

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

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,)	Civil Action No. 1:20-cv-02044-CRC
)	
Plaintiff,)	
)	
v.)	
)	
U.S. DEPARTMENT OF STATE,)	
)	
Defendant.)	

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant United States Department of State hereby moves the Court to enter summary judgment in its favor with respect to documents withheld by Defendant under Exemption 5 of the Freedom of Information Act. The grounds supporting this motion are set forth in the accompanying memorandum of points and authorities. In accordance with the Local Civil Rules, this motion is accompanied by a statement of undisputed material facts and a proposed order.

Dated: May 18, 2021

Respectfully submitted,

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FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff,

V.

U.S. DEPARTMENT OF STATE,

Defendant.

Civil Action No. 1:20-cv-02044-CRC

**MEMORANDUM IN SUPPORT OF
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff Citizens for Responsibility and Ethics in Washington (“Plaintiff” or “CREW”) submitted two requests under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), seeking certain records related to the U.S. Department of State’s (“State”) responses to document or testimony requests from Members of Congress. In response to Plaintiff’s request, State has withheld information exempt from disclosure under FOIA Exemption 5, and has disclosed all reasonably segregable non-exempt material to Plaintiff. More specifically, State withheld portions of (1) draft letters to Members of Congress, and deliberative communications regarding edits to these draft letters; (2) deliberative information related to the numbers of pages preliminarily considered by subcomponents within State to be potentially responsive to congressional inquiries; and (3) deliberative communications discussing proposed agency strategy in responding to congressional inquiries, and regarding a proposed plan for a State subcomponent to resume activities following a government shutdown. Because all of the withheld information falls under the protection of the deliberative process privilege, FOIA exempts it from disclosure. State therefore respectfully requests that the Court enter summary judgment in its favor.

BACKGROUND

On June 26, 2020, CREW submitted two FOIA requests to State. Declaration of Eric F. Stein ¶ 5 (“Stein Decl.”), attached as Ex. 1. In its first request, CREW requested all documents within a specified time frame “pertaining, concerning or reflecting any guidance, instruction, directive, or recommendation on how to handle document or testimony requests from congressional committee chairs, and whether that handling differs depending on the political party of the Chairman or Chairwoman who makes the request.” *Id.*

CREW's second FOIA request requested two categories of records. *Id.* ¶ 6. First, CREW sought all records regarding requests for documents or testimony sent to State by Democratic committee chairs (a) Rep. Elijah E. Cummings, former Chairman of the House Committee on Oversight and Reform ("HCOR") and HCOR staff; (b) Rep. Carolyn Maloney, Chairwoman of the HCOR and HCOR staff; or (c) Rep. Maxine Waters, Chairwoman of the House Financial Services Committee ("HFSC") and HFSC staff. *Id.* Second, CREW requested all documents received by Secretary of State Michael R. Pompeo, Director Akard, Senior Advisor Kissel, as well as any State employee with the title "Chief of Staff" or "Deputy Chief of Staff" to the Secretary, or acting in any such capacity related to a June 18, 2020 complaint by CREW to the Department of State's Office of Inspector General. *Id.*

CREW filed this action seeking relief under FOIA on July 28, 2020. *See* Compl., ECF No. 1. State conducted a search for documents responsive to CREW's two FOIA requests, which yielded a total of twelve responsive documents. *See* Stein Decl. ¶¶ 8-9. State released in part all twelve documents to CREW. *Id.*

ARGUMENT

I. Standard of Review

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (citing *Bigwood v. U.S. Agency for Int'l Dev.*, 484 F. Supp. 2d 68, 73 (D.D.C. 2007)). Under Federal Rule of Civil Procedure 56, the Court must grant summary judgment when the pleadings, discovery materials, and any pertinent affidavits show that there is no genuine issue as to any material fact showing that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 247 (1986). A court reviews an agency's response to a FOIA request *de novo*. See 5 U.S.C. § 552(a)(4)(B).

An agency that withholds material pursuant to a FOIA exemption bears the burden of showing the applicability of claimed exemptions, *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011), and must submit an index of all materials withheld. *Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973). FOIA "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citation omitted). In enacting FOIA, Congress recognized "that legitimate governmental and private interests could be harmed by [the] release of certain types of information and provided nine specific exemptions under which disclosure could be refused." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). Thus, although FOIA generally promotes disclosure, it recognizes "that public disclosure is not always in the public interest." *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982). As the Supreme Court has stressed, the statutory exemptions must be construed "to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Pinson v. U.S. Dep't of Justice*, 160 F. Supp. 3d 285, 293 (D.D.C. 2016) (quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007)).

II. Because State Correctly Withheld Information Protected by the Deliberative Process Privilege Under Exemption 5, the Court Should Enter Summary Judgment in State's Favor.

Here, State withheld limited and discrete portions of twelve documents under Exemption 5 because those portions fell within the protections of the deliberative process privilege. As

explained below, and as demonstrated in the attached Vaughn Index and Stein Declaration, State's withholdings clearly satisfy the requirements of FOIA.

FOIA Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "This exemption includes all privileges that would apply during discovery in ordinary litigation, including the deliberative process privilege." *Gellman v. Dep't of Homeland Sec.*, ___ F. Supp. 3d ___, 2020 WL 1323896, at *11 (D.D.C. Mar. 20, 2020).

The deliberative process privilege serves "to encourage frank discussion of policy matters, prevent premature disclosure of proposed policies, and avoid public confusion that may result from disclosure of rationales that were not ultimately grounds for agency action." *Petrucelli v. Dep't of Justice*, 51 F. Supp. 3d 142, 161 (D.D.C. 2014). To qualify for the privilege, a document must be both predecisional and deliberative. *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). "To be pre-decisional, the communication (not surprisingly) must have occurred before any final agency decision on the relevant matter." *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 463 (D.C. Cir. 2014). "The term 'deliberative' in this context means, in essence, that the communication is intended to facilitate or assist development of the agency's final position on the relevant issue." *Id.*

The portions of the documents redacted by State under Exemption 5 fall generally into three categories: (1) draft letters to Members of Congress, and deliberative communications regarding edits to the draft letters; (2) deliberative information regarding the numbers of pages preliminarily considered by a State subcomponent to be potentially responsive to congressional inquiries; and (3) deliberative communications discussing proposed agency strategy in responding to congressional inquiries, and regarding a proposed plan for a State subcomponent

to resume agency activities following a government shutdown. *See* Vaughn Index, attached as Ex. 2. As explained in the Vaughn Index and Stein Declaration, each of the redacted portions contains information that is pre-decisional and deliberative in nature. *See id.*; Stein Decl. ¶ 12. Accordingly, State properly asserted Exemption 5 to redact selected portions of documents exempted from disclosure by the deliberative process privilege.

A. Draft Letters to Members of Congress and Portions of Related Communications

The draft letters and communications fall within three categories. First, State withheld in large part two drafts of a three-page letter from the then-Assistant Secretary of the Bureau of Legislative Affairs responding to a January 14, 2019 letter from House Representative Elijah Cummings.¹ *See* Vaughn Index at 1. Second, the agency redacted three lines from five pages of email communications transmitting and discussing proposed edits to these draft letters.² *See id.* Third, State redacted twenty-two lines from a five-page email exchange reflecting proposed edits and seeking clearance on a letter to House Representative Trey Gowdy.³ *See id.* at 4.

These draft letters and related communications fall within the protections of the deliberative process privilege. “[D]raft documents, by their very nature, are typically predecisional and deliberative.” *Agility Public Warehousing Co. v. Dep’t of Defense*, 110 F. Supp. 3d 215, 221 (D.D.C. 2015) (quoting *Exxon Corp. v. Dep’t of Energy*, 585 F. Supp. 690, 698 (D.D.C. 1983)); *see Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (describing as “deliberative” documents that “reflect[] the give-and-take of the consultative process” and stating that the “exemption thus covers *recommendations, draft*

¹ FL-2020-00132 02/26/2021 3-5, FL-2020-00132 02/26/2021 7-9.

² FL-2020-00132 02/26/2021 1-2, FL-2020-00132 02/26/2021 6, FL-2020-00132 03/15/2021 4-5

³ FL-2020-00132 02/26/2021 21-25.

documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency”) (emphasis added). Many courts in this District have concluded that agency deliberations regarding “how to respond to questions from Congress about matters of agency policy qualify as deliberative and predecisional.”

Judicial Watch, Inc. v. Dep’t of State, 306 F. Supp. 3d 97, 115-16 (D.D.C. 2018); *see, e.g., Competitive Enter. Inst. v. EPA*, 12 F. Supp. 3d 100, 119-20 (D.D.C. 2014) (finding exempt from disclosure records involving “how to communicate with members of Congress” and how to “prepare for potential points of debate or discussion”); *Judicial Watch, Inc. v. 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 inquiries from the press and Congress”); *Judicial Watch, Inc. v. Dep’t of Justice*, 306 F. Supp. 2d 58, 71-72 (D.D.C. 2004).

The draft letters and selected portions of related communications “fit[] squarely within th[e] description” of deliberations regarding how to respond to questions from Congress about matters of agency policy. *CREW v. Gen. Servs. Admin.*, No. CV 18-2071 (CKK), 2021 WL 1177797, at *9 (D.D.C. Mar. 29, 2021). Moreover, State has articulated a foreseeable harm that would arise from the disclosure of such information: namely, that it would chill State’s ability to engage in the open and frank discussion of ideas, recommendations, and opinions that occurs when U.S. Government officials are drafting documents. *See Vaughn Index* at 1, 4. State has accordingly demonstrated that the draft letters and redacted portions of related deliberations are protected from disclosure under Exemption 5.

B. Deliberative Information Related to the Numbers of Pages Internally Considered by a State Subcomponent Before a Final Agency Release Decision

State released to Plaintiff three pages of email communications regarding a six-page internal State memorandum dated May 30, 2019.⁴ The memorandum, entitled “IPS Quick Stats, May 24 – May 30,” is a weekly activities report prepared by employees of State’s Office of Information Programs and Services, and distributed within that office. Vaughn Index at 2. The report summarizes the status of ongoing document requests being processed by that Office under FOIA and in response to congressional oversight inquiries, as well as other Office business. *Id.* The three pages of email communications circulate a copy of the report within State for review. *Id.*

State released in large part the three pages of email communications to Plaintiff,⁵ and redacted portions of twelve lines from the six-page memorandum under Exemption 5. *Id.* The redacted twelve lines include the numbers of pages of documents that are potentially responsive to congressional oversight inquiries, and that have been shared between agency subcomponents prior to a final release determination. *Id.*⁶ They also include a one-sentence description (with

⁴ FL-2020-00132 02/26/2021 10-17.

⁵ State redacted the names, telephone numbers, and email addresses of State employees in the communications under Exemption 6. Plaintiff does not challenge those redactions.

⁶ The text surrounding the redacted twelve lines of the report is as follows:

Congressional Document Production Branch:

(U) STATE-2019-05 Allegations of Political Retaliation (HCOR): On May 23, 2019, the Congressional Document Production branch (CDP) provided the Bureau of Legislative Affairs (H) with two identical discs, [redacted] for production to the House Committee on Oversight and Reform.

heading) of the preliminary status of a subcomponent's processing of a document request prior to a final release determination. *Id.*

The redacted twelve lines fall within the protection of the deliberative process privilege. The preliminary assessments made by State subcomponents of the numbers of potentially-responsive pages precede the final release decisions by the agency as a whole. Releasing these preliminary numbers (and the description) would necessarily disclose internal agency deliberations regarding the actual number of pages finally determined to be responsive to a congressional inquiry, as well as the form in which those pages should be produced to Congress. It is well established in this Circuit that “[i]n some circumstances, even material that could be characterized as ‘factual’ would so expose the deliberative process that it must be covered by the [deliberative process] privilege.” *Elec. Frontier Found. v. U.S. Dep’t of Justice*, 739 F.3d 1, 13 (D.C. Cir. 2014) (quoting *Wolfe v. HHS.*, 839 F.2d 768, 774 (D.C. Cir. 1988)); *see also Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 513 (D.C. Cir. 2011) (“[T]he legitimacy of withholding does not turn on whether the material is purely factual in nature . . . , but rather on whether the selection or organization of facts is part of an agency’s deliberative process.”). Exemption 5 protects factual information related to preliminary decisions made by agency components in response to document searches that precede the final agency decision

(U) STATE-2019-08 Documents Related to Christopher Steele (SJC): On May 23, 2019, CDP provided H with two identical discs, [redacted] for production to the Senate Judiciary Committee.

(U) CDP Production Statistics:

- Number of Documents/Pages produced to H in calendar year 2019: [redacted]
- Number of Documents/Pages produced to H in calendar year 2018: [redacted]
- Number of Documents/Pages produced to H in calendar year 2017: [redacted]

Information Access Branch: [redacted]

regarding document release. *See Assassination Archives & Research Ctr. v. CIA*, 781 F. App'x 11, 13 (D.C. Cir. 2019) (Exemption 5 protected from release internal forms used in processing FOIA requests), *cert. denied*, 141 S. Ct. 872 (2020); *Machado Amadis v. Dep't of Justice*, 388 F. Supp. 3d 1, 19 (D.D.C. 2019), (deliberative process privilege protected succinct summaries of initial FOIA search and initial response to FOIA request), *aff'd sub nom. Machado Amadis v. U.S. Dep't of State*, 971 F.3d 364 (D.C. Cir. 2020); *Nat'l Sec. Couns. v. CIA*, 206 F. Supp. 3d 241, 277 (D.D.C. 2016) (Exemption 5 protected results of preliminary FOIA searches, even when search results were produced without further alteration to FOIA requestor, where preliminary searches were used to guide agency's subsequent deliberations regarding its final response to particular FOIA request), *aff'd*, 969 F.3d 406 (D.C. Cir. 2020).

Here, revealing the numbers of pages of documents that were only preliminarily assessed by an agency subcomponent to be responsive to congressional inquiries would necessarily reveal the agency's deliberative process, by allowing for a comparison with the final number of documents determined by the agency to be responsive. In identifying a preliminary number of responsive documents, the agency subcomponent presented a recommendation as part of the agency's deliberative process regarding the number of documents that should ultimately be produced. Such a recommendation "may have been in the form of numbers" but "should be characterized as opinion." *Fla. House of Representatives v. U.S. Dep't of Commerce*, 961 F.2d 941, 950 (11th Cir. 1992); *see also Quarles v. Dep't of Navy*, 893 F.2d 390, 393 (D.C. Cir. 1990) (Exemption 5 protected cost estimates prepared by agency officials because "disclosure of the information sought could chill discussion at a time when agency opinions are fluid and tentative") (citation and internal punctuation omitted); *Heffernan v. Azar*, 417 F. Supp. 3d 1, 18 (D.D.C. 2019) (Exemption 5 protected factual material contained in draft press release because it

“reflect[ed] [the agency’s] preliminary positions or ruminations about how to exercise discretion’ regarding whether and how to present the information regarding the operational department review to the public”) (quoting *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992)); *SMS Data Prods. Grp., Inc. v. U.S. Dep’t of Air Force*, No. 88-0481, 1989 WL 201031, at *2 (D.D.C. Mar. 31, 1989) (agency properly withheld numerical information under Exemption 5 that was prepared by a body without final decisionmaking authority for use as a recommendation to a final decisionmaker and thus even if “expressed in quantitative terms, [its] evaluations are nonetheless opinions rather than facts”).

The release of this information could reasonably be expected to chill the open and frank discussion between agency subcomponents regarding how to process potentially responsive documents in response to congressional inquiries, and in what form and quantity such documents should ultimately be released by the agency. Exemption 5 therefore protects this information from disclosure.

C. Deliberative Communications Discussing Proposed Agency Strategy in Responding to Congressional Inquiries, and Proposed Plan to Resume Government Activities

The final category of documents consists of two sets of deliberative agency email communications preceding final agency decisions. First, State released to Plaintiff fifteen pages of email exchanges regarding a meeting between three agency subcomponents (Bureau of Legislative Affairs, Office of the Legal Adviser, and the Administration Bureau’s Office of Information Programs and Services) to discuss agency strategy in responding to congressional inquiries, and redacted sixteen lines and a column in a table with the heading “Status.”⁷ Vaughn

⁷ FL-2020-00132 02/26/2021 18-20, FL-2020-00132 02/26/2021 26-27, FL-2020-00132 03/15/2021 1-3, FL-2020-00132 03/15/2021 6-7, FL-2020-00132 03/15/2021 8-10, FL-2020-00132 03/15/2021 11-12.

Index at 3. The redacted lines include discussions of internal agency processes involved in formulating responses to congressional inquiries, together with suggested edits and status updates of these proposed responses. *Id.*

Second, State released to Plaintiff a four-page email exchange among State employees discussing and attaching a two-page draft paper. *Id.* at 5. The email exchange discusses whether and how to resume the activities of State's Office of Information Programs and Services, including its FOIA litigation and congressional document processing operations, following a federal government shutdown. *Id.* The two-page draft paper consists of the Office's proposed plan for resuming activities. *Id.* State redacted six lines from the four-page email exchange, and withheld the two-page draft paper in full. *Id.*

Exemption 5 protects both sets of email communications, and the draft paper, from disclosure. The first set of email communications is protected because it reflects proposed agency responses to congressional inquiries, and as explained above, Exemption 5 protects agency deliberations regarding how to respond to congressional questions regarding matters of agency policy. *See supra* II.A. The second set of email communications is protected because it consists of agency deliberations preceding a final agency decision—namely, whether and how to resume agency activities (including with respect to FOIA activities concerning cases in ongoing litigation) following a government shutdown. And the two-page draft paper is exempt from disclosure because as a draft document, it necessarily reflects a preliminary stage of the agency's deliberations. *See id.* The foreseeable harm resulting from the release of such communications is the subjective chill of agency discussions regarding how to respond to outside congressional inquiries, and in what manner to resume government activities following a shutdown. These two

sets of agency communications (and the draft paper) are thus exempted from disclosure under Exemption 5.

D. State Has Released All Reasonably Segregable Information Not Exempt From Disclosure.

Additionally, State has released to Plaintiff all reasonably segregable, non-exempt information. *See* Stein Decl. ¶ 13; Vaughn Index at 1-5. FOIA requires that, if a record contains information that is exempt from disclosure, any “reasonably segregable” information must be disclosed after deletion of the exempt information, 5 U.S.C. § 552(b), unless the non-exempt portions are “inextricably intertwined with exempt portions.” *Mead Data Ctr. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Kurdyukov v. U.S. Coast Guard*, 578 F. Supp. 2d 114, 128 (D.D.C. 2008). However, this provision does not require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat’l Sec. Archive Fund v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information existed because “the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words”).

Consistent with this obligation, State has reviewed each of the documents redacted or withheld on a line-by-line basis and has concluded that there is no additional non-exempt information that may reasonably be segregated and released. *See* Stein Decl. ¶ 13; Vaughn Decl. at 1-5. As explained above, in releasing these responsive documents to Plaintiff, State took care to redact only a relatively small number of lines comprising information that is predecisional and deliberative in nature, and it withheld in full only three short draft documents. State has therefore produced all non-exempt, “reasonably segregable portion[s]” of the responsive records. 5 U.S.C. § 552(b).

CONCLUSION

In response to Plaintiff's two FOIA requests, State properly withheld information falling within the scope of the deliberative process privilege under Exemption 5, and released all reasonably segregable information to Plaintiff. For these reasons, State respectfully requests that summary judgment be entered in its favor.

Dated: May 18, 2021

Respectfully submitted,

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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
CITIZENS FOR RESPONSIBILITY AND)	
ETHICS IN WASHINGTON.)	
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)	Civil Action No. 20-CV-02044
)	
U.S. DEPARTMENT OF STATE,)	
)	
Defendant.)	
_____)	

DECLARATION OF ERIC F. STEIN

Pursuant to 28 U.S.C. § 1746, I, Eric F. Stein, declare and state as follows:

1. I am the Director of the Office of Information Programs and Services (“IPS”) of the United States Department of State (the “Department” or “State”) and have served in this capacity since January 22, 2017. Previously, I served as the Acting Director since October 16, 2016, and as the Acting Co-Director since March 21, 2016. I am the Department official immediately responsible for responding to requests for records under the Freedom of Information Act (the “FOIA”), 5 U.S.C. § 552, the Privacy Act of 1974, 5 U.S.C. § 552a, and other records access provisions. As the Director of IPS, I have original classification authority and am authorized to classify and declassify national security information. Prior to serving in this capacity, I worked directly for the Department’s Deputy Assistant Secretary (“DAS”) for Global

Information Services (“GIS”) and served as a senior advisor and deputy to the DAS on all issues related to GIS offices and programs, which include IPS.

2. The core responsibilities of IPS include: (1) responding to records access requests made by the public (including under the FOIA, the Privacy Act, and the mandatory declassification review requirements of Executive Order No. 13526 of December 29, 2009, governing classified national security information), by Members of Congress, by other government agencies, and those made pursuant to judicial process, such as subpoenas, court orders, and discovery requests; (2) records management; (3) privacy protection; (4) national security classification management and declassification review; (5) corporate records archives management; (6) research; (7) operation and management of the Department’s library; and (8) technology applications that support these activities.

3. I make the following statements based upon my personal knowledge, which in turn is based upon information furnished to me in the course of my official duties. I am familiar with the efforts of Department personnel to process the subject request, and I am in charge of coordinating the agency’s search and recovery efforts with respect to that request.

4. This declaration explains Department’s use of FOIA Exemption 5, 5 U.S.C. § 552(b)(5), as applied in processing the responsive records to Plaintiff’s requests. The attached *Vaughn* index (Exhibit 1) provides a detailed description of the withheld information and the justifications for those withholdings.

I. ADMINISTRATIVE PROCESSING OF PLAINTIFF’S FOIA REQUESTS

5. On June 26, 2020, Plaintiff submitted two FOIA requests (Exhibit 2) to the Department. In the first request, Plaintiff requested all documents created or received from June

1, 2017, to the date the State Department conducts its search “pertaining, concerning or reflecting any guidance, instruction, directive, or recommendation on how to handle document or testimony requests from congressional committee chairs, and whether that handling differs depending on the political party of the Chairman or Chairwoman who makes the request.”

6. In the second request, Plaintiff requested two categories of records created since the start of the 116th Congress on January 3, 2019, and the date the Department conducts its search. First, Plaintiff requested the following:

[A]ll documents, as well as all communications and records of communications sent to, copied to, or received by:

1. Senior Advisor to the Secretary of State Mary Kissel; as well as any Department employee with the title “Chief of Staff” or “Deputy Chief of Staff” to the Secretary of State, or acting in any such capacity;
2. the Department’s Office of Information Programs and Services (“IPS”) Director Eric F. Stein; as well as anyone with the title “Chief of Staff” or “Deputy Chief of Staff” to the Director, or acting in any such capacity;
3. Stephen J. Akard, Director, Office of Foreign Missions; as well as,
4. Bureau of Legislative Affairs (“BLA”) Assistant Secretary Mary Elizabeth Taylor; BLA Deputy Assistant Secretary of House Affairs Jess Moore; BLA Executive Director Alicia A. Frechette; or Congressional Correspondence Unit Chief Cynthia Andrews;

regarding requests for documents or testimony from:

- a. Rep. Elijah E. Cummings, former Chairman of the House Committee on Oversight and Reform (“HCOR”) and HCOR staff;
- b. Rep. Carolyn Maloney, Chairwoman of the HCOR and HCOR staff; or
- c. Rep. Maxine Waters, Chairwoman of the House Financial Services Committee (“HFSC”) and HFSC staff.

Plaintiff asked that the Department “exclude those records, documents, and communications regarding requests made jointly by Rep. Eliot L. Engel, Chairman of the House Foreign Affairs

Committee, and either former Chairman Cummings (a) or Chairwoman Maloney (b).” Second, Plaintiff requested “all documents, as well as all communications and records of communications sent to, copied to, or received by Secretary of State Michael R. Pompeo, Director Akard, Senior Advisor Kissel, as well as any State Department employee with the title ‘Chief of Staff’ or ‘Deputy Chief of Staff’ to the Secretary, or acting in any such capacity related to CREW’s [June 18, 2020] complaint to the Department’s Office of Inspector General to review Department practices related to congressional oversight responses.”

7. By letters dated October 30, 2020 (Exhibit 3), November 30, 2020 (Exhibit 4), and January 6, 2021 (Exhibit 5), the Department informed Plaintiff that after reviewing in excess of 300 documents across both requests that no responsive records had yet been identified.

8. By letter dated February 26, 2021 (Exhibit 6), the Department informed Plaintiff that the Department had located seven responsive documents. The Department released all seven documents in part.

9. By letter dated March 15, 2021 (Exhibit 7), the Department informed Plaintiff that the Department had located five responsive documents. The Department released all five documents in part.

II. DESCRIPTION OF FOIA EXEMPTION CLAIMED

FOIA Exemption 5 – Privileged Information

10. 5 U.S.C. § 552(b)(5) states that the FOIA does not apply to:

[I]nter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency....

11. Exemption 5 thereby protects from disclosure information that is normally privileged in the civil discovery context, including information that is protected by the deliberative process privilege.

12. As detailed in the attached *Vaughn* index, the Department withheld certain information in this case pursuant to the deliberative process privilege. The deliberative process privilege protects the confidentiality of candid views and advice of U.S. Government officials in their internal deliberations related to policy formulation and administrative direction. The information the Department withheld pursuant to the deliberative process privilege reflects the internal exchange of ideas and recommendations that occurred while U.S. Government officials were formulating strategy and directing executive branch action relating to FOIA litigation and the production of records to Congress. Disclosure of this information could reasonably be expected to chill the open and frank exchange of comments, recommendations, and opinions that occurred among U.S. Government officials, reveal the internal development and implementation of Department policies and procedures, and harm the intra-agency exchange of candid information. In addition, disclosure of these details would hamper the ability of responsible Department officials to formulate and carry out executive branch programs. The withheld information is, accordingly, exempt from release under Exemption 5, 5 U.S.C. § 552(b)(5), pursuant to the deliberative process privilege.

III. CONCLUSION

13. In summary, following a reasonable search, the Department located 12 documents responsive to Plaintiff's FOIA requests, all of which were released in part. The Department has carefully reviewed all of the documents addressed herein for reasonable segregation of non-

exempt information and has implemented segregation when possible. Otherwise, the Department determined that no segregation of meaningful information in the documents could be made without disclosing information warranting protection under the law.

* * *

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 7th day of May 2021, Washington, D.C.


Eric F. Stein

EXHIBIT

2

Vaughn Index
CREW v. U.S. Department of State (Case No. 20-cv-02044)

<u>Bates Beg.</u>	<u>Bates End</u>	<u>Doc. Type</u>	<u>Pages</u>	<u>Date / Date Range</u>	<u>Author(s) / Recipient(s)</u>	<u>Review Result</u>	<u>Exemptions</u>
FL-2020-00132 02/26/2021 1	FL-2020-00132 02/25/2021 5	Emails with attachment	5	02/23/2019	Offices of Information Programs and Services (IPS) and Government Information Services (GIS)	Release in Part (RIP)	(b)(5) Deliberative Process Privilege (DPP)
FL-2020-00132 02/26/2021 6	FL-2020-00132 02/26/2021 9		4				
FL-2020-00132 03/15/2021 4	FL-2020-00132 03/15/2021 5		2				

DESCRIPTION: These documents consist of an email exchange regarding IPS and GIS edits to two drafts of a letter to the Chair of the House Committee on Oversight and Reform. The drafts reflecting those edits are attached to the email exchange. The Department does not have a record of the letter being finalized or sent to Congress.

The Department withheld three lines from the five pages of emails, and the draft letters, under **Exemption 5**, 5 U.S.C. § 552(b)(5), pursuant to the deliberative process privilege. The withheld information is subject to the deliberative process privilege, because it is both predecisional (it predates any final version of the letter prepared by Department officials) and deliberative (it reveals the drafters' and editors' preliminary, non-final thoughts about what information should be included in the letter). The release of this information could reasonably be expected to have a chilling effect on the open and frank discussion of ideas, recommendations, and opinions that occurs when U.S. Government officials are drafting documents.

The Department conducted a line-by-line review of these email chains and attachment and determined that there is no additional meaningful, non-exempt information that can be reasonably segregated and released.

<u>Bates Beg.</u>	<u>Bates End</u>	<u>Doc. Type</u>	<u>Pages</u>	<u>Date / Date Range</u>	<u>Author(s) / Recipient(s)</u>	<u>Review Result</u>	<u>Exemptions</u>
FL-2020-00132 02/26/2021 10	FL-2020-00132 02/26/2021 17	Email with attachment	8	5/30/2019	IPS Employees	RIP	(b)(5) DPP
<p>DESCRIPTION: These documents consist of email communications circulating a copy of the IPS Weekly Activities Report and Quick Statistics for May 30, 2019, which is a weekly report summarizing the status of IPS's various document requests in the FOIA and Congressional oversight contexts, among other IPS business.</p> <p>The Department withheld portions of twelve lines from the six-page attachment under Exemption 5, 5 U.S.C. § 552(b)(5), pursuant to the deliberative process privilege. The withheld information includes the numbers of pages internally considered for release to Congress and is subject to the deliberative process privilege because it predates the final decision about what to produce to Congress and in what form. It also includes a one-sentence description (with heading) of the preliminary status of a subcomponent's processing of a document request prior to a final release determination. The release of this information could reasonably be expected to have a chilling effect on the open and frank discussion of ideas, recommendations, and opinions that occurs when U.S. Government officials are developing a preferred course of action on a sensitive matter.</p> <p>The Department conducted a line-by-line review of this email chain and attachment and determined that there is no additional meaningful, non-exempt information that can be reasonably segregated and released.</p>							

<u>Bates Beg.</u>	<u>Bates End</u>	<u>Doc. Type</u>	<u>Pages</u>	<u>Date / Date Range</u>	<u>Author(s) / Recipient(s)</u>	<u>Review Result</u>	<u>Exemptions</u>
FL-2020-00132 02/26/2021 18	FL-2020-00132 02/26/2021 20	Emails	3	12/12/2018 – 01/25/2019	Office of Legislative Affairs (H), Office of the Legal Adviser (L), and IPS	RIP	(b)(5) DPP
FL-2020-00132 02/26/2021 26	FL-2020-00132 02/26/2021 27		2				
FL-2020-00132 03/15/2021 1	FL-2020-00132 03/15/2021 3		3				
FL-2020-00132 03/15/2021 6	FL-2020-00132 03/15/2021 7		2				
FL-2020-00132 03/15/2021 8	FL-2020-00132 03/15/2021 10		3				
FL-2020-00132 03/15/2021 11	FL-2020-00132 03/15/2021 12		2				

DESCRIPTION: These documents consist of email exchanges regarding a meeting with H, L, and IPS to discuss Department strategy in responding to Congressional inquiries, including discussions about internal Department processes involved in formulating responses to Congressional inquiries and suggested edits and status updates of the same.

The Department withheld sixteen lines, and a column in a table with the heading “Status,” from the fifteen pages of email exchanges under **Exemption 5**, 5 U.S.C. § 552(b)(5), pursuant to the deliberative process privilege. The withheld information is subject to the deliberative process privilege because it predates the final decision about how and whether to engage in a course of action, and it provides information that bears on how to proceed. The release of this information could reasonably be expected to have a chilling effect on the open and frank discussion of ideas, recommendations, and opinions that occurs when U.S. Government officials are developing a preferred course of action on a sensitive matter.

The Department conducted a line-by-line review of these email chains and attachment and determined that there is no additional meaningful, non-exempt information that can be reasonably segregated and released.

<u>Bates Beg.</u>	<u>Bates End</u>	<u>Doc. Type</u>	<u>Pages</u>	<u>Date / Date Range</u>	<u>Author(s) / Recipient(s)</u>	<u>Review Result</u>	<u>Exemptions</u>
FL-2020-00132 02/26/2021 21	FL-2020-00132 02/26/2021 25	Emails	5	1/9/2019	IPS	RIP	(b)(5) DPP
<p>DESCRIPTION: This document consists of an email exchange reflecting IPS edits and seeking clearance on a draft letter to Representative Gowdy. The Department does not have a record of the letter being finalized or sent to Congress.</p> <p>The Department withheld twenty-two lines from the five-page email exchange under Exemption 5, 5 U.S.C. § 552(b)(5), pursuant to the deliberative process privilege. The withheld information is subject to the deliberative process privilege because it is both predecisional (it reflects proposed edits that predate any final version of the referenced letter prepared by Department officials) and deliberative (it reveals the drafter's preliminary, non-final thoughts about what information should be included in the referenced letter). The release of this information could reasonably be expected to have a chilling effect on the open and frank discussion of ideas, recommendations, and opinions that occurs when U.S. Government officials are drafting documents.</p> <p>The Department conducted a line-by-line review of this email chain and attachment and determined that there is no additional meaningful, non-exempt information that can be reasonably segregated and released.</p>							

<u>Bates Beg.</u>	<u>Bates End</u>	<u>Doc. Type</u>	<u>Pages</u>	<u>Date / Date Range</u>	<u>Author(s) / Recipient(s)</u>	<u>Review Result</u>	<u>Exemptions</u>
FL-2020-00132 02/26/2021 28	FL-2020-00132 02/26/2021 30	Emails and attachment	4	1/25/2019	IPS	RIP	(b)(5) DPP
<p>DESCRIPTION: This document consists of an email exchange among IPS employees regarding whether and how to resume activities, including in its FOIA and Congressional document processing operations, following the government shutdown and attaches a two-page draft paper outlining the proposed plan doing so.</p> <p>The Department withheld six lines from the four-page email exchange, and the draft paper, under Exemption 5, 5 U.S.C. § 552(b)(5), pursuant to the deliberative process privilege. The withheld information is subject to the deliberative process privilege because it predates the final decision about how and whether to engage in a course of action, and it provides advice and a recommendation about how to proceed. The release of this information could reasonably be expected to have a chilling effect on the open and frank discussion of ideas, recommendations, and opinions that occurs when U.S. Government officials are developing a preferred course of action on a sensitive matter.</p> <p>The Department conducted a line-by-line review of this email chain and attachment and determined that there is no additional meaningful, non-exempt information that can be reasonably segregated and released.</p>							

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY)	
AND ETHICS IN WASHINGTON,)	Civil Action No. 1:20-cv-02044-CRC
)	
Plaintiff,)	
)	
v.)	
)	
U.S. DEPARTMENT OF STATE,)	
)	
Defendant.)	
)	

DEFENDANT’S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Civil Rule 7(h), Defendant United States Department of State (“State”) submits this statement of material facts as to which no genuine dispute exists.

1. On June 26, 2020, Plaintiff Citizens for Responsibility and Ethics in Washington (“Plaintiff” or “CREW”) submitted two requests under the Freedom of Information Act (“FOIA”) to State. Declaration of Eric F. Stein ¶ 5 (“Stein Decl.”), attached as Ex. 1 to Defendant’s Memorandum.

2. In its first FOIA request, CREW requested all documents “pertaining, concerning or reflecting any guidance, instruction, directive, or recommendation on how to handle document or testimony requests from congressional committee chairs, and whether that handling differs depending on the political party of the Chairman or Chairwoman who makes the request.” *Id.*

3. The stated timeframe for Plaintiff’s FOIA request was June 1, 2017, to the date that State conducted its search. *Id.*

4. CREW’s second FOIA request requested two categories of records. *Id.* ¶ 6.

5. The first category of records sought in CREW's second FOIA request was all records regarding requests for documents or testimony sent to State by Democratic committee chairs (a) Rep. Elijah E. Cummings, former Chairman of the House Committee on Oversight and Reform ("HCOR") and HCOR staff; (b) Rep. Carolyn Maloney, Chairwoman of the HCOR and HCOR staff; or (c) Rep. Maxine Waters, Chairwoman of the House Financial Services Committee ("HFSC") and HFSC staff. *Id.*

6. The second category of records sought by CREW in its second FOIA request sought all documents received by Secretary of State Michael R. Pompeo, Director Akard, Senior Advisor Kissel, as well as any State employee with the title "Chief of Staff" or "Deputy Chief of Staff" to the Secretary, or acting in any such capacity related to a June 18, 2020 complaint by CREW to the Department of State's Office of Inspector General. *Id.*

7. Plaintiff initiated the present action on July 28, 2020. *See* Compl., ECF No. 1.

8. In response to CREW's two FOIA requests, State released in part twelve documents. *See* Stein Decl. ¶¶ 8-9.

Dated: May 18, 2021

Respectfully submitted,

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

**CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON,**

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Civil Action No. 1:20-cv-02044-CRC

PROPOSED ORDER

Upon consideration of Defendant's Motion for Summary Judgment, the opposition and reply thereto, and the entire record herein, it is hereby ORDERED that the motion is GRANTED. It is further ORDERED that summary judgment be entered for Defendant.

IT IS SO ORDERED this ____ day of _____, _____.

CHRISTOPHER R. COOPER
UNITED STATES DISTRICT JUDGE