Report, Barsa, John (2017), https://www.documentcloud.org/documents/4387638-John-Barsa-Financial-Disclosure.html (last visited Mar. 29, 2021). Therefore, CREW asserts, the "records and e-mail chains received, reviewed, or responded to by [him]" before that date do not qualify for withholding under the privilege because they were not "intra- or inter-agency communications." *See* Pl.'s Opp'n at 15 (arguing that Exemption 5's coverage of intra- or inter-agency communications "is language of limitation").

At the time CREW filed its opposition brief, DHS held the view that, during the relevant period, Barsa "plainly was within the agency for purposes of [the deliberative process] privilege" because "his emails were sent from his dhs.gov account, his emails typically included a footer indicating his status as part of the 'DHS Transition Team,' and there are no indicia he was acting out of self-interest or for the benefit of third parties, such as his former clients." Def.'s Mot., Mem. in Supp. of Mot. for Summ. J., ECF No. 15-1 [hereinafter Def.'s Br.], at 13 n.1 (citing First Holzer Decl. ¶ 26). In other words, the agency's position was that before May 8, 2017, Barsa was a DHS Transition Team member and covered by the privilege. But DHS changes its tune in its reply brief. Based on new information provided by the Office of the Chief Human Capital Officer, DHS states that "[d]uring the relevant time-period, John Barsa was a government employee." Def.'s Reply at 6. Holzer clarifies:

> From January 21, 2017 to May 13, 2017, Mr. Barsa was a GS-15, Advisor, first under a provisional appointment to the Office of the Secretary and Executive Management Executive Secretariat (January 21, 2017 to April 1, 2017) and then under an excepted appointment to the Office of the Assistant Secretary for Policy (April 2, 2017 to May 13, 2017). From May 14, 2017 to June 10, 2019, Mr. Barsa was a non-career SES as the Principal Deputy Assistant Secretary and Chief of Staff.

Second Holzer Decl. ¶ 10. So, says Holzer, "from January 21, 2017 to June 10, 2019, Mr. Barsa was an employee of the Department of Homeland Security, and prior to January 20, 2017, he was a member of the DHS Transition Team for the Trump Administration." *Id*.

In the face of conflicting evidence, the court views Barsa's employment status prior to May 8, 2017, as a genuinely disputed material fact. Although Holzer's clarification is entitled to a presumption of good faith, it is lacking in key respects. Notably, his declaration does not respond to the documentary evidence offered by CREW. The declaration provides no explanation for why Barsa himself certified in his Public Financial Disclosure Report that he had not held a federal government position in the twelve months prior to June 13, 2017. And it does not explain why, between January 20, 2017, and May 8, 2017, Barsa's email footer stated that he was still a member of the DHS Transition Team. Nor does Holzer attach any documentary evidence in support of his declaration. In the absence of further explanation from DHS, the court denies the agency's summary judgment motion as to this issue.

2. Foreseeable Harm

Barsa's employment status aside, CREW argues that DHS's assertion of the deliberative process privilege is generally improper because the agency failed to satisfy the "foreseeable harm" requirement now applicable to every FOIA exemption. Pl.'s Opp'n at 25–28. Although it is a close call, the court disagrees with CREW.

The FOIA Improvement Act mandates that "[a]n agency shall withhold information . . . only if (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption . . . or (II) disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i). "[T]o justify withholding records under FOIA's foreseeable-harm provision, [an agency] cannot simply rely on 'generalized' assertions that disclosure 'could' chill deliberations." *Machado Amadis v. U.S. Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020). Instead, the agency should "specifically focus on the information at issue" and "conclude[] that disclosure of that information *would* chill future internal discussions." *See id.* (cleaned up) (emphasis added). DHS has done that here.

Holzer clearly identifies the information at issue as withheld material regarding "reconsideration of whether particular grants should be awarded." First Holzer Decl. ¶ 25; *id.* (describing "internal, predecisional deliberations concerning [the CVE program] and the grants at issue"). He then attests to the "concrete and foreseeable harm that *would* result if the material withheld . . . were to be disclosed: diminished inter- and intra-agency candor and capacity to engage in thoughtful, uninhibited, and occasionally contentious consideration and debate of at times opposing internal viewpoints before a final decision is reached." *Id.* (emphasis added); *see id.* ("[I]t is reasonably foreseeable that agency officials in the future *will* be less likely to engage in the kind of unrestrained internal exchange of ideas and proposals necessary to arrive at the proper policy outcome" if they know that their deliberations "have been publicly revealed." (emphasis added)). "Such chilling of candid advice is exactly what the privilege seeks to prevent." *Machado Amadis*, 971 F.3d at 371.

Relatedly, DHS states that because the withheld records relate to "violent extremism," disclosure could lead "to harassment or even physical harm against those who took part in the deliberations by individuals who disagree with the Department's mission or activities." First

Holzer Decl. ¶ 25. CREW counters that it has been more than three years since the CVE grants were made or withdrawn, and DHS does not point to any real threat of harm related to the program. Pl.'s Opp'n at 26–27. But CREW points to no case law indicating that the passage of time undercuts the force of such potential harm. In fact, when considering the application of similar FOIA exemptions, courts have noted that "[c]onfidentiality interests cannot be waived through . . . the passage of time." *Spurling v. U.S. Dep't of Justice*, 425 F. Supp. 3d 1, 16 (D.D.C. 2019) (quoting *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999)).

Accordingly, the court grants DHS summary judgment on the issue of foreseeable harm with respect to those records otherwise properly withheld under Exemption 5.

3. Residual Issues Regarding Withholding and Redaction

Finally, CREW claims (1) that "DHS improperly redacted material it deemed as non-responsive from responsive records," Pl.'s Opp'n at 28, and (2) that DHS improperly invoked FOIA Exemption 6[1] to redact the names of higher-level government employees on certain documents, *id.* at 29. DHS replies that its supplemental releases in July 2020 and September 2020 render these claims moot. Def.'s Reply at 8. Because the court is already remanding this matter back to DHS, and because CREW had no occasion to address DHS's replies in its own briefing, the court defers resolution of these two issues for a later time.

V. CONCLUSION AND ORDER

For the foregoing reasons, the court grants DHS's motion for summary judgment in part, denies it in part, and remands this matter back to DHS for proceedings consistent with this Memorandum Opinion. The parties shall file a Joint Status Report by June 1, 2021, that updates

[1] Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

the court on search and production efforts on remand and, if appropriate, proposes a schedule for further proceedings.

Dated: March 31, 2021

Amit P. Mehta
United States District Court Judge