

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. 19-1344 (RBW)

REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS,

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,

Defendant.

Civil Action No. 19-2125 (RBW)

NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs Citizens for Responsibility and Ethics in Washington and Reporters Committee for Freedom of the Press respectfully submit this notice of supplemental authority in the above-captioned consolidated cases.

These cases arise under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). The foreseeable harm provision, 5 U.S.C. § 552(a)(8), which was added to FOIA as part of the FOIA Improvement Act of 2016, P.L. 114-185, is applicable to the FOIA requests at issue in this case. Because this Court’s resolution of the parties’ pending cross-motions for summary judgment in this matter, ECF Nos. 18, 19, will require the Court to evaluate de novo the sufficiency of U.S.

Department of State's showing under the foreseeable harm provision, including as to its deliberative process privilege withholdings under Exemption 5, Plaintiffs respectfully brings this Court's attention to the July 2, 2021 unanimous panel opinion of the United States Court of Appeals for the District of Columbia Circuit in *Reporters Committee for Freedom of the Press, et al., v. Federal Bureau of Investigation, et al.*, No. 20-5091, --- F. 4th ---, 2021 WL 2753938 (D.C. Cir. July 2, 2021) ("*Reporters Committee*"), a true and correct copy of which is attached hereto as Exhibit A.

Reporters Committee is only the second time the D.C. Circuit has had occasion to consider the foreseeable harm provision, and it is the first time the court has set forth in detail the standard that agencies must meet to satisfy the requirements of that provision. *Compare id. with Machado Amadis v. U.S. Dep't of State*, 971 F.3d 364 (D.C. Cir. 2020).

In *Reporters Committee*, the D.C. Circuit explained that "the foreseeable harm requirement imposes an independent and meaningful burden on agencies." *Id.* at *12 (cleaned up) (citation omitted). It further explained that it is "apparent from the statutory text alone that the government's successful invocation of a FOIA exemption cannot justify its withholding of exempt material without a more particularized inquiry into what sort of foreseeable harm would result from the material's release." *Id.* at *11 n.2. In so doing, agencies "cannot rely on mere speculative or abstract fears, or fear of embarrassment to withhold information. Nor may the government meet its burden with generalized assertions." *Id.* at *11 (cleaned up) (citations omitted). Rather, agencies must "*specifically and thoughtfully* determine whether it reasonably foresees that disclosure of *each particular record* would harm an interest protected by the exemption." *Id.* at *14 (cleaned up) (citations omitted) (italics added); *see also id.* at *11 (stating that while agencies "may *sometimes* satisfy that burden on a category-by-category basis rather

than a document-by-document basis,” in such cases, the “basis and likelihood of that harm must be independently demonstrated for each category”) (citation omitted) (italics added).

In the context of the agencies’ deliberative process privilege withholdings under Exemption 5, specifically, the D.C. Circuit explained that:

the foreseeability requirement means that agencies must concretely explain how disclosure “would”—not “could”—adversely impair internal deliberations. A perfunctory statement that disclosure of all the withheld information—regardless of category or substance—would jeopardize the free exchange of information between senior leaders within and outside of the agency will not suffice. Instead, *what is needed is a focused and concrete demonstration of why disclosure of the particular type of material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward.* Naturally, this inquiry is context specific.

Id. (cleaned up) (citations omitted) (italics added). Applying this standard, the panel in *Reporters Committee* held that the declarations submitted by the Federal Bureau of Investigation and the Department of Justice (“DOJ”) in that case did not justify the withholding of, *inter alia*, a draft DOJ Inspector General report. *Id.* at *13.

Dated: July 15, 2021

Respectfully submitted,

/s/ Nikhel S. Sus
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